



BOARD DECISION

RFR 2011-05 / RA11001

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary RA11001.

Klaas Ijtsma

May 19, 2011

Background

On April 5, 2011, NRCB Approval Officer Francisco Echegaray issued Decision Summary and Approval RA11001 to Klaas Ijtsma. The decision approved Klaas Ijtsma's application to construct and operate a new 200 milking cow dairy operation to be located at SW 18-28-27-W4 in Rocky View County.

Pursuant to Section 20(5) of the *Agricultural Operation Practices Act (AOPA)*, Janice and Brad Niven filed a Request for Board Review of the Approval Officer's decision. The Nivens also requested, pursuant to Section 20(6) of *AOPA*, that the Board reconsider their status, since the Approval Officer had found them not to be a directly affected party. The Niven's request met the 10-day filing deadline established by *AOPA*.

Directly affected parties identified in Decision Summary RA11001 were provided a copy of the Request for Board Review along with notification of their opportunity to file a rebuttal by May 6, 2011. The Board did not receive any rebuttal submissions. On May 9, 2011, the Board convened to deliberate on this matter.

Jurisdiction

Section 20 of *AOPA* provides authority for the Board to review an Approval Officer decision which found that a party was not directly affected by an application. In part, it reads:

- 20(6) A person or organization that was determined under section 19 not to be a directly affected party may, with written reasons,*
 - (a) within 10 working days of receipt of the decision under subsection (4), apply to the Board, with written reasons, for a review of whether the person or organization is a directly affected party, and*
 - (b) apply to the Board, in accordance with the regulations, for a review of the decision under subsection (4).*
- (7) An applicant under subsection (6)(a) must provide, on the request of the Board, further information relevant to the application.*
- (8) The Board must notify the applicant under subsection (6)(a) in writing of the Board's determination whether the applicant is a directly affected party.*
- (9) If a person is determined under subsection (8) to be a directly affected party, the Board must consider the person's application, if any, for a review of the decision under subsection (5).*

The Board's authority for considering a request to review an Approval Officer's decision is found in Section 25(1) of *AOPA*, which states:

25(1) *The Board must, within 10 working days of receiving an application under section 20(5), 22(4) or 23(3) and within 10 working days of the Board's determination under section 20(8) that a person or organization is a directly affected party,*

(a) *dismiss the application for review, if in the opinion of the Board, the issues raised in the application for review were adequately dealt with by the approval officer or the issues raised are of little merit, or*

(b) *schedule a review.*

The Board considers that a party requesting a board review has the onus of demonstrating that there are sufficient grounds to merit review of the Approval Officer's decision. Section 14 of the *Board Administrative Procedures Regulation* describes the information that must be included in each Request for Board Review.

Documents Considered

The Board considered the following information in arriving at its decision:

- Decision Summary and Approval RA11001, dated April 5, 2011;
- Request for Board Review filed by Brad and Janice Niven, dated April 27, 2011; and,
- Statement of concern submitted to the Approval Officer by Brad and Janice Niven and others, dated February 11, 2011.

Counsel for the Approval Officer also submitted a May 6, 2011 letter providing a brief response to the filed request for review. Board staff advised of the supplemental filing, seeking instructions as to whether the Board wished to consider it. The letter referenced materials in the Approval Officer's file, including a summary of the Approval Officer's explanation as to why the Nivens were not determined to be directly affected. The letter also briefly commented on meteorological data and included a site plan satellite photo with an additional 'x' mark to denote the location of the Niven's residence. The Board considered receiving this additional filing and determined the supplemental letter was not essential to its deliberations. Therefore it was not provided to the Board or any other parties.

Board Deliberations

Status Reconsideration

The Niven's Request for Board Review included a request that the Board reconsider the Approval Officer's decision that they were not a directly affected party. Under *AOPA*, the Board must first find a party to be directly affected before it can further pursue the merits of the appealing party's review request. In seeking status reconsideration from the Board, the Board considers that the filing party has the responsibility to demonstrate that they are a directly affected party.

This issue raises the important, but sometimes confusing distinction between the terms '*affected person*' and '*directly affected party*' as it relates to a party's status under *AOPA*, and the Board sees value in offering some clarification at this point. In considering a confined feeding operation (CFO) approval application, an Approval Officer is required by Section 19(1) of *AOPA* to provide for notification of the subject matter of the application to all *affected persons* (and potentially others). Who is affected is defined under Section 5 of *the Agricultural Operations, Part 2 Matters Regulation* based on the number and type of livestock and distance

from the proposed CFO (and potentially others if the CFO were to be located within 100 metres of the bank of a river, stream or canal). For Klaas Ijtsma's application, using the factors set out in the regulation, *affected persons* include any municipality and persons who own land which is 0.5 miles from the boundary of the CFO. Further, it is the responsibility of an Approval Officer to decide at first instance who is a *directly affected party*. According to Section 19(4) of AOPA, the Approval Officer is to determine, on application, whether an *"affected party, other person or organization or member of the public"* is a *directly affected party*. According to the helpful explanation in Approval Officer Decision Summary FA09007A, *"the NRCB [Approval Officer] typically treats all persons who meet the definition of 'affected' persons as also 'directly affected'... However, the NRCB [Approval Officer] also considers whether people who reside or own land outside of the 'affected' person radius are 'directly affected' based on their exposure to potential nuisances or risks posed by a proposed CFO."*

In Decision Summary RA11001 the Approval Officer identified that Brad and Janice Niven's land and/or residence was located at SW 17-28-27 W4. As indicated in his decision, during the application review process the Approval Officer received a statement of concern from seven parties including Brad and Janice Niven. After considering the statement of concern, the Approval Officer determined that only one party (Bruce and Robin Knight) had established itself as directly affected, *"...because they reside on or own land within 0.5 miles of the boundary of the parcel of land on which the confined feeding operation is to be located."* The Approval Officer determined the remaining signatories to the February 11, 2011 statement of concern, including Brad and Janice Niven, were not directly affected because *"....they do not own land and/or reside within 0.5 miles of the boundary of the parcel of land on which the confined feeding operation is to be located and they have not established that there will be a direct material effect upon them, which will be equivalent to someone who does."*

The Board notes that the Nivens did not dispute the fact that they do not own land or reside within 0.5 miles of the boundary of the proposed CFO. Since the Niven's residence is estimated to be 1,142 metres from the nearest point of the proposed CFO facilities, the Board accepts that they reside outside the 0.5 mile radius. The second part of the Approval Officer's conclusion in Decision Summary RA11001, that *"...they have not established that there will be a direct material effect upon them which will be equivalent to someone who does"* requires further evaluation by the Board in its reconsideration of the Niven's status. The Board notes the Approval Officer did not substantiate this conclusion in Decision Summary RA11001.

The Niven's review request challenges the Approval Officer's assessment of their status by endeavouring to establish that Klaas Ijtsma's operation will have a direct material effect upon them. Their primary contention is that the Approval Officer failed to adequately consider relevant factors regarding the local micro-climate in reaching his decision. The Nivens contended that AOPA calls for consideration of micro-climate issues such as wind, topography, air drainage, and existing wind controls (i.e., shelterbelts). They further submitted that the dispersion factor was not properly assessed. Given air drainage issues relevant to the siting of the operation and their residence's location downhill and frequently downwind of the proposed facility, they asserted directly affected party status was justified. The Board notes that the Niven's arguments in their written request regarding potential odour impacts and the merits of applying a modified dispersion factor are intermingled in forming the basis for both their request for directly affected status and their Request for Board Review; in the interests of fairness the Board has taken the broadest view of the arguments that apply to its status consideration.

To support their position the Nivens quoted from a study by Chastain et al. (1999) and suggested the proposed CFO would significantly impact them in a manner not previously considered as the study states “...if a livestock facility or waste storage is located uphill from...[residences]...the cool air will flow past the livestock facility, may pick up unpleasant odors, and create a nuisance around dwellings in its path.” They further noted that the study states it is best to choose a site that is not up-slope from close neighbours. The Nivens indicated the Approval Officer’s sole reliance on *AOPA*’s minimum distance setback requirements was inadequate to address their concerns, given that the proposed operation would be sited on a hilltop directly west of their residence.

The Board reviewed the February 11, 2011 statement of concern filed by the Nivens and others during the application review process. The Board notes that issues regarding the micro-climate and consideration of the dispersion factor were not brought forward for the Approval Officer’s consideration at that time. Nevertheless, the Board considers that the provisions of *AOPA* allowing reconsideration of a party’s status require the Board to make its own separate assessment.

Consistent with previous Board decisions, in considering whether a party should be considered directly affected, the Board evaluates whether the party has reasonably established the following:

- a plausible chain of causality exists between the proposed project and the effect asserted;
- the effect would probably occur;
- the effect could reasonably be expected to impact the party;
- the effect would not be trivial; and
- the effect falls within the NRCB regulatory mandate under *AOPA*.

The Board accepts that parties owning or residing on lands beyond the 0.5 mile radius may establish a direct effect that would warrant granting them directly affected status, if the above criteria are met.

The Board notes the Niven’s position that the proposed operation would cause odour impacts that could unfairly impact their home, prevent further property development and affect their property values. In this case, the Board finds that while the Nivens have raised a plausible chain of causality between the proposed CFO and potential odour impacts to them due to possible air drainage issues, they have not substantiated their assertions by furnishing enough information to determine the probability of the claimed effects. Given the lack of more detailed information such as details of the specific location of the Niven’s residence in proximity to the CFO’s siting with topographical information regarding the height and slope of the hill, the Board is unable to conclude that the potential effects raised could reasonably be expected to impact the Nivens in a material way.

The Board recognizes that Brad and Janice Niven will likely experience some odours from this and perhaps other CFOs in the area, but they have not demonstrated that this would qualify them to be a directly affected party as contemplated under *AOPA*. While *AOPA* includes measures to mitigate nuisance impacts, experiencing some nuisances such as odours, dust and noise is commonplace to rural living. Minimum distance setback (MDS) requirements, as established in the *Standards and Administration Regulation*, are intended to provide some mitigation for nuisances. In this case, the proposed operation requires an MDS of 349 metres for Category 1 (residences on agricultural land) and 465 metres for Category 2 (residences on non-agricultural land); with an estimated setback of 1,142 metres to Brad and Janice Niven’s

residence, the Board observes the required MDS was adequately met with the actual setback being more than double the required distance.

The Board recognizes that a dispersion factor forms part of each calculation in the Approval Officer's determination of the required MDS. Schedule 1 of the *Standards and Administration Regulation* defines the dispersion factor, stating that it "*allows for a variance to the MDS due to the unique climatic and topographic influences at the site, and is determined in accordance with section 5.*" While Section 5 allows for the dispersion factor to account for topography, screening and micro-climate factors, the Board observes that Section 5(1) states, "*Unless information is provided to establish otherwise to an approval officer's or the Board's satisfaction, the dispersion factor must equal 1.0.*" Accordingly, the Approval Officer's use of a dispersion factor other than 1.0 may only be triggered by the provision of information to establish that a different dispersion factor is warranted. Any change to the dispersion factor would then in turn either increase or decrease the required MDS, dependent on whether the standard dispersion factor of 1.0 were increased or decreased. In this case, it appears that the Approval Officer did not consider applying a different dispersion factor, as the issue was not raised during the application review process. The first instance this issue was raised is in the Niven's Request for Board Review of the Approval Officer's decision.

The Board recognizes that the application of the dispersion factor can produce modifications to the normal MDS factor. The Board notes that, in this case, in order to effect the MDS calculation sufficiently to prevent the proposed operation from meeting the setback requirements, the dispersion factor would need to cause a doubling or tripling effect on the required MDS. The Board finds that the Nivens have not provided sufficient information to substantiate that a dispersion factor of this magnitude should be applied to the MDS calculation.

Based on the status reconsideration process described above, the Board finds that the Nivens did not provide sufficient information to establish themselves as directly affected by the subject Approval. The Board therefore denies their request for directly affected status. Without directly affected status, the Board cannot further consider the Niven's review request.

Decision

The Board determined that Brad and Janice Niven remain parties without directly affected status. The review request is therefore denied.

DATED at CALGARY, ALBERTA, this 19th day of May, 2011.

Original signed by:

Vern Hartwell
Panel Chair

Donna Tingley
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Copies of the *Agricultural Operation Practices Act* can be obtained from the Queen's Printer at www.qp.gov.ab.ca or through the NRCB website.