



BOARD DECISION

2015-01 / LA13018

Review of Decision Summary LA13018

Folsom Dairy Ltd.

January 14, 2015

Background

On August 8, 2014, NRCB Approval Officer, Carina Weisbach issued Decision Summary LA13018, which denied an application made by Folsom Dairy Ltd. to expand its existing dairy operation. The expansion application was to increase Folsom Dairy Ltd.'s livestock numbers from 238 to 600 milking cows (plus associated dries and replacements), to construct a new earthen liquid manure storage (EMS) and to expand the dairy barn at its confined feeding operation (CFO) located at SE 19-04-27 W4M in Cardston County.

Decision Summary LA13018 listed factors that the Approval Officer considered, including a determination that the proposed development met the *Agricultural Operation Practices Act (AOPA)* groundwater protection and nutrient management requirements. However, the application was denied given that the Approval Officer concluded the proposed expansion did not meet *AOPA*'s minimum distance separation (MDS) requirement, was inconsistent with the land use provisions of Cardston County's Municipal Development Plan (MDP) and Land Use Bylaw (LUB), had the potential to pose a negative effect on the community (due to its inconsistency with urban fringe setback requirements) and was not considered to be an "appropriate use of land" due to its inconsistency with the MDP.

On August 29, 2014, Folsom Dairy Ltd. filed a Request for Board Review of Decision Summary and Approval LA13018, meeting the 10-day filing deadline established by *AOPA*. Folsom Dairy Ltd.'s request asked the Board to reverse the Approval Officer's decision, stating that it had obtained a missing waiver in order to satisfy the MDS requirement and had received supporting letters from Cardston County and the Village of Hill Spring, waiving the 1.6 km urban fringe setback requirement.

The Board issued a notice to all interested parties on September 2, 2014 granting a rebuttal opportunity for those who believed they would be adversely affected by the positions presented in Folsom Dairy Ltd.'s Request for Board Review. In response, the Board received ten replies from the following directly affected parties: 1) Monty Gibb; 2) Martha Paridaen; 3) Scott Young; 4) Jesse McCollister; 5) Fred Rice, United Irrigation District (UID); 6) Robert Wynder; 7) Gail Workman; 8) Ellen Brooks and Linda Smith; 9) Peter Whitford; and, 10) Michael and Jami Gibb.

The Board met on September 10, 11, 16, 24 and 25, 2014 to deliberate on the Request for Board Review. In its decision issued on September 26, 2014 (Board Decision RFR 2014-03/LA13018), the Board granted a review of Decision Summary LA13018 and scheduled a two-day oral hearing. While originally set for December 3 & 4, 2014 the hearing dates were later revised to December 1 & 2, 2014, in order to best accommodate participation by directly affected parties.

In Board Decision RFR 2014-03/LA13018, the Board specified that the review hearing was warranted to consider whether the applicant satisfied the MDS requirement; whether the proposed expansion was consistent with setback provisions in Cardston County's MDP; whether the Board should exercise its authority to approve the expansion notwithstanding an inconsistency with the MDP; and the potential risk to surface water associated with existing pens located immediately south of the UID irrigation canal and the related response required. Parties to the review were asked to file hearing submissions addressing these matters. A written submission deadline of October 22, 2014 was originally set, but later extended to November 14, 2014 to accommodate additional time required by Cardston County.

Twelve hearing submissions were submitted by the November 14, 2014 filing deadline by: 1) NRCB Approval Officer; 2) NRCB Field Services; 3) Cardston County; 4) Village of Hill Spring; 5) United Irrigation District; 6) Martha Paridaen; 7) Peter Whitford; 8) Monty & Aileen Gibb – who also represented Ellen Brooks, Linda Smith, Michael and Jami Gibb; 9) Jesse McCollister; 10) Scott Young; 11) Chad Folsom of Folsom Dairy Ltd.; and, 12) Richard Hornby. All of these parties had standing to participate in the hearing, with the exception of Richard Hornby. (Although Mr. Hornby is a close neighbour to Folsom Dairy Ltd., he had not previously obtained directly affected status by filing a statement of concern with the Approval Officer, he did not file a request for the Board to reconsider his status, nor did he attend the hearing to address his standing with the Board).

A Board Panel (the Panel or the Board) consisting of Vern Hartwell (Panel Chair), Jim Turner and Donna Tingley was appointed to conduct the review. The hearing was conducted on December 1 & 2, 2014 at the Heritage Inn Hotel and Convention Centre in Pincher Creek. Parties to the review and their representatives are identified below:

Parties to the Review	Counsel/Representative
NRCB Approval Officer and Field Services <ul style="list-style-type: none"> • Carina Weisbach, Approval Officer • Kevin Seward, Inspector • Andy Cumming, Director Field Services - Applications 	Mike Wenig, Counsel
Cardston County <ul style="list-style-type: none"> • Fred Lacey, Reeve • Mike Burla, Planner for the Oldman River Regional Services Commission • Josh Bourelle, Director of Planning Services 	Fred Lacey, Reeve
Folsom Dairy Ltd. <ul style="list-style-type: none"> • Chad Folsom • Lynn Folsom • Jim Folsom 	Chad Folsom
United Irrigation District	Craig Smith, Assistant Manager
Monty and Aileen Gibb (also representing Ellen Brooks and Linda Smith, Michael and Jami Gibb)	Monty Gibb
Martha Paridaen	Martha Paridaen
Peter Whitford	Peter Whitford
Scott Young	Scott Young

Bill Kennedy participated in the hearing as General Counsel to the Board. Additional staff support was provided by Susan Whittaker, Board Reviews Manager.

The Board conducted a site visit on December 1, 2014 that allowed it to observe the lay of the land surrounding Folsom Dairy Ltd.'s operation, as well as its proximity to the village, surrounding neighbours, and other physical features.

This report provides the Panel's decision following its review of Decision Summary LA13018.

Issues

The review hearing set the following matters for the Board's consideration:

1. Whether the applicant satisfied the minimum distance separation (MDS) requirement;
2. Whether the proposed expansion is consistent with the setback provisions included in Cardston County's Municipal Development Plan, including:
 - a) the interpretation of language contained in both the MDP and Land Use Bylaw to determine whether the expansion is indeed prohibited;
 - b) whether the MDP incorporates the relevant provisions of the Land Use Bylaw (AOPA provisions direct the Board to consider the MDP rather than other municipal instruments); and
 - c) what process is required for Cardston County to waive provisions in its MDP and what role does the Village of Hill Spring have in that process;
3. Whether the Board should exercise its authority to approve the expansion notwithstanding an inconsistency with the MDP having regard for matters that would normally be considered if a municipal development permit were being issued, and considering the effects on the environment, the economy and the community and the appropriate use of land;
4. What is the potential risk to surface water associated with the existing dry/heifer pens located immediately south of the UID irrigation canal and what response is required.

Board Decision

Preliminary Matters

In its written submission, Folsom Dairy Ltd. (Folsom) asked the Panel to address two new issues: one, whether the NRCB had correctly determined the capacity of the dairy in its 2009 permitting decision granting an Authorization to Folsom and two, whether the Panel would "officially declare" certain seasonal corrals to be a "seasonal feeding and bedding site" as defined in s. 1(i) of *AOPA*.

Prior to the commencement of the oral hearing, the Panel, through its legal counsel, informed Folsom that it was not prepared to review the dairy's grandfathered capacity, that being the capacity of the confined feeding operation (CFO) as it existed on January 1, 2002, when *AOPA* came into force. The reason was that the issue of grandfathered capacity was not a matter considered in Decision Summary LA13018, nor was it raised in the Folsom Request for Review. While the issue was nevertheless raised by Folsom's witnesses throughout the hearing, to be clear, the Panel makes no decision concerning Folsom's grandfathered capacity.

Likewise, the status of certain seasonal heifer pens located to the south of the irrigation canal was not dealt with in Decision Summary LA13018 nor in the Folsom Request for a Board Review. Accordingly, this was not an issue identified for this review and the Panel declines to make a finding on whether these pens constitute seasonal feeding and bedding sites under the Act. Nevertheless, it should be noted that at the outset of the hearing, counsel for the Approval Officer suggested that the Field Services Division of the NRCB would be willing to meet with Folsom to discuss reclassifying the seasonal heifer pens. This would be an appropriate forum to discuss this issue should it remain a concern for Folsom.

Minimum Distance Separation

Whether the proposed Folsom Dairy expansion satisfies the statutory minimum distance separation (MDS) between the CFO and nearby residences was an important issue for this review.

S. 3(1) of the *Standards and Administration Regulation* under *AOPA* prohibits an Approval Officer and the Board from issuing a permit unless the MDS complies with the requirements of the regulation. The regulation prescribes the method for calculating the MDS and establishes specific situations where the MDS can be varied or otherwise does not apply. Of relevance in this case is s. 3(6) which states that the MDS will not apply to a residence within the MDS if the owner of the residence provides a written waiver of the MDS requirements.

According to Decision Summary LA13018, the result of the Approval Officer's MDS calculation was a finding that 55 residences, owned or co-owned by eighty-three people, were located within the Folsom MDS. Following completion of the Folsom application to the NRCB, but before the issuance of the Approval Officer's Decision, there was some toing and froing over the required waivers. As described in Decision Summary LA13018, initially the applicant obtained signed MDS waiver documents from owners of all 55 residences although two of the waivers were conditional. Next, five owners withdrew their waivers on the basis that they had incorrect or incomplete information about the proposed expansion. New waivers were subsequently signed by the owners of the five residences, but those waivers were also conditional. Because the Approval Officer determined that three of the five conditions included in the waivers were not enforceable by the NRCB, she concluded that the conditional waivers were invalid and notified the owners. Eventually, the Approval Officer received unconditional, signed waivers from all but one of the owners of the residences within the MDS. With one waiver still outstanding, based on the requirements of *AOPA* and the regulation, the Approval Officer correctly denied Folsom application for failure to meet the MDS requirement.

In its decision to hold a review, the Board concluded that an issue for consideration was whether the applicant satisfied the MDS requirement. As part of its written submission to the hearing, Folsom provided new evidence to the Panel, being an MDS waiver signed by Richard Hornby and Kathryn Hornby, dated August 25, 2014. (Exhibit 18, Attachment A) In oral testimony, the Approval Officer conceded that Folsom had now provided the NRCB with 100% of the MDS waivers required.

The Panel is satisfied, based on the calculations included in Appendix B of the Approval Officer's Decision Summary, and the map provided at the hearing in the package identified as Exhibit 19, referred to as "Google 5," that the Approval Officer correctly calculated the MDS applicable to Folsom and properly identified the residences within the MDS where waivers were needed. Notably, no participants in the Board review process raised concerns about these calculations. Accordingly, it is the Panel's decision that based on reliable evidence that the last outstanding

waiver required from residences in the MDS has now been signed, the Folsom application meets the required MDS.

Cardston County Planning Documents

The Folsom Dairy is located in Cardston County near the Village of Hill Spring. Considerable time and effort in the written submissions and at the hearing was devoted to a discussion of the contents of two Cardston County documents, the Municipal Development Plan (MDP) and the Land Use Bylaw (LUB), their interpretation and application to the proposed Folsom expansion. In deciding to undertake a review of Decision Summary LA13018, the Board set out several questions for hearing participants concerning the interpretation of the MDP and LUB, the relationship of the two and whether the County could waive relevant provisions of these documents.

This issue arises from s. 20(1) of *AOPA* which states that an Approval Officer, when considering an application for an approval, must deny the application if there is an inconsistency with the land use provisions of the municipal development plan. The Board's authority in relation to a municipal development plan is not the same as an Approval Officer's; under s. 25(4)(g) of *AOPA*, when undertaking a review, the Board "*must have regard to, but is not bound by, the municipal development plan.*" In the Panel's view, there is a logical reason for this difference. The Legislature, when it enacted *AOPA*, tacitly acknowledged the continuing role for rural municipalities in identifying policies on the suitability of CFOs in certain areas in their jurisdiction, as expressed in land use provisions in their respective municipal development plans. The Act requires Approval Officers, who are employees of the NRCB, to give effect to these provisions. The Board, however, which consists of members appointed by provincial Order in Council, and which has overall responsibility for the implementation of *AOPA*, is assigned the weighty responsibility of considering, but not necessarily following, a municipal development plan duly enacted by locally elected municipal politicians.

In Decision Summary LA13018, the Approval Officer concluded that the Folsom application was inconsistent with the Cardston County MDP and "associated land use bylaw" because the proposed expansion was within a development setback in the LUB. Hence, the considerable attention paid by the hearing participants to the Cardston County MDP and LUB.

On its face, *AOPA* requires an NRCB Approval Officer to determine whether an approval application is consistent with the land use provisions of a municipal development plan, not a land use bylaw. In this instance, the Approval Officer's rationale for also considering the land use bylaw in her analysis and reasoning is set out in Appendix C to the Decision Summary, supplemented by NRCB Field Services' written submission to the hearing (Exhibit 8).

In essence, the Approval Officer concluded that the Cardston County MDP cross-referenced the County's LUB and basically deferred to the LUB to fulfil the MDP's own high level planning objectives. More specifically, the Approval Officer observed that the MDP makes few specific references to ILOs ("intensive livestock operations", which was the term for CFOs before *AOPA* was enacted). Accordingly, the Approval Officer cited broad provisions in the MDP having to do with avoiding land use conflicts, balancing land use needs, coordinating land use decisions with smaller municipalities, protecting rural lands in the fringe area and referring applications within the 1 mile urban fringe to adjacent municipalities for comment. With respect to the LUB, the Approval Officer focused on s. 8.4(c) which says that "*an application to locate or expand an intensive livestock operation shall not be recommended for approval ... less than 1.6 km (1 mile) from a ...village.*" S. 8.4(c) was key as if the Cardston County LUB were to be

considered part of the County's MDP for the purpose of the Approval Officer's assessment, the expanded Folsom CFO would be within a CFO exclusion zone.

In support of her conclusion regarding the LUB, the Approval Officer also referred to a previous decision of this Board which found that an Approval Officer was entitled to consider an intermunicipal development plan in their consistency determination if it was adopted by reference by the MDP. The written submission of the Field Services Division at this hearing provided additional authority and concluded that "*logically, this adoption-by-reference approach should also apply to land use bylaws that are sufficiently referenced in MDPs to essentially become 'part' of the MDPs.*"

Cardston County, in its written submission, made a number of arguments why its LUB should not be considered by the Panel in determining whether the proposed Folsom expansion is consistent with the MDP. It pointed out that both the MDP and LUB were passed in 1999 and 1998 respectively, when the County was responsible for regulating ILOs (now called CFOs). Accordingly, the Panel would need to determine the weight to be given to the LUB given that the County no longer regulates CFOs. The County also argued that suggesting that an MDP incorporates relevant provisions of an LUB is actually an "*inversion of the established relationship of planning documents....the hierarchy of planning documents is that the Land Use Bylaw is where the rules are established to reflect and implement the goals and vision of the MDP to be in a position to address day to day activities in the County.*"

The Panel sympathizes with the Approval Officer; when directed by AOPA to determine whether an application for a permit under the Act is consistent with the land use provisions of an MDP, it can be expected that the Approval Officer will examine the various provisions in the MDP with a great deal of care. The Cardston County MDP is especially challenging as it was enacted before AOPA and has not been updated to account for the new regulatory regime for CFOs in Alberta. As well, curiously, the LUB was passed the year before the MDP. In the end, the Approval Officer, and indeed this Panel, found nothing in the Cardston County MDP expressly dealing with the siting of CFOs. In contrast, the County's LUB establishes a setback for a new or expanded ILO from a village of 1.6 km. In the Panel's experience undertaking reviews of MDPs, this is the type of provision that has been included in the plans of municipalities that have updated their MDPs since the enactment of AOPA. However, in order to give effect to this section in the LUB, the Approval Officer needed to link it to the MDP which she is bound by statute to implement.

The Panel has carefully considered the Approval Officer's reasoning and respectfully disagrees with the conclusion that the Cardston County's LUB has been adopted by reference by the MDP and can be used to decide whether the proposed expansion is consistent with the MDP's land use provisions. The Panel's understanding of the hierarchy of municipal planning documents in Alberta is similar to that asserted by the County which is that the MDP is a broad planning document that sets out the long term vision for land use in the municipality. It is a statutory plan under the *Municipal Government Act (MGA)*. The LUB, on the other hand, contains the specific rules and regulations regarding the use and development of land and buildings in a municipality. It is not a statutory plan under the *MGA* and must comply with the provisions of the MDP and other statutory plans. While this Panel is aware of previous decisions by the NRCB concluding that the provisions of statutory plans had been incorporated into an MDP, it would take the clearest wording and intention, combined with a transparent and cogent rationale, for this Panel to conclude that the LUB was incorporated by reference into the MDP. This standard was not met in the case of the Cardston County MDP and LUB and accordingly,

the Panel does not find that the MDP has referentially incorporated relevant provisions of the LUB.

Impact on the Community and Appropriate Use of Land

S. 20(1)(b)(ix) of AOPA directs an Approval Officer to consider the effects on “*the environment, the economy and the community and the appropriate use of land*” when considering an application for an approval. Under s. 25(1)(4)(k), the Board has exactly the same obligation when undertaking a review of a decision on an approval. In applying this section, the Approval Officer concluded that the proposed Folsom expansion had “*the potential to pose a negative effect on the community because it is inconsistent with the urban fringe setback requirements in the land use provisions of Cardston County’s MDP and associated land use bylaw*” and is not considered to be an ‘appropriate use of land’ due to the inconsistency with the MDP and the LUB.

In determining whether in the Panel’s view the Approval Officer assessed these statutory criteria correctly, the Panel finds itself looking at the Cardston County MDP and LUB once again, although this time from a different angle. In the Panel’s view, it is entirely appropriate for the Approval Officer to look to the County’s municipal planning documents, including the LUB, as an indicator of the appropriateness of the proposed CFO expansion on land use and more generally its impact on the community. Although the two statutory criteria are related and possibly even overlapping, the Panel finds that the assessment of the “impact on the community” is the broader consideration which takes into account the totality of the impacts, both positive and negative, on the citizens living and working in proximity to the CFO. According, “impact on the community” is the focus of the Panel’s consideration.

As noted earlier, the Cardston County LUB provides in s. 8.4(c) that “*an application to locate or expand an intensive livestock operation shall not be recommended for approval ... less than 1.6 km (1 mile) from a ...village.*” The Folsom operation is closer than 1.6 km from the Village of Hill Spring, and accordingly, any expansion would offend this provision. However, following the issuance of Decision Summary LA13018 on August 8, 2014, on August 25, 2014 Cardston County purported to waive this requirement at a meeting of its Municipal Planning Commission. This development was brought to the Panel’s attention initially in the Folsom RFR and discussed at length at the oral hearing. The County waiver was not considered by the Approval Officer as it was effected after the issuance of her Decision Summary; however, it is a relevant consideration for the Panel in determining the applicability of the LUB provision.

By letter dated August 26, 2014, the County informed the Approval Officer that it had “*waived the setback requirement of 1.6 km, as found in section 8.4(c) of the agricultural land use district in Schedule 2, for this application*” (Exhibit 18, Attachment D). Correspondence also provided by Folsom confirmed that the County wrote to the Village of Hill Spring asking whether it would concur with a potential County decision to waive the 1.6 km ILO setback from the Village and the Village’s subsequent indication of support. That much is clear to the Panel. However, the County’s evidence about its process in effecting the waiver was less straightforward.

Notably, in its written submission to the NRCB (Exhibit 9), the County asserted that its authority to waive the setback provision rested on s. 640(6) of the *Municipal Government Act (MGA)* and s. 40(1) of the Cardston County LUB. In oral testimony, the County added s. 5.1.4 of the Cardston County MDP as a basis for waiving the setback. As for the process followed by the County in enacting the waiver, a County witness confirmed that there was no advance public notice of the Folsom application for a waiver of the setback. The County explained that it did

not specifically notify the neighbours since the Folsom application did not require a County development permit. Based on an information meeting held in June and general discussion in the community about the proposed expansion, the County believed it had the input required. As for its reasons for approving the waiver, the County's witness testified that its number one focus was the promotion of agriculture. While the County was aware of concerns about the Folsom expansion, it viewed the proposal as an important economic driver for the area and expected that the CFO would meet current standards and improvements in the CFO would address operational concerns raised by some neighbours.

It is beyond the jurisdiction of the NRCB and this Panel to rule on the validity of the Cardston County's waiver of the CFO setback in its LUB. The NRCB does not have the authority under *AOPA* to either strike down or uphold the waiver. Rather, the Panel views the LUB as one measure of the acceptability of the Folsom expansion in relation to its potential impact on the community and appropriate land use and is assessing the waiver in this context.

Based on the County's written and oral evidence, the Panel is convinced of its unconditional political support for the Folsom expansion based on anticipated economic benefits. Whether the Panel is equally convinced of the soundness of the County's efforts to legally waive the 1.6 km setback in its LUB is a separate question. While the Panel was informed that the County took a flexible, common sense approach to interpreting the LUB, the Panel observes that the County made minimal effort to take into account the views of the community when considering the Folsom waiver application as required by its own bylaws.

The Panel notes that s. 640(6) of the *MGA* empowers a municipality to include a waiver provision in its LUB on certain conditions, and under this authority, s. 40(1) of the Cardston County LUB authorizes the Municipal Planning Commission (MPC) to decide on a development application notwithstanding that it does not comply with the bylaw if in its opinion, "*the proposed development would not unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use of enjoyment or value of neighbouring properties...*". In addition, s. 5.1.4 of the Cardston County MDP, suggested at the hearing by a County witness as the basis for the setback waiver, establishes criteria for waiving "*strict adherence to minimum parcel size and measurable standards*" including, amongst other things, "*the effect of the variance would not, in the council's or authority's opinion, harm the agricultural potential or adjacent land uses in the area.*" In short, the County could only waive a requirement of its LUB (or MDP) if the waiver would not harm the neighbours' use and enjoyment of their land.

The County provided no evidence to the Panel establishing that it had considered its own mandatory statutory criteria concerning community impact before adopting the Folsom waiver. Indeed, the Panel concludes that the only time the County reached out to the broader community was at a June 4, 2014 public meeting, which it characterized in oral testimony as an "open house," where information about the proposed Folsom expansion was provided.

In the Panel's view, the County's action on August 25, 2014 to waive the setback in its LUB as it applied to the Folsom expansion was a hasty response to the Approval Officer's denial of the Folsom application to the NRCB to expand its CFO. The Panel was provided with little evidence that the County considered its statutory criteria in granting the waiver, especially concerning the impact of the waiver on the neighbours. Accordingly, the Panel will give no weight to the County's efforts to waive the setback in its LUB, although the Panel is cognizant of its intention.

To conclude this section, while the Panel did not consider the Cardston County LUB to have been referentially incorporated in the MDP, it does view s. 8.4(c) of the LUB as the County's

formal expression of an appropriate setback between a CFO and the Village of Hill Spring, in the context of considering the impact of the Folsom expansion on the community.

Neighbours' Concerns

Some neighbours supported the proposed Folsom expansion and some neighbours were opposed to it. As noted earlier in this decision, each resident living within the MDS provided Folsom with a written MDS waiver, meaning that they were in agreement with the expanded dairy being located closer to their residences than otherwise would be permitted under *AOPA*. The Cardston County and Village of Hill Spring (Exhibit 10) Councils were also supportive of the expansion.

Nevertheless, there were individuals, considered “directly affected parties” under *AOPA* who were opposed to the Folsom expansion application. While comparatively few in number, those individuals prepared written submissions and participated in the oral hearing, setting out their views and testing the evidence of the other parties. Without exception, their submissions were thoughtful and respectfully presented. The Folsom witnesses countered that the vast majority of those who were directly affected by their application were supportive of the expansion, as demonstrated either by their providing an MDS waiver or not objecting to the application. The Panel appreciates this viewpoint, but must point out that its process is not one where it calculates the numbers for and against and decides in favour of the party with the most supporters. Rather, every submission by a party opposing the application is considered carefully to determine whether there are individual and community interests that will be harmed by it.

The following is a summary of the main issues raised before the Panel about the Folsom application by directly affected parties:

- Proximity to the Village of Hill Spring
- Decrease in property values
- Quality of life compromised by noise, odour, flies and potential pathogens from the CFO
- Potential contamination of shallow groundwater
- Contamination of the irrigation canal
- Monitoring of manure application and groundwater quality
- Disposal of dead stock
- Compliance with existing requirements
- Overstatement of the economic benefits of the CFO expansion

These issues are similar to those raised by these same, plus other directly affected parties, in statements of concern submitted to the Approval Officer before the issuance of Decision Summary LA13018. The issues were addressed by the Approval Officer in her Decision Summary; they were also considered by the Board in RFR 2014-03/LA13018 where it decided to proceed to an oral hearing on specified questions. In that decision, the Board concluded that the technical issues raised by parties requesting a review concerning the impact of the CFO on the community and the environment had been adequately addressed by the Approval Officer, with one exception discussed in the next section below. However, in the same decision, the Board invited hearing participants to provide submissions on the effects of the Folsom application on the environment, the economy and the community and the appropriate use of land “*as well as argument as to how the Board should balance those components in reaching a decision.*” It is in this context that this Panel considers the issues raised by the hearing participants opposed to the CFO expansion.

It will be a rare instance where an NRCB Panel will consider rejecting an application for an approval under *AOPA* on the basis of its impact on the community and appropriate use of land, where the application otherwise complies with the technical requirements in the Act and regulations. However, the Panel is of the opinion that there can be a situation where a combination of factors viewed in their totality, gives rise to a concern about the potential impact of a new or expanded CFO. This is such a case. The Panel is of the view that the Legislature, in enacting *AOPA*, provided Approval Officers, and a Board Panel undertaking a review, with a failsafe provision where broad community interests could be considered separately from and in addition to the technical requirements in the Act. The Folsom application represents a unique combination of factors leading to this Panel's concern based on the submissions from directly affected parties and the County's LUB: close proximity to an established community, past compliance and management issues and proximity to an irrigation canal.

Having become aware of community concerns, in its written submission to the Panel and during the hearing itself, witnesses for Folsom made several commitments to respond to those concerns including to:

1. Use a direct injection manure applicator for all liquid manure
2. Install a composter digester
3. Install automatic alley scrapers to remove and deal with manure in a timely manner
4. Use lights with timers in the new facility
5. Use a rendering truck service to pick up any dead stock

During the hearing, the witness for Folsom committed to complete the construction of the new facilities by October 2017.

Having considered the concerns raised by directly affected parties, it is the view of the Panel that these commitments represent significant improvements to the Folsom application, especially when combined with plans to construct a modern dairy barn and a larger earthen manure storage lagoon big enough to store 9 months of manure. While the CFO will still be in close proximity to the Village of Hill Spring, the nuisance impacts on the community and potential environmental effects from the operation will be reduced in the Panel's view.

Based on the Folsom commitments, the Panel is prepared to find that the proposed expansion is not an inappropriate use of land and the impact of the CFO on the community will be reduced to an acceptable level. Whether the Folsom dairy underwent an expansion, it would continue to be a part of the Hill Spring community with the inevitable impacts associated with a dairy CFO; it is the Panel's view that while an expanded dairy will house more animals, the modernization of facilities, equipment and management will lead to noticeable improvements.

The Panel notes that the United Irrigation District (UID) provided a written submission to the Panel and appeared at the hearing. The written submission (Exhibit 11) reported that the UID had entered into an agreement with Folsom dated September 5, 2014, and it was stated in oral testimony that there has been compliance with the agreement thus far. The written submission also noted the importance of implementing a storm management plan. The Panel understands that the *Folsom Dairy Storm Runoff Evaluation* prepared by Wilde Bros. Engineering Ltd., dated November 13, 2014, submitted by Folsom as Exhibit 18, Attachment G, constitutes such a storm management plan, and the Panel expects that Folsom and the UID will work with NRCB Field Services to support its implementation.

The Panel acknowledges the additional concerns raised by directly affected parties about potential impacts of the expanded Folsom CFO on groundwater and surface water quality. The Panel was not, however, provided with evidence in this regard that would effectively challenge the conclusions of the Approval Officer in Decision Summary LA13018 that the proposed development meets *AOPA* groundwater protection requirements for the design of floors and liners of manure collection and storage areas and *AOPA*'s nutrient management requirements regarding the land application of manure. Should issues arise concerning compliance, they would be a matter for the NRCB's Field Services Compliance Division.

Risk to Surface Water from Dry/Heifer Pens

In RFR 2014-03/LA13018, the Board identified as issue 4: "*what is the potential risk to surface water associated with the existing dry/heifer pens located immediately south of the UID irrigation canal and what response is required?*" This issue arose from the Approval Officer's finding in Decision Summary LA13018 that these pens give rise to surface water runoff concerns. The issue was referred to an NRCB inspector for further assessment and remedial action if required. Given the possibility that the Board's review could result in a reversal of the Approval Officer's decision to deny the Folsom application, the Board required assurance that this issue was being adequately addressed.

This issue was answered directly in the Approval Officer's written submission (Exhibit 7) as follows:

"I referred the matter to Inspector Seward, rather than address the concerns in a permit condition, simply because I was not issuing a new permit. My understanding is that the runoff risk has now been mitigated to Inspector Seward's satisfaction, by the operator's construction of a berm. Based on this remedy, the dry cow/heifer pens would likely be considered to pose a low risk of surface runoff, if I re-assess that risk under the NRCB's Environmental Risk Screening Tool."

With this information, the Panel is satisfied that this issue has been adequately addressed.

Conclusion

Following is a short summary of the conclusions reached by the Panel to this point:

1. The Panel has declined to hear two issues raised by Folsom, being the capacity of the dairy in 2009 and whether certain corrals were "seasonal feeding and bedding sites" under *AOPA*, as they had not been raised by Folsom in the Request for Board Review and were not identified as relevant issues by the Board.
2. Based on reliable evidence that the last outstanding waiver required from residences in the MDS has now been signed, the Folsom application now meets the required *AOPA* MDS.
3. The Panel could identify no provisions in the Cardston County MDP providing clear direction on the siting of CFOs.
4. The Panel respectfully disagrees with the Approval Officer's conclusion that the Cardston County's LUB has been adopted by reference and can be used to decide whether the proposed expansion is consistent with the MDPs land use provisions.
5. Nevertheless, the Panel considered the County's LUB in the context of determining the Folsom expansion's impact on the community and whether it represented an appropriate use of land. While cognizant of the County's intention to waive the CFO setback in its

LUB, the Panel will not interpret the waiver as binding due to apparent procedural gaps in its enactment.

6. Having considered the concerns raised by directly affected parties, the Panel concludes that Folsom commitments made after Decision Summary LA13018 was issued, represent significant improvements to the Folsom application, especially when combined with plans to construct a new modern dairy barn and a larger earthen manure storage lagoon big enough to store 9 months of manure.
7. Based on the Folsom commitments, the Panel is prepared to find that the proposed expansion is not an inappropriate use of land and the impact of the CFO on the community will be reduced to an acceptable level.
8. The Panel is satisfied that the potential risk to surface water associated with the existing dry/heifer pens located immediately south of the UID irrigation canal has been addressed through the construction of a berm following the involvement of NRCB Inspector Seward.

This review was established to review Approval Officer Decision Summary LA13018, focusing on four specific questions set by the Board. The review was complicated by the fact that certain events occurred after the issuance of the Approval Officer's decision, intended to rectify the conditions that had led the Approval Officer to deny the Folsom approval in the first instance. Those factors were the production of the final missing MDS waiver and the County's purported waiver of the CFO setback in its LUB. In addition, to its credit, Folsom made additional commitments in its written submission, and more firmly in its oral testimony, to implement certain specific improvements in its facilities and operation, to address the concerns of directly affected parties. The Panel accepted evidence of each of these developments and considered them in coming to a decision.

With the receipt of the final MDS waiver, the Folsom application is now compliant with *AOPA* MDS requirements. Without this waiver, the expansion could not have proceeded. The Panel also acknowledges the fact that every one of the 55 residences within the MDS, being those who will be most directly affected by the CFO expansion, provided a written MDS waiver to the NRCB. The Panel finds that that this is strong, though not conclusive, evidence of community support for the application. The apparent support of the elected Councils of Cardston County and the Village of Hill Spring also provides weight to this finding.

Nevertheless, the issues raised by the directly affected parties were of concern to the Panel and combined, raised questions as to whether the CFO expansion would cause a negative impact on the community. The Panel concludes, however, that the Folsom commitments to further improve its facilities and operations will be sufficient to allow the Panel to approve this application.

Accordingly, the Panel directs the Approval Officer to issue an approval to Folsom on the condition that it:

1. Use a direct injection manure applicator for all liquid manure
2. Install and operate a composter digester for manure collected in the milking barn
3. Install and operate automatic alley scrapers to remove and deal with manure in a timely manner
4. Use lights with timers in the new facility

Construction of new facilities and equipment must be completed by October 31, 2017.

Conditions 1 through 4 come into effect before any increase in animal numbers beyond the current permitted capacity of 238 milking cows. Notwithstanding a commitment made to the Panel at the hearing by Folsom in its testimony that it would not increase animal numbers beyond the current permitted capacity before completing all proposed construction and improvements, Folsom included a request in its rebuttal to be permitted to operate as a 311 milking cow dairy. The Panel has considered that request and finds that any increase in animal numbers beyond the current permitted number prior to the fulfilment of all conditions would cause inappropriate effects on the community. For that reason, the Panel requires that the approval contain a further condition stating that until such time as Folsom has completed all construction, it is restricted to 238 milking cows (plus associated dries and replacements).

The Panel also directs the Approval Officer to include a condition in the Folsom approval requiring that Folsom use a rendering truck to pick up any dead stock. This practice, which has already started, must continue indefinitely, unless otherwise authorized by the NRCB.

These conditions are fundamental to the Panel's approval of this expansion. Should Folsom request an amendment to its approval delaying the construction deadline, the Board expects to be formally consulted by NRCB Field Services before any change is made.

The Panel notes the concerns from directly affected parties, including the UID, regarding Folsom's past compliance with its permits and statutory obligations. Folsom witnesses advised the Panel that management practices at the dairy would improve, and the Panel urges it to start by informing itself of its obligations and setting up appropriate systems to ensure compliance. In particular, the Panel draws Folsom's attention to the provisions of the *Standards and Administration Regulation* passed under *AOPA* concerning the application of manure on frozen or snow-covered land. The Panel is confident that the NRCB's compliance division will work with Folsom to assist it to achieve full compliance. The Panel also suggests that Folsom build on its existing community support and work with its detractors to learn of their concerns and to work openly and collaboratively to identify solutions.

Decision

The Panel directs the Approval Officer to issue Folsom Dairy Ltd. an approval to expand its existing dairy operation subject to the conditions set out in this Board Decision.

DATED at CALGARY, ALBERTA, this 14th day of January, 2015.

Original signed by:

Vern Hartwell
Panel Chair

Donna Tingley
Panel Member

Jim Turner
Panel Member

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