



## **BOARD DECISION**

### **RFR 2016-01 / RA16006**

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act* in relation to Decision Summary RA16006

Jos and Dorthy Peters

June 7, 2016

## Background

On May 4, 2016, NRCB Approval Officer Francisco Echegaray issued Decision Summary RA16006 regarding Jos and Dorothy Peter's confined feeding operation (CFO) located at SW 32-47-26 W4M in the County of Wetaskiwin. Jos and Dorothy Peters applied to construct a new 800 goat dairy CFO. The goats would be confined in a new goat barn. In Decision Summary RA16006 the Approval Officer approved Jos and Dorothy Peter's application.

Pursuant to Section 22(4) of the *Agricultural Operation Practices Act (AOPA)*, Requests for Board Review of Decision Summary RA16006 were filed by Lori Bonnard and Ron Westman, Kim A. Taylor, Reg and Cathy Minchau, and Scott Middleton. Each of these parties made submissions to the Approval Officer. All Requests for Review were 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 Jos and Dorothy Peters that met the May 30, 2016 response filing deadline.

The Board convened to deliberate on the Requests for Board Review on May 31 and June 2, 2016.

## 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 RA16006 dated May 4, 2016;
- Registration RA16006;
- Technical Document RA16006;
- Requests for Board Review filed by:

- Lori Bonnard and Ron Westman (two submissions),
- Kim A. Taylor,
- Reg and Cathy Minchau, and
- Scott Middleton;
- Response to the Requests for Board Review filed by Jos and Dorothy Peters;
- Email from Reg and Cathy Minchau to the NRCB dated May 29, 2016
- County of Wetaskiwin Municipal Development Plan;
- Portions of the public record maintained by the Approval Officer.

## **Board Deliberations**

The Board met on May 31 and June 2, 2016 to deliberate on the filed Requests for Board Review (RFRs). In its deliberations, the Board considered each RFR and each of 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. For the purposes of this decision the Board has grouped the issues raised in the RFRs as follows:

- Consistency with the land use provisions of the County of Wetaskiwin's MDP
- The existence and location of a second water well not included in the application (ground water quality)
- Risk to surface and ground water quality
  - Groundwater contamination
  - Appropriate wetland and lake management
  - Storage and application of manure
  - Surface water quality (active waterway)
  - Habitat for water fowl and wildlife
- Property values
- Health risk, human and animal
  - Air quality and odour
  - Pathogens from manure contaminating drinking or recreational water
  - Flies and other insects from stockpiled manure
  - Animal disease transmission
- Matters outside NRCB jurisdiction
  - Cumulative impacts, given other large operations in the area
  - An AOPA requirement that CFOs must meet all other federal and provincial legislative provisions
  - Dead animal disposal
  - Deficiencies in the wetland assessment
  - Animal welfare
  - Groundwater quantity
- Alleged approval officer bias

The Board must consider each of these questions in accordance with the provisions of s. 25(1) of the *AOPA*. These provisions require the Board to consider whether the issues advanced at the RFR stage warrant consideration at a Board hearing.

## **Board Deliberations - Issues Proceeding to Hearing**

Having regard for the materials referenced above the Board has determined that while many of the issues were adequately considered by the approval officer, three issues merit consideration at a hearing.

### **Hearing Issue 1 - Whether the proposed CFO is consistent with the land use provisions of the County of Wetaskiwin's MDP.**

Decision Summary RA16006 devotes a considerable amount of text to considering whether the CFO is consistent with the land use provisions of the County's MDP. The key question faced by the approval officer was whether Lake A is indeed a lake or not for the purposes of the MDP. Having studied the logic set out in Decision Summary RA16006, the Board finds that this issue merits consideration at a review hearing. In reaching this conclusion, the Board recognizes that there was conflicting information before the approval officer; however, the Board finds that the weight given certain evidence by the approval officer is questionable given the legislative direction of AOPA to respect the MDP, the correspondence from the County of Wetaskiwin as well as the notation of Lake "A" on the land title.

### **Hearing Issue 2 – If the proposed CFO is not consistent with the land use provisions of the County of Wetaskiwin's MDP, should the Board exercise its authority to approve the expansion notwithstanding an inconsistency with the MDP.**

This issue is contingent on the Board's finding on issue 1; however, the Board is satisfied that it is prudent to set this as one of the hearing issues. To do otherwise might necessitate a second hearing when in fact the parties have already canvassed the majority of relevant considerations that are likely to arise in this context.

While an approval officer must deny an application if it is inconsistent with a municipal development plan [AOPA s.22(1)(a)], the Board in conducting a review of an approval officer's decision "must have regard to, but is not bound by, the municipal development plan" [AOPA s.25(4)(g)].

AOPA s.25(4)(h) states that the Board "may consider matters that would normally be considered if a development permit were being issued." The Board interprets this subsection as providing useful direction on matters relevant to determining whether to approve an application despite inconsistencies with the MDP. The Board anticipates that submissions may address a variety of matters relevant to understanding the underlying objectives of section 1.4.3 of the County of Wetaskiwin's MDP.

The Board sees the obvious benefit of the County's participation in the review hearing and will direct its staff to contact the county directly.

### **Hearing Issue 3- Whether the Approval Officer adequately considered the issue of risk to ground water associated with the possible existence of the "unknown 2<sup>nd</sup> water well".**

Concerns over the risk to ground water from the CFO were raised in relation to various components of manure storage and handling. The Board finds that, with one exception, the approval officer adequately considered those concerns in relation to surface and groundwater quality (see below).

The one exception to the Board's finding that the approval officer adequately dealt with issues related to surface and ground water quality protection relates to what Alberta Health Services describes as the "unknown 2<sup>nd</sup> water well". While appreciating that an effort was made by both the Peters and the Approval Officer, the Board believes that it would benefit from a better understanding of the efforts to date to locate the existence of a second well. The Board also would like to understand what measures would be appropriate should future activities on the site uncover such a well. The Board will consider submissions on the reasonable implications associated with the possible existence of the "unknown 2<sup>nd</sup> water well". The Board would invite a written submission from the approval officer on this issue.

## **Board Deliberations - Issues adequately considered by the Approval Officer and not proceeding to hearing**

### **Risk to surface and ground water quality.**

A number of parties raised concerns over the risk to both surface and ground water from the volume of manure that will be produced by the 800 goat dairy. The CFO will house the goats inside a barn using straw over a concrete floor. The applicant proposes to clean the barns twice yearly, employing temporary storage just south of the barn for up to 14 days before removal from the CFO lands. The registration includes a condition that manure will not be spread on the SW 32-47-26 W4M. The manure removal agreement with Marieholm Farms that the manure storage may exceed 14 days if weather or road conditions do not allow for removal.

The approval officer site elevation measurements in March 2016 support the conclusion that any surface runoff from the CFO would run away from the water body identified on title as "Lake A" and the Peters' water well. A condition is included in the registration requiring that a "submission of a completion report to confirm the specifications of the concrete used to construct the manure liners, as well as confirmation that the finished landscape around the new goat barn slopes to the south and west."

With the exception of the Board's referral to hearing of the matters associated with the potential second water well on SW 32-47-26 W4M, the Board is satisfied that the Approval Officer collected and considered sufficient information in his review of the CFO application process to protect surface and groundwater quality.

### **Property values.**

The Board is satisfied the Approval Officer adequately considered this issue. The Approval Officer declined to consider the issue of potential land value impacts associated with a new confined feeding operation stating that the Board has consistently found that this is not a subject for review under AOPA. To restate those previous findings, the Board's view is that land value effects on any specific parcel of land are not relevant to the consideration of an application under AOPA by either the Approval Officer or the Board. Land use within a community is a planning matter dealt with by municipalities in municipal development plans and land use bylaws. In making those planning decisions, the municipality has regard for the general effects on land values that result. AOPA states that an Approval Officer must deny an application for a confined feeding operation if it is not consistent with the municipal development plan.

## **Health risks, human and animal**

The Board respects that neighbours have concerns for the health of their families and their livestock. Having said that, the Board agrees with the various observations, considerations and conclusions made by the Approval Officer in considering the RA16006. The Board is prepared to accept that scientific opinion has not reached a consensus on the health effects associated with air emissions and insects (vectors) from CFOs. The Approval Officer relies largely on the response from Alberta Health Services (AHS) dated April 6, 2016. In that response the various health concerns raised by the directly affected parties are examined and an expert opinion provided. The Board finds that the Approval Officer's consultation with AHS was both prudent and reasonable and does not find anything on the face of the AHS response that warrants further examination. For these reasons, the Board finds that the human health risk issues set out in the requests for review will not be considered at the hearing as it is satisfied that these issues were adequately considered by the Approval Officer.

The Approval Officer also considered odour, flies and dust in their nuisance capacity. AOPA prescribes a calculated minimum separation distance (MDS) that varies through a calculation that incorporates animal type and numbers. While the Board understands that nuisance effects associated with CFOs may be experienced by neighbours outside the calculated MDS, the magnitude of such effects will diminish as distance increases. The Approval Officer finds in Decision Summary RA16006 that the nearest neighbour is more than 350 m to the proposed goat barn and the calculated MDS is 190 m. The Approval Officer also notes the AOPA standards regulation that requires all landowners to ensure that pests and insects are properly controlled. The Board is satisfied that nuisance issues were adequately considered by the Approval Officer and therefore will not be considered at the hearing.

## **Matters outside NRCB jurisdiction**

Directly affected parties raised a number of issues that are outside the NRCB AOPA mandate and that were identified as such by the Approval Officer and therefore not considered in Decision Summary RA16006. The Board has listed these issues above and considered whether the Approval Officer was correct in finding that these issues were outside the NRCB's legislative mandate. The Board agrees in each instance with the assessment and reasons set out by the Approval Officer in Decision Summary RA16006 and for that reason the Board will not consider them at the hearing.

## **Allegations of bias of Approval Officer**

The Board notes that some concerns were expressed about the Approvals Officer's interaction with directly affected parties. These concerns as stated, are:

- The approval officer did not make any effort to meet with affected parties regarding their concerns, however, he made multiple contacts with the CFO applicant
- The title "approval officer" suggests bias
- At a County hearing into MDP changes a participant stated "Francisco has been working hard with us to ensure that our new CFO is approved and we meet all the AOPA requirements"
- Declined to consider the cumulative effects given the existing cow dairy in close proximity to the proposed goat dairy CFO.
- The approval officer selectively used or disregarded information from the first application
- Approval officer was not objective

- Approval officer did not provide directly affected parties with application related material they requested and needed to meet the RFR deadline

Any allegation of bias is a serious matter for an entity with a responsibility to the public. As a regulator we understand and embrace the principles that are expected of a quasi-judicial administrative tribunal and regulator. While the Board does not find that the issues identified parties are appropriate issues for the hearing into RA16006, it wants those parties who raised these issues to know that every time such issues are brought to our attention they are taken seriously.

## Decision

As a result of the Board’s deliberations, it has determined that a review is warranted in the form of an oral hearing to consider:

1. Whether the proposed CFO is consistent with the land use provisions of the County of Wetaskiwin’s MDP.
2. Whether the Board should exercise its authority to approve the CFO notwithstanding an inconsistency with the MDP having regard for matters that would normally be considered if a municipal development permit were being issued; and
3. Whether the Approval Officer adequately considered the issue of risk to ground water associated with the possible existence of the “unknown 2<sup>nd</sup> water well”.

## Review Process

The Board proposes that eligible parties to this proceeding include Jos and Dorthy Peters, Lori Bonnard and Ron Westman, Kim A. Taylor, Reg and Cathy Minchau, and Scott Middleton, County of Wetaskiwin, and NRCB approval officer Francisco Echegaray. Any eligible party wishing to submit a written submission must file their submission on or before June 28, 2016.

Board staff will contact the County of Wetaskiwin and request that they consider attending the hearing with a view to speaking to the MDP.

While generally the Board does not expect the approval officer to file submissions in review hearings, the approval officer is invited to file a submission in relation to the “unknown 2<sup>nd</sup> water well.”

Written submissions are to be directed to the attention of Tim Riordan at the Edmonton offices of the NRCB. Following this filing date, the Board will ensure all directly affected parties are provided copies of each other’s submissions.

DATED at EDMONTON, ALBERTA, this 7 day of June, 2016.

*Original signed by:*

---

Vern Hartwell

---

Glenn Selland

---

Jay Nagendran

Contact the Natural Resources Conservation Board at the following offices. Dial 310.0000 to be connected toll free.

**Edmonton Office**

4th Floor, Sterling Place, 9940 - 106 Street  
Edmonton, AB T5K 2N2  
T (780) 422.1977 F (780) 427.0607

**Calgary Office**

19<sup>th</sup> Floor, 250 - 5 Street SW  
Calgary, AB T2P 0R4  
T (403) 297.8269 F (403) 662.3994

**Fairview Office**

Provincial Building, #213, 10209 - 109 Street  
P.O. Box 159, Fairview, AB T0H 1L0  
T (780) 835.7111 F (780) 835.3259

**Lethbridge Office**

Agriculture Centre, 100, 5401 - 1 Avenue S  
Lethbridge, AB T1J 4V6  
T (403) 381.5166 F (403) 381.5806

**Morinville Office**

Provincial Building, #201, 10008 - 107 Street  
Morinville, AB T8R 1L3  
T (780) 939.1212 F (780) 939.3194

**Red Deer Office**

Provincial Building, #303, 4920 - 51 Street  
Red Deer, AB T4N 6K8  
T (403) 340.5241 F (403) 340.5599

NRCB Response Line: 1.866.383.6722

Email: [info@nrcb.ca](mailto:info@nrcb.ca)

Web Address: [www.nrcb.ca](http://www.nrcb.ca)

Copies of the *Agricultural Operation Practices Act* can be obtained from the Queen's Printer at [www.qp.gov.ab.ca](http://www.qp.gov.ab.ca) or through the NRCB website.