



BOARD DECISION

RFR 2017- 11 / BA17002

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

Decision Summary RA17002
Pigs R Us Inc.

December 6, 2017

Background

On October 23, 2017, NRCB Approval Officer Nathan Shirley issued Decision Summary BA17002 in relation to the confined feeding operation (CFO) proposed by Pigs R Us Inc. (Pigs R Us) at Pt. SE 12-57-9 W5M in Lac Ste. Anne County. Pigs R Us sought approval for a new 4,100 feeder swine CFO. The proposed CFO includes the construction of one feeder barn, an earthen liquid manure storage, a loadout addition, and a wash bay. The approval officer considered this application in Decision Summary BA17002 and issued an approval with conditions.

Pursuant to section 20(5) of the *Agricultural Operation Practices Act* (AOPA), Requests for Board Review (RFRs) of Decision Summary BA17002 were filed by directly affected parties Janet Funduk, Jason and Lisa Funduk, Glen and Carolyn LeClercq, Blaine and Christine Yohemas, Jack and Sandra DeGrandis, Melanie Martin, Walter and Kimberly Andrusiak, Mary Ann Hagman, and Lac Ste. Anne County. Pursuant to section 20(6) of AOPA, Frederick and Hannah Madsen, Carol and Lloyd Tulloch, Melanie Bohnet, Bruce Shuck, and Roy and Susan Yohemas requested that the Board first find them to be directly affected by the Pigs R Us application, and then consider their RFRs of Decision Summary BA17002. Each of the above mentioned parties made submissions to the approval officer. In addition, the Board received an RFR from Lance and Erica Tulloch, who had not made a submission to the approval officer. All RFRs were filed within the 10-day filing deadline established by AOPA.

Following receipt of the RFRs, all parties were provided with copies of the requests, and notified of the Board's intent to meet and deliberate on this matter. Directly affected parties with an adverse interest to the matters raised in the RFRs were provided the opportunity to make a rebuttal submission in response. The Board did not receive any submissions that met the November 21, 2017 filing deadline.

The Board convened to deliberate on the RFRs on November 22, 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 BA17002, dated October 23, 2017
- Approval BA17002
- Technical Document BA17002
- RFRs filed by:
 - Janet Funduk
 - Jason and Lisa Funduk
 - Glen and Carolyn LeClercq
 - Blaine and Christine Yohemas
 - Jack and Sandra DeGrandis
 - Melanie Martin
 - Walter and Kimberly Andrusiak
 - Mary Ann Hagman
 - Lac Ste. Anne County
- Requests to review directly affected party status and RFRs filed by:
 - Frederick and Hannah Madsen
 - Carol and Lloyd Tulloch
 - Melanie Bohnet
 - Bruce Shuck
 - Roy and Susan Yohemas
- RFR filed by Lance and Erica Tulloch (neither party participated in application process)
- Lac Ste. Anne County Municipal Development Plan
- Portions of the public record maintained by the approval officer.

Board Deliberations

The Board met on November 22, 2017 to deliberate on the RFRs.

Preliminary Issue—the Lance and Erica Tulloch RFRs

Lance and Erica Tulloch filed RFRs with the Board on November 6 and 8, 2017. The Board can only consider RFRs that meet the requirements of section 25 of AOPA. Section 25(1) states that a RFR in relation to an approval must be made in accordance with section 20(5). Section 20(5) requires that a party file a submission with the approval officer setting out:

- how the proposed project directly affects the person, AOPA s.19(4); and
- any evidence or concerns the person wants the approval officer to consider, AOPA s.20(1)(b)(iii).

Section 25(1) also provides for a party who was found not directly affected by the approval officer to file an RFR, provided that the Board has first determined that the party is a directly affected party. That process is described in section 20, subsections (6) and (8). In each instance, the result is that the Board may only consider a RFR from a party who filed a statement of concern with the approval officer. The September 6, 2017 Notice of Application issued by the approval officer stated these requirements in plain language and included the statement that “failure to submit a statement of concern may affect your rights to apply for an NRCB review.” .

The November 6, 2017 letter from Lance and Erica Tulloch to the approval officer states that “we did not write a letter of concern earlier.” There is no reference to either Lance or Erica Tulloch in the approval officer’s Decision Summary. The Board has also reviewed the approval officer’s record and can find no statement of concern filed by Lance or Erica Tulloch pursuant to section 19(4) of AOPA.

Given that these individuals did not respond to the approval officer’s Notice of Application, the Board finds that it has no legislative authority to consider this RFR.

Preliminary Issue—Review of Directly Affected Party Status

Frederick and Hannah Madsen, Carol and Lloyd Tulloch, Melanie Bohnet, Bruce Shuck, and Roy and Susan Yohemas submitted statements of concern to the approval officer in response to the Notice of Application (published in the August 7, 2017 edition of the Lac Ste. Anne Bulletin). The approval officer determined that each of these individuals had failed to establish that they would be directly affected by the CFO.

In reviewing the concerns raised, the Board does not find that any of these individuals has established that they would be directly affected. The Board’s approach is the same as outlined by the approval officer in Decision Summary BA17002—the onus is on the party requesting status to demonstrate that:

- a plausible chain of causality exists between the proposed project and the effect asserted,
- the effect would probably occur,
- the effect could reasonably be expected to impact the party,
- the effect would not be trivial, and
- the effect falls within the NRCB regulatory mandate under AOPA.

The Board is satisfied that the approval officer properly determined that the parties living beyond the one mile radius from the CFO would experience odour and other nuisance issues, but those impacts would be both infrequent and of short duration. The Board concurs with the approval officer’s assessment that nuisance effects on these individuals may occur; however, the effects will be trivial.

Beyond nuisance odours, each of the parties that have asked the Board to find them to be directly affected raised a number of concerns. Stating concerns without substantive supporting evidence is not enough to meet the burden of proof necessary for the Board to find a party directly affected. In addition, statements cannot overreach in terms of common logic. For example, one party states that they reside near enough to the CFO that it is reasonable to assume that their water will be impacted. The Board finds that the available evidence, which includes requirements to build to proven construction standards and a risk screening conducted by the approval officer, supports the reasonable assumption that the parties’ water will not be impacted.

Several parties state that they will be directly affected as the identified CFO manure spreading lands are in close proximity to their residence. The Board acknowledges that residences adjacent to manure spreading land will experience odour; however, as the Board has no general control over what lands an operator chooses to spread manure on, the Board does not consider effects from spreading beyond knowing that the operator has secured the right to sufficient spreading acreage.

Having regard for the submissions of each party, the Board has determined that none of these parties are directly affected. It follows that the RFRs filed by these parties are dismissed.

Deliberations on Requests for Review (RFRs)

In its deliberations, the Board considered each RFR filed by the directly affected parties and the various issues raised. The Board must dismiss an application 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. The issues raised in the RFRs include:

- Increase in odour, noise and flies
- Manure spreading odour and risk to water quality
- Risk to surface and groundwater from manure storage
- Issues raised by Lac Ste. Anne County
- Matters beyond the NRCB mandate

Odour, Noise and Flies

Odour effects on the use and enjoyment of property was a concern raised in most of the RFRs, and was considered by the approval officer. Decision Summary BA17002 referenced the use of minimum distance separation (MDS) requirements as a mitigation measure for nuisance impacts associated with CFOs, noting that the nearest neighbouring residence is 918 metres from the proposed CFO. The calculated MDS for the CFO is 633 metres.

The Board finds that the MDS requirements and the other technical requirements in AOPA mitigate the potential nuisance effects of air quality, noise, and flies associated with the proposed CFO. Section 24 of the *AOPA Standards and Administration Regulation* also sufficiently regulates the land spreading of manure for its nutrient value, and to minimize odour and control run-off. Impact to adjacent lands is regulated by the application of these regulations under the regulatory stewardship of NRCB inspectors.

The Board has reviewed the relevant components of the approval officer's public record, as well as his analysis in Appendix C of Decision Summary BA17002, and finds that the approval officer adequately considered nuisance issues.

Manure Application

Several RFRs expressed concern that manure spreading activity creates groundwater quality issues, and poses a risk that surface water movement may carry manure offsite. Decision Summary BA17002 reviews and assesses the required land base, incorporation requirements, timing and frequency of application, setbacks, soil testing, record keeping, and the NRCB's related compliance role. The Board finds that the approval officer adequately dealt with the issues associated with spreading activities, and that the *AOPA Standards and Administration Regulation* directly and adequately establishes manure spreading controls to protect surface and groundwater. With respect to the stated concern related to spreading lands that have drainage tiles, the Board is satisfied that the approval officer adequately considered this issue. In reviewing the approval officer's reasons, the Board specifically finds that the approval officer addressed drainage on the spreading lands with drainage tiles and found it was not a concern, as illustrated in the following excerpt from his decision:

"...Drainage tile is designed to encourage soil drainage during extremely wet seasons...Lands with drainage tile are unlikely to experience nutrient loss, as the depth of the drainage system

allows a considerable amount of soil medium to retain manure nutrients before they reach the drainage tile.”

Risk to Surface and Groundwater from Manure Storage

The protection of water quality from manure seeping from or breaching the CFO manure storage facilities was raised in several submissions. AOPA requires new CFO manure storage facilities to be constructed to specified standards so that there is low risk to ground and surface water. The approval officer’s decision and technical summary provide ample evidence that the facilities as approved meet AOPA standards; further, the NRCB environmental risk screening tool assesses the risk to ground and surface water as low. The process and requirements to meet these AOPA standards are straightforward and well understood. A concern was raised that the NRCB approval officer erred by relying on application material that was prepared in support of a previous application. The approval officer considered this issue in his decision summary, and has required current engineering stamps for both design and construction.

The Board is satisfied that the approval officer adequately addressed water quality protection through the application of both AOPA’s manure management regulations, and the construction specifications for the hog barn and earthen liquid manure storage.

Issues Raised by Lac Ste. Anne County

The County asserts that the Board should overturn the approval based on “the history of non-compliance”, a failure to adequately consider a number of issues raised by residents who are directly affected parties, and a failure to require that the proponent enter into a road use agreement with the County. Further, the County takes exception with the approval officer’s conclusion that the County’s municipal development plan (MDP) provisions relating to setbacks and road use may not be land use provisions.

The County appears to have remained relatively inactive regarding this application throughout the approval officer’s review. Within the application process, the County assisted with identifying the relevant MDP provisions and providing contact information related to ownership and residences of affected parties. However, the County did not object until it submitted its RFR.

The Board does not accept that characterizing the failure of the permit holder to proceed with construction as a “history of non-compliance” would support denying this application. Permit holders often need to source financing and time construction to meet commodity market fluctuations or personal circumstances. In any event, the history presented does not raise compliance related issues that would suggest an operator will not conform to current standards, or that there is any elevated operational risk potential. Further, the approval includes a construction deadline.

The County asserts that the approval officer failed to satisfy AOPA section 20(1)(b)(i) by failing to afford considerable weight to the issues expressed by directly affected residents. The evidence establishes that the CFO’s location conforms to the land use provisions of the County’s MDP. The CFO is not located in any of the CFO exclusion zones described on Map 10 of the County’s MDP and in fact is located in a CFO buffer zone. Given consistency with the MDP land use provisions, the AOPA regulatory provisions establish the standard by which to assess the source, magnitude, and mitigation related to general nuisance concerns.

The County also included the MDP road use provisions and setback provisions in the list of issues that it believes the approval officer did not adequately consider. The Board finds that the County's assertion that the approval officer erred in finding that MDP provisions relating to setbacks are not land use provisions does not merit consideration, as the evidence is that the CFO's manure storage facilities conform to the MDP's setback provisions. The approval officer applied the NRCB's standing policy not to require road use agreements at the request of municipalities, as such requests are outside of the scope of an AOPA application. The Board is satisfied that the reminder to Pigs R Us "that it is responsible under municipal law for complying with any county road use requirements" correctly states the operator's road use obligations.

The Board finds that the approval officer adequately considered the County's municipal planning documents as well as the other issues raised in the RFR, and concludes that none of those issues warrant consideration at a hearing.

Matters Beyond the NRCB's Mandate

Several RFRs raised a concern that the Pigs R Us CFO would adversely affect the ability of the groundwater resource to service existing licensed water wells. Water licence applications are made to Alberta Environment and Parks (EP) under the provisions of the *Water Act*, and not to the NRCB. If, as happened in this case, an applicant advises the NRCB that they wish to have their NRCB application and their *Water Act* application considered separately, the applications are "de-linked."

Once a water licence application is de-linked from the AOPA application, the NRCB has no statutory authority in relation to water quantity issues. Concerns respecting the issuance of a water licence application may be made directly to EP in accordance with the provisions of the *Water Act* and will be considered by that department, but do not have relevance to the CFO application to the NRCB approval officer or to the Board when included in an RFR. Additionally, by signing the declaration within the Technical Document BA17002-TD, the applicant assumes the risk of compliance with the *Water Act*.

The RFRs also raise issues concerning the effect of the CFO on neighbouring land values. The Board understands that landowners will be concerned about the value of their lands. However, as the Board has consistently stated in previous decisions, land value effects related to community land use is a planning matter dealt with by municipalities in MDPs and land use bylaws. Effects on neighbouring land values is not a relevant Board consideration when the development is consistent with the MDP's land use provisions.

Similarly, the issues raised in respect of dead animal disposal, potential increase of predators, and animal diseases are matters that fall outside the mandate set out for the Board under AOPA. The approval officer responded to each of these concerns in Decision Summary BA17002. The Board has reviewed the approval officer's consideration of these concerns, as well as the directly affected parties' expression of these issues in the RFRs. The approval officer stated that dead animal disposal and livestock diseases are managed under the *Animal Health Act*. Each of these issues is beyond AOPA's legislative scope.

The Board finds that these issues have no merit.

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 RFRs are denied.

DATED at EDMONTON, ALBERTA, this 6th day of December, 2017.

Original signed by:

Vern Hartwell

L. Page Stuart

Michele Annich

Contact the Natural Resources Conservation Board at the following offices. Dial 310.0000 to be connected toll free.

Edmonton Office

4th Floor, Sterling Place, 9940 - 106 Street
Edmonton, AB T5K 2N2
T (780) 422.1977 F (780) 427.0607

Calgary Office

19th Floor, 250 – 5 Street SW
Calgary, AB T2P 0R4
T (403) 297.8269 F (403) 662.3994

Fairview Office

Provincial Building, #213, 10209 - 109
Street
P.O. Box 159, Fairview, AB T0H 1L0
T (780) 835.7111 F (780) 835.3259

Lethbridge Office

Agriculture Centre, 100, 5401 - 1 Avenue S
Lethbridge, AB T1J 4V6
T (403) 381.5166 F (403) 381.5806

Morinville Office

Provincial Building, #201, 10008 - 107
Street
Morinville, AB T8R 1L3
T (780) 939.1212 F (780) 939.3194

Red Deer Office

Provincial Building, #303, 4920 - 51 Street
Red Deer, AB T4N 6K8
T (403) 340.5241 F (403) 340.5599

NRCB Response Line: 1.866.383.6722

Email: info@nrcb.ca

Web Address: www.nrcb.ca

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.