



BOARD DECISION

RFR 2011-01 / FA10003

In Consideration of Requests for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary FA10003.

Grow North Inc.

January 26, 2011

Background

On December 10, 2010, NRCB Approval Officer Randy Bjorklund issued Decision Summary and Approval FA10003 to Grow North Inc. for a confined feeding operation (CFO) to be located at NE 4-111-19-W5 in Mackenzie County. The decision approved Grow North's application to construct and operate four feedlot barns that would collectively house a total of 5,000 beef finishers. (The Decision Summary also indicated that the CFO is part of a larger planned project that later anticipates including bio-digesters, electrical generation facilities, an abattoir, a packing plant and an ethanol plant).

Pursuant to Section 20(5) of the *Agricultural Operation Practices Act (AOPA)*, two parties filed Requests for Board Review of the Approval Officer's decision. Both requests met the 10-day filing deadline established by *AOPA*. These requests were filed by Mr. Ernie Derksen and Mr. Gerhard Neudorf, both of whom are identified as directly affected parties in Decision Summary FA10003. All the directly affected parties identified in Decision Summary FA10003 were then provided with a copy of the requests for review along with notice of an opportunity for anyone adversely affected by positions presented in the requests for review to file a rebuttal. Mr. Mike Mihaly filed a rebuttal submission on behalf of Grow North Inc. on January 12, 2011.

The Board convened to deliberate on this matter on January 18, 2011 and reconvened on January 20, 2011.

Jurisdiction

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 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 FA10003, dated December 10, 2010;
- Request for Board Review filed by Mr. Ernie Derksen, dated December 27, 2010;
- Request for Board Review filed by Mr. Gerhard Neudorf, dated December 29, 2010;

- Rebuttal filed by Mike Mihaly for Grow North, dated January 11, 2011;
- Mackenzie County Municipal Development Plan, dated November 10, 2009;
- Mackenzie County – Town of High Level Inter-Municipal Development Plan, dated November 30, 2010;
- Mackenzie County letter to the Approval Officer, dated October 1, 2010;
- Mackenzie County email to the Approval Officer, dated October 15, 2010; and,
- Original statement of concern from Mr. Derksen, dated August 30, 2010.

Board Deliberations

The Board met on January 18 and 20, 2010 to deliberate on the filed Requests for Board Review. In its deliberations, the Board determined that the Requests for Review raised issues concerning Approval FA10003. Mr. Neudorf raised noise, odour, water use, surface water quality, animal welfare and property value issues. Mr. Derksen raised siting, setback, road-use and odour issues, and took exception with the Approval Officer's decision that the confined feeding operation was consistent with the Municipal Development Plan and Inter-Municipal Development Plan. Both Requests for Review raised an issue that the project had components that went beyond a traditional confined feeding operation and therefore should be considered as industrial activity.

In considering a request for the review, the Board is directed by section 25(1) of the *Agricultural Operation Practices Act* that provides "The Board must... (a) dismiss a 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 has considered each of the issues raised in the requests for review in a manner consistent with this section.

The Board is satisfied that the Approval Officer adequately considered odour and surface water quality issues. The Approval Officer considered odour by examining whether the operation met the minimum distance separation (MDS) required by the regulations. MDS is an odour specific tool intended to establish an adequate distance between confined feeding operations and existing residences. The Board finds that the Requests for Review do not identify any reasons that would lead them to conclude that this issue was not adequately dealt with by the Approval Officer. Similarly, the Approval Officer considered the project's design in context of surface water quality protection through an assessment of the manure handling measures included in the application. Having regard for the Requests for Review, and without repeating the reasoning set out in Decision Summary FA10003, the Board is satisfied that this issue was adequately considered by the Approval Officer.

The *Agricultural Operation Practices Act* does not have criteria respecting noise, water use, setbacks from municipal roads or animal welfare. These issues, along with the issues raised concerning the future incorporation of a bio-digester for manure and offal, ethanol production and an abattoir are within the regulatory purview of either the municipal authority or provincial government departments. While the NRCB may in appropriate circumstances have regard for such issues, its authority does not include regulatory authority over them. Consequently, the Board is satisfied that these issues should not be the subject of a Board review.

The Board does find that the issue of the development's consistency with the provisions of the Municipal Development Plan warrants a review. Most notably, the Municipal Development Plan provides in section 4.2.9 that:

Applications to the NRCB for the establishment or expansion of CFOs shall not be supported by the County unless they are compatible with adjacent land uses, do not generate adverse health or environmental effects, follow the Agricultural Operations and Practices Act (sic) (AOPA) guidelines, and meet or exceed the following separation distances:

- a) *3.2 kilometers (km) from an adjacent municipality, Hamlet, Indian Reserve or a multi-lot country residential subdivision;*

The Board finds that the Approval Officer's rationale in concluding that the operation as located is consistent with the Municipal Development Plan contains a number of assumptions and conclusions that warrant review. Notably, the Approval Officer concluded that the separation distance in section 4.2.9 of the Municipal Development Plan, set out above, was addressed in that the "multi-lot country subdivision" at issue was outside the minimum separation distance established by the *Agricultural Operation Practices Act*. Given the requirement in section 20(1)(a) of the *Agricultural Operation Practices Act* that an Approval Officer must deny an application if there is an inconsistency with the Municipal Development Plan land use provisions, a review is warranted in this case.

In this review, the Board will concern itself with two questions: one, whether the application is consistent with the Municipal Development Plan, including the Inter-Municipal Development Plan; and two, whether the Board should exercise its authority under section 25(4)(g) of the *Agricultural Operation Practices Act* in the case of this application, to have regard to, but not be bound by, the Municipal Development Plan.

In conducting this review the Board believes it imperative that a representative from Mackenzie County be present to provide assistance to the NRCB Panel established to conduct this review. Questions will focus on the interpretation of the application planning documents (Municipal Development Plan and Inter-Municipal Development Plan), such as:

- How much discretion was intended by section 4.2.9 of the Municipal Development Plan?
- Why was the distance of 3.2 kilometers chosen?
- Is Mackenzie County of the view, in context of the current planning documents, that the Grow North application is consistent with the Municipal Development Plan?

As the appearance of an individual from the County capable of assisting the Panel is required, the Board hereby directs NRCB General Counsel to contact Mackenzie County.

As a result of its deliberations, the Board concluded that a Board review is warranted.

Decision

The Board determined that it will conduct a review by way of oral hearing in the Town of High Level. The review is limited to the question of the consistency of Grow North's proposal for a confined feeding operation with the provisions contained within the current Municipal Development Plan and Inter-Municipal Development Plan.

The Board expects that the hearing will be completed in one day. The Board is proposing a hearing date of March 1 or 2, 2011. NRCB staff will be contacting those parties who filed submissions with respect to any conflicts this timing may present and an appropriate venue in High Level will be chosen to hold the hearing.

Written submissions to be filed by those who wish to participate in the hearing process shall be filed no later than February 15, 2011. Parties are requested to file 7 copies of their submission to the attention of Susan Schlemko at the Edmonton offices of the NRCB. Written submissions should address whether the Grow North application is consistent with the Municipal Development Plan and Inter-Municipal Development Plan, and if not consistent, whether the Board should exercise its authority under section 25(4)(g) of the *Agricultural Operation Practices Act*.

DATED at CALGARY, ALBERTA, this 26th day of January, 2011.

Original signed by:

Vern Hartwell
Panel Chair

Donna Tingley
Panel Member

Jim Turner
Panel Member

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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.