

FINANCING AND DEBT ISSUES

Recent Legislative Issues in Farm and Ranch Financing and Business Operation

- Agricultural Operation Practices Act, RSA 2000, c. A-7
- Natural Resources Conservation Board Act, RSA 2000, c. N-3

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INDEX:

	Page:
I. <u>INTRODUCTION</u>	1
II. <u>OVERVIEW OF THE LEGISLATION</u>	
1. Purpose and Background:	2
2. Roles and Responsibilities:	3
3. What is Governed? Defining CFO's:	4
4. Key Points in the Legislation:	7
5. Legislative amendments in 2004:	10
6. Contact Information:	13
7. Indexes to Legislation and Regulations	14

Recent Legislative Issues in Farm and Ranch Financing and Business Operation
Agricultural Operation Practices Act and Natural Resources Conservation Board Act

Definitions: (sorry, some acronyms are unavoidable)

- “**AOPA**” means the **Agricultural Operation Practices Act**, RSA 2000, c. A-7, as amended
- “**CFO**” means a **Confined Feeding Operation** as defined in AOPA;
- “**NRCB**” means the **Natural Resources Conservation Board** as defined in the NRCB Act;
- “**NRCB Act**” means the **Natural Resources Conservation Board Act**, RSA 2000, c. N-3, as amended

I. INTRODUCTION :

Why Should I Care? The relevance of the legislation to lenders and lawyers:

	<u>2002/03</u>	<u>2003/04</u>
Total Applications Received by NRCB:	177	154
Total Complaints Received by NRCB:	1,019	1,108
Total Enforcement Orders Issued by NRCB:	36	19
Total Cost of Applying and Complying:	\$Priceless?	

Many of us act as lawyers for farm businesses and lenders to farm businesses or, in many cases, for both. The purpose of this paper is to provide an overview of, and resource material for lawyers in dealing with, the Agricultural Operation Practices Act [“**AOPA**”] and the Natural Resources Conservation Board Act [**NRCB Act**”]. The AOPA and the NRCB Act must be read together as the two separate pieces of legislation jointly impose a regulatory registration, compliance and enforcement regime that can impose **significant up-front and compliance costs for our farming clients**, and **expose lenders to significant risks in asset depreciation, customer cash flow and realization on security**.

As legal counsel, we have a duty to consider the implications of the AOPA in our advice to our farming and lending clients as we act in estate planning manners and in purchase, sale and financing transactions. At the very least, we should inquire into whether or not our farming clients (or their lenders) are aware of the AOPA and advise them to consider the AOPA before making important business decisions.

The AOPA is potentially relevant to more than just our clients who operate a confined feedlot operation [“**CFO**”]. For example, many of our farming clients invest heavily in developing beautiful yard sites and residences, the value of which can be dramatically affected if an adjacent CFO is developed or spreads manure within the permitted buffer zone of 150 meters.

An understanding of the legislation should allow us to advise our clients who are CFO operators as to their obligations so as to avoid potential complaints, and also to provide opinions and strategies to those who wish to oppose development or make a complaint about a CFO. For example, Section 11 of the NRCB Act provides for **funding for interveners** to assist in the preparation and presentation at a proceeding of the Board (for example: legal and consultant’s fees). Advising a client to consider such an application could make you even more popular than you already are. An indirect benefit should be that lender security is improved as farmers and farm businesses become aware of the AOPA and NRCB Act and learn how to operate within the regulatory regime.

Finally, we should consider the AOPA in the advice and legal opinions we provide to lenders. I defer to Ian Logan and his paper “**Current Issues of Prominence in Settlement and Enforcement**” for advice in that regard. (Although a more appropriate title for his paper might have been: “**Why Lawyers Should Never Give Opinions on Agricultural Security**”)

II. OVERVIEW OF THE LEGISLATION (AOPA and NRCB Act)

1. Purpose and Background:

The AOPA was designed to set out clear environmental standards for all livestock operations in Alberta. (If you Google™ the AOPA however, you will find that not everyone agrees that the foregoing represents either the intent or the outcome.)

Historically, CFO’s were regulated through municipalities by zoning and land use by-law regulation and voluntary codes of practice were developed, but often observed in the breach. The development of feed lot alley near Brooks, Alberta and opposition to intensive livestock operation development (particularly large swine operations) prompted the Alberta Government to prepare legislation designed to bring some certainty of process to developers and affected residents.

Significant amendments to the existing AOPA were proclaimed on January 1, 2002, imposing new Alberta-wide standards for environmental management in Alberta's livestock industry. Further amendments based on a targeted review of the legislation designed to clarify and enhance the province's ability to deal with nuisance, such as odour, noise, dust, smoke or other disturbances resulting from an agricultural operation were proclaimed in force on June 1, 2004.

The NRCB Act was amended to give the NRCB new authority to regulate CFO's and deal with all aspects of applications, approvals, complaints, investigation and enforcement. Much of the following information was taken from government publications or web-sites providing information in relation to the AOPA and the NRCB.

2. Roles and Responsibilities:

Alberta Agriculture, Food and Rural Development [“AAFRD”].

Is responsible for the legislation and associated regulations including updating the legislation, to ensure they meet the needs of the livestock industry and the public. AAFRD takes the lead role in providing extension services, information materials and technology transfer of applied research related to AOPA.

The Natural Resources Conservation Board [“NRCB”].

Is responsible for administering the regulations under AOPA. It is an independent, quasi-judicial Board that reports to the Minister of Sustainable Resource Development. NRCB Approval Officers answer process-related application questions, inform producers as to what information is required to support their applications, and approve or deny applications, including those for ancillary structures associated with a CFO. As part of this mandate, the NRCB is responsible for monitoring NRCB permits (Approvals, Registrations or Authorizations) and existing CFO municipal permits, and enforcing compliance with permit conditions and province-wide AOPA environmental standards. The NRCB is responsible for the review of Approval Officer decisions when requested by directly affected parties.

Municipal Governments.

Are invited to provide input on specific applications, and to develop land-use plans that identify where new and expanding CFOs would not be compatible with current or future land uses.

Municipal governments are considered directly affected parties for all CFO applications and their views are an important part of decisions for siting new and expanding CFOs.

The Farmers' Advocate of Alberta.

Pursuant to the provisions of s. 3 of the NRCB Act, this office now deals with nuisance cases, such as those of odour, noise, dust, smoke or other disturbances resulting from agricultural operations. Complaints about livestock operations are first reviewed by the NRCB to determine whether the operation is in compliance with the standards and regulations. The Minister of AAFRD can direct the Farmers' Advocate to attempt to mediate a dispute. If the complaint is not resolved, the Minister of AAFRD can direct the Farmers' Advocate to establish an Agricultural Practices Review Committee to determine whether an agricultural operation is following generally accepted farming practices. This committee will also attempt to further mediate complaints, and may prepare a report that can be used either by the NRCB in an enforcement order or by the court system if legal action is taken.

3. What is governed? Defining CFOs

Section 1 of the AOPA defines a confined feeding operation ["CFO"] as

“fenced or enclosed land or buildings where livestock are confined for the purpose of growing, sustaining, finishing or breeding by means other than grazing and any other building or structure directly related to that purpose but does not include residences, livestock seasonal feeding and bedding sites, equestrian stables, auction markets, race tracks or exhibition grounds”

Examples of How AOPA Applies to Livestock Operations:

Livestock operations in Alberta will be affected to varying degrees by the 2004 amended AOPA legislation. The following examples illustrate how different types of operations might be affected.

Existing CFOs as of January 1, 2002

Capacity: Producers can operate at their January 1, 2002, capacity without obtaining an Approval, Registration or Authorization.

Existing permits: Permits previously issued by a municipality or health authority will be considered an Approval, Registration or Authorization under AOPA.

Maintenance: An Approval, Registration or Authorization is not required when reconstructing or maintaining existing facilities other than a manure collection area or manure storage facility.

Manure storage: Operations are not required to meet the manure storage regulations unless they are modifying or expanding, or they pose a risk to the environment.

Manure application: A person applying manure to land must be aware of incorporation regulations, nitrate-nitrogen and soil salinity limits, and setbacks.

Record keeping: Any person who applies or transfers more than 500 tonnes of manure, composting materials or compost per year must keep records. Producers have until the end of 2004 to comply with the manure management standards in AOPA.

New/Expanding CFOs

Minimum Distance Separation [“MDS”]: MDS is a setback or buffer established between a CFO facility and adjacent land uses to minimize odour nuisance.

Affected Party: People who are determined by the NRCB to be affected parties can provide input into a new or expanding operation.

Who is Considered to be an Affected Party?

An "affected party" **must be notified** when an application for an Approval for a CFO is received. They include:

- a. A person or municipality that is entitled, under the Water Act, to divert water from the river, stream or canal within 10 miles downstream, as measured along the water course, if any part of the CFO facility is located or is to be located within 100 metres of the bank of a river, stream or canal.
- b. The municipality where the CFO is to be located.
- c. A person who resides on or owns land that is within the greater of 0.5 miles or the MDS of a Registration-sized operation.

- d. A person who resides on or owns land that is within the following distances from the boundary of a parcel of land on which an Approval-sized CFO is located or is to be located:
- i. 0.5 mile of a CFO that contains or is to contain 500 or fewer animal units.
 - ii. 1 mile of a CFO that contains or is to contain 501 or more animal units, but fewer than 1,001 animal units.
 - iii. 1.5 miles of a CFO that contains or is to contain 1,001 or more animal units, but fewer than 5,001 animal units.
 - iv. 2 miles of a CFO that contains or is to contain 5,001 or more animal units, but fewer than 10,001 animal units.
 - v. 3 miles of a CFO that contains or is to contain 10,001 or more animal units, but fewer than 20,001 animal units.
 - vi. 4 miles of a CFO that contains or is to contain 20,001 or more animal units.

Permits: A permit must be issued by the NRCB before construction or expansion of a CFO can begin. Regulatory requirements for CFOs are determined based on the category and type of livestock, and the number of animals.

Application process: A person can obtain application forms and process guides from the NRCB Web site (www.nrcb.gov.ab.ca) and from NRCB offices. Use of a qualified lawyer or reputable consultant is highly recommended.

Manure storage: All operations must meet the regulations for manure storage and application to protect water quality.

Manure collection area: These areas include the floor of the feedlot pen, the floor of a barn, the under-floor pits of a barn, and a catch basin where manure collects. The floor of a livestock corral is not considered a manure collection area.

Manure application: A person applying manure to land must be aware of incorporation regulations, nitrate-nitrogen and soil salinity limits, and setbacks. The regulations are very detailed and are broken down by community for many purposes. A careful review of the current regulations is vital.

Record keeping: Any person who applies or transfers more than 500 tonnes of manure, composting materials or compost per year must keep records. Producers have until the end of 2004 to comply with the manure management standards in AOPA.

Cow/Calf Producers

Seasonal feeding and bedding sites: Producers have until the end of 2004 to manage these sites according to AOPA requirements. A major issue will be managing run-off.

Short term manure storage: Standards are set to locate short term solid manure storage to protect water quality.

Manure application: A person applying manure to land must be aware of incorporation regulations, nitrate-nitrogen and soil salinity limits, and setbacks. Same comment as above respecting the specifics of the regulations.

Record keeping: Any person who applies or transfers more than 500 tonnes of manure, composting materials or compost per year must keep records. Producers have until the end of 2004 to comply with the manure management standards in AOPA.

4. Key Points in the Legislation

Under AOPA, there are **three different types of permits for building or expanding a CFO**. The regulatory requirements for CFOs are determined based on the **category** and **type of livestock**, and the **number of animals** (AR 257/2001 Matters Regulation, Schedule 2).

Large CFO's require an Approval,

Small and medium-size CFO's require a **Registration**.

Operators are required to obtain an **Authorization** for the construction, modification and/or expansion of a manure storage facility that is intended for containment of manure for seven months or more in any calendar year and has capacity for 500 tonnes or more of manure, composting materials or compost (Matters Regulation, Section 4).

Without a prior Approval, Registration or Authorization, **construction or expansion of a CFO cannot begin**. There has been some judicial consideration of the expansion of existing CFO's [see **Bengston v Alberta (Natural Resources Conservation Board) 2003 ABCA 173**].

Operators who hold an Approval, Registration or Authorization must comply with the terms and conditions set out in these permits (s. 13 AOPA). If a **CFO is sold or transferred** to a new owner, the new owner must **notify the NRCB** of the change in ownership (s. 28 AOPA). Lenders would need to consider requisite safeguards before taking possession after default.

Minimum Distance Separation (MDS), is the distance of separation between CFOs and neighbouring residences to reduce nuisance (AR 267/2001 Standards and Administration Regulation, Section 3). The **MDS is established when the application is submitted to the NRCB**.

The AOPA includes provisions for the **Approval Officer to obtain public input**. AOPA defines who should be notified of a proposed or expanding CFO. It may include neighbouring residences, water users, government agencies and municipalities.

AOPA regulations define who an **affected party** is. Approvals, Registrations or Authorizations each have **separate criteria** as to who is considered an affected party in an application.

Seasonal feeding and bedding sites and livestock corrals are **not subject to the CFO application process**, but must be **sited or designed to protect surface water** from manure contamination (AR 267/2001 Standards and Administration Regulation, Section 4).

All operators must **manage and apply manure, composting materials and compost in accordance with the nutrient management requirements** in the AR 267/2001 Standards and Administration Regulation (Sections 23 to 25). However, **operators may seek a variance** from the NRCB that authorizes a higher application rate than is specified in the legislation.

Compost containing manure will be treated like manure. AOPA regulates all agricultural composting from primary agriculture at agricultural operations, except the composting of carcasses or parts of carcasses.

AOPA includes **standards for solid and liquid manure storage, and collection areas and facilities**. These requirements **apply to all producers**, not just CFOs. The regulations specify how manure storage facilities and collection areas are to be constructed, sited and operated.

Consider obligations of contractors to comply with the legislation in drafting building contracts or seeking damages if corrective construction required.

Any operator who applies or transfers, and any person who receives more than 500 tonnes of manure, composting materials or compost **must keep records and perform soil tests** (Standards and Administration Regulation, Section 28). Operators have until the **end of 2004** to comply with the manure management standards. Cost again will become an issue in complying with the legislation and the regulations.

All CFOs or manure storage facilities that existed prior to January 1, 2002, are deemed to have an Approval, Registration or Authorization under AOPA. The NRCB will have sole responsibility for **enforcing conditions on existing permits** pertaining to CFOs, including non-manure related conditions such as road-use agreements. The NRCB will have the **authority to amend the terms and conditions in permits previously issued** for CFOs.

AOPA does **not apply to an existing building or structure until:**

- a. The building or structure is expanded, or;
- b. There is a risk to the environment or an inappropriate disturbance.

(Essentially similar to a pre-existing non conforming use in the land use by-law context)

However: Existing operations do not have to change, modify or construct a building or structure to meet the standards unless there is a **risk to the environment or an inappropriate disturbance** as determined by the NRCB. This, of course creates some uncertainty for operations and legal counsel. The NRCB can investigate any risk to the environment or an inappropriate disturbance and enforce terms and conditions in existing development permits or enforce compliance issues relating to any existing operation. When the existing operation expands, only the new or expanded portion or manure storage facility must meet the new standards in the regulations.

AOPA **allows an inspector to enter and inspect any building or land**, other than a private dwelling-place, believed to be used in connection with an agricultural operation (s. 30 AOPA).

The NRCB may issue an **enforcement order to compel producers to rectify a situation** (s. 39 AOPA). If a producer does not comply with an enforcement order and the situation poses an immediate environmental risk, the NRCB may issue an emergency order and take corrective action. If the producer in some way resists, obstructs or delays a field inspector, a court order may be issued by the Court of Queen's Bench. A person who contravenes the regulations or certain sections of AOPA may be liable to a fine (ss. 35 and 36 AOPA).

5. Legislative Amendments in 2004

The information above includes the June 1, 2004 legislative amendments. For those of you who wish to advise your clients of the changes, attached is a 2 page Summary of Amendments to APOA 2004 provided by AAFRD:

6. Contact Information

If you need cheerful and prompt assistance with inquiries, my suggestion is that you contact **Andy Cumming** at the NRCB Lethbridge Regional Office Direct Line **310-0000 (403) 381-5838**. Andy is the Director of the NRCB office for CFO's and can guide you to the resources and contacts you may require.

Alberta Agriculture, Food and Rural Development (AAFRD)

Alberta Ag-Info Centre
Toll Free: (866) 882-7677

Natural Resources Conservation Board (NRCB)

Toll Free: (866) 383-6722
Web site: www.nrcb.gov.ab.ca

NRCB Regional Offices:

Lethbridge
Phone: (403) 381-5166
Fax: (403) 381-5806

Red Deer
Phone: (403) 340-5241
Fax: (403) 340-5599

Barrhead
Phone: (780) 674-8303
Fax: (780) 674-8362

Fairview
Phone: (780) 835-7111
Fax: (780) 835-3600

Farmers' Advocate of Alberta

Phone: (780) 427-2433
Fax: (780) 427-3913

For your ease of reference and sleeping pleasure, I have also attached the indexes to the AOPA, NRCB Act and related regulations.

AGRICULTURAL OPERATION PRACTICES ACT
Chapter A-7

Table of Contents

1	Definitions
1.1	Records
Part 1 Nuisance	
2	Nuisance claims
3	Application re disturbance
4	Referral
5	Practice review committee
6	Powers, immunity
7	Procedure
8	Investigation, mediation
9	Committee recommendation
Part 2 Livestock and Manure	
10	Approval officers
11	Inspectors
12	Board delegation
13	Approval, registration required
14	Authorization required
15	Manure, composting materials, compost application
16	Seasonal feeding and bedding site
17	Variance
18	Application for approval, registration, authorization and amendments
18.1	Deemed approvals, registration and authorizations
19	Approval notification, directly affected parties
20	Considerations on approvals
21	Registration, authorization notification, directly affected parties
22	Considerations on registrations, authorizations
23	Approval officer amendments
24	Board, approval officers, powers
25	Review
26	Co-operative reviews
27	Appeal
28	Selling, etc., approvals, registration or authorization
29	Cancellation
30	Access to premises
31	Order to allow inspection
32	Additional fine where monetary benefits acquired by offender
33	Continuing offences
34 - 36	Offences
37	Defence
38	Limitation period
38.1	Request for committee
39	Enforcement orders by Board
40	Amendment of enforcement orders
41	Review and cancellation of enforcement order
42	Court order to comply with enforcement order
42.1	Emergency order
42.2	Failure to comply with an emergency order
43	Joint and several liability
Part 3 Regulations	
44	Regulations
45	Transitional regulations

(Consolidated up to 90/2004)
ALBERTA REGULATION 257/2001

Agricultural Operation Practices Act

AGRICULTURAL OPERATIONS, PART 2

MATTERS REGULATION

Table of Contents

1	Definitions
2	Approval required
3	Registration required
4	Authorization required
5	Affected party
5.1	New livestock categories
6	Expiry
7	Coming into force
	Schedules

(Consolidated up to 88/2004)
ALBERTA REGULATION 268/2001

Agricultural Operation Practices Act
BOARD ADMINISTRATIVE PROCEDURES REGULATION

Table of Contents

1	Interpretation
Applications, Submissions	
2	Approval application
3	Registration application
4	Application for authorization
5	Professional engineer's verification
6	Additional information and particulars
7	Withdrawal of application or submission
8	Notice of application
9	Copy of application
10	Filing submissions
11	Applications by directly affected parties, affected persons
12	Copies of submissions, applications
13	Filing of additional material
14	Application for review
15	Notice of review
Process Procedures	
16	Variation of procedures
17	Notice to attend
18	Oath or affirmation
19	Presentation of submissions
20	Direct evidence
21	Examination of witnesses
22	Hearings in the absence of the public
23	Submissions by Board staff and experts
24	Arguments
25	Written hearings
26	Approval officer amendment
27	Evidence not confidential
28	Board directions
29	On-site visits
30	Amendments of proceedings
31	Enlargement or abridgement of time
32	Failure to comply with Regulation
33	Notice
34	Revisions to documents
35	Affidavits
36	Evidence
Acquisition of an Approval, Registration, Authorization	
37	New owner
Inspectors	
38	Identification of inspectors
Expiry, Coming into Force	
39	Expiry
40	Coming into force

(Consolidated up to 85/2004)
ALBERTA REGULATION 267/2001

Agricultural Operation Practices Act
STANDARDS AND ADMINISTRATION REGULATION

Table of Contents

1	Definitions
Part 1	
Standards	
2	Standards apply
3	Minimum distance separation
Manure Storage	
4	Seasonal feeding and bedding sites, livestock corrals
5	Short term solid manure storage
6	Surface water control systems
7	Natural water and wells
8	Flooded areas
9	Water table protection
10	Manure storage volumes
11	Liquid manure containment
12	Safety
13	Access
14	Side slope
15	Erosion protection
16	Bottom filling
17	Sealing
18	Groundwater protection
19	Catch basins
20	Fly and dust control
21	Unused operation or facility
Nutrient Management	
22	Application and interpretation
23	Nutrient management requirements
24	Manure application limits
25	Soil protection
25.1, 26	Nutrient management plan
27	Irrigation of manure
Part 2	
General Administration Matters	
28	Records
29	Expiry
30	Coming into force

Schedules

NATURAL RESOURCES CONSERVATION BOARD ACT
Chapter N-3

Table of Contents

1	Definitions
2	Purpose of Act
3	Crown is bound
4	Reviewable projects
5	Application for review
6	Hearings, inquiries and other proceedings
7	Power of Board on inquiry
8	Hearings
9	Approval
10	Amendment of Board approval
11	Funding for interveners
12	Establishment of Board
13	Membership of Board
14	Chair and Vice-chair
15	Remuneration and expenses
16	Acting Board members
17	Prohibitions as to interests of Board members
18	Divisions of the Board
19	Absent Board members
20	Protection from action
21	Co-operative reviews
22	Powers of the Board
23	Services of technical specialists
24	Restraining order
25	Rehearing
26	Delegation of powers
27	Personnel
28	Meetings
29	Rules of practice
30	Coming into force of order
31	Appeal
32	Exclusion of prerogative writs
33	Signing of Board documents
34	Proof of Board orders
35	Records as evidence
36	Protection re evidence
37	Witnesses at hearing
38	Notices
39	Costs of advertising notice
40	Services of Government departments
41	Fiscal year
43	Disposition of money collected
44	Regulations