



## **BOARD DECISION**

### **RFR 2014-04 / BA13006 and BA14002**

In Consideration of Requests for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary BA13006 and BA14002

William and Audrey Trenchuk

December 19, 2014

## **Background**

On October 17, 2014, NRCB Approval Officer Randy Bjorklund issued Decision Summary BA13006 and BA14002 in relation to William and Audrey Trenchuks' (Trenchuks) confined feeding operation (CFO) located on three quarter sections (NW 21-59-16 W4M, SE 21-59-16 W4M and SW 21-59-16 W4M) in Smoky Lake County. Trenchuks submitted two separate applications to facilitate the potential for a future division of their feedlot operation between their two sons. Together these applications sought approval for 11 feedlot pens that were constructed without a permit, six new feedlot pens, two new catch basins and an increase in animal numbers from 3,950 to 9,500 beef feeders. The Approval Officer considered both applications in a single decision summary, Decision Summary BA13006 and BA14002, and issued separate approvals with conditions.

Pursuant to Section 20(5) of the *Agricultural Operation Practices Act (AOPA)*, Requests for Board Review of Decision Summary BA13006 and BA14002 were filed by Robert and Linda Morgan, Lawrence Rogoza, James Rogoza, and Billy Bogdan. Each of the four Requests for Board Review was filed within the 10-day filing deadline established by the *AOPA*.

Following receipt of the Requests for Board Review, all directly affected 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 Requests for Review were provided the opportunity to make a submission in response. The Board received a response submission from the Trenchuks that met the November 20, 2014 response filing deadline. On November 20, 2014 the Board also received a 3-page written submission from Patrick Timms, Mae Timms and Lorne Achtymichuk; the Board observed that the content of this submission had previously been filed with the Approval Officer on July 18, 2014.

The Board convened to deliberate on the Requests for Board Review on November 25 and 27, 2014.

## **Jurisdiction**

The Board's authority for granting a review of an Approval Officer's decision is found in Section 25(1) of the *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 BA13006 and BA14002 dated October 17, 2014;
- Approval BA13006;
- Approval BA14002;
- Requests for Board Review filed by:
  - Robert and Linda Morgan,
  - Lawrence Rogoza,
  - James Rogoza, and
  - Bill Bogdan;
- Response to the Requests for Board Review filed by the Trenchuks, dated November 19, 2014;
- Submission from Patrick Timms, Mae Timms and Lorne Achtymichuk dated November 20, 2014; and,
- Portions of the public record maintained by the Approval Officer.

## **Board Deliberations**

The Board met on November 25 and 27, 2014 to deliberate on the filed Requests for Board Review (RFRs). As a preliminary matter the Board dismissed the November 20, 2014 submission from Patrick Timms, Mae Timms and Lorne Achtymichuk as it was not filed by the deadline for filing an RFR; nor could it be considered as a response to an RFR as the submission content did not respond to the filed RFRs. However, as Decision Summary BA13006 and BA14002 identifies these parties as directly affected, they will have the opportunity to participate in the review process granted by the Board.

In its deliberations, the Board considered each RFR 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.

## **Surface and Groundwater**

*AOPA* includes a variety of requirements to protect both surface and groundwater quality. Each of the RFRs raised ground and surface water quality issues. James Rogoza and Billy Bogdan provided significant detail in support of the water quality issues contained within their RFRs. The Board has conducted a thorough review of the issues raised and located the relevant information in Decision Summary BA13006 and BA14002 and the Approval Officer's file. In each case, the Board is satisfied that the Approval Officer collected and considered sufficient information through the application process to protect surface and groundwater quality. Notwithstanding the Approval Officer's failure to complete the environmental risk screening tool (ESRT) form for the existing pens in the Technical Requirements documentation for Application BA13006, the Board is satisfied from a review of the file and statements in the Decision Summary that the ESRT was applied in both applications.

## **Minimum Distance Separation**

Two distinct minimum distance separation (MDS) issues are raised in the RFRs; the first relates to an existing cabin located on NE 21-59-16 W4M and the second relates to the calculated MDS to the Rogoza residences on NE 16-59-16 W4M or perhaps to the Jarema residence on SE 29-59-16 W4M. There is some uncertainty arising from the RFR filed by James Rogoza as it is not completely clear when he states that there is a second residence located more than 25 m to the NW of the primary residence that is located at 710 m. It appears that the Rogozas believe that one of their residences was calculated by the Approval Officer as 710 m from the Trenchuk confined feeding operation.

There is no question that the cabin located on NE 21-59-16 W4M is located within the MDS required by the Trenchuks application. The Approval Officer determined that, as the cabin was constructed in 2005, it was built within the MDS held by the then existing Trenchuk confined feeding operation which in a separate determination of the Approval Officer held a deemed AOPA approval for 3,950 beef feeders effective January 1, 2002. As such, Decision Summary BA13006 and BA14002 concludes that the MDS requirement to the cabin does not apply to the Trenchuk expansion application. While there may be some question that this cabin should not be considered a residence under AOPA, the Board is prepared to accept for the purposes of this RFR decision that the cabin is a residence. The only related matter in dispute is the date when the cabin was constructed.

The Approval Officer accepted the County's determination that the cabin was built "*in or around 2005.*" As the owner of the cabin, Mr. Dublenko provided a statement of concern to the Approval Officer that the cabin was an "*existing dwelling*" and that the MDS required for the Trenchuk expansion was not met. The Approval Officer database report includes a note entry for August 20, 2014 stating that in a telephone conversation he had with Mr. Dublenko "*One of the questions was whether the county's record of the cabin being constructed in 2005 was correct in his opinion. He said that he thought it was about then.*" Three of the RFRs include statements that the cabin was built before 2002: Lawrence Rogoza states that the cabin was constructed prior to 2002, James Rogoza states that he witnessed the cabin built in the 1980's and Mr. Bogdan states that Mr. Dublenko told him that he built the cabin in 1994. Mr. Dublenko did not file an RFR.

The Board finds the conflicting information challenging. Given that the cabin was built without County permits, definitive evidence may not be available. None of the submissions suggest that a hearing would produce any better or further evidence on when the cabin was built. The Board accepts that the Approval Officer made an appropriate finding in using the 2005 construction date for the cabin. Given the Board's determination the cabin MDS is not a matter that warrants consideration at a hearing.

The second MDS issue relates to the Approval Officer's finding that the nearest residence is greater than the required 695 meters from the nearest existing or proposed manure storage. The Approval Officer states in Decision Summary BA13006 and BA14002 that he calculated the distance to the nearest residence to be 710 meters, however, the Decision Summary does not include information to identify ownership or land location. The Technical Document for each of the two applications does not identify any residence as being 710 meters distant, the nearest being the Daniel Jarema residence at >715 m on SE 29-59-16 W4M for Application BA14002 and the Jim and Rae Brown residence at >730 m on NE 21-59-16 W4M for Application BA13006.

As stated earlier the Board is uncertain about the land location for the residence James Rogoza states may be 685 m from the nearest manure storage facility in the application. The Board accepts that this uncertainty probably arises from the lack of information contained in Decision Summary BA13006 and BA14002. The Board is disappointed that Decision Summary BA13006 and BA14002 contains little useful information on residence locations and is not particularly “reader friendly” as it employs multiple appendices. Further, what limited detail that is available for the MDS to residences can only found in the Approval Officer’s Technical Document.

James Rogoza stated that there are two residences on the NE 16-59-16 W4M and that a professional survey should be done given the difference between 695 meter required distance and the 710 meter distance identified by the Approval Officer. Both James and Lawrence Rogoza submitted that there is a second residence on the NE 16-59-16 W4M that is inside the required 695 meters. The Board reviewed all of the available materials on the Approval Officer’s public file and was not able to locate any maps or aerial photos that contained sufficient detail to conclude this issue. The Approval Officer’s record contains a conclusion, however, the Board expects that in cases where a conclusion is not patently obvious the Approval Officer should have sufficient information to present a transparent record of the evidence and reasoning employed.

The use of online aerial photos and measurement tools is common practice for the determination of MDS issues by the NRCB operations division. The Board has no understanding of what margin for error is appropriate to safely use this tool and what factors may affect measurement accuracy. In addition, if there is a second residence that was not identified during the application review process, further information is required. The Board finds that there is sufficient uncertainty in relation to the Approval Officer’s consideration of MDS in relation to residence(s) on the NE 16-59-16 W4M to warrant a review.

### **Other Issues**

The RFRs raise a number of other issues that can be considered together as effects on the community. These include various concerns that are commonly raised in relation to confined feeding operations and include matters such as odour, flies, aesthetics, land value and traffic. The Board determined that the Approval Officer adequately considered each of the effects on the community adequately and that these issues do not warrant consideration at a hearing. In reaching this conclusion, the Board is aware that some residents may experience adverse effects. Mitigation measures such as minimum distance separation, while effective, cannot eliminate these effects. The general siting of confined feeding operations is primarily a land use decision that is reflected in a municipality’s Municipal Development Plan (MDP). When a new or expanding confined feeding operation is proposed on land where the municipal authority has designated such use as a permitted use in the MDP the Board accepts that effects on the community, both adverse and positive, from such uses were considered as part of the MDP process.

### **Form of Review**

The Board finds that there is sufficient uncertainty in relation to the Approval Officer’s consideration of MDS in relation to residence(s) on the NE 16-59-16 W4M to warrant a review. As part of this review the Board needs to be comfortable that the tools and methods used by the Approval Officer identified all the residences and that the measurements are sufficiently reliable.

The Board finds that an oral hearing is not necessary at this time as a hearing would not produce sufficient evidence to determine this issue without further work first being performed by the Approval Officer. Therefore, the Board directs that the Approval Officer prepare and file a report on or before January 15, 2015 that:

- clearly identifies all residences on NE 16-59-16 W4M;
- aerial photographs and site plans showing sufficient detail to indicate the points from which measurements were taken;
- a description of the tools and methods used to determine measurements; and
- qualitative information on the reliability of the measurements reported.

On receipt of the report from the Approval Officer the Board will provide a copy to the Trenchuks and all directly affected parties identified in Decision Summary BA13006 and BA14002. The Board will establish a date at that time within which those parties will have an opportunity to comment. Once the Board has considered the Approval Officer's report and any comments from the directly affected parties, it will determine whether a hearing is required as part of this review.

## **Decision**

As a result of the Board's deliberations, it has determined that a review is warranted to consider whether the Approval Officer adequately determined that Applications BA13006 and BA14002 satisfy the required MDS.

DATED at CALGARY, ALBERTA, this 19th day of December, 2014.

*Original signed by:*

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Vern Hartwell

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Jim Turner

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Donna Tingley

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