



BOARD DECISION

RFR 2015-01 / RA14007

In Consideration of Requests for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary RA14007

Spruit Farms Ltd.

March 19, 2015

Background

On January 29, 2015, NRCB Approval Officer Scott Cunningham issued Decision Summary RA14007 in relation to Spruit Farms Ltd.'s (Spruit Farms) confined feeding operation (CFO) located on a 50 acre parcel at Pt. SE 26-37-28 W4M in Red Deer County. Spruit Farms sought approval to change livestock numbers from 811 sows farrow to wean to 500 sows farrow to finish and proposed construction including a new sow barn and expansion of a current barn to add a weaner area and additional finisher barn space. The Approval Officer considered this application in Decision Summary RA14007 and issued an approval with conditions.

Pursuant to Section 20(5) of the *Agricultural Operation Practices Act (AOPA)*, Requests for Board Review of Decision Summary RA14007 were filed by Sonke and Sabine Andersen, Jim Asmus, Daryl Frenette, Hilda Good, Allan Hough, A. Malcolm Hough, Cheryl and Floyd Mullaney, Victor Campbell and Doug Westman. Each of these parties made submissions to the Approval Officer. Adam and Lisa Baird and John Donald also filed Requests for Board Review. These parties did not make submissions to the Approval Officer during the application review process. All Requests for Review were filed within the 10-day filing deadline established by the *AOPA*. The Board received a further email and map attachment from Doug Westman on February 23, 2015. The Board read this material but did not find it material to the RFR deliberations.

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 Spruit Farms that met the March 2, 2015 response filing deadline. On March 2, 2015 the Board also received a 7-page written submission from the Approval Officer.

The Board convened to deliberate on the Requests for Board Review on March 5, 11, and 19, 2015.

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 RA14007 dated January 29, 2015;
- Approval RA14007;
- Technical Document RA14007;
- Requests for Board Review filed by:
 - Sonke and Sabine Andersen,
 - Jim Asmus,
 - Daryl Frenette,
 - Hilda Good,
 - Allan Hough,
 - A. Malcolm Hough,
 - Cheryl and Floyd Mullaney,
 - Victor Campbell,
 - Doug Westman,
 - Adam and Lisa Baird, and
 - John Donald;
- Response to the Requests for Board Review filed by Spruit Farms, dated March 3, 2015 (but filed March 2, 2015);
- Submission from the Approval Officer dated March 2, 2015;
- Red Deer County Municipal Development Plan and Land Use Bylaw;
- Portions of the public record maintained by the Approval Officer.

Board Deliberations

The Board met on March 5, 11, and 19, 2015 to deliberate on the filed Requests for Board Review (RFRs). As a preliminary matter the Board dismissed the RFRs from Adam and Lisa Baird and John Donald as they did not file a submission with the Approval Officer during the application review process.

Mr. Donald's RFR stated that he did not receive notice of the Spruit Farms application. The NRCB's adopted notice procedure is to publish notice in a daily or community newspaper. In addition, approval officers send out courtesy letters by Canada Post to homeowners identified by the municipality near the application site. The Panel reviewed the details of notice publication and is satisfied that notice was adequate. The Panel also notes that the Approval Officer's file indicates that courtesy letters were sent to Mr. Donald on two separate occasions.

As a further preliminary matter the Board considered the submissions of Spruit Farms and the Approval Officer respecting the status of the RFR filed by Victor Campbell. Having considered both submissions the Board finds that it agrees with the issue assessment advanced by the Approval Officer and therefore will consider the RFR filed by Victor Campbell.

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. The issues raised in the RFR include:

- Minimum distance separation
 - method used to measure distances
 - application of minimum distance separation to neighbouring residences
- water quantity
- surface and groundwater water quality
- consistency with municipal planning documents
- MDS waiver cancellation

Minimum Distance Separation

Two distinct minimum distance separation (MDS) issues are raised in the RFRs; the first relates to the method of measuring the distance from the existing and proposed facilities to residences. All directly affected parties submitting RFRs challenged the Approval Officer's use of air photos and ruler to determine distances to neighbouring residences.

Approval officers' common practice is to use aerial photographs in assessing MDS. The Board accepts that this method provides reasonably accurate measurements when the photographs have adequate resolution and the approval officer is able to calibrate measurements for each photograph. In this case the Approval Officer confirmed in Decision Summary RA14007 that he calibrated his measurements by first measuring a known distance on each photograph. The Approval Officer imposed as a condition to Approval 14007 that surveys be completed to two neighbouring residences after footings are poured, but prior to construction, to ensure that when the barns are completed they will satisfy the required MDS. The Board finds that this condition is both prudent and adequate in terms of meeting the MDS and accordingly concludes that it does not warrant consideration at a Board hearing.

The second MDS issue was stated in each of the RFRs as "the majority of these acreages, including those on the same quarter were here prior to Spruits purchase of the operation (pre 2003) and built with the knowledge from the County that CFO expansion would not occur due to existing restrictions. The primary focus should be, can we allow this CFO to encroach on surrounding acreages." The RFR submitted by Mr. Westman expanded on this issue by stating that the Spruit Farms expansion would effectively stop a subdivision of his R1 property. As stated, this raises issues related to both MDS and consistency with municipal planning. As the Board will consider consistency with municipal planning below, the Board will restrict its comments here to the Approval Officer's application of MDS.

MDS is a legislated standard that is calculated according to a formula set out in the *Standards and Administration Regulation* and must be applied in accordance with *AOPA* and the regulation. The Approval Officer included considerable detail of his MDS assessment of the Spruit Farms application notably considering the submission of waivers, the application of the mandatory expansion factor and the date neighbouring residences were built. Having regard for the MDS review in Decision Summary RA14007 the Board finds that the issues raised in the RFRs were adequately dealt with by the Approval Officer. The Board therefore concludes that further consideration at a hearing is not warranted.

Surface and Ground Water Quality

AOPA includes a variety of requirements to protect both surface and groundwater quality. Each of the RFRs stated that they observed septic fields or lagoons in the aerial photographs. Each of the RFRs also stated that the wetlands were 30 meters from the manure storage facility rather than the 100 meters stated in the Spruit Farms application. The RFRs included a further concern that a high water table may impair construction of the facility or that Spruit Farms may not respect the related condition included in Approval 14007 during construction.

While the RFRs are all similar in content, each directly affected party obviously included their individual concerns in their RFR. Four of the RFRs stated the presence of “7 septic fields” while the remaining two RFRs referred to “septic lagoons/fields.” In its reply to the RFRs, Spruit Farms stated that there are two residences on the property and that each is served by a septic mound.

There is no indication in the Spruit Farms application or the Approval Officer’s file that there are septic fields on the property. It may be that the references incorrectly identify manure storage facilities as septic fields. If indeed the reference is to residential septic facilities, the Board agrees with Spruit Farms’ statement that such facilities are not regulated by the NRCB or relevant to reviews conducted by the Board. If however, the reference is meant to direct the issue to manure storage facilities, none of the RFRs raise the issue in a manner which would cause the Board to conclude that the Approval Officer’s consideration of existing facilities was not sufficiently complete.

The Board reaches the same conclusion with respect to the statement that the wetland is 30 meters rather than 100 meters from the nearest manure storage facility. There is an explanation in both Decision Summary 14007 and Spruit Farms’ reply to the RFRs that provides a credible explanation of the 2003 aerial photo indicating the larger area of the wetland and the subsequent remedial work to the drainage at the railway line. The Approval Officer stated that the current wetland area is approximately 100 meters from the manure storage. As this more than meets the 30 meter standard set out in the regulations and no special circumstances were identified that warrant a review of the acceptance of standard in this instance, the Board is satisfied that that Approval Officer adequately considered this issue.

In considering the concerns related to encountering a high water table during construction, the Board concludes that the Approval Officer adequately considered all related issues. In his examination of the site, the Approval Officer conducted a risk assessment using the environmental risk screening tool for both ground and surface water in relation to all existing facilities. In each case the resulting risk to both ground and surface water received a low rating. Additionally a condition is included in Approval 14007 that requires that construction cease if the water table is observed within 1 meter of the bottom of the concrete barn liners. The Board further notes that section 9(2) of the *Standards and Administration Regulation* requires that the bottom of a liner of a manure storage facility or collection area must be not less than 1 meter above the water table at the time of construction.

The Board concludes that the surface and ground water quality concerns raised in the RFRs do not warrant consideration at a hearing.

Water Quantity

Each of the RFRs raised a concern that the Spruit Farms expansion would adversely affect the ability of the groundwater resource to service existing licensed water wells. Water licence

applications are made to Alberta Environment and Sustainable Resource Development (ESRD) under the provisions of the *Water Act* and not to the NRCB. If, as happened in this case, an applicant advises the NRCB that they wish to have their NRCB application and their *Water Act* application considered separately, the applications are “de-linked.” Concerns respecting the issuance of a water licence application may be made directly to ESRD in accordance with the provisions of the *Water Act* and will be considered by that department, but do not have relevance to the CFO application to the NRCB Approval Officer. That said, should Spruit Farms not obtain a sufficient water licence it may affect its decision to proceed with expansion.

Consistency with Municipal Planning Documents

The RFRs did not take direct issue with the Approval Officer’s finding that the Spruit Farms application is consistent with the Red Deer County municipal development plan (MDP), but rather asked that a Board review consider that neighbours might have taken comfort in previous MDP provisions that would have limited expansion of Spruit Farms. The Board has carefully reviewed the Approval Officer’s consideration of the MDP and other applicable statutory plans and does not take issue with the related conclusions in Decision Summary 14007.

The Board also considered the provisions of the Red Deer County Land Use Bylaw (LUB). The LUB provides that a confined feeding operation is a discretionary use on parcels with a minimum 80 acres that are within an Intermunicipal Development Plan (IDP) and zoned for agriculture. The Spruit Farms property is located within an IDP that states that the subject lands are zoned for agriculture. In looking at the entire LUB, the Board finds that the definition of confined feeding operation is relevant in that it states:

Confined Feeding Operation means a confined feeding operation as defined in the Agricultural Operation Practices Act. The County does not regulate confined feeding operations but identifies it as a permitted use in the Agricultural District as an indication of the location the County will support in principle, subject to the relevant Municipal Development Plan policies. (Red Deer County Land Use Bylaw, s.8.1)

This definition directs the planning determination to the MDP agricultural land use designation and the areas designated therein as confined feeding operation exclusion zones. While the LUB specifies a minimum 80 acre parcel, the Board does not find that such limitation is relevant to the Spruit Farms expansion given the overall legislative direction provided by the AOPA.

The Board concludes that issues related to municipal planning do not warrant consideration at a hearing.

MDS Waiver Cancellation

Victor Campbell included an MDS waiver cancellation dated February 19, 2015 as part of his RFR. In the form of cancellation he stated that at the time he signed the original waiver on May 1, 2014 his understanding was that the Spruit Farms application would result in fewer animals, less manure production and lower water use. Mr. Campbell further stated that Mr. Spruit failed to explain the actual details of the application to him in good faith.

The Approval Officer calculated the distance to Mr. Campbell’s residence as 437 meters. This distance is clearly within the required category 1 MDS of 503 meters and as such the waiver was material to the Approval Officer’s decision to issue Approval RA14007. The Board considered both the timing of the waiver cancellation and whether there was bad faith in obtaining the signed waiver.

Spruit Farms argued that parties that sign a waiver should not be able to withdraw that waiver after an Approval Officer has issued a permit that has relied on the waivers existence. Without repeating the elements of the Spruit Farms decision, the Board finds that argument compelling. The Board does believe that while there are good reasons to respect a person's choice to withdraw a waiver during the course of the permit review process, there must be a point in time that a waiver cannot be withdrawn. To decide otherwise would not be consistent with the statutory intent. The Board finds that once an Approval Officer issues the permit, a waiver may not be withdrawn.

The Board has reviewed the signed waiver form and notes that it provides a cursory description that Spruit Farms is asking for "a permit to change my hog operation from the current 800 sow farrow-to-wean structure to a newer 500 sow farrow-to-finish system." The waiver also included several commitments that Spruit Farms put forward to minimize any inconvenience to Mr. Campbell. These commitments are included as conditions in Approval 14007. While the waiver provided only minimal detail of the Spruit Farms expansion, the waiver itself formed only part of the relevant information available to Mr. Campbell. Spruit Farms application was publicly available and as an affected party Mr. Campbell received notice of the application and two courtesy letters by mail from the Approval Officer. Included in the notice was an invitation to request a complete copy of the application or contact the Approval Officer for further information.

While the Board is sympathetic to Mr. Campbell's situation it also believes that it is incumbent on a party signing a waiver to take steps necessary to inform themselves of the consequences. Several months passed between the time Mr. Campbell signed the waiver and the date when the permit was issued. The Board is satisfied that this time period provided Mr. Campbell with adequate opportunity to obtain a clear and full understanding of the effects that he might experience from the Spruit Farms expansion.

The Board concludes that Mr. Campbell's waiver cancellation dated February 19, 2015 was not provided on a timely basis and that a review hearing on this issue is not warranted.

Decision

As a result of the Board's deliberations, the Board finds that the Approval Officer adequately considered all issues raised in the filed Requests for Review and therefore does not direct any matters to a hearing.

DATED at EDMONTON, ALBERTA, this 19th day of March, 2015.

Original signed by:

Vern Hartwell

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Donna Tingley

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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.