



BOARD DECISION

RFR 2017- 03 / RA16003A

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary RA16003A

Philipsen Farm Ltd.

March 8, 2017

Background

NRCB Approval Officer Carina Weisbach issued Decision Summary RA16003A (the AO Decision) on January 5, 2017 granting Philipsen Farm Ltd.'s (Philipsen Farm) application to amend Approval RA16003 by removing a condition. The AO Decision is for a 440 cow dairy confined feeding operation (CFO), located at E½ 18-41-25 W4M in Lacombe County (the county), roughly 3.5 kilometres north of Lacombe. Philipsen Farm applied to amend its dairy operation approval by removing condition 11, which states:

Manure shall not be spread within 1,000 feet of neighbouring residences, unless the manure is injected into soil or incorporated within 24 hours of spreading.

The Approval Officer considered this application in the AO Decision, and issued an amended approval with condition 11 removed in its entirety.

Approval RA16003 was issued on August 12, 2016 in response to an application from Philipsen Farm to expand its dairy from 200 to 400 milking cows. The CFO was originally permitted by the County on January 21, 1999, and included the above-stated condition. A single Request for an NRCB Board Review (RFR) of the AO Decision was filed by Philomena Maier and Michael Davey, Jane and Troy Bailey, Julie and Dan Berger, Doug Law, Leslie and Greg Comis, Louella and Roger Morse, and Heather and Paul Pollock (collectively the RFR parties); and Kevin Lundie. The RFR asked the Board to reverse the approval officer's decision. Mr. Lundie and Heather and Paul Pollock have also filed submissions requesting the Board to reconsider the approval officer's finding that they were not directly affected parties in respect to application RA16003A. These filings all met the 10-day filing deadline pursuant to section 20(5) and (6) of AOPA.

Following receipt of the RFR and the requests to review directly affected party status, the Board sent a Notice of Filed Request for Board Review (the Notice), and a copy of the filed materials, to the people found by the approval officer to be directly affected parties and to those requesting directly affected party status. The Notice advised that any adversely affected parties had an opportunity to file a response submission with the Board by February 7, 2017. The Board did not receive any responses.

The Board met on February 9 and 15 and March 7, 2017, to deliberate on the RFR and the 2 requests to review directly affected party status.

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 of an approval officer's decision has the onus of demonstrating that there are sufficient grounds to merit a review. The information that must be included in each RFR is described in section 14 of the *Board Administrative Procedures Regulation*, and is also set out in the AO Decision cover letter dated January 5, 2017.

Documents Considered

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

- Decision Summary RA16003A dated January 5, 2017 and its companion technical document (Application for Amendment);
- Request for Board Review filed by Philomena Maier and Michael Davey, Jane and Troy Bailey, Julie and Dan Berger, Doug Law, Leslie and Greg Comis, Louella and Roger Morse, Heather and Paul Pollock, and Kevin Lundie, dated January 25, 2017;
- Request for Board Review of directly affected party status filed by Kevin Lundie, dated January 25, 2017;
- Request for Board Review of directly affected party status filed by Heather and Paul Pollock, dated January 25, 2017; and
- portions of the public record maintained by the approval officer.

Board Deliberations

Directly affected party status of Kevin Lundie and Heather and Paul Pollock

The approval officer concluded that neither Kevin Lundie or Heather and Paul Pollock were directly affected by the Philipsen application as their residences were not within 1000 feet of

the identified manure spreading lands. The submission of Heather and Paul Pollock states that their residence is within 1000 feet of the manure spreading lands, notwithstanding the approval officer's contrary finding. The Board has reviewed both the AO Decision and the approval officer's public file record and can find no evidence that supports her conclusion. The Board does not doubt that the approval officer performed a measurement to the Pollock residence, but expected the file to show how the task was performed, what the actual measurement was, and what margin of error is appropriate. Without that information, the Board is left without the proper tools to select between contradicting statements of fact. While the burden to prove that the approval officer was incorrect would normally fall on the Pollocks as the party requesting the review, the gap in the approval officer's record requires the Board to consider the onus with caution. In doing so, the Board finds that the Pollocks are directly affected, as the Board can find nothing to support the approval officer's conclusion.

Kevin Lundie acknowledges that his residence is not within 1000 feet of the Philipsen manure spreading lands. His request to have the Board reconsider his status includes assertions that Philipsen Farm has a history being non-compliant with AOPA manure spreading requirements, as well as various nuisance issues. The Board has also looked at the approval officer's determination of directly affected party status for Mr. Lundie. The Board accepts the approval officer's rationale as reasonable and appropriate in determining that Mr. Lundie is not a directly affected party, and adopts the reasoning of the approval officer in reaching the same conclusion.

Review of RFR

The Board is directed by AOPA to dismiss a request for review if, in its opinion, the issues raised in the RFR were adequately dealt with by the approval officer, or the issues are of little merit. Having regard for the documents referenced above, the Board has determined that the issues raised by the RFR were adequately dealt with by the approval officer, and the Board therefore dismisses the RFR.

The RFR identifies several issues where it asserts that the approval officer did not adequately investigate or give any consideration to the concerns presented. Specifically those issues are:

- 1) A failure to adequately consider the Alberta Health Services statement that, "There is insufficient information provided in the application to demonstrate that the amendment will not impact the environment, ground and surface water".
- 2) The approval officer did not fully consider the implications of revisiting the manure spreading condition originally imposed by the County of Lacombe.
- 3) The approval officer did not adequately consider human health risk and the risk to surface and groundwater.

- 4) The approval officer either dismissed or downplayed the concerns raised by parties living adjacent to the 4 newly-acquired manure spreading quarters, because no objections were filed by the 28 individuals who own or reside on land within the notification radius of the Philipsen Farm CFO.

Issue 1 – The Alberta Health Services statement

The RFR states that the approval officer did not have appropriate regard for the Alberta Health Services objection. In its letter to the approval officer, Alberta Health Services objected to the NRCB amending the Philipsen Farm permit after concluding that, “There is insufficient information provided in the application to demonstrate that the amendment will not impact the environment, ground and surface water”. The Board could not find anything in the file or AO Decision that indicates that the approval officer specifically followed up to determine what additional information Alberta Health Services might have found useful. The Board is concerned by the scenario where the approval officer seeks a response from Alberta Health Services asking for an opinion, and then does not follow up when that response objects to the application.

Despite the lack of follow-up by the approval officer, the Board is satisfied that the approval officer adequately considered the health effects associated with this application. This application is for a relaxation of an operating condition that became part of a deemed NRCB approval. The evidence clearly indicates that the county applied the spreading setback to residences as a common condition when approving CFOs, rather than a response to any unique characteristic of the Philipsen Farm CFO. Similarly, the government of Alberta has established manure spreading standards in AOPA that apply to all CFOs and are intended to reduce risk to human health and the environment and minimize nuisance. The Board finds that the approval officer adequately considered the consequences of relying on AOPA manure spreading standards in the specific context of the Philipsen Farm application and lands, and concludes that this issue does not merit consideration at a Board review.

Issue 2 – The implications of revisiting the County of Lacombe condition

This ground for requesting a review relies at least in part on the statement in the county’s letter to the approval officer noting that, “There are a number of residences in the quarters associated to this application.” The RFR parties state that there would have been no expectation in 1998/99 that the Philipsen Farm would acquire or seek to spread manure on the subject quarters in 2017. The RFR also states that the knowledge on the use of manure and its hazards has advanced significantly since 1998/99. The Board finds that this issue generally raises several nuisance and health concerns, but does not raise any reviewable issues on its own.

Issue 3 – Human health risk and risk to surface and groundwater

The RFR raises these concerns related to the application of manure to the 4 quarters from the Philipsen Farm generally, rather than in the specific context of condition 11. AOPA manages risk by establishing standards that minimize either the likelihood or magnitude of a particular event. In establishing those standards, the government of Alberta gives the NRCB a template to apply to the regulation of CFO facilities and manure management throughout the province.

Nothing stated in the RFR identifies that the risk associated with the spreading of manure in accordance with AOPA standards creates an elevated risk that should preclude adoption of the AOPA standard, or require the continued use of the elevated constraints set out in condition 11. The concerns raised in the RFR largely restate the concerns raised with the approval officer. The AO Decision outlines the consideration given to those concerns, and the Board is satisfied that the issues with respect to human health risk and the risk to surface and groundwater were adequately considered. For that reason, the Board finds that the AO Decision adequately assessed and considered the various risks associated with amending RA16003A.

Issue 4 – The approval officer either dismissed or downplayed the concerns raised by parties living adjacent to the 4 newly-acquired manure spreading quarters, because no objections were filed by the 28 individuals who own or reside on land within the notification radius of the Philipsen Farm CFO

The Board agrees with the directly affected parties that this stated rationale for dismissing or downplaying their concerns is inappropriate. The approval officer's file includes submissions from Philipsen Farm that the distance to these lands causes them to face added burdens to meeting the terms of condition 11 compared to those faced on the CFO facility lands. There may also be other reasons why those 28 individuals in the Philipsen Farm CFO radius chose not to make a submission or record few complaints. In the absence of what the Board would consider a more substantive inquiry into this line of reasoning, the Board has concluded that the approval officer gave inappropriate weight to the absence of input from the 28 individuals.

The Board fully understands why the RFR parties would take exception with the approval officer dismissing their claims of operator misconduct for this reason. The Board also wants to assure the RFR parties that any future complaints of misconduct related to matters regulated by the NRCB will be appropriately investigated. The Board remains puzzled as to why the approval officer chose to extrapolate any conclusion with respect to past issues of misconduct. The AO Decision correctly proceeds to review and assess the risk component of manure spreading on the 4 quarters under the regulatory requirements imposed by AOPA. Approval officers generally review applications under the assumption that compliance issues are properly a matter for the NRCB compliance group rather than matters relevant to the current application. In finding that the approval officer's consideration of the "few reported

complaints” did not seem to have material bearing on her assessment of risk, the Board concludes that this issue does not merit consideration at a hearing.

Decision

As a result of the Board’s deliberations, the Board finds that the Approval Officer adequately considered all issues raised in the filed Requests for Review and therefore does not direct any matters to a hearing. The RFR is denied.

DATED at EDMONTON, ALBERTA, this 8th day of March, 2017.

Original signed by:

Vern Hartwell

Glenn Selland

Jay Nagendran