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To: [Laura Friend](#); "cindyc@mdwillowcreek.com"
Cc: [Bill Kennedy](#); [Andy Cumming](#); [John Brown](#); [Sylvia Kaminski](#)
Subject: LA19036 Muilwijk RFR - approval officer submission
Date: Wednesday, February 10, 2021 2:47:42 PM
Attachments: [20210210 Muilwijk RFR Submission of Approval Officer.pdf](#)

Good afternoon,

I am Chief Legal Officer – Operations at the Natural Resources Conservation Board. As such, I act on behalf of the Approval Officer in relation to proceedings on application LA19036 (Muilwijk).

To be clear, the Approval Officer takes no position on whether the Board should dismiss the request for review (RFR), or schedule a review. However, in this case the Board and participants may benefit from clarification on a couple of points raised in the RFR. Kindly see the attached submission (“20210210 Muilwijk RFR Submission of Approval Officer”).

This message is being sent to the applicant and their agent; the MD of Willow Creek; Manager, Board Reviews, and Board Counsel for the NRCB Board; John Greene; and Terry J. McCullough. I have blind copied personal e-mail addresses. A hard copy of the submission is being sent to the Brauers by regular mail.

Regards,

Fiona N. Vance
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In the matter of a Request for Review
under section 25(1) of the
Agricultural Operation Practices Act, RSA 2000, c A-7
of a decision by an Approval Officer set out in
Decision Summary LA19036

SUBMISSION OF THE APPROVAL OFFICER

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On behalf of the Approval Officer

1. Arie and Willemina Muilwijk have requested that the Board review the decision of the Approval Officer in file LA19036.
2. The Approval Officer takes no position on whether the Board should dismiss the application for review (RFR), or schedule a review.
3. With one exception, the Approval Officer also takes no position on what matters should be included in a review, if the Board were to grant a review.
4. The exception is that the Board should not include the issue of alleged partiality in a review, as the issue has little merit under section 25(1)(a) of the *Agricultural Operation Practices Act*.
5. The RFR suggests that the Approval Officer did not apply impartial judgment when reviewing the application (RFR, Submission of Cody Metheral at p 5), but offers no evidence. The test for reasonable apprehension of bias is, according to the Alberta Court of Appeal:

[38] The test for determining whether there was a reasonable apprehension of bias is whether an informed person, reviewing the matter realistically and practically, would have a reasonable apprehension of bias. The ground must be serious and substantial. There must be a real likelihood or probability of reasonable apprehension of bias not just a mere suspicion: *Committee for Justice and Liberty v Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394-395, 68 DLR (3d) 716 and *College of Physicians and Surgeons of Alberta v Ali*, 2017 ABCA 442 at para 22, 67 Alta LR (6th) 16. The burden of proof is on the party alleging the bias.

- *Fitzpatrick v College of Physical Therapists of Alberta*, 2019 ABCA 254, leave to appeal to SCC refused 38736 (Nov 28, 2019)

Bias is not made out by reason of an unfavourable decision. Impartiality does not require a decision maker to arrive at findings that an applicant agrees with.

6. The Board and RFR participants may benefit from clarification of two other assertions made in the RFR, prior to the Board determining whether to schedule a review.

7. First, the RFR asserts that Andy Cumming had been part of approving Approval LA18053 (RFR, Submission of Cody Metheral at p 4). The NRCB approval officer for Approval LA18053 was not Andy Cumming. NRCB approval officers are independent statutory decision makers under the *Agricultural Operation Practices Act*.

8. Second, the RFR appears to make serious allegations against NRCB Environmental Specialist, and professional engineer, Scott Cunningham (RFR, Submission of Cody Metheral at pp 1-2). On behalf of Mr. Cunningham, the NRCB takes exception to these allegations and reminds the RFR applicant that

- a. the NRCB does not take such accusations against its staff lightly, and
- b. the Association of Professional Engineers and Geoscientists, not the NRCB, is the regulatory body of professional engineers under the *Engineering and Geoscience Professions Act*.

RESPECTFULLY SUBMITTED THIS 10th DAY OF FEBRUARY, 2021

Fiona N. Vance

Chief Legal Officer – Operations

Natural Resources Conservation Board