



BOARD DECISION

RFR 2021-02 / LA19036

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary LA19036

Arie and Willemina Muilwijk

February 24, 2021

The Board issues this decision document under the authority of the *Agricultural Operation Practices Act*, following its consideration of a request for Board review of Decision Summary LA19036.

Background

On January 14, 2021, Natural Resources Conservation Board (NRCB or Board) approval officer Andy Cumming issued Decision Summary LA19036, denying an application to convert a swine confined feeding operation (CFO) to a beef feeder calf CFO (expanded to 3,000 calves). The existing CFO is owned and operated by Arie and Willemina Muilwijk (the Muilwijks), and is located at NE 10-9-27 W4 in the Municipal District of Willow Creek.

Pursuant to section 20(5) of the *Agricultural Operation Practices Act* (AOPA), a Request for Board Review (RFR) of Decision Summary LA19036 was filed by the Muilwijks within the 10-day filing deadline of February 4, 2021, established by AOPA.

The directly affected parties, as identified by the approval officer, were notified of the Board's intent to review the RFR and were provided with a copy on February 5, 2021. Parties that had an adverse interest to the matters raised in the RFR were given the opportunity to submit a rebuttal by the deadline of February 11, 2021. The Board received two rebuttals; one from John Green (Green) and one from Dean and Hannah Brauer (the Brauers).

Under the authority of section 18(1) of the *Natural Resources Conservation Board Act*, a division of the Board (panel) consisting of Peter Woloshyn (panel chair), L. Page Stuart, Indra L. Maharaj, and Earl Graham was established on February 16, 2021, to consider the RFR. The panel convened to deliberate on the RFR on February 16 and 17, 2021.

On February 18, 2021, the panel released its decision letter, granting an oral virtual review hearing. The decision letter outlined the four issues for the hearing. The panel advised that its RFR decision report with reasons would be issued no later than February 26, 2021. The panel met on February 23, 2021 to finalize the RFR decision report.

Jurisdiction

The Board's authority for granting a review of the 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 review has the onus of demonstrating that there are sufficient grounds to merit a review of the approval officer's decision. Section 13(1) of the AOPA Administrative Procedures Regulation describes the information that must be included in a request for Board review. The RFR submitted by the Muilwijks complied with section 13(1) of the AOPA Administrative Procedures Regulation.

Documents Considered

The Board considered the following information:

- Decision Summary LA19036, dated January 14, 2021
- Technical Document LA19036, dated January 14, 2021
- RFR filed by Arie and Willemina Muilwijk, dated February 4, 2021
- Submission filed by the approval officer, dated February 10, 2021
- Rebuttal filed by John Green, dated February 11, 2021
- Rebuttal filed by Dean and Hannah Brauer, dated February 11, 2021
- Municipal District of Willow Creek Municipal Development Plan

Board Decision

Upon review of the Muilwijks' RFR and the rebuttals filed by Green and the Brauers, the Board had decided that a hearing is warranted. The Board finds that several issues raised by the Muilwijks remain unresolved and, therefore, directs that this matter proceed to an oral (virtual) hearing. Specifically, the Board finds that four specific issues merit further submissions and review.

Hearing issues

- 1) whether the roller compacted concrete (RCC) liner associated with application LA19036 meets the standards required for a manure storage facility under the *Agricultural Operation Practices Act* and its associated regulations;
- 2) whether the potential permit conditions identified in Decision Summary LA19036 for the catch basin and fly control are appropriate;
- 3) a determination of the risk associated with the existing water well in the yard; and
- 4) a determination of the deemed capacity to confine livestock at the confined feeding operation pursuant to Section 18.1 of the *Agricultural Operation Practices Act*.

Submissions by Parties at the Hearing

Issues raised by directly affected parties

The Board encourages submissions by all directly affected parties with respect to requests for review hearings. Submissions should focus on the hearing issues and serve to provide further evidence in support of your position.

The Muilwijk RFR included a request that the Board review the approval officer's risk assessment for the site, in particular to determine which permit conditions are appropriate. The Board expects that the appropriateness of conditions relative to site risk will be determined in the evaluation of the identified hearing issues.

The Brauers and Green each expressed concern that the proposed CFO will degrade their respective water supply. The Board notes that the identified hearing issues specifically relate to the protection of groundwater and proper management of surface water run-on and runoff. The Board welcomes submissions from the Brauers and Green on this matter.

The Board requests a submission from Field Services with respect to the following issues, in addition to any other submissions that Field Services may decide to make:

- a) what, if any, guidelines exist with respect to the specifications necessary for RCC liners to meet AOPA's groundwater protection standards;
- b) what resources did the approval officer? rely upon in assessing RCC liner suitability as a protective liner in this case;
- c) what experience does Field Services have relating to the technical requirements required for RCC liners; and
- d) what analysis did Field Services undertake with respect to the compliance of the applied-for RCC liner with the AOPA groundwater protection standards.

Issues not under Consideration at the Hearing

The Board finds that the following issues raised in the Muilwijk RFR do not merit further review at the hearing:

Impartiality of the approval officer

The Board acknowledges the Muilwijks' assertions regarding the approval officer's conduct during the application process; specifically, that the approval officer failed to act impartially in reaching his decision. While the Board takes these assertions seriously, it also notes that the Muilwijks' opportunity to dispute the approval officer's decision under AOPA is satisfied through the Muilwijks' submitted RFR to this Board.

While the Board does not see that a review of Field Services staff conduct will contribute to the Board's consideration of the hearing issues, parties have the opportunity to advance evidence and argument in their submissions that they believe will assist the Board in addressing the reviewable issues.

Impact of past decisions on new applications

The Muilwijks requested that the Board review the approval officer's decision with respect to the following questions:

- a) if the applicant was treated fairly compared to application LA18053;
- b) if the NRCB set precedence when it approved RCC as a liner for LA18053;
- c) how the NRCB calculated hydraulic conductivity, addressed crack control, and determined that the RCC liner met groundwater protection standards in LA18053; and
- d) how the NRCB's prior approvals affect subsequent applications.

The Board acknowledges and supports that Field Services' policies, fact sheets and guidelines, in addition to its work with the Policy Advisory Group and Technical Advisory Group, are intended to provide stakeholders with clarity and consistency in its role of issuing permits and ensuring compliance. However, it is also important to the work of the Board that it have the ability to assess each case on its own merits and make a decision that is based on the specific circumstances presented by each applicant.

In this case, the Muilwijks requested that the Board weigh in on the issue of precedence and explain the process used by the approval officer in Decision Summary LA18053, where she determined that the site in that case met the AOPA requirements. The Board's authority to review an approval officer decision arises through AOPA's legislated RFR process that allows affected parties to submit requests for review on a particular file. Therefore, the Board confirms that it does not have the jurisdiction to review past decisions.

The Board notes there is no statutory obligation to follow precedence in either approval officer decisions or board reviews. Having said that, the Board acknowledges and supports stakeholder expectations that the consistent application of AOPA legislation and associated regulations is an important pillar for a respected regulator to uphold. The NRCB strives for and supports transparency, fairness, and consistency in its decision making, and recognizes these principles as foundational in its role as a regulator. The Board applies all of these principles in its commitment to ensure that the statutory requirements of AOPA are met.

Approval officer's review of work submitted by third party professional engineers

The Muilwijks asserted that NRCB engineering staff did not follow the Alberta Professional Engineers and Geologists Association (APEGA) Guideline for Ethical Practice. The Board recognizes that APEGA has the authority to regulate its members. It is not within this Board's jurisdiction to adjudicate matters referable to and under the jurisdiction of APEGA.

However, the Board notes that Field Services does have a fact sheet to assist staff in reviewing work submitted by external professional engineers¹. Among other things, the fact sheet directs approval officers to:

- a) be available to explain or discuss information requirements;
- b) determine whether the information submitted by a professional engineer meets the requirements of AOPA;
- c) advise consulting engineers of any errors, omissions or inconsistencies in the information they provided; and
- d) provide professional engineers with the opportunity to address any errors or omissions in information they have provided.

The Board expects that Field Services staff follow its fact sheet and internal policy in reviewing work submitted by third party professional engineers. Reviewing the conduct of Field Services staff in this matter will not provide further relevant information with respect to the issues to be addressed by the Board in this review hearing.

¹ NRCB [Fact Sheet](#) "Work Submitted by Professional Engineers" January 19, 2016.

The Board Hearing

The hearing will commence at 9:30 a.m. on April 20, 2021. Board staff have been able to confirm that all parties are available for the hearing date and, in the event the hearing requires additional time, that parties are available on April 21, 2021.

The hearing will be conducted virtually using the Zoom platform. Board staff will contact all participating parties in advance of the hearing date to facilitate participation.

The Board has the expectation that the approval officer will make the complete application record available no later than March 26, 2021. Written submissions from all parties shall be filed with the Board no later than April 8, 2021. All documents should be filed electronically and directed to laura.friend@nrcb.ca. Parties are encouraged to file submissions as Adobe pdf documents. All participating parties will be able to access filed documents through the NRCB's website. The Board encourages all parties to sign up for email notification of new documents being posted to the website project page ([Muilwijk - review documents and sign-up](#)).

DATED at EDMONTON, ALBERTA, this 24th day of February, 2021.

Original signed by:

Peter Woloshyn

Indra L. Maharaj

L. Page Stuart

Earl Graham

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NRCB Response Line: 1.866.383.6722

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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.