

Office of  
McLean County State's  
Attorney



# McLean County

STATE OF NORTH DAKOTA

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To: McLean County Planning and Zoning Committee

From: Ladd Erickson, McLean County State's Attorney

Date: May 14, 2018

Re: CAFO ZONING

Concentrated Animal Feeding Operation (CAFO) zoning has distinctions and limitations on county zoning powers which are distinct from gravel pits, subdivisions, and other routine matters that come before the committee.

A county is not allowed to prohibit CAFOs:

"4. A board of county commissioners may not preclude the development of a concentrated feeding operation in the county." N.D.C.C. § 11-33-02.1(4)

Therefore, if an applicant meets the county zoning regulations, a permit to build a CAFO must be granted. In addition, counties and townships have been limited in their CAFO zoning powers, and cannot zone for issues reserved by law for the North Dakota Department of Health CAFO permitting process – such as manure management. *See Ramsey County Farm Bureau v. Ramsey County*, 2008 ND 175, 755 N.W.2d 920.

A county may enact separate CAFO locating regulations:

"6. A board of county commissioners may adopt regulations that establish different standards for the location of concentrated feeding operations based on the size of the operation and the species and type being fed."  
N.D.C.C. § 11-33-02.1(6)

Based on that power, the McLean County Commission has supplemented the state CAFO law: requiring them to be setback from county waterbodies as follows:

"B.1 Water Resource Setbacks. The operator of a new animal feeding operation that has more than 1,000 animal units shall not locate or establish that operation:

17. a. Within a delineated source water protection area for a public water system. The source water protection areas for water supply wells include the entire wellhead protection area. For the surface-water intakes of public water systems, source water protection areas include all or portions of the surface water that supplies the water for the public water system, including all or portions of the surface-water's shoreline.

b. Within 1,200 feet of a private ground water well which is not owned by the operator or within 1,500 feet of a public ground water well which does not have a delineated source water protection area.

c. Within 1,000 feet of surface water which is not included in a source water protection area.

d. Within one (1) mile of the following Class 1 recreational surface waters:

1. The Missouri River, as measured from the edge of the River at its ordinary high water mark or, if an ordinary high water mark has not been established for that tract, from the edge of the River when the flow of the river is 20,000 cfs.

2. Lake Sakakawea, when it is filled to its maximum level.

3. Lake Audubon, when it is filled to its maximum level.

e. Within one-half (½) mile of the following Class 2 recreational surface waters at their ordinary high water marks: Strawberry Lake; Camp Lake; Brush Lake; Blue Lake; Crooked Lake; Long Lake; Lake Brekken; Lake Holmes; Lightning Lake; Turtle Lake; Lake Peterson; or Lake Williams.

f. Within three hundred (300) feet of the McClusky Canal or any creek or intermittent stream that drains into a surface identified in d. or e., unless such animal feeding operation is operated under a permit and nutrient management plan issued by the North Dakota Department of Health that prevents the discharge of pollutants into any surface waters, or if the Board of County Commissioners finds just cause to grant a variance to this setback.”

*See MCZO 6.5.5 - ANIMAL FEEDING OPERATIONS.*

In this instance, the McLean County Water Board has found that the CAFO before the committee will not discharge into surface waterbodies, and it will be under a “permit and nutrient management plan issued by the North Dakota Department of Health that prevents the discharge of pollutants into any surface waters.”

Another supplement to state law McLean County has is some CAFO closure requirements:

“C.4 Closure and Financial Assurance.

C.4.A Notice of Termination. The owner, operator or permittee shall provide the County with a minimum of thirty (30) days written notice prior to permanent cessation or abandonment of the animal feeding operation or any part of the wastewater treatment system. It shall be a violation of these rules to permanently cease the use or abandon any facility or site or any part of the wastewater treatment system, including but not limited to pits, lagoons, impoundments, piping, disposal areas, storage areas, and land application sites without complying with notice and closure requirements.

C.4.B Closure and Financial Assurance Instruments.

1. The McLean County Commissioners shall establish by rules the conditions and standards for proper closure of a concentrated animal feeding operation upon cessation of operations. These shall address at a minimum; lagoon draining, cleaning and filling, removal of waste handling facilities and equipment, disposal of animal parts or carcasses and other conditions to assure public health and safety.
2. Upon proper closure, as determined by an inspection by the North Dakota State Health Department and/or by the First District Health Unit of Minot, N.D., any financial assurance instrument required under Section C.1.d shall be returned to the posting entity.”

The purpose of these closure regulations is to protect the county from the experiences of counties in Minnesota and Iowa who end up with abandoned hog CAFO properties that are too polluted to market, and a substantial financial burden on the county to clean up. If the committee finds this particular CAFO meets our zoning regulations, there is no purpose for requiring the posting of a closure bond in this case because this is not a hog or dairy CAFO with large slurry pits, and mining regulations require continued groundwater pollution monitoring already - so if nutrients from this CAFO get detected in groundwater, that will have to be addressed by the operator on the front end, as opposed to dumping the property on the county after the pollution becomes extreme.

If the committee approves this CAFO, I recommend doing so conditioned on it be permitted by the Department of Health, and include in the permit that a violation of Health Department rules shall constitute a violation of the county permit. I additionally recommend, if a permit is granted, that the county CAFO closure regulations be imposed, absent the posting of a closure bond.