



BOARD DECISION

RFR 2017-10 / RA16039

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary RA16039

Fuhrhop Farms Ltd.

November 7, 2017

Background

On September 8, 2017, NRCB Approval Officer Carina Weisbach issued Decision Summary RA16039 in relation to Fuhrhop Farms Ltd.'s (Fuhrhop) confined feeding operation (CFO) located at NE 2-46-25 W4M in Wetaskiwin County. Fuhrhop sought approval to expand an existing 170 milking cow dairy to a 600 milking cow dairy (plus associated dries and replacements) operation. The proposed expansion includes the construction of new manure storage facilities, consisting of a dairy barn and an earthen manure storage. The approval officer considered this application in Decision Summary RA16039 and issued a registration with conditions.

Pursuant to section 20(5) and 20(6) of the *Agricultural Operation Practices Act* (AOPA), a Request for Board Review (RFR) of Decision Summary RA16039 was filed by the Ermineskin Cree Nation (ECN) on September 22, 2017, which is within the 10-day filing deadline established by AOPA. As the RFR included an assertion that the NRCB did not provide notice to the ECN, the Board requested the approval officer file an outline of the notice she provided to the ECN and any communication that may have occurred between the date of notice and the issuance of Decision Summary RA16039. The approval officer filed that outline on September 29, 2017.

Following receipt of the RFR, all directly-affected parties were notified of the Board's intent to meet and deliberate on this matter, and were provided with copies of the RFR and of the notice outline. Directly affected parties with an adverse interest to the matters raised in the RFR were provided the opportunity to make a submission in response. The Board did not receive any response submissions that met the October 10, 2017 rebuttal filing deadline.

The Board convened to deliberate on the RFR on October 11 and 12, 2017, and determined that it must first determine what its consultation obligations are with the ECN. The Board directed its counsel to seek advice and assistance from the Alberta Aboriginal Consultation Office (ACO). A letter was sent to the ACO on October 12, 2017 and its response was provided on October 20, 2017.

The Board reconvened to deliberate on the RFR on October 26, 2017.

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 RFR.

Documents Considered

The Board considered the following information:

- Decision Summary RA16039 dated September 8, 2017
- Approval RA16039
- Technical Document RA16039
- Request for Board Review filed by the Ermineskin Cree Nation
- Approval officer's Outline of Notice to the Ermineskin Cree Nation
- Aboriginal Consultation Office letter dated October 20, 2017
- Ermineskin Cree Nation letter to the Aboriginal Consultation Office dated September 25, 2017
- Portions of the public record maintained by the approval officer

Board Deliberations

The Board met on October 11, 12, and 26, 2017 to deliberate on the filed RFR.

In its deliberations, the Board considered the issues raised in the RFR. The Board must dismiss an application for review if, in its opinion, the issues raised were adequately dealt with by the approval officer, or the issues are of little merit. The issues raised in the RFR include:

- notice to the ECN and the Crown's duty to consult
- groundwater quality
- odour
- risk in the event of flood

Notice to the ECN and the Crown's Duty to Consult

Adequacy of Notice

The RFR states that the approval officer failed to provide timely notice to the ECN as an affected person. The ECN specifically references the importance of the timely notification, given the AOPA provision that affected parties have 10 working days to provide a written request to the approval officer for a determination on whether the affected person is a directly-affected person (section 19(4)). From a procedural standpoint this is relevant, as only directly-affected persons have the opportunity to make submissions to the approval officer in relation to a CFO application, and to request a Board review of the approval officer's decision in relation to that application.

The approval officer published notice of the Fuhrhop application in the *Wetaskiwin Times Advisor* newspaper on May 31, 2017, and mailed a copy of the notice on May 24, 2017 directly to 48 persons that were identified by Wetaskiwin County as owning or residing on land within 1.5 miles of the CFO. The notice set a deadline of June 28, 2017 to file a statement of concern with the approval officer. The first contact made by the approval officer to the ECN was a letter dated June 30, 2017 and sent by

email on July 4, 2017. That letter asked that any comments or concerns regarding the application be provided to the approval officer by July 17, 2017. The approval officer used a letter template generally used to notify municipalities for the June 30, 2017 letter to the ECN.

On receiving the RFR, the Board requested the approval officer file an outline of the notice she provided to the ECN and any communication that may have occurred between the date of notice and the issuance of Decision Summary RA16039. The outline provided in response referred to various emails and telephone contacts between her and the ECN.

The Board is satisfied that where a First Nation owns land or reserve lands in the calculated notification radius, it should be treated as an "affected party." As an affected party it should receive the notice that normally is issued in the NRCB's courtesy letter, as it could be a directly affected party. In this case that did not occur. Firstly, the ECN did not receive a courtesy letter in the form that the 48 other landowners did, nor did the ECN receive the courtesy letter with the June 28, 2017 deadline that the 48 other landowners received.

The June 30, 2017 letter sent to the ECN included a complete copy of the Fuhrhop application for a CFO. As the letter was drafted using the municipal notice template letter, it asks the addressee's response to cover land use planning-related issues. The Board accepts that the ECN may have found this confusing as the ECN is not a municipality.

On July 19, 2017, the ECN and approval officer exchanged emails, and on July 25, 2017 they had a telephone conversation. At this stage the Board finds that it is clear that the approval officer was still asking the ECN to express any concerns it may have in relation to the CFO application. In noting the language used by the approval officer in her database entry, the Board concludes that the ECN was now considered an affected party and could outline its concerns as could any landowner in the 1.5 mile radius.

The Board finds that approval officer adequately notified the ECN of the application and provided a reasonable opportunity to state any concerns to the approval officer as required by AOPA section 20(1)(b)(iii). The approval officer left a message with the ECN land manager on August 1, 2017. On August 3, 2017, the ECN's land manager emailed the NRCB, stating that she was "working on" the ECN's response and she "needed a few more weeks or sooner to get this complete..." On August 17, 2017, the approval officer phoned the ECN's land manager again and asked about the status of a response, but was only able to speak with an assistant who said she would convey the message to the ECN's land manager. No one from the ECN followed up with the approval officer.

The Board calculates that from July 19, 2017 to the day before the approval was issued, the ECN had 48 days to review and respond to the application. The Board determines that the July 25, 2017 conversation between the approval officer and the ECN's land manager confirms that the land manager was aware of the need to respond even though no deadline was set. On September 8, 2017 the approval officer's decision was issued.

Having regard for the foregoing analysis, the Board finds that the ECN's arguments that timely and adequate notice had not been provided are without merit.

Crown's Duty to Consult

The RFR also requested that the NRCB “suspend the Approval to allow for an ECN–provincial Crown consultation process on the Fuhrhop application.” The ECN’s lawyer asks that any consideration or approval of the Fuhrhop application be suspended, pending a provincial Crown consultation process with the ECN to address the effects on ECN reserve lands of the current and proposed manure storage and handling systems. Specifically, the ECN stated that this consultation must first occur on issues including groundwater quality, odour, and risk to the ECN lands in the event of a flood.

The RFR stated that “at no time did the province’s Aboriginal Consultation Office contact ECN to consult about the Fuhrhop application”. As a preliminary matter to the full consideration of the RFR, the Board sent a letter to the ACO on October 12, 2017 to request advice and assistance. The October 12 letter asked the ACO four specific questions related to consultation with the ECN on the Fuhrhop application. The ACO response was provided on October 20, 2017 and stated “...the ACO has no formal role in the NRCB processes, including with respect to any consultation...”

The Board considers that the pertinent components that it needs to consider regarding consultation with the ECN on the Fuhrhop application are:

1. whether the issue of failure to consult by the Crown with the ECN through the Crown’s consultation unit (the ACO), before the approval decision, is an issue of merit, and
2. whether the NRCB application and Board review process under AOPA satisfied the Crown’s consultation obligation in relation to the ECN’s treaty rights in this case.

The Board finds that there is no merit to the allegation of failure to directly consult by the Crown through the ACO. The ACO confirmed that it has no mandate with respect to consultation in this case. As the basis for direct consultation has been refuted by the ACO (in its October 20, 2017 letter, the ACO’s mandate is described as “the ACO provides advice and support to Government of Alberta ministries with statutory and regulatory responsibilities related to Crown land and natural resource managements, as well as to the Alberta Energy Regulator”), the Board finds that there is no support for the ECN’s request to suspend the approval on the basis that the Crown’s consultation unit failed to consult on the project.

As noted in the recent Supreme Court of Canada case of *Clyde River*, an administrative tribunal empowered to consider questions of law must determine whether consultation is sufficient. The NRCB can decide questions of law and fact in regard to AOPA approvals. There is no argument provided that disputes that mandate. Although the NRCB cannot decide constitutional questions regarding Charter or Division of Powers matters, it must ensure that its decisions comply with section 35 of the *Constitution Act*.

In respect to the issue of consultation and whether a duty was owed and fulfilled prior to the approval of the Fuhrhop application, the Board finds that in this case there was no lack of consultation. As for the NRCB’s role in the consultation process as a delegate of the provincial Crown, it was fulfilled by NRCB’s application, notice, and participation opportunities.

Having regard for the entirety of the efforts made by the approval officer, the Board finds that the NRCB satisfied the Crown’s duty to consult. The ECN had a fulsome opportunity to participate in the decision-making process. The ECN’s land manager received the full Fuhrhop application by no later than July 4, 2017. The ECN’s land manager was advised by the approval officer on July 25, 2017 that she could

present the ECN's concerns with the project because the ECN had been provided with late notice. The incorrect treatment of the ECN as a municipality was remedied by July 25, 2017, when the approval officer confirmed that a statement of concern could be provided. Although no deadline was then issued, the approval officer did follow up with the ECN. The approval officer sought to engage the ECN in dialogue about ECN concerns on the project through reminder telephone calls on August 1, 2017 and subsequently on August 17, 2017. The ECN did not respond, other than to confirm on August 1, 2017 that a response would be coming in "a few more weeks". The ECN did not respond with a statement of concern or communicate in any way with the NRCB in "a few more weeks", nor did they return the approval officer's August 17, 2017 follow-up telephone call. In fact, an entire month expired after the ECN's response setting its own deadline for response.

There is no evidence that "actual consultation" did not take place because of the NRCB's process. The Board finds that the NRCB's processes were modified to allow for a reasonable opportunity for consultation, and the ECN did not take action to exercise that opportunity. The failure of the ECN to provide its input does not prevent the NRCB approval officer from acting through its approval process (*R. v. Lefthand*, [2007] A.J. No. 681 at par.42). The Board also notes that in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* ([2017] S.C.J. No. 41), the Supreme Court of Canada held that "...the duty to consult does not provide Indigenous groups with a 'veto' over final Crown decisions...proper accommodation stresses the need to balance competing societal interests with aboriginal and treaty rights...." (par.59). In this case, the approval officer balanced the land owner interests against those of the applicant. Although the ECN failed to provide its concerns to the approval officer in a reasonable time, the fact is that the very concerns subsequently raised by the ECN's lawyer were addressed in the approval officer's decision. The ECN is not entitled to a one-sided process, but rather, a cooperative one. In this case, the ECN received the same, or greater, opportunity to participate as did other neighbouring land owners.

The Board interprets the ECN's failure to respond with a statement of concern as a failure of the ECN to engage in consultation.

Groundwater, Surface Water, and Odour

The ECN states that it has concerns about the potential effect of the CFO's current and proposed manure storage, manure handling systems, and operating practices. Specifically, the ECN expresses concerns related to potential effects on groundwater that flows under the reserve and on-reserve water wells, and the risk to the environment and ECN reserve lands in the event of a flood. The ECN also expresses concern that the earthen manure storage proposed as part of the application will create an unacceptable increase in nuisance odour.

AOPA directs the Board to dismiss an RFR where the Board determines that the issues raised were adequately dealt with by the approval officer, or where it finds the issues to have no merit (section 25(1)(a)). The RFR raises generic issues related to groundwater risk, odour, and risk from flooding; however, the RFR does not assert any shortcomings in the technical components of the approval officer's decision.

The approval officer considered surface and groundwater, odour, and the integrity of the earthen manure storage in the course of considering the Fuhrhop application. In assessing the potential risk to surface and groundwater, the approval officer conducted a site risk assessment following the NRCB's

standard practice, and concluded that the risk associated with the proposed CFO will be low. The risk assessment can be found in the public record maintained by the NRCB.

Every CFO application considered by the NRCB is referred to Alberta Health Services for advice and comment. In this case, Alberta Health Services had no concerns, specifically observing that the nearest water well used by a neighbour was more than 800 meters from the manure storage facilities, and that there was no surface water on the CFO quarter section. The approval officer's decision summary and companion technical assessment indicates that she made a number of conservative assumptions and used what she characterizes as worst-case scenarios. The Board has reviewed the approval officer's public record and is satisfied that her conclusion that the proposed facilities pose a low risk to surface and groundwater is more than adequately supported.

The ECN suggests that the earthen manure storage is cause for concern because of the potential for seepage or breach, without asserting any specific shortcomings in the approval officer's assessment of the manure storage lagoon. Decision Summary RA16039 confirms that the earthen manure storage facility will meet the provincially established standards designed to protect both groundwater and surface water. The Board also notes that "as a precaution, monitoring of the existing water wells will be adopted as a condition into this permit". The Decision Summary confirms that the earthen manure storage will exceed the required nine month storage capacity, which affords greater protection to any risk of overflowing. Earthen manure storages constructed and operated in accordance with AOPA standards pose an extremely low risk of overflow or failure due to flood events.

The ECN also raises the potential for the increase in odours to create a nuisance for the ECN. Nuisance odour is an issue that AOPA manages by establishing a minimum distance separation (MDS) between manure storage facilities and neighbouring residences. MDS is dependent on the species and animal numbers, providing a calculated distance that the province has determined is required so that the odour experienced at neighbouring residences does not create an unacceptable nuisance. The approval officer calculated MDS for this CFO is 401 metres. While there is no evidence available to the Board that would allow it to determine the distance between the existing and proposed manure storage facilities and the nearest residence on the ECN reserve lands, the distance to the ECN reserve boundary is at least 1,250 meters; this exceeds the AOPA MDS standard by a factor of three. The Board is satisfied that the approval officer adequately considered nuisance odour issues.

Decision

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

DATED at EDMONTON, ALBERTA, this 7th day of November, 2017.

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