



## **BOARD DECISION**

**2013-02 / RA09046A**

Review of Decision Summary RA09046A

Sunterra Farms Ltd.

**April 12, 2013**

## Background

The Sunterra Farms Ltd. confined feeding operation is currently permitted for 4,000 sows farrowing having received a development permit from Special Areas No. 2 in 1997. Section 18.1 of the *Agricultural Operations Practices Act (AOPA)* provides that development permits for confined feeding operations (CFOs) issued by municipal authorities prior to 2002 are deemed to be AOPA permits and any municipal conditions remain in the permit. The operation is located at SW-36-27-17-W4 in Special Areas No. 2 in a sparsely populated area south of Little Fish Lake. Little Fish Lake includes a community of primarily seasonal cottages (one permanent resident) on its south shore, a provincial park and campground on its east shore, and Hand Hills Ecological Reserve to the west and north.

The original development permit issued by the Special Areas No. 2 Municipal Planning Commission was appealed in 1997 by the City of Drumheller and an association of Little Fish Lake cabin owners. As a result of that appeal the Special Areas Development Appeal Board upheld the development permit with some changes and additions to the conditions of approval issued by the Municipal Planning Commission. The changes attached by the Special Areas Development Appeal Board included the replacement of the word “permanently” with “intermittently” in what was then condition 4, and the addition of NE 31, N 32, and NW 33 all in T27-R16W4 to the list of lands where manure may not be spread in what was then condition 7.

On November 27, 2012 NRCB Approval Officer, Scott Cunningham, issued Decision Summary RA09046A in response to Sunterra Farms Ltd.’s (Sunterra Farms) application 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. As a result of the Approval Officer’s decision, those conditions carried forward from RA09046M were renumbered in Approval RA09046A. This Decision Report will reference the conditions using the condition numbers in Approval RA09046A. Sunterra Farms filed a Request for Board Review of Decision Summary RA09046A on December 18, 2012 asking the Board to review the Approval Officer’s decision to decline to remove conditions 2, 3, 4 and 5 in Approval RA09046A.

Reference in RA09046A	Reference in RA09046M	
2	4	Manure shall not be spread within 400 feet (122 m) from the bed and shore of a river, stream, creek, coulee, lake, marsh, ditch, or reservoir, whether it contains or conveys water continuously or intermittently.
3	6	No manure of any kind including effluent may be spread or injected on any lands on the holiday weekends commonly known as the Victoria Day weekend, Canada Day weekend, Heritage Day weekend, Labour Day weekend and Thanksgiving weekend, or on the two days prior to the commencement and two days following any such holiday weekend.
4	7	No manure may be spread upon the following lands: All of sec 4, 5, 6, 7, 8, 9, 16, 17, 18 TWP 28 RGE 16–W4. All of Sec 1, 12, 13 TWP 28 RGE 17 – W4, NE quarter of Section 31, North half of Section 32 and the NW quarter of Section 33, all the Township 27, Range 16, West of the Fourth Meridian.
5	8	No manure of any kind may be disposed of or spread within 250 feet (76 m) of a water well.

In its resulting decision (Board Decision RFR 2013-01/RA09046A) issued January 10, 2013, the Board granted a review of Decision Summary RA09046A as it concluded that legitimate issues were raised with regard to procedures and considerations in the amendment of conditions contained in a “deemed” approval. Notice was issued on January 10, 2013 to all directly affected parties advising that an oral hearing would be held on March 5 and 6, 2013 in Drumheller, Alberta and establishing a written submission filing date of February 19, 2013. Subsequently, the Board amended the hearing date to March 12 and 13 and the filing date to February 26 by way of Notice dated January 23, 2013.

A Board Panel (the Panel or the Board) consisting of Vern Hartwell (Panel Chair), Jim Turner and Donna Tingley was appointed to conduct the review.

Submissions from those parties with standing to participate in the hearing were filed on behalf of: Sunterra Farms; Robert Krystoff; Colin and Louise Kloot; Stan and Tracy Fullerton; Alberta Tourism, Parks and Recreation; Special Areas No. 2; NRCB Field Services Division and Approval Officer, Scott Cunningham; and, Sunterra Farms.

The hearing was conducted in Drumheller on March 12, 2013 at the Badlands Community Facility. Parties to the review and their representatives are identified below:

<b>Parties to the Review</b>	<b>Counsel/Representative</b>
NRCB Approval Officer <ul style="list-style-type: none"> <li>• Scott Cunningham, Approval Officer</li> </ul> NRCB Field Services Division <ul style="list-style-type: none"> <li>• Andy Cumming, Director</li> </ul>	Mike Wenig, Counsel
Sunterra Farms Ltd.	Brent Lohner, Operator
Robert Krystoff	Robert Krystoff
Colin and Louise Kloot	Colin Kloot
Stan and Tracy Fullerton	Stan Fullerton
Special Areas No. 2	Trent Caskey, Acting Administrator
Alberta Tourism, Parks and Recreation	Written submission only

The Panel received staff support from Bill Kennedy as counsel and Susan Whittaker, Board Reviews Manager. Jay Nagendran, Board Member, attended as an observer.

The Board conducted a site visit on March 11, 2013 that allowed it to observe the general land and physical features associated with the review. The Board remained on public roads throughout the site visit.

This report provides the Panel’s reasons for decision following its review of Decision Summary RA09046A.

## Issues and Board Views

### Legislation

When the predecessor to Sunterra Farms [PIG Improvement (Canada) Ltd.] sought approval for this 4,000 hog sow farrowing facility in 1997, the permitting of confined feeding operations was done through the municipal development permit process. While there were guide documents (codes of practice) available to assist municipal authorities in considering development permit applications for CFOs, the application of the guide documents by the municipal authorities was discretionary. Compulsory standards for CFOs came into effect on January 1, 2002 under the provisions of Part 2 of the *Agricultural Operation Practices Act (AOPA)*.

The *AOPA* directed that the Natural Resources Conservation Board was responsible for the permitting and regulation of confined feeding operations (CFOs) as of January 1, 2002. Section 18.1 of the *AOPA* provides that operations in existence or permitted prior to 2002 are deemed to have an *AOPA* permit. It reads:

*18.1(1) If a confined feeding operation or manure storage facility*

*(a) existed on January 1, 2002 with respect to which a licence, permit or other approval was not issued pursuant to the Public Health Act or with respect to which a development permit was not issued,*

*(b) existed on January 1, 2002 with respect to which a licence, permit or other approval was issued pursuant to the Public Health Act or with respect to which a development permit was issued and that licence, permit, approval or development permit was in effect on January 1, 2002, or*

*(c) was constructed pursuant to a development permit that was issued before January 1, 2002 or was issued as described in section 10 of the Agricultural Operation Practices Amendment Act, 2001,*

*the owner or operator of the confined feeding operation or manure storage facility is deemed to have been issued an approval, registration or authorization under this Act.*

*(2) The capacity allowed by a deemed approval or registration pursuant to*

*(a) subsection (1)(a) is the capacity of the enclosures to confine livestock at the confined feeding operation on January 1, 2002,*

*(b) subsection (1)(b) is the capacity authorized by the licence, permit, approval or development permit or, if a capacity was not so authorized, the capacity of the enclosures to confine livestock at the confined feeding operation on January 1, 2002, and*

*(c) subsection (1)(c) is the capacity authorized by the development permit.*

*(3) The capacity allowed by a deemed authorization pursuant to*

*(a) subsection (1)(a) is the capacity of the manure storage facility on January 1, 2002,*

*(b) subsection (1)(b) is the capacity authorized by the licence, permit, approval or development permit or, if a capacity was not so authorized, the capacity of the manure storage facility on January 1, 2002, and*

*(c) subsection (1)(c) is the capacity authorized by the development permit.*

*(4) Subject to subsection (5), the terms and conditions of a deemed approval, registration or authorization are those in the licence, permit or other approval issued pursuant to the Public Health Act or in the development permit described in subsection (1), and the terms and conditions continue to apply despite the regulations until*

*(a) an enforcement order or an emergency order is issued with respect to the confined feeding operation or the manure storage facility, or*

*(b) the terms or conditions are amended when the deemed approval, registration or authorization is amended in accordance with this Act.*

*(5) If a development permit described in subsection (1) includes terms or conditions that require the permit holder or owner or operator to undertake tests or evaluations or to submit information to the municipality, the holder, owner or operator must continue to undertake the tests and evaluations but must submit the information to the Board for use in administering this Act.*

The Panel is satisfied that the clear legislative intent was that permit conditions imposed on confined feeding operations by municipal or health authorities would remain in effect under the mandate created for the Natural Resources Conservation Board to regulate CFOs. With this mandate came the authority to amend permits and conditions on application by the CFO operator.

While the legislative intent is clear, it presents a challenge to the regulator in the management of these “deemed” permits. In part, this challenge occurs as the deeming process constitutes a declaration that the permit is now something that was not contemplated at the time it was issued. As an example, when a municipality wanted to impose limitations on an operation’s manure management practices it did so on a case-by-case basis during the municipal permitting process as provincial standards did not exist. With the creation of the NRCB’s mandate under AOPA, the province established manure spreading standards that apply to all operations, while at the same time carrying forward conditions imposed by a municipality. In response to this challenge, NRCB Field Services developed a policy statement.

### **Justification for Amending Permit Conditions**

Decision Summary RA09046A references a letter to NRCB Approval Officers dated September 12, 2012 from the Director of Field Services. The stated purpose of the letter was to “clarify the processes that should be used when considering amending or deleting existing permit

*conditions.*” The letter provides guidance to Approval Officers for amending existing permit conditions under two broad scenarios. The second scenario described in the September 12, 2012 letter is relevant to this review as it deals with operator initiated applications to delete or amend specific conditions in an existing permit.

Among other statements, the letter provides that:

*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 condition 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.*

The Approval Officer applied this direction in Decision Summary RA09046A by declining to remove conditions 2, 3, 4 and 5 based on his conclusion that the justification received did not adequately address the reason for inclusion of the condition in the original permit. The September 2012 letter directs Approval Officers to consider the *Approval Officer Amendments of Municipal Permits Policy* (October 2010).

The *Approval Officer Amendments of Municipal Permits Policy* was developed in response to the provision in Section 23 of the AOPA whereby an approval may be amended on the Approval Officer’s own motion. The Panel finds that this earlier statement of policy provides little assistance in understanding the Approval Officer’s decision not to remove conditions 2, 3, 4 and 5 from Approval RA09046A. The 2010 policy states that conditions that are more stringent than related AOPA requirements “*must not be removed*” through an Approval Officer amendment; the document goes on to state that operators must submit an application to amend such conditions. The concept of reasonable justification does not appear until the September 12, 2012 letter from the Director of Field Services.

While providing process direction to Approval Officers, the September 2012 letter avoids providing any substantial guidance as to what level of justification an operator should provide in order to have conditions rescinded or varied. The Panel acknowledges that what might be adequate justification depends on a variety of considerations, some of which were raised by parties to this review. These include:

- current AOPA standards;
- whether directly affected parties object;
- the purpose for including the condition in the original permit;
- the process that resulted in the conditions being included;
- whether the condition was included as a voluntary offer by the operator;
- actions undertaken by parties in reliance on permit conditions;
- consequences of continuing with a condition;
- passage of time and change of circumstance (scientific understanding, economics, community); and
- special or unique considerations relating to the operation and community.

Not all of these factors will be relevant to each application and the weight of each factor is dependent on the unique facts presented on each application.

A document entitled *Written Submission for the Field Services Division* dated February 26, 2013 was included as part of the NRCB Field Services Division written submission to the hearing. The Panel finds aspects of this submission compelling and relevant to understanding the need to provide adequate justification for removing a condition imposed on a CFO through a municipal development permit. The Panel agrees that the onus rests on permit holders to provide adequate justification in order to have permit conditions amended under Section 18.1. In essence the statutory provision that incorporates conditions imposed in a development permit into the “deemed” AOPA permit leads to a natural interpretation that the amendment process for such conditions places the onus on an applicant to provide sufficient justification. The Panel also agrees with the Field Services submission that a pragmatic approach is appropriate in assessing whether there is adequate justification to amend or rescind a condition.

### **Conditions 2, 3, 4 and 5**

Sunterra Farms’ submission stated that the continued requirement to meet conditions more restrictive than those standards set out in the AOPA result in a competitive disadvantage. Sunterra Farms also believes that continuing conditions that go beyond the AOPA standards serves no constructive purpose as the AOPA standards are based on a scientific approach to protect public safety and the environment. Generally, the other parties to the hearing expressed concern over surface water quality and odour. Submissions highlighted the potential for manure run-off as a consequence of significant rainfall events, the environmental importance of Little Fish Lake to waterfowl and shorebirds as well as the Hand Hills ecological area.

### **Condition 2**

Condition 2 states:

*Manure shall not be spread within 400 feet (122 m) from the bed and shore of a river, stream, creek, coulee, lake, marsh, ditch, or reservoir, whether it contains or conveys water continuously or intermittently.*

There seems to be universal agreement among the parties that the purpose of this condition is to protect surface water quality. This condition was amended by the Special Areas Development Appeal Board in 1997 by replacing the word “permanently” with “intermittently.” Sunterra Farms asserted that AOPA standards afford the same degree of surface water protection as this condition and sought to have condition 2 deleted. Other participant submissions asserted the value of this condition in protecting water quality in Little Fish Lake.

The relevant AOPA standard is found in Section 24(10) of the *Standards and Administration Regulation*, which provides:

*A person must not apply manure, composting materials or compost on frozen or snow-covered land and on forage and directly seeded crops on land that*

*(a) is within 30 m of a common body of water, where the land slopes towards the common body of water and the mean slope of the land measured over 90 m from the edge of the common body of water is 4% or less,*

*(b) is within 60 m of a common body of water, where the land slopes towards the common body of water and the mean slope of the land measured over 90 m from the edge of the common body of water is greater than 4% but less than 6%,*

*(c) is within 90 m of a common body of water, where the land slopes towards the common body of water and the mean slope of the land measured over 90 m from the edge of the common body of water is 6% or greater but less than 12%, or*

*(d) has a mean slope of 12% or greater, where the land slopes to a common body of water.*

The *AOPA Standards and Administration Regulation* defines a common body of water as:

*(d) “common body of water” means the bed and shore of an irrigation canal, a drainage canal, a reservoir, a river, a stream, a creek, a lake, a marsh, a slough or another exposed body of water, but does not include*

*(i) repealed AR 85/2004 s1,*

*(ii) a reservoir, lake, marsh or slough that is completely surrounded by private land controlled by the owner or operator and has no outflow going directly beyond the private land to a drainage canal, reservoir, river, permanent stream or creek, lake or potable water source that is being used for human or livestock consumption,*

*(iii) an irrigation canal or a drainage canal that is completely surrounded by private land controlled by the owner or operator and has no outflow going beyond the private land,*

*(iv) a roadside ditch,*

*(v) a wastewater system as defined in the Environmental Protection and Enhancement Act,*

*(vi) a storm drainage system as defined in the Environmental Protection and Enhancement Act, and*

*(vii) a temporary stream on private land controlled by the owner or operator that has no outflow going beyond the private land directly to a drainage canal, reservoir, river, permanent stream or creek, lake or potable water source that is being used for human or livestock consumption;*

The effect of the concurrent application of condition 2 and the *AOPA* standards means that the more restrictive of the two provisions establish the operational setbacks for Sunterra Farms. While both provisions deal with setbacks to protect surface water, the exclusion of roadside ditches and certain marshes contained in the *AOPA* definition contrast with the inclusions of these features in condition 2.

Sunterra provided information that focused on the 400 foot setback from any ditch (commonly understood to mean a roadside ditch) specified in condition 4; advising that this provision prohibited it from spreading on 75 acres of otherwise spreadable lands as the *AOPA* standard does not include a setback requirement to a roadside ditch. Sunterra Farms' evidence included information on the location and slope of the ditch located on the south side of the secondary road 573 bordering the north boundary of NE36-27-17W4 and N1/2 31-27-16W4. This information was based on field observations conducted the day prior to the hearing and included distances, slopes, culvert locations and flowpath contours. Sunterra Farms asserted that the surface flowpaths that move toward Little Fish Lake from the two culverts under



secondary road 573 provide approximately 1900 and 2100 feet of vegetative buffer thereby reducing the potential for the movement of manure with surface water. Sunterra contrasted this with the exclusion of any roadside ditch setback provided in the *AOPA* standards.

With the exception of Alberta Tourism, Parks and Recreation which limited its comments to condition 4, the other parties participating in the hearing objected to any amendment to condition 2 citing concerns about water quality in Little Fish Lake. Special Area No. 2 supported continuation of all of the conditions, expressing the benefits of the general objects of the conditions as well as the notion that these conditions were not appealed by Sunterra Farms in the first instance and that area residents and vacationers held the expectation that these conditions would “*remain for the foreseeable future.*”

The Panel received little to no evidence from any of the interveners about effects in relation to the other setbacks provided in condition 2; however, general concerns were expressed about the adverse effects that would occur should manure reach Little Fish Lake. Sunterra Farms provided limited information on a coulee located in the NW 36-27-17W4; however, the information furnished did not provide the Panel with any clear understanding of the current limitations imposed by condition 2 or the consequences of relying on *AOPA* standards in relation to associated spreading restrictions. For this reason the Panel is not prepared to direct the complete removal of condition 2.

While the evidence was somewhat limited, the Panel is satisfied that Sunterra Farms’ submission has provided adequate justification for considering an amendment of condition 2 that would remove the (roadside) ditch setback. Having regard for all of the evidence and submissions it finds that an amendment removing the application of the setback from a (roadside) ditch is warranted. In reaching this conclusion, the Panel finds that the setback from the roadside ditches currently imposed in relation to the Sunterra spreading lands is not necessary to afford reasonable protection to Little Fish Lake water quality, and as such, the condition does not materially contribute to the purpose for including the condition in the original permit. The Panel also concludes that considerations related to the decision of Sunterra Farms not to appeal the provision from the Special Area Development Appeal Board and the level of community reliance on that condition since that time are not a major factor in the specific case of amending the roadside ditch setback provision.

### **Condition 3**

In its February 26, 2013 written submission, Sunterra Farms rescinded its request to have condition 3 removed from its permit citing a recognition that this condition provides security for the cabin owners and other recreationalists at Little Fish Lake. The Panel acknowledges Sunterra Farms’ gesture as one that was volunteered in the spirit of furthering community relationships.

### **Condition 4**

As to condition 4, the Panel finds that Sunterra Farms did not provide sufficient evidence to meet any threshold justification warranting the consideration of amending this condition. While Sunterra Farms did advance some evidence related to SW6-28-16W4 and the NE31-28-16W4, the level of detail was limited and was challenged by all other parties to the hearing. No evidence was provided on any of the other lands that are included in this condition. Sunterra Farms stated that the spreading lands it has been using since commencing operations will continue to meet its needs for another 5 years. The Panel is therefore not prepared to grant Sunterra Farms any relief from condition 4.

**Condition 5**

Similarly, little to no evidence was provided on either the location, status or surface completion standards of those water wells (condition 5) located on currently used spreading lands. Nor did Sunterra Farms advance evidence or argument that would promote an understanding of the hardship that this condition was imposing on its operation. As a consequence the Panel is not prepared to grant Sunterra Farms any relief from condition 5.

**Summary**

The Panel notes that this is the first time that it has considered a request to amend conditions contained in one of the “deemed” approvals. Clearly, in dealing with any new issue, care must be taken as the results of the decision will provide some level of guidance for others parties considering or responding to a similar application. In its submission to the hearing, NRCB Field Services stated it “*anticipates having further policy discussion on this topic, both internally and externally with members of the multi-stakeholder AOPA “policy advisory group.”*” The Board believes that the development of this policy will benefit from the proposed discussion with stakeholders.

**Board Decision**

The Panel directs the Approval Officer to amend Approval RA09046A by removing the reference to “ditch” in condition 2. The request by Sunterra Farms to remove conditions 2, 4 and 5 is denied.

DATED at CALGARY, ALBERTA, this 12<sup>th</sup> day of April, 2013.

*Original signed by:*

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Vern Hartwell  
Panel Chair

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Donna Tingley  
Panel Member

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Jim Turner  
Panel Member

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