



## **BOARD DECISION**

### **RFR 2008-06 / EO 08-07**

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act* in relation to Enforcement Order 08-07

The Hutterian Brethren Church of Three Hills

**December 19, 2008**

## **Background**

On application to the NRCB, the Hutterian Brethren Church of Three Hills (the Operator) received Approval RA03012, dated August 6, 2003, to construct and operate a 250 sow farrow to finish hog facility, 5000 bird layer facility, 2500 bird broiler facility, 120 cow dairy plus dry cows and replacements, and a 1200 head beef finishing feedlot located at SE-01-31-24-W4 in Kneehill County. A 304,889 cubic foot liquid manure storage facility to support the hog and dairy components was included in the facilities approved.

On April 3, 2008, NRCB Inspector Tim Jespersen conducted a site inspection at the Hutterian Brethren Church of Three Hills to ensure compliance matters associated with approval RA03012 had been met. Condition 4(d) of this approval states that:

*“The earthen liquid manure storage (hog and dairy) must include a plastic surface covering for both cell 1 and cell 2.”*

Inspector Jespersen reports that it was confirmed to him during this inspection, and a subsequent inspection on June 12, 2008, that construction of the earthen liquid manure storage facility was completed in the late fall of 2004 and that there had not been any plastic coverings placed over the storage cells.

Inspector Jespersen issued Enforcement Order No. 08-07 on November 6, 2008 ordering that:

*“...Three Hills Colony of Three Hills, Alberta, owners/operators of a confined feeding operation on the Southeast Quarter of Section 01, Township 31, Range 24, West of the 4th Meridian, in the County of Kneehill, in the Province of Alberta shall immediately take measures to comply with and operate in accordance with the terms and condition of permit RA03012. The necessary measures shall include, but are not limited to:*

*Cover earthen liquid manure storage (hog and dairy) cells one and two with a plastic surface covering.*

*Have the plastic covering in place no later than by June 1, 2009.*

*Keep the plastic coverings over cells one and two except during periods of regular maintenance and manure management.”*

A Request for Board Review was filed by Sam S. Wurz on behalf of the Hutterian Brethren Church of Three Hills on December 1, 2008, pursuant to Section 41(1) of the *Agricultural Operation Practices Act (AOPA)*.

The Board convened to deliberate on this matter on December 9, 2008.

## **Jurisdiction**

The Board's authority for considering a request to review an enforcement order is found in Section 41 of *AOPA*, which states:

- 41(1) The Board may, on the request of a person to whom an enforcement order is directed, review and confirm, vary, amend or rescind the enforcement order.*
- (2) An enforcement order takes effect at the time prescribed in the enforcement order and its operation is not suspended by a request for a review, but the*

*Board may, if it thinks fit, suspend the operation of an enforcement order when a review is requested until a decision on the review is rendered.*

- (3) *A written copy of the Board's decision under subsection (1) must be served on the persons to whom the enforcement order that is being reviewed is directed.*

## **Documents Considered**

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

- Request for Board Review filed by the Hutterian Brethren Church of Three Hills, dated November 28, 2008.
- Enforcement Order No. 08-07, dated November 6, 2008.
- Decision Report and Approval RA03012, dated August 6, 2003.

## **Board Deliberations**

As a result of its deliberations, the Board concluded that the issues raised in the Hutterian Brethren Church of Three Hills Request for Board Review were not appropriate to be considered in a review of an enforcement order at this time as other potential remedies have not been exhausted. The Board is exercising its discretion under *AOPA* not to review the enforcement order as requested on the basis that the Hutterian Brethren Church of Three Hills is asking the Board to do indirectly that which it cannot do directly, which is to amend the existing approval on application for review of an enforcement order.

## **Issues**

In its Request for Board Review, the Hutterian Brethren Church of Three Hills asked the Board to:

- Rescind Enforcement Order No. 08-07, thereby reversing the approval officer's decision. In the alternative, amend the enforcement order such that the Hutterian Brethren Church of Three Hills will not be ordered to cover the earthen liquid manure storage facility, but rather be required to construct a wind barrier around the facility and employ other odour and dust containment practices.
- Amend Approval RA03012 such that condition 4(d) reads that the earthen liquid manure storage (hog and dairy) must include an adequate system of fly and dust control which shall require the construction of a wind barrier around the facility and such other measures as may be required.
- Suspend the operation of the enforcement order until a decision on the review is rendered.

Several grounds for this request were included in the Hutterian Brethren Church of Three Hills Request for Board Review. The Hutterian Brethren Church of Three Hills also stated that there was no reasonable cause for the inspector to conduct a site visit as there had been no complaints lodged with the NRCB.

The Board's findings and reasons for decision are described below.

### Rescinding or Amending the Enforcement Order

The Request for Board Review asks that the Board rescind the enforcement order or amend the enforcement order to replace the requirement for plastic surface coverings of the manure storage facilities with a requirement that a wind barrier and other odour and dust containment be employed. The Board notes that neither option would bring the operation into compliance with the terms and conditions of Approval RA03012. In assessing any request to review an enforcement order that refers to the terms and conditions of an approval, the Board believes that it must have full regard for and respect the terms of the approval. While the Board does believe that recipients of an enforcement order should have an opportunity to have access to an NRCB process that provides for consideration of the fairness of the enforcement order, the Board does not believe it extends to these circumstances as the Operator has other options available to address the conditions in its approval. The Operator in this case is not challenging the fairness of the enforcement order, but rather has issues with the terms and conditions contained in an approval it received in 2003. Further, rescinding or amending the enforcement order in the manner requested would not change the content of the approval and consequently the operation could be subject to further enforcement action on the same issue.

### Amending the Approval on Review of Enforcement Order

The Hutterian Brethren Church of Three Hills' Request for Board Review asks the Board to amend condition 4(b) of the approval to remove the obligation to provide plastic covers on the earthen liquid manure storage cells and replace it with a condition providing alternate means of odour, dust and fly control. The Board does not find any authority in the enforcement order review provisions of *AOPA* for an approval to be amended in the manner sought by the Hutterian Brethren Church of Three Hills. *AOPA* provides operators with a process to request a review of any term or condition contained in their approval provided they do so within the timelines specified. Further, *AOPA* provides that an approval holder may apply to an NRCB approval officer for an amendment to their approval.

The Board believes that it must deny the Hutterian Brethren Church of Three Hills Request for Board Review as it does not believe that the enforcement order review process can or should provide relief of the nature sought. This denial does not prejudice any right the Hutterian Brethren Church of Three Hills has to seek an amendment to its approval or any further requests to review this enforcement order on other grounds.

### Reasonable Cause for Inspection

The Hutterian Brethren Church of Three Hills states that that there was no reasonable cause for Inspector Jespersen to conduct site inspections at its operation. As the provincial regulator of confined feedings operations in Alberta, the Board has a responsibility to assure that approved facilities are operated in a manner that is consistent with the Act and Regulations. Public confidence in the Board's regulatory mandate is dependent on Board's actions taken to assure that activities are conducted in accordance with the legislation. While instances of non-compliance are not common, they do occur. Inspections, whether triggered by complaint or on the initiative of the Inspector, are an important component of responsible regulator practice and certainly not unique to the NRCB.

Suspension of the Operation of the Enforcement Order

In light of the Board's decision not to review the enforcement order issued to the Hutterian Brethern Church of Three Hills, it declines to suspend the operation of the enforcement order at this time.

**Decision**

The Board declines to grant a review of Enforcement Order No. 08-07.

DATED at CALGARY, ALBERTA, this 19<sup>th</sup> day of December, 2008.

*Original signed by:*

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**Vern Hartwell, Chair**

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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](http://www.qp.gov.ab.ca) or through the NRCB website.