



BOARD DECISION

RFR 2009-01 / RA07046

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act* in relation to Approval RA07046

Bos Dairy (Gerard and Natalie Bos)

January 13, 2009

Background

NRCB Approval Officer Scott Cunningham issued Decision Summary RA07046 on November 19, 2008. The Decision Summary approved an application made by Gerard and Natalie Bos of Bos Dairy to expand their existing 200-milking cow dairy operation to a 300-milking cow dairy operation at NW 25-47-24 W4 in the County of Wetaskiwin.

A Request for Board Review was filed by Vince Ng, legal counsel on behalf of Warren and Stacey Crow, on December 8, 2008 pursuant to Section 20(5) of the *Agricultural Operation Practices Act (AOPA)*. Mr. Ng's request met the 10-day filing deadline established by *AOPA* and Warren and Stacey Crow were recognized as a directly affected party in Decision Summary RA07046. Following receipt of the request, all directly affected parties were provided a copy of the Request for Board Review and given an opportunity to file a rebuttal. Gerard and Natalie Bos filed a rebuttal on behalf of Bos Dairy on December 17, 2008.

The Board convened to deliberate on this matter on December 19, 2008.

Jurisdiction

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

Documents Considered

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

- Decision Summary and Approval RA07046, dated November 19, 2008.
- Request for Board Review filed by Vince Ng, dated December 8, 2008.
- Rebuttal Submission filed by Gerard and Natalie Bos of Bos Dairy, dated December 17, 2008.

Board Deliberations

As a result of its deliberations, the Board concluded that the issues raised in the Request for Board Review were adequately addressed in the Approval Officer's Decision Summary RA07046. The Board carefully considered each of the concerns outlined in the Request for Board Review, along with the Operator's filed rebuttal, the Decision Summary and Approval RA07046. This report includes a summary of the issues raised and the Board's findings on each matter.

Issues

Mr. Ng's Request for Board Review asked the Board to reverse the Approval Officer's decision. As grounds for the request, Mr. Ng indicated that the application was inconsistent with the County of Wetaskiwin's Municipal Development Plan (MDP) and Land Use Bylaw (LUB) and the Approval Officer failed to properly assess the effects of the application on the environment.

With respect to the prejudice or damage that would result from the Approval Officer's decision, Mr. Ng expressed concern for potential negative financial impact on Warren and Stacey Crow and asserted that the application would hamper their enjoyment of, and development plans for, their land.

The Board's findings relating to each of Mr. Ng's grounds for requesting a review are described in detail below.

Whether the Application is Consistent with the County's MDP and LUB

Mr. Ng's Request for Board Review stated that the Application was inconsistent with the County of Wetaskiwin's Municipal Development Plan (MDP) and Land Use Bylaw (LUB), and that as such, the Approval Officer must deny the application pursuant to s. 20(1)(a) of AOPA.

Section 6.10 of the County's MDP states that: *"In order to prevent disputes between landowners, the County will not normally issue a development permit for a new residence within the Minimum Distance Separation (MDS) of an existing confined feeding operation, unless the residence is associated with the confined feeding operation. This policy may be overridden if there is nowhere else to build on that parcel."*

County of Westaskiwin Land Use Bylaw 95/54 provides that:

12.1 Notwithstanding that use of land may be permitted or discretionary in a land use district

12.1.2 the Development Authority may refuse to issue a development permit, if in the Authority's opinion the site of the proposed building or use is not safe or suitable for the proposed building or use

12.2 A site is deemed unsafe or unsuitable if it:

12.2.13 is closer to a confined feeding operation or manure storage facility than the separation distance set out in the regulations under AOPA

In the Decision Summary, on Pages 7 and 8, the Approval Officer calculated the MDS for both the existing 200 milking cow dairy and the proposed expanded 300 cow dairy. The Approval Officer concluded that the MDS for the expanded dairy in "category 4" which includes

“residences on land zoned for large scale country residential” would be 1079 m. According to the County’s comments on the original application, an Area Structure Plan and Multi-parcel Subdivision Approval were granted on November 15, 2007 on Pt. SE 26-47-24W4, and with the 1079 m MDS, at least 3 of 11 lots in the subdivision will fall within the MDS radius thereby triggering the County setback under section 12 of the LUB.

In considering this issue, the Board must determine whether the Approval Officer correctly calculated the MDS for the proposed dairy expansion and applied section 20(1)(a) of *AOPA* which states that *“if ... there is an inconsistency with the municipal development plan land use provisions, the approval officer must deny the application.”*

The Board finds that the Approval Officer correctly assessed the MDS in relation to this Application. The Board observes that the Bos Dairy application was received by the NRCB on October 26, 2007 and therefore this is the proper date that the MDS in relation to neighbouring residences was established (*AOPA, Standards and Administration Regulation, Section 3(2)*). The Bos Dairy application was filed prior to the County of Wetaskiwin’s approval of the subdivision, and the Board agrees that the Approval Officer’s finding that the Application was consistent with the County’s MDP at the time it was made.

The Board finds that the Approval Officer correctly assessed the MDP and other municipal documents in relation to this application. The Board notes that the MDS is measured from the manure storage area of a confined feeding operation to an existing residence, not a potential residence. The Board further observes that the provisions of *AOPA* do not restrict the construction of residences within an established MDS; however, anyone building within an MDS must accept the normal impacts of living close to a confined feeding operation. In this case, the restriction on the development of residences within the MDS is created by the operation of the County of Wetaskiwin’s MDP and LUB. Any potential financial loss to the Crows, due to their inability to develop their land as planned, would arise from the regulatory actions of the County, not the Approval Officer’s decision to approve the Bos Dairy expansion under *AOPA*.

Whether the Approval Officer Appropriately Considered the Effects on the Environment

In his Request for Board Review, Mr. Ng contended that the Approval Officer failed to fully consider the effects on the environment when assessing the Application. In support of this view, Mr. Ng noted that the applicant had not applied for a water licence from Alberta Environment and further that *“... Alberta Environment has not been able to fully canvass the impact this application has on the environment with the Approval Officer.”*

On Page 5 of Decision Summary RA07046 the Approval Officer noted that the applicant chose not to couple the *AOPA* application with an application for a water license from Alberta Environment. On Page 17, the Approval Officer addressed effects on the environment noting that he *“reviewed the application and determined that it does meet the requirements for confined feeding operations as established in the regulations. The application meets or exceeds the requirements set out in AOPA and its associated regulations and therefore the effects on the environment will be within the scope of allowable effects on the environment.”*

With respect to the water licence issue, the Board acknowledges that the applicants chose to decouple their water licence application from the approval application under *AOPA*. This means the applicants will separately pursue their water license from Alberta Environment, outside of the NRCB’s decision-making process. Since the applicant’s water licence application was

separated from the NRCB's process, the Board does not maintain jurisdiction to address this issue. The Board therefore finds that the Approval Officer adequately addressed this matter in his Decision Summary.

Regarding the assessment of environmental effects, the Board believes that Mr. Ng's statement "... *Alberta Environment has not been able to fully canvass the impact this Application has on the environment with the Approval Officer*" may stem from a misunderstanding of Alberta Environment's limited role in relation to the NRCB's application process. Although Alberta Environment administers water license applications associated with CFOs, it is not the department's role to assess the potential environmental impacts of CFO applications before the NRCB. Under the jurisdiction of *AOPA*, it is the Approval Officer's role to assess CFO applications, including their associated effects on the environment.

Decision Summary RA07046 provides the Approval Officer's assessment that the application meets the legislative requirements and the report includes responses to specific issues raised in the Statements of Concern filed during the application process. The Board notes that Page 14 includes the Approval Officer's considerations regarding the location of completed water wells on the site, to ensure protection of the aquifer. Similarly, Page 15 details the construction requirements for the compacted clay liner in the new dairy barn, to ensure adequate groundwater protection.

Before an approval is issued, applicants must duly demonstrate the ability to meet all regulatory requirements under *AOPA*. The Board believes that meeting these requirements does provide adequate protections to the environment. The Board concludes that the Approval Officer adequately addressed this matter in Decision Summary RA07046.

Decision

The Board carefully considered each of the concerns outlined in the Request for Board Review, along with the operator's filed rebuttal, the Decision Summary and Approval RA07046. The Board concludes that the Approval Officer adequately addressed the issues raised in Mr. Ng's Request for Board Review of Decision Summary and Approval RA07046. The Board therefore denies the Request for Board Review filed on behalf of Warren and Stacey Crow.

DATED at CALGARY, ALBERTA, this 13th day of January, 2009.

Original signed by:

Vern Hartwell, Chair

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

3rd Floor, 640 - 5 Avenue S.W.
Calgary, AB T2P 3G4
T (403) 662.3990 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.gov.ab.ca

Web Address: www.nrcb.gov.ab.ca

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.