



BOARD DECISION

RFR 2013-01 / RA09046A

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act* in relation to Approval RA09046A.

Sunterra Farms Ltd.

January 10, 2013

Background

On November 27, 2012, NRCB Approval Officer Scott Cunningham issued Decision Summary RA09046A in relation to the Sunterra Farms Ltd. (Sunterra) confined feeding operation (CFO) located at SW-36-27-17-W4 in Special Areas #2. Sunterra's application sought to amend its existing Approval RA09046M by removing 14 conditions. Decision Summary RA09046A granted the application in part by removing 5 conditions and declining to remove 9 conditions.

The Sunterra CFO is currently permitted for 4,000 sows farrowing having received a development permit from Special Areas #2 in 1997. Section 18.1 of the *Agricultural Operations Practices Act (AOPA)* provides that development permits for confined feeding operations issued by municipalities prior to 2002 are grandfathered as *AOPA* permits and carry forward any included conditions. The Sunterra approval was amended in 2009 through the Leak Detection Program initiated by the NRCB. The 2009 amendment process replaced the groundwater monitoring condition (condition 1) of the approval but did not address other aspects of the approval.

Pursuant to Section 20(5) of *AOPA*, a Request for Board Review of Decision Summary RA09046A was filed by Sunterra on December 18, 2012. The Request for Board Review asked that the Board review the decision of the Approval Officer to decline to remove conditions 4, 6, 7 and 8 of Approval RA09046A. The Request for Board Review met the 10-day filing deadline established by *AOPA*. Following receipt of the Request for Board Review, all directly affected parties were provided with a copy of the request, as well as a notice of their opportunity to file a rebuttal. No rebuttal submissions were received by the Board.

Jurisdiction

The Board's authority for granting a review of 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 RA09046A, dated November 27, 2012;
- Request for Board Review filed by Sunterra, dated December 18, 2012;
- *Approval Officer Amendments of Municipal Permits Policy* dated October 22, 2010;

- Letter from NRCB Director of Field Services to NRCB Approval Officers *Re: Amendment of existing permit conditions* dated September 24, 2012; and,
- The public components of the file maintained by the Approval Officer.

Board Deliberations

The Board met on January 7, 2013 to deliberate on the filed Request for Board Review. In its deliberations, the Board determined that the Request for Review raised issues concerning the Approval Officer's decision not to remove conditions 4, 6, 7 and 8 (the conditions) from Approval RA09046A. The conditions each deal with separate aspects of manure spreading activities:

- condition 4 provides for a manure spreading setback from surface water;
- condition 6 prohibits spreading manure on and around specified long weekends;
- condition 7 prohibits spreading on specified lands; and,
- condition 8 establishes spreading setbacks from water wells.

Each of these conditions was included in Special Areas #2 Development Permit SA2-18 issued in 1997.

Sunterra asserts that the current *AOPA* standards adequately address the underlying purpose of the conditions included in their development permit, but that the continued requirement to meet these more restrictive conditions places them at a competitive disadvantage.

Application of NRCB Field Services Policy

The Approval Officer's rationale for declining to remove conditions 4, 6, 7 and 8 from Approval RA09046A is largely governed by his application of a policy set out in a September 24, 2012 letter from the NRCB Director of Field Services. Most notably that letter states:

conditions that are more stringent than AOPA requirements should be carried forward unless justification is given, and input received, that provides satisfactory evidence that what is proposed can address the reasons for the inclusion of the conditions in the original permit. A request to be regulated by the current AOPA requirements is not sufficient justification to remove a condition more stringent than AOPA.

In declining to remove these conditions from the new approval issued to Sunterra the Approval Officer concluded that each of these conditions was more stringent than the standard established by *AOPA* and that the justification provided by Sunterra did not provide sufficient support to removing the condition.

While the September 24 letter states that the permit conditions may be amended if the operator provides justification, little direction is included to interpret what justification is sufficient to satisfy the policy. The Board acknowledges that the question of what might constitute adequate justification must be determined on a case-by-case basis; however, as this is the first time that this question or this policy has come before the Board it believes that a review of this issue is warranted. Therefore the Board is prepared to grant a review of the Approval Officer's decision in respect to conditions 4, 6, 7 and 8.

Relevant considerations for the hearing

Directly affected parties, including the Approval Officer, may want to address any or all of the following issues in their written submissions to the hearing:

1. What knowledge or information can you provide to gain an understanding of the rationale for why Special Areas #2 included conditions 4, 6, 7 and 8 in the 1997 development permit?
2. What decisions have you made in reliance on these conditions since 1997?
3. What might constitute appropriate justification for removing, amending or continuing each of the four grandfathered conditions?

The Board will consider each of the four conditions included in the Request for Review separately and parties should frame their submissions such that it is clear which condition or conditions the submission is addressing and the outcome advocated.

Consultation by the operator

The Board notes that Sunterra's Request for Review expresses disappointment that they were not given the full opportunity to find a solution most agreeable to all parties affected. The Board believes that operators and the communities where CFOs operate can only benefit from a continuing sharing of information and ideas. The Board urges Sunterra to pursue such efforts with the directly affected parties prior to the commencement of the hearing.

Decision

As a result of the Board's deliberations, it has determined that a review will be granted to consider the appropriateness of amending Approval RA09046A by removing or amending any or all of conditions 4, 6, 7 or 8.

The review will take the form of an oral hearing which the Board expects will be completed in two days. The Board is proposing March 5 and 6, 2013 as the hearing dates. NRCB staff will contact directly affected parties who file submissions with respect to any conflicts this timing may present and all parties will be notified once an appropriate venue in Drumheller has been selected for the hearing.

Directly affected parties who wish to participate in the hearing must file a written hearing submission by no later than February 19, 2013. Written submissions are to be directed to the attention of Susan Whittaker at the Edmonton offices of the NRCB.

DATED at CALGARY, ALBERTA, this 10th day of January, 2013.

Original signed by:

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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.