



BOARD DECISION

RFR 2011- 02 / RA10053

In Consideration of Requests for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary RA10053.

Zealand Farms Ltd.

February 17, 2011

Background

On January 7, 2011, NRCB Approval Officer Francisco Echegaray issued Decision Summary and Approval RA10053 to Zealand Farms Ltd. for a confined feeding operation (CFO) to be located at NE 24-42-25-W4 in Ponoka County. The decision approved Zealand Farms Ltd.'s application to construct and operate two poultry broiler barns and one service building that would collectively house a 95,000 poultry broiler operation.

Pursuant to Section 20(5) of the *Agricultural Operation Practices Act (AOPA)*, five parties who the Approval Officer had determined were directly affected by the Zealand Farms Ltd. application filed Requests for Board Review of the Approval Officer's decision. These requests were filed by Ms. Mary Shimwell, Mr. Brad Shimwell, Ms. Marrion Owen, Mr. Ken and Ms. Cheryl Henkelman, and Ponoka County.

In addition, pursuant to Section 20(6) of *AOPA*, three parties filed Requests for Board Review of the Zealand Farms Ltd. application that included a request that the Board reconsider the Approval Officer's decision that they were not directly affected parties. These requests were filed by Ms. Donna Rudd, Ms. Bernice and Mr. Larry Edwards, and Mr. Darrell and Ms. Katherine Gellatly.

All of these requests met the 10-day filing deadline established by *AOPA*.

All the directly affected parties identified in Decision Summary RA10053 were then provided with a copy of the requests for review along with notice of their opportunity to file a rebuttal. Wilson Law Office filed a rebuttal submission on behalf of Zealand Farms Ltd. on February 7, 2011.

The Board convened to deliberate on this matter on February 10, 2011.

The Board also received five Requests for Board Review from parties who did not make a submission to the Approval Officer. Section 25 of *AOPA* requires that the opportunity to Request a Review or a reconsideration of directly affected status is limited to those parties who made a submission to the Approval Officer during the course of the application process. As these five parties did not make a submission to the Approval Officer, these Requests for Review were not provided to the Board for their consideration.

Jurisdiction

The Board's authority for considering a request for review filed by a party who the Approval Officer determined was not directly affected by an application is found in Section 20 of *AOPA*, which states:

- 20(6) A person or organization that was determined under section 19 not to be a directly affected party may, with written reasons,*
- (a) within 10 working days of receipt of the decision under subsection (4), apply to the Board, with written reasons, for a review of whether the person or organization is a directly affected party, and*
 - (b) apply to the Board, in accordance with the regulations, for a review of the decision under subsection (4).*

- (7) *An applicant under subsection (6)(a) must provide, on the request of the Board, further information relevant to the application.*
- (8) *The Board must notify the applicant under subsection (6)(a) in writing of the Board's determination whether the applicant is a directly affected party.*
- (9) *If a person is determined under subsection (8) to be a directly affected party, the Board must consider the person's application, if any, for a review of the decision under subsection (5).*

The Board's authority for considering a request to review 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 RA10053, dated January 7, 2011;
- Request for Board Review filed by Ms. Mary Shimwell, dated January 19, 2011;
- Request for Board Review filed by Mr. Brad Shimwell, dated January 20, 2011;
- Request for Board Review filed by Ms. Marrion Owen, dated January 26, 2011;
- Request for Board Review filed by Mr. Ken and Ms. Cheryl Henkelman, dated January 27, 2011;
- Request for Board Review filed by Ponoka County, dated January 28, 2011;
- Request for Board Review of whether she is a directly affected party filed by Ms. Donna Rudd, received January 27, 2011;
- Request for Board Review of whether they are directly affected parties filed by Ms. Bernice and Mr. Larry Edwards, dated January 18, 2011;
- Request for Board Review of whether they are directly affected parties filed by Mr. Darrell and Ms. Katherine Gellatly, dated January 27, 2011;
- Rebuttal filed by Wilson Law Office for Zealand Farms Ltd., dated February 7, 2011;
- Ponoka County Municipal Development Plan, By-Law 6-08-MDP; and,
- Approval Officer's Completeness Review document for Application RA10053.

Board Deliberations

Status Reconsideration

Ms. Donna Rudd, Ms. Bernice and Mr. Larry Edwards, and Mr. Darrell and Ms. Katherine Gellatly filed Requests for Board Review of the Zealand Farms Ltd. application that included a request that the Board reconsider the Approval Officer's decision that they were not directly affected parties. In seeking status reconsideration from the Board, the onus rests on a filing party to demonstrate that they are a directly affected party.

The Approval Officer stated in Decision Summary RA 10053 that "these parties are not directly affected parties because they do not own land and/or reside within 0.5 miles of the boundary of the parcel of land on which the confined feeding operation is to be located and they have not established that there will be a material effect upon these parties which will be equivalent to someone who does." This statement includes a two part assessment by the Approval Officer. The Board accepts that the first conclusion is a relatively straight forward calculation of whether parties reside or own land within the calculated radius set out in the *AOPA, Part 2 Matters Regulation*. None of the parties seeking a review of their status questioned the finding of the Approval Officer on this issue.

The Approval Officer's conclusion that "they have not established that there will be a material effect upon these parties which will be equivalent to someone who does" does not include any reasons. While the inclusion of reasons may allow the Board to benefit from the reasoning of the Approval Officer, it believes that the provisions of *AOPA* require that the Board consider their status anew. This is somewhat different to the *AOPA* provisions on considering a Request for Review filed by a directly affected party that provide for the analysis of whether the issues raised were adequately dealt with by the Approval Officer.

In considering whether a party should be considered directly affected, the Board evaluates whether the party has reasonably established 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*.

Ms. Bernice and Mr. Larry Edwards' lands are shown as being immediately adjacent to the second Chain Lake in NW 6-42-24 W4 (approximately 3 miles south of the application lands), Ms. Donna Rudd's lands are located in NW 2-42-25 W4 (approximately 3 miles south of the application lands), and Mr. Darrell and Ms. Kate Gellatly's lands are located in SW 7-42-24 W4 (approximately 2.5 miles south of the application lands).

The Board accepts as a reasonable starting point that the notification distances established in the *AOPA, Part 2 Matters Regulation* are intended to provide context to the Board in determining what constitutes a direct effect. While it is understood that effects, most notably noise and odour, associated with confined feeding operations may extend beyond the notification distances established in that regulation, it is clear that they are attenuated by distance. Parties beyond this radius may be able to establish a direct effect provided they can identify some special circumstance associated with the application. In this case the Board finds the only special circumstance raised by these parties is the proximity of the proposed confined feeding operation to Chain Lakes.

Each of the parties have asserted that contamination from the confined feeding operation and from manure spreading activities has the potential to impact them directly through the contamination of Chain Lakes. In assessing this claim the Board has considered the required chain of causality that would be necessary for manure to enter Chain Lakes and then result in direct effects on any of these persons.

The Board accepts that there is always some risk associated with manure from a confined feeding operation. Indeed a core purpose of *AOPA* is to manage this risk. Having regard for the nature of the Zealand Farms Ltd. application, the parties have not persuaded the Board that there is a direct cause and effect between the proposed CFO and potential contamination of the Chain Lakes.

As to the other issues raised by the parties, the Board does not find any plausible chain of causality between the proposed project and the effect asserted.

The Board finds that Ms. Donna Rudd, Ms. Bernice and Mr. Larry Edwards, and Mr. Darrell and Ms. Katherine Gellatly are not directly affected parties in the review of the Zealand Farms Ltd. application.

Issues Raised by Directly Affected Parties

1. Water Issues

Water issues common to each of the requests relate to surface water quality. Specific components set out cumulatively in the requests include natural springs on the application lands, proximity to Chain Lakes, land slope, groundwater contamination, human health and animal health. *AOPA* responds to surface and ground water quality issues through regulatory standards that manage manure storage and handling associated with confined feeding operations. In reviewing Decision Summary RA10053, the Board finds that the Approval Officer adequately dealt with all of the water quality related issues raised in the review requests through his conclusion that the relevant standards prescribed by *AOPA* and the associated regulations had been met. None of the requests for review challenged the Zealand Farms Ltd.'s application consistency with *AOPA* standards.

In relation to the concern over surface water contamination the Board notes that the rebuttal filed by Wilson Law Office for Zealand Farms Ltd. states that no manure will be stored outside the barns and will be hauled to the NE of 30 for storage until spreading on the fields. The Board notes Approval RA10053 does not contain a condition that would require this practice, notwithstanding the reference in Decision Summary RA10053 that Zealand Farms Ltd. would be willing to make such a commitment.

With respect to those directly affected parties who argued that Zealand Farms Ltd. should not have been approved without a water license, the Board finds that the Approval Officer correctly recognized that an application for a water license is outside the NRCB's jurisdiction under *AOPA*.

2. Odour and Air Quality

Directly affected parties asserted that if approved, the Zealand Farms Ltd. operation would impact their air quality and cause odour problems. Having reviewed Decision Summary RA10053, the Board is satisfied that the Approval Officer carefully considered the distances

between the proposed project and neighbouring residences and accurately concluded that the minimum distance separation established in the *Standards and Administration Regulation*, was met. Accordingly, the Board concludes that this issue was adequately addressed by the Approval Officer.

3. Roads and Land Values

Several parties expressed the concern that truck traffic associated with the Zealand Farms Ltd. operation could cause damage to roads. Decision Summary RA10053 states that the matter of road use agreements is under the jurisdiction of the County and not the NRCB. The Board agrees with this finding and therefore finds this is not a matter that warrants review.

In considering the issue of potential land value impacts associated with a new confined feeding operation, the Board has consistently stated that this is not a subject for review under *AOPA*. The Board finds that land value effects on any specific parcel of land are not relevant to the consideration of an application under *AOPA* by either the Approval Officer or the Board. Land use within a community is a planning matter dealt with by municipalities in municipal development plans and land use bylaws. *AOPA* states that an Approval Officer must deny an application for a confined feeding operation if it is not consistent with the municipal development plan.

4. Cumulative Effects

The issue of cumulative effects is not within the Board's regulatory mandate. As a statutory decision maker, the Board takes its direction from the authorizing legislation. *AOPA* does not provide for cumulative effects assessment.

5. Municipal Development Plan

Directly affected parties have questioned whether the Approval Officer was correct in his finding that the Zealand Farms Ltd. application was consistent with the Ponoka County Municipal Development Plan (MDP).

Key provisions of the MDP are found under the heading Intensive Animal Operations and provide:

Policy 2.1 The County encourages CFOs as a way of adding value to grain crops, and providing more employment and income per acre of land. However, the environment and the rights of neighbours must be protected.

Policy 2.2 The County believes that very large CFOs are inappropriate in this part of Alberta, and requests the NRCB not to allow them here. "Very large" means more than ten times the size shown in Column 3 of Schedule 2 in Alberta Regulation 257/2001. For example, column 3 shows that a 250 sow farrow-to-finish operation requires NRCB approval, so "very large" means an operation with more than 2,500 sows.

Policy 2.3 The County requests the NRCB not to allow new or expanded CFOs in the following areas:

- *within two miles of the towns of Ponoka and Rimbey*
- *within one mile of the hamlets of Bluffton and Hobbema*

- *in the Gull Lake and Red Deer Lake watersheds*
- *land within one mile of Chain Lakes*
- *land designated for multiple lot acreage development*

and to impose very strict conditions on manure handling and storage in the following areas:

- *the Chain Lakes watershed*
- *the Maskwa Creek watershed, which is part of the watershed supplying the City of Wetaskiwin*

These areas are shown on Map 2.

Policy 2.4 The County requests the NRCB to set strict rules for the timely incorporation of manure spread within a mile of any urban municipality or rural residence.

Policy 2.5 The County requests the NRCB not to allow CFOs closer than two miles to any lake unless the regulators are convinced that the manure management system is fail-safe and there is no reasonable risk of contamination of the lake.

Policy 2.6 CFOs should not be established or expanded where there is any risk that runoff will contaminate domestic water supplies.

In reviewing an application for an approval, the Approval Officer must deny the application if there is an inconsistency with the municipal development plan land use provisions [AOPA s. 20(1)(a)]. Section 20(1.1) of AOPA states that in reviewing application the Approval Officer “*shall not consider any provisions respecting tests or conditions related to the construction of or the site for a confined feeding operation or manure storage facility nor any provisions respecting the application of manure, composting materials or compost.*”

In considering the stated policies in the MDP the Board finds that Policy 2.1 is a general policy statement rather than a land use provision. The Board further finds that the Approval Officer correctly interpreted Policy 2.2. In the Board’s view, Policies 2.4, 2.5, and 2.6 are provisions that relate to the manure storage facility and the application for manure and therefore, as provided for in AOPA s. 20(1.1), the Approval Officer is directed not to consider these provisions.

Finally, the Board considered the Approval Officer’s consideration of Policy 2.3, which requests the NRCB not to allow new or expanded CFOs on land within one mile of Chain Lakes. In the Board’s view a review is warranted as there is sufficient uncertainty as to the correctness of the Approval Officer’s interpretation of this provision. Notably, the Approval Officer interpreted the use of the word “requests” in Policy 2.3 to provide for an *ad hoc* decision-making function reserved to the municipality or that is intended to impart discretion to the NRCB in considering any particular application. The Approval Officer concluded that the second interpretation is supported by the “(t)he fact that the County itself has never officially objected to, or requested that the NRCB deny, the application” (emphasis added). The Board is challenged in reconciling the Approval Officer’s reliance on a lack of a “request” from the County on a specific application when the MDP appears to include a general “request” directed to the NRCB. Therefore, the

Board concludes that there are adequate grounds to conduct a review of the Approval Officer's Decision in relation to Application RA10053.

In this review, the Board will concern itself with two questions: one, whether the application is consistent with the Municipal Development Plan; and two, whether the Board should exercise its authority under section 25(4)(g) of *AOPA* in the case of this application, to have regard to, but not be bound by, the MDP.

Decision

The Board determined that it will conduct a review by way of oral hearing in the Town of Ponoka. The review is limited to the questions:

1. whether the Zealand Farms Ltd. application is consistent with the Ponoka County Municipal Development Plan; and
2. if not consistent with the MDP, whether the Board should exercise its authority under section 25(4)(g) of *AOPA* in the case of this application, to have regard to, but not be bound by, the MDP.

The Board expects that the hearing will be completed in one day. The Board is proposing a hearing date of March 24, 2011. NRCB staff will be contacting those parties who filed submissions with respect to any conflicts this timing may present and an appropriate venue in Ponoka will be chosen to hold the hearing.

Directly affected parties who wish to participate in the hearing process shall file a written hearing submission no later than March 10, 2011. Parties are requested to file 7 copies of their submission to the attention of Susan Schlemko at the Edmonton offices of the NRCB. Written submissions should address whether the Zealand Farms Ltd. application is consistent with the Municipal Development Plan, and if not consistent, whether the Board should exercise its authority under section 25(4)(g) of the *Agricultural Operation Practices Act*.

DATED at CALGARY, ALBERTA, this 17th day of February, 2011.

Original signed by:

Vern Hartwell
Panel Chair

Donna Tingley
Panel Member

Jim Turner
Panel Member

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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.