

Agricultural Operation Practices Act

**Board Decision in Consideration of Request for
Board Review filed in relation to:**

Decision Report & Approval RA06017

**Decision Report Date: December 11, 2006
Board Decision # RFR 2006-13 / RA06017**

NRCB
3rd Floor, EUB Building
640 – 5th Avenue SW
Calgary, Alberta T2P 3G4
Telephone: (403) 662-3990
Facsimile: (403) 662-3994

Background

On October 16, 2006, NRCB Approval Officer, Andrea Hiba Brack, issued Approval and accompanying Decision Report RA06017 to the Hutterian Brethren of Lougheed. The Approval permits the applicant to construct and operate a 1,500 beef feeder, 850 swine farrow to finish, 150 milking cow dairy (plus replacements and dries), 10,000 poultry layer, 1,200 ducks, 400 geese and 2,000 poultry broiler operation. The proposed site is located at the SE 05-42-11 W4M and portions of the SW 05-42-11 W4M in Flagstaff County.

Subsequently, eight parties applied to the Board requesting a review of this Approval. These parties included: Edwin Albrecht representing Albrecht Acres, Keith Armstrong, Dean and Theresa Armstrong, Shelly Armstrong representing Flagstaff County, Lana Love representing Bellshill Social Society, Ed and Fay Davidson, Gary Davidson and Janice Cullen; as well as Pearl Bebee. All requestees were considered directly affected by the Approval Officer in the Decision Report, with the exception of Pearl Bebee. Ms. Pearl Bebee, deemed not directly affected, requested status reconsideration at the outset of her filed Request for Board Review.

The Board met on November 21, 2006 to consider the filed Requests; however, at that time the Board became aware that not all directly affected parties had been sent the review materials and therefore had not been afforded an opportunity to file a rebuttal. As such, the Board issued a new notice on November 21, 2006, ensuring that all parties were sent the review materials and provided with a rebuttal opportunity. The new rebuttal deadline was set as November 28, 2006. The Board met again on November 29, 2006 to consider the eight Requests for Board Review and the November 24, 2006 rebuttal filed by the operator.

Status Reconsideration of Pearl Bebee

In Decision Report RA06017, the Approval Officer identified the status of parties as established under the provisions of *Agricultural Operation Practices Act (AOPA)*. In the report, Ms. Pearl Bebee was found to not be a directly affected party. Submissions from parties considered not directly affected by the Approval Officer are dealt with by the Board as outlined in Section 20(6) of *AOPA*.

While the Approval Officer's determination of an affected party's status is dependant on geographical location, the Board is not bound by the same criterion when considering an affected party's request for status change. The onus is on the affected party to outline to the Board why they are susceptible to a significant probability of harm contingent on the application approval and therefore why they should be considered a directly affected party.

In reviewing the Approval Officer's rationale in designating Ms. Pearl Bebee not directly affected, the Board first reviewed the proximity of Ms. Bebee's residence in relation to the proposed confined feeding operation (CFO). The Board finds that Ms. Bebee does not own land and/or reside within 1.5 miles of the boundary of the parcel of land on which the CFO is to be located. Although Ms. Bebee made the case that she owns and lives on lands bordering the applicant's manure spreading lands, the Board notes that *AOPA* does not consider proximity to manure spreading lands as a basis for determining directly affected status. In determining if status reconsideration was warranted, the Board also evaluated the request using the following test:

- Affected parties must demonstrate that an uninterrupted chain of cause and effect existed between the affected parties' description of the predicted effects from the CFO and their person and/or property;
- Affected parties must demonstrate that there was a high probability that the effect would occur; and,
- Affected parties must demonstrate that the effect would not be trivial.

Based on the status reconsideration process above, and with the environmental protection provided by *AOPA* and other conditioned commitments made by the applicant, the Board finds that Ms. Bebee did not make the case that she would be personally directly affected by the Approval.

The Board denies Ms. Bebee's request for status reconsideration and confirms the Approval Officer's determination of 'not directly affected' party status as set out in Decision Report RA06017. Without directly affected status, the Board could not consider the issues raised in Ms. Bebee's Request for Board Review. Although unable to consider the issues contained in Ms. Bebee's submission, the Board notes that other parties deemed directly affected raised similar concerns, which are addressed below.

Issues

The Board considers that the pertinent issues raised in the multiple Requests for Board Review revolve around whether the Approval Officer adequately addressed the proposed operation's potential impacts regarding:

- Land values;
- Odour;
- Water quantity;
- Water quality; and,
- Community Impacts.

Jurisdiction

The Board's authority for granting a review of a decision of an Approval Officer is found in Section 25(1) of the *Agricultural Operation Practices Act (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 a review.

Documents considered

The Board considered the following information in arriving at its decision:

- Decision Report and Approval RA06017, dated October 16, 2006;
- Requests for Board Review of Approval RA06017 filed by:
 - Edwin Albrecht, for Albrecht Acres, Directly Affected (October 30, 2006)
 - Keith Armstrong, Directly Affected (November 6, 2006)
 - Dean & Theresa Armstrong, Directly Affected (November 6, 2006)
 - Flagstaff County, Directly Affected (November 2, 2006)
 - Lana Love, for Bellshill Social Society, Directly Affected (November 1, 2006)
 - Ed & Fay Davidson, Directly Affected (November 6, 2006)
 - Gary Davidson & Janice Cullen, Directly Affected (November 6, 2006)
- Rebuttal response of the applicant (received November 27, 2006).

Board Deliberations

The Board concluded that the Approval Officer adequately addressed the issues raised in each of the Requests for Board Review and provides details below relevant to its considerations.

Rebuttal of the Operator

On behalf of the Hutterian Brethren of Lougheed, Chris Stahl disputed the need for review, based on the proposed operation's adherence to *AOPA's* regulations and standards. He asserted that the provisions of *AOPA* fully take into account the possible adverse effect on the community and ensure protection of groundwater, surface water and the environment. In combination with completion of the required testing, and the agreement to install leakage detection and monitoring of water wells within 100 metres of the proposed facility, he asserted that the proposed operation surpasses the regulatory requirements.

Land Values

In his Request for Board Review, Edwin Albrecht, representing Albrecht Acres, requested compensation for devaluation of his lands. Except for his assertion that property values would be negatively affected by the proposed operation's proximity to his property, no other supportive information was received to substantiate his claim. The Approval Officer noted that *AOPA* and the *Standards and Administration Regulation* do not specify or contain requirements relating to land value. Rather the Approval Officer identified that the responsibility was to consider the "appropriate use of land". Through that consideration, the Approval Officer determined that a CFO was an appropriate use of this land and the land adjacent to the CFO did not have future development restrictions. The Approval Officer concluded that the application met the land use provisions of the Municipal Development Plan (MDP) for Flagstaff County.

The Board notes that the onus rests with the party requesting the review to provide adequate evidence to substantiate claims such as reduced property values. In this case, the Board finds

that claims were not substantiated. The Board agrees with the Approval Officer's determination that the proposed expansion is an appropriate use of the subject lands (zoned agricultural), and that the application meets the land use provisions of the County's MDP. The Board also notes that *AOPA* gives municipalities jurisdiction to identify land use provisions, including CFO exclusion zones, and no exclusion zone was identified around Bellshill Lake in Flagstaff County's MDP. As a result the Board finds that the Approval Officer adequately dealt with this issue.

Odour

Multiple parties submitted concerns regarding odours, their subsequent impact on the enjoyment of their properties, and the potential air quality effects associated with the proposed development. Remedial actions suggested included a straw cover over the lagoon, bottom-filling of the existing lagoon, use of steel manure storage tanks, and planting shelterbelts. One party also suggested that the application did not comply with Flagstaff County's MDP; but did not specify the matter of non-compliance.

The Approval Officer referenced the use of MDS requirements as a mitigation measure for nuisance impacts associated with confined feeding operations. In addition, the report identified a number of other mitigative measures required by *AOPA* as well as conditioned commitments made by the applicant which exceed *AOPA* requirements.

On Pages 21 and 22 of Decision Report RA06017 the Approval Officer details consideration of Section 1.8(b) and 1.8(c) of Flagstaff County's MDP. The Approval Officer does not accept the MDP's direction that under Section 1.8(b), all swine related facilities be considered class 4 for the purpose of calculating minimum separation distances, and that the distance should be measured to a point 75 meters from the dwelling, as per Section 1.8(c). Based on *AOPA*, the Approval Officer declined to accept any modifications to the MDS calculations and confirmed that the proposed development met the MDS.

The Board finds that the MDS requirements, the other technical requirements in *AOPA*, and the additional commitments included as conditions, mitigate the potential air quality effects associated with the proposed CFO. Although *AOPA* requires liquid manure storage facilities to be constructed so that the primary cell is filled within the bottom quarter, the Board finds that the existing lagoon is grandfathered and is not required to have bottom filling. In addition the Board finds that *AOPA* does not require the use of lagoon covers, steel manure storage tanks, or shelterbelts.

With regard to odour objectives for swine operations and the measurement protocol for MDS, the Board agrees with the Approval Officer's conclusion, finding that the Approval Officer rightly declined to accept any modifications to the MDS calculations. The Board notes that the NRCB is mandated to apply the MDS protocol specified in *AOPA* rather than the protocol included in the municipality's MDP. Therefore, the Board finds that any additional exclusion zones must be identified by appropriate zoning and specified in the land use planning provisions of the municipality's MDP. As a result, the Board concludes that the Approval Officer adequately addressed the issues involving odour as it relates to the handling of manure at the proposed facility.

Water Quantity

In regard to the water quantity issue associated with the proposed facility, multiple parties expressed their concern for future water sufficiency in their Requests for Board Review. The Approval Officer noted that the applicant chose to de-link the water licensing process from the NRCB application process, and pursue it directly with Alberta Environment (AENV), the government agency responsible for issuing approvals for water diversion.

Pursuant to the *Water Act*, AENV administers a complex regulatory scheme for the issuance of water licenses that relies upon standards established to appropriately manage and conserve Alberta's water resources. The Board considers that when an applicant chooses to address water quantity issues directly with AENV rather than in conjunction with the NRCB approval process, the NRCB has no regulatory jurisdiction regarding adequacy of water supply and it is appropriate for the Approval Officer to defer the decision to AENV.

The Board is comfortable that AENV's regulatory process will ensure appropriate protection of and access to water resources for all users. The Board also notes that a party that disagrees with a water license decision by AENV may file an appeal of the decision with the Environmental Appeal Board.

Water Quality

The protection of water from contamination was raised in a number of submissions. Concern was expressed for both groundwater and surface water, including Bellshill Lake. Several of the submissions in this regard focussed on the already existing EMS facility. Requests for Board Review identified the Approval Officer's comments that the environmental risk at the site was "high" due to sandy loam layers sloping north towards the lake. Parties proposed monthly or quarterly monitoring by an independent, qualified third party; as well as testing of the water quality in Bellshill Lake.

Considering the fact that the existing EMS is grandfathered, the Approval Officer acknowledged that the potential environmental risk at the site was high. The Approval Officer addressed the high risk of the site by identifying the *AOPA* technical requirements designed to protect surrounding water quality, and by prescribing additional construction, management, and monitoring conditions (over and above *AOPA* requirements) to protect water from contamination. To enhance the future compliance, the Approval Officer added another condition requiring that the NRCB be notified immediately, if overflow occurs from any of the manure storages.

In regard to the potential for water contamination, the Board agrees with the Approval Officer's approach to dealing with a high risk site. The Board recognizes that the Approval Officer has addressed the high risk nature of the proposed facility with requirements and conditions that exceed the requirements of *AOPA* in order to ensure and monitor the integrity of the manure storage facilities and to mitigate surface water contamination from runoff. In addition, the monitoring guidelines exceed those established in the NRCB Technical Guideline TG 2004-01.

Further, the Board finds that the Approval Officer went beyond the requirements of *AOPA* by conditioning some of the monitoring to be done by a qualified, independent third party. With

regard to the testing of Bellshill Lake, the Board notes that while it is the responsibility of the NRCB to implement the legislative requirements to provide groundwater protection and runoff controls, it is AENV's responsibility to conduct the necessary testing and monitoring of Alberta's water courses. As a result, the Board finds that the Approval Officer has appropriately considered the issue of water quality, and notes that the conditions imposed by the Approval Officer exceed the requirements of AOPA.

Community Impacts

Bellshill Social Society, as represented by Lana Love, expressed concern with regard to potential odour issues and lake contamination compromising the enjoyment of the recreational facility and decreasing the rental demand for the Community Hall. The Approval Officer viewed this issue from a broad perspective and determined that this development meets the requirements of the land use provisions of the MDP and considered the potential effects on the economy and the community to be acceptable.

The Board supports the Approval Officer's determination and notes that the land use provisions of the MDP sets out a framework of acceptable development intended to benefit the community and enhance the economy within Flagstaff County. In this respect, the Board notes that the MDP does not exclude the development of a CFO on this site. In addition, the Board recognizes that the Approval Officer established conditions regarding setbacks and timing of manure application to mitigate impact on the community's use of the recreational facility. The Board respects the County's jurisdiction in identifying recreational areas where they feel CFO development would be inappropriate. However, the Board finds that these specific exclusion zones must be identified in the County's MDP.

Decision

The Board hereby denies the Requests for Board Review of all the Directly Affected Parties, as it determined that the Approval Officer adequately addressed the issues raised.

DATED at CALGARY, ALBERTA, this 11th day of December, 2006.

Original signed by:

Vern Hartwell, Chair