

Enforcement Order No. 20-01

MADE UNDER SECTION 39 OF THE

AGRICULTURAL OPERATION PRACTICES ACT, RSA 2000, c A-7

Date issued: May 22, 2020
File Number: LC20087
Inspector: Karl Ivarson
Basis for Order: **Non Compliance with *Agricultural Operation Practices Act***

I, Karl Ivarson, Inspector appointed by the Natural Resources Conservation Board, make an enforcement order under section 39 of the *Agricultural Operation Practices Act* (AOPA), against:

Arie and Willemina Muilwijk

on the basis that they have failed to comply with AOPA and its Regulations. Specifically, Arie and Willemina Muilwijk (the Muilwijks) carried out unauthorized construction at a confined feeding operation (CFO), without a permit that is required under the *Agricultural Operation Practices Act*. The CFO is located at NE 10-009-27 W4, in the Municipal District of Willow Creek (M.D.), approximately 11 kilometers west of Fort Macleod, Alberta. The CFO is owned and operated by Arie and Willemina Muilwijk.

Background

This site holds municipal permit 1002-80, issued by the M.D. Willow Creek on December 3, 1980, which allowed construction of a 100 sow farrow to finish swine CFO. This permit is still valid, therefore allowing the Muilwijks to operate a swine farrow to finish operation.

The site also holds an NRCB issued permit LA10054N that was issued on March 11, 2011. This permit was issued to deal with a lagoon monitoring condition in the M.D. of Willow Creek municipal permit 118-98.

On August 29, 2019, I issued Compliance Directive CD19-07 to the Muilwijks also for unauthorized construction at their CFO without a permit, which was a violation under section 13 of AOPA. The directive was issued to remedy the violation and mitigate any possible risks to the environment and to any affected neighbours. In summary, I concluded that the Muilwijks had constructed additional facilities to confine feeder calves at their CFO, in 2013 and 2018, in both instances without permits. CD19-07 required the Muilwijks to depopulate their 686 head confined feeder calf operation to below the 360 head threshold at which a permit is required. Additionally the Muilwijks were directed not to exceed this threshold **unless they obtain the appropriate NRCB permit.**

By October 9, 2019, the NRCB had received and deemed complete the Muilwijk's permit application, LA19036, for 3,000 beef feeder calves and related facilities.

Investigation leading up to Enforcement Order:

On May 8, 2020 I received a phone call from Andy Cumming, Director, Field Services-Applications, NRCB. Mr. Cumming advised me he had received a phone call earlier that day from Mr. Muilwijk regarding his application. In that conversation, Mr. Muilwijk stated he had already constructed and put into use several of the proposed facilities in the application Mr. Cumming is considering. Mr. Cumming stated he told Mr. Muilwijk that he would forward this information on to NRCB Compliance to follow up on. That same day I called and spoke with Mr. Muilwijk. In the discussion with him he told me he had built all of the applied-for facilities without a permit. I arranged to meet with him at his place on the afternoon of May 12, 2020.

On May 12, 2020, I met with Mr. Muilwijk on site and inspected the facilities. Mr. Muilwijk confirmed he had already constructed the facilities he proposed in his NRCB permit application LA19036. Mr. Muilwijk stated that initially he was of the understanding that he would have his approved permit in hand on November 14, 2019. With this in mind, he had made arrangements early in November, 2019, for the roller compacted concrete (RCC) liners to be placed on November 14, 2019, for the three existing pens and the covered shelter. Mr. Muilwijk said that the construction of the catch basin started in late October 2019. From November 2019 through to early January 2020 he continued with the covered shelter construction.

I inspected the unauthorized construction facilities with Mr. Muilwijk, those being:

1. A permanent covered shelter measuring approximately 78m x 15m (as provided by Mr. Muilwijk) with a floor of RCC.
2. The RCC liner installation in the three existing feeder calf pens.
3. The catch basin, constructed to receive manure runoff from the three feeder calf pens, measuring (as provided by Mr. Muilwijk) about 31 m x 21 m x 1.8 m deep. The catch basin was currently not lined. On inspecting the bottom of the catch basin I found it to be of coarse sand material.

I asked Mr. Muilwijk how many feeder calves he had on hand in permanent facilities, i.e. not including portable calf shelters. On calculation, he stated approximately 1,020 head of feeder calves contained in the permanent structures. I discussed the previously issued compliance directive (CD19-07) with him.

Reasons:

Section 13(1) of the *Agricultural Operation Practices Act* provides:

13(1) No person shall commence construction or expansion of a confined feeding operation for which an approval or registration is required pursuant to the regulations unless that person holds an approval or registration.

Section 3 of the *AOPA Part 2 Matters Regulation* sets out when an approval is required for a confined feeding operation:

2(1) Subject to this section, an approval is required for an owner or operator to commence construction or expansion of a confined feeding operation for the containment of the number of animals set out in column 3 of Schedule 2 for the type of livestock to be present at the confined feeding operation.

Columns 2 and 3 of Schedule 2 of the *AOPA Part 2 Matters Regulation* shows threshold levels at which an owner or operator must hold a permit. The Regulation states that when dairy calves are housed away from a dairy, they are to be treated as beef feeder calves. The threshold in column 3, for which a NRCB permit (Approval), is required for a beef feeder calf operation, for animals less than 550 lbs, is 900 head.

Based on my observations, including those referenced in CD19-07, my conversations with Arie Muilwijk, and my site inspection of May 12, 2020, I have formed the opinion that the Muilwijks are contravening section 13 of the *Agricultural Operation Practices Act* because:

- Municipal permit 1002-80, which is still valid, was for the construction of a 100 sow farrow to finish swine CFO.
- None of the subsequent permits for this CFO facility were for the addition of feeder calves or associated facilities (pens, permanent calf structure, and catch basin).
- Approval LA19036 has not yet been issued.
- The population of feeder calves has risen well above the requirement for a permit under AOPA.

For these reasons, constructing the new feeder calf facilities, populating them with calves, and additionally, constructing a catch basin without a permit is unauthorized construction, and therefore is a violation of section 13 of the act. AOPA and NRCB Policy provides for several tools to address and mitigate violations under the act and its regulations. As examples,

- a) Under section 39 of the act, the NRCB may issue an enforcement order if the NRCB has the opinion that a person is contravening the act or the regulations. The Court of Queen's Bench may, further, order a person to comply with an enforcement order.
- b) If prosecuted under section 35 of the act, a person who contravenes section 13 of the act is guilty of an offence and is liable for a fine of not more than \$5,000, or \$10,000 if the contravention was knowingly done.

In considering options open to me to address, in my opinion, a serious violation of AOPA I am guided by NRCB Unauthorized Construction Operational Policy 2012-1 (updated August 17, 2017). This policy directs an inspector to consider a variety of factors when developing a response to unauthorized construction.

4.1 Developing an unauthorized construction response plan

When developing a response plan, the inspector must follow the enforcement ladder outlined in the NRCB's compliance and enforcement policy. The compliance action taken will depend on a variety of factors, including:

1. *The nature and magnitude of the potential risk to the environment and to the surrounding community created by the unauthorized construction*
2. *The operation's compliance history*
3. *The economic and practical impact on the CFO of the enforcement action being considered*
4. *Whether the CFO gained a financial benefit by commencing construction without first obtaining a permit*
5. *Whether the operator self-reported the unauthorized construction*
6. *The level of cooperation received from the operator*

In this case, I find this violation is of considerable significance in terms of potential risk to the environment. The constructed manure collection and storage areas have no certification from a qualified professional that they meet AOPA regulations. Given the nature of the soils in the area, specifically those in and around the catch basin, there is the potential for manure contamination to impact groundwater under the facility.

Also relevant is the Muilwijks' prior compliance history. In particular, Compliance Directive CD19-07 was issued for the unauthorized construction of three of the very same pens that are part of the Muilwijks' application LA19036 for permitting. CD 19-07 advised the Muilwijks that they could not populate the three pens above the permit threshold level of 359 head, without the appropriate NRCB permit.

I also considered the extent to which the Muilwijks have financially benefitted from the unauthorized construction. Mr. Muilwijk told me his operation is a custom feeding facility with only one client. The client owns the calves. The Muilwijks take delivery of the calves, feed them up to the 500 pound weight, and then ship them out to his client's operation. The client also pays him yardage, a daily dollar amount per head that the calves are on feed at his operation. As there was an increase in the number of calves on feed, there would have correspondingly been an increase in the yardage fees to the client.

On the other side, I note that the Muilwijks have been cooperative and forthcoming about the unauthorized construction. Mr. Muilwijk self-reported to Mr. Cumming on May 8, 2020, and made no effort to deny the construction when I visited on May 20, 2020.

In such circumstances, the common enforcement action might be to require depopulation back down to 359 head, the level at which a permit is required. However, that is simply not practical or feasible at this particular time. The COVID-19 pandemic has forced beef packing plants to seriously curtail slaughter animal deliveries, thereby causing slaughter cattle to back up in the supply system, down to and including feeder calves. This includes the Muilwijks' CFO. Mr. Muilwijk told me during the May 12, 2020, inspection that he has not been able to deliver any calves out of his operation for more than a month because of the back log. His client's facility is full as he has cattle backed up there as well and cannot take any of the calves from the Muilwijks'. Under the circumstances, depopulation is not an alternative and cannot be considered as a practical enforcement action.

In summary, this is the second enforcement action that this owner/operator has received under the NRCB Compliance and Enforcement Policy (2016-8) in less than a year, the first action being the issuance of Compliance Directive CD19-07 on August 29, 2019. Under this same policy, an Enforcement Order is being issued as I believe this to be a serious contravention of

AOPA, and is appropriate under the circumstance, rather than pursue other enforcement options (e.g. prosecution, another compliance directive).

The Board has delegated me, as an inspector, to form opinions and issue enforcement orders under section 39.

As noted in my discussion above, in determining an unauthorized construction response plan, in considering the nature and magnitude of the potential risk to the environment and to the surrounding community, I find this violation is of considerable significance. Accordingly, this Enforcement Order is to remedy the violations noted above, to mitigate any possible risks to the environment and to any affected neighbours.

Orders:

Under section 39(1)(d) of the *Agricultural Operation Practices Act*, in order to facilitate compliance with the Act, the person(s) named in this Enforcement Order must undertake the following actions:

1. Arie and Willemina Muilwijk shall provide by June 19, 2020, the NRCB with a written construction completion report for the new feedlot pens. The report shall be stamped and signed by a “professional engineer,” as defined in the Standards and Administration Regulation, and shall certify that:
 - the feedlot pens, permanent covered calf shelter, and the catch basin were constructed according to the dimensions and locations specified in the site plan provided with the application;
 - the pen and covered calf shelter bed for the liner was level and compacted, before the RCC was installed;
 - the RCC product was placed on the bed with an even thickness of at least 7” (0.18 metres) and is at least 6” (0.15 metres) thick when compacted;
 - the RCC was properly compacted around transition zones (stock waterers, feed bunk aprons, pen entrances, fence posts, and any other objects that penetrate the RCC), according to the product supplier’s compaction recommendations using a hand packer around posts and a small vibratory compactor around stock waterers, feed bunk aprons, and the covered calf shelter and pen entrance areas;
 - the RCC was properly covered immediately after it was compacted, and for a sufficiently long period, to ensure proper curing; and
 - the final compaction has reached at least a 92% compaction density.
2. The NRCB will review on receiving the construction completion report, and will notify Arie and Willemina Muilwijk in writing if the report is found acceptable. The NRCB will assess the report in a reasonable manner based on the requirements above.
3. If Arie and Willemina Muilwijk obtain a permit for these facilities before the construction completion report is accepted by the NRCB, then that permit is automatically and immediately suspended under section 39(1)(e) until the report is accepted.
4. By November 1, 2020, Arie and Willemina Muilwijk must depopulate their confined feeder calf operation to below 360 head of feeder calves less than 500 lbs weight (not counting

the calves in the moveable hutches), should they not by that date hold an active (not suspended) NRCB permit for the facilities listed above.

The deadlines noted in the Orders above may be extended or modified by the NRCB if agreed to by the NRCB in writing.

CONSEQUENCES OF NOT COMPLYING WITH THIS ORDER

If you do not comply with any part of this Enforcement Order, the Natural Resources Conservation Board may refer the matter for prosecution under section 35 of the *Agricultural Operation Practices Act*.

Alternately, or in addition, the Natural Resources Conservation Board may apply to the Court of Queen’s Bench for an Order of the Court directing the persons named in this Enforcement Order to comply with the Enforcement Order, under section 42 of the *Agricultural Operation Practices Act*.

NOTE: Under section 39(3), if a person to whom this Enforcement Order is directed complies with the Order, no prosecution may be commenced under the *Agricultural Operation Practices Act* for the offence with respect to the facts that gave rise to this Enforcement Order.



Karl Ivarson
Inspector, Natural Resources Conservation Board

Appendices:

- A. Site map as per LA19036 Part 2
- B. CD 19-07

SERVICE OF ORDER:

Delivered to: _____

Method of Delivery: _____

Date of Delivery: _____

INFORMATION: RIGHT TO REQUEST A REVIEW OF THIS ENFORCEMENT ORDER

Under section 41 of AOPA, you may request that the NRCB's board members (the "Board") "review and confirm, vary, amend or rescind" this Enforcement Order. The Board has discretion whether to hold a review or not.

Please note that, under section 41(2), this Enforcement Order takes effect at the time prescribed in the Order. This Enforcement Order will remain in effect unless the Board suspends the operation of this Enforcement Order.

Under section 13 of the *AOPA Administrative Procedures Regulation*, AR 106/2017, your request, must include:

- a) a clear and concise statement of the facts relevant to your request;
- b) the grounds on which your request is made;
- c) a brief explanation of the harm that has resulted or will result from the Enforcement Order addressed in your request;
- d) a brief description of the remedy you seek; and
- e) the name, address in Alberta and telephone number and the fax number and e-mail address, if any, of you or your representative (if you have one);
- f) and if you want the Enforcement Order suspended until the Board's review is completed, you must also be clear about this in your written request for review, and provide your reasons for asking for a suspension of this Enforcement Order.

Under section 15(2) of the *AOPA Administrative Procedures Regulation*, a request for a review of the Enforcement Order must be filed with the Board within 10 working days of the date you received the Enforcement Order or by any later date specified in the order. Because this Enforcement Order does not extend the 10 working day deadline in section 15(2) of the Regulation, the deadline for you to file a request for review by the Board is June 5, 2020.

If you wish to have the Board review this order, please submit a written request to Laura Friend, Manager, Board Reviews by e-mail to: laura.friend@nrcb.ca. If you have any questions about requesting a review or about the review process please call Ms. Friend at 403-297-8269.

Compliance Directive

AGRICULTURAL OPERATION PRACTICES ACT Revised Statutes of Alberta 2000 Chapter A-7

Directive no.: CD 19-07

Date issued: August 29, 2019

Issued by: Karl Ivarson, Inspector
Compliance and Enforcement Division
Natural Resources Conservation Board (NRCB), Lethbridge Office

Issued to: Arie and Willemina Muilwijk
Box 1628
Fort Macleod, Alberta, T0L 0Z0

This directive relates to unauthorized construction at a confined feeding operation (CFO), without a permit under the Agricultural Operation Practices Act (AOPA). The CFO is located at NE 10-009-27 W4, in the Municipal District of Willow Creek, approximately 11 kilometers west of Fort Macleod, Alberta. The CFO is owned and operated by Arie and Willemina Muilwijk (Muilwijk's).

Background

This site holds municipal permit 1002-80, issued by the M.D. Willow Creek on December 3, 1980, which allowed construction of a 100 sow farrow to finish swine CFO. This permit is still valid, therefore allowing the Muilwijk's to operate a swine farrow to finish operation.

The site also holds municipal permit 118-98 issued by the M.D. Willow Creek for the modification of a "manure storage lagoon". Later, the NRCB issued permit LA10054N as an amendment to permit 118-98. In error, LA10054N was labelled as an "Approval" when it should have been labelled as an "Authorization" because there was no increase in animals. This error will be further investigated and resolved in the future.

On July 11, 2019 while conducting NRCB inspections in the area I drove past Muilwijk's operation and noticed three newer feedlot type pens. These three pens are situated to the east of the existing hog barn, in a north/south line. The most southern pen, appeared to be recently constructed. It appeared to be approximately the same size as the two adjoining northern pens. The two northern pens were populated with dairy feeder calves. The adjoining southernmost pen was not populated.

Upon further investigation I confirmed that no NRCB permit for any expansion or construction at this CFO had been issued to the Muilwijk's. In referencing Google Earth™, Google Earth™ imagery of July 13, 2013 revealed no constructed pens at the identified new pen location.

The most recent Google Earth™ imagery of June 10, 2015, showed two livestock pens, measuring about 32 metres x 39 metres, constructed to the east of the swine barn. The imagery also showed that both pens appeared to be stocked with feeder calves.

I completed a site inspection of the facility on July 17, 2019. I met with Arie Muilwijk on site, and he provided me with a review of the recent history of his operation, as follows.

Mr. Muilwijk stated his father, Dirk Muilwijk, originally managed the operation as a swine CFO for Marvin Galts. The swine operation ceased production of swine in 2010. Arie Muilwijk then purchased the property in 2012. At that time, he placed about 200 head of dairy feeder calves in the swine barn. The dairy feeder calves were fed out to about 350 pounds and then went to other feedlots. Mr. Muilwijk stated he did not make an application to the NRCB for a change of livestock category, from swine to beef at that time.

Around 2013 the Muilwijk's built the first two pens for the feeding of additional dairy feeder calves outside of the calves being fed in the swine barn. Also around that time some portable calf hutches were added. The Muilwijk's did not apply for a NRCB permit for the construction of the two feeder calf pens constructed in 2013. These two new pens have a capacity of about 160 head of feeder calves each. Including the swine barn, these two new pens, and the calf hutches, the operation confined fed a total of about 726 head of dairy feeder calves at that time. Mr. Muilwijk further added that he had been in contact with a NRCB Approval Officer about expanding the dairy feeder calf operation at the site. At that time there were concerns that the site may not have a suitable naturally occurring liner as required by AOPA.

In 2018 the Muilwijk's added another third pen to the south of the two previously built pens. It too held about 160 head of feeder calves. Again no application to the NRCB was made for a permit for the third pen. Total capacity of the facility with the third pen is approximately 886 dairy feeder calves. Calf hutches are not considered to be part of a CFO due to their temporary siting ability. Therefore, excluding the 200 head housed in the portable calf hutches, the site currently has a total capacity to confine feed 686 dairy feeder calves.

Unauthorized construction

Section 13(1) of the *Agricultural Operation Practices Act* provides:

13(1) No person shall commence construction or expansion of a confined feeding operation for which an approval or registration is required pursuant to the regulations unless that person holds an approval or registration.

Section 1(1)(d) of the *AOPA Part 2 Matters Regulation* defines "expansion" in part as

- (i) with respect to a confined feeding operation, means the construction of additional facilities to accommodate more livestock,

Under NRCB Approvals Policy 2016-7 (updated May 8, 2018) sec. 4.5, the NRCB interprets "facilities" in the "expansion" definition to include increased animal numbers.

Section 3 of the *AOPA Part 2 Matters Regulation* sets out when a registration is required for a confined feeding operation:

3(1) Subject to this section, a registration is required for an owner or operator to commence construction or expansion of a confined feeding operation for the containment of the number of animals set out in column 2 of Schedule 2 for the type of livestock to be present at the confined feeding operation.

Column 2 of Schedule 2 of the *AOPA Part 2 Matters Regulation* shows threshold levels at which an owner or operator must hold a permit. The Regulation states that when dairy calves are housed away from a dairy, they are to be treated as beef feeder calves. The threshold for which a NRCB permit (Registration) is required for a beef feeder calf operation, for animals less than 550lbs, is 360 head.

Based on my observations, my conversations with Arie Muilwijk, and my site inspection of July 17, 2019, I have formed the opinion that the Muilwijk's are contravening section 13 of the *Agricultural Operation Practices Act* because:

- Municipal permit 1002-80, which is still valid, was for the construction of a 100 sow farrow to finish swine CFO.
- None of the subsequent permits for this CFO facility were for the addition of feeder calves or associated facilities.

Mr. Muilwijk advised me that the initial two feeder calf pens constructed in 2013 were constructed without applying for or receiving a NRCB permit. He also advised me that the third feeder calf pen, constructed in 2018, was also constructed without applying for or receiving a NRCB permit.

As noted above, my investigation indicates that the Muilwijk's conducted unauthorized construction activities by constructing three pens for the confinement and feeding of dairy feeder calves, and by increasing the number of confined fed calves above the threshold. The Muilwijk's did not hold a permit under AOPA for the construction of the new feeder calf pen facilities, for the change in livestock category, or for the confinement of feeder calf animal numbers over the threshold.

For these reasons, constructing the new feeder calf pens, and populating them with calves, without a permit is unauthorized construction, and therefore is a violation of section 13 of the act. If you continue to violate section 13 of the act, you should be aware that:

- a) Under section 39 of the act, the NRCB may issue an enforcement order if the NRCB has the opinion that a person is contravening the act or the regulations.
- b) Under section 35 of the act, a person who contravenes section 13 of the act is guilty of an offence and is liable for a fine of not more than \$5,000, or \$10,000 if the contravention was knowingly done.

This is the first enforcement action that this owner/operator has received under the NRCB compliance policy. Therefore a compliance directive is being issuing rather than an enforcement order at this time. Accordingly, this directive is to remedy the violations noted above and to mitigate any possible risks to the environment and to any affected neighbours.

DIRECTIVES:

- 1) By September 30, 2019, Arie and Willemina Muilwijk must depopulate their confined feeder calf operation to below 360 head (not counting the calves in the moveable hutches), the threshold at which a permit is required. The Muilwijk's cannot exceed this threshold unless they obtain the appropriate NRCB permit.
- 2) This date can be changed, if requested in writing, by the NRCB.

These requirements shall remain in effect until otherwise directed by the NRCB in writing.

If you fail to comply with this directive, the NRCB may take additional enforcement action.



Karl Ivarson
Inspector, Compliance and Enforcement Division
Natural Resources Conservation Board

Cc: M.D. Willow Creek
Adria Snowdon, NRCB