



BOARD DECISION

2020-03 / FA19003

Review of Decision Summary FA19003

1577912 Alberta Ltd. (Hines Creek
Farms)

April 23, 2020

The Board issues this decision document, following its written review of Approval FA19003, held pursuant to the *Agricultural Operation Practices Act (AOPA)*.

Background

On January 31, 2020, NRCB approval officer Nathan Shirley issued Decision Summary FA19003 (Decision Summary), in relation to 1577912 Alberta Ltd./Hines Creek Farms' (Hines Creek Farms) application to construct a new multi-species confined feeding operation (CFO), located at NE 4-85-5-W6M in Clear Hills County (County). The proposed CFO includes chicken layers, chicken broilers, geese, ducks, dairy milking cows, and turkey broilers; and the proposed facilities includes four barns and three manure storage pads.

The approval officer denied Hines Creek Farms' application, as he determined that it was inconsistent with the land use provisions of the County's municipal development plan (MDP). Board Decision 2017-05 (Hutterian Brethren of Bear Canyon) outlined the jurisdictional differences between approval officers and the Board, with respect to the review of the land use provisions in an MDP:

In 2001, and concurrent with the establishment of the NRCB mandate regulating CFOs, the Municipal Government Act was amended to remove the authority of municipalities to issue development permits for CFOs and manure storage facilities. The provisions in AOPA respect the municipality's planning authority to establish land use provisions that restrict CFO development in its municipal development plan. However, while NRCB approval officers are directed to deny any application that is inconsistent with land use provisions set out in the municipal development plan, the Board is not bound by such a provision. AOPA only requires that the Board have regard to the municipal development plan.

A Request for Board Review (RFR) of Decision Summary FA19003 was filed by Hines Creek Farms on February 4, 2020. The RFR asked the Board to reverse the approval officer's decision and approve the application.

On March 10, 2020, NRCB Board Decision RFR 2020-01 was released, advising that the Board had determined that a written review was warranted. A deadline of March 27, 2020 was set to file submissions to the review, and a deadline of April 3, 2020 was set as the date by which parties could submit a reply to the submissions of other parties. The Board subsequently suspended the April 3, 2020 deadline to accommodate submissions from parties requesting a reconsideration of their status to participate in the Board review.

Reconsideration of Status to Participate

After receiving a telephone inquiry from Terrie Wayland, the Board acknowledged its failure to provide notice of the RFR to parties found not directly affected by the approval officer in Decision Summary FA19003. The Board corrected this oversight by letter dated March 31, 2020. That letter invited Glen and Hope Hoover, Peter and Joanne Frixel, and Terrie Wayland to make

submissions seeking a reconsideration of their status to participate in the Board's review. Terrie Wayland and Peter Frixel provided submissions in response to the Board's letter.

The Board uses the same criteria that approval officers use to determine whether a person is a directly affected party within the meaning of AOPA. That is, whether the person has reasonably established that:

- a plausible chain of causality exists between the proposed project and the effect asserted;
- the effect would probably occur;
- the effect could reasonably be expected to impact the party;
- the effect would not be trivial; and
- the effect falls within the NRCB regulatory mandate under AOPA.

The Board considered both the March 20 and April 6, 2020 emails provided by Peter Frixel. These emails state a clear desire that the Board deny the Hines Creek Farms CFO application; however, it is not clear that Mr. Frixel is asking that the Board reconsider the approval officer's finding that he was not directly affected by the CFO application. Mr. Frixel's land is over 2 km from the proposed CFO site, and he provided no information that would support a finding that he would be directly affected by the CFO application.

The Board finds that Mr. Frixel is not a directly affected party in relation to the Hines Creek Farms CFO application.

Terrie Wayland filed a submission dated April 9, 2020 requesting that the Board reconsider her status to participate in the review. Mrs. Wayland asserts that the CFO will directly affect her in a number of ways. Most notably, she states that odour from the CFO site and from manure spreading activities will reduce the value and personal enjoyment of her property.

The approval officer noted that Mrs. Wayland resides outside the 1/2 mile "affected party" radius established by the AOPA Part 2 Matters Regulation for CFO applications of the size proposed by Hines Creek Farms. As stated by the Board in RFR Decision 2018-03 (Spruit Farms Ltd.), it "considers that the 'affected party' radius in the AOPA regulations were established to include all lands and residences that, barring special circumstances, would experience effects from the CFO facility that could make the owners or residents directly affected parties."

The AOPA Standards and Administration Regulation provides for minimum distance separation (MDS) requirements to provide mitigation for nuisances. MDS is a calculated value that is determined for each CFO facility based on the size and type of operation. As such the MDS provides assistance in understanding whether:

- the effect would probably occur;
- the effect could reasonably be expected to impact the party; and
- the effect would not be trivial.

In this case, the proposed operation requires an MDS of 315 metres for Category 1 (farmsteads and acreage residences) and 841 metres for Category 4 (large scale country residential, rural hamlet, village town or city residences). The four MDS categories provided for in the Regulation are based on the premise that living in an agricultural setting comes with the expectation that there will be exposure to various agricultural nuisances (Category 1 and 2 residences). The Category 4 value is intended to provide sufficient separation to mitigate the nuisance values for communities that would expect nuisances associated with urban rather than agricultural activities. At 2.5 kilometres from the proposed CFO, Mrs. Wayland's residence is at a distance of approximately eight times the Category 1 MDS, and three times the Category 4 MDS. At this distance, the Board finds that odour effects from the CFO facilities are unlikely to impact the Wayland residence or, in any event, the effect would be trivial.

Mrs. Wayland states that her residence is within 800 metres to spreading lands identified by Hines Creek Farms. Spreading events are short term and infrequent. At this distance, a residence may experience nuisance effects during land spreading events. However, the Board has no general control over what lands an operator chooses to spread manure on. Section 24 of the Standards and Administration Regulation states that an applicant must satisfy an approval officer that the applicant has a sufficient manure spreading land base for the first year following the granting of the application. The Board does not consider effects from spreading, beyond knowing that the operator has secured the right to access sufficient spreading acreage. Having said that, the Board notes that all operators must adhere to land spreading requirements as directed in the Standards and Administration Regulation.

The Board finds that Mrs. Wayland is not a directly affected party in relation to the Hines Creek Farms CFO application.

Board Deliberation on the Hearing Issues

The issue for review is whether the Board should exercise its authority to approve the CFO, notwithstanding an inconsistency with the MDP. The Board must have regard for matters that would normally be considered if a municipal development permit were being issued by considering the effects on the environment, the economy, and the community; and by considering the appropriate use of land. The Board record included the following documents:

- Hines Creek Farms request for Board review, dated March 4, 2020
- Submission filed by the approval officer, dated March 25, 2020
- Submission filed by the County, dated March 26, 2020
- County submission filed with the approval officer, dated October 28, 2019
- Clear Hills County MDP (Bylaw No. 243-19)

Decision Summary FA19003 sets out the approval officer's consideration of various provisions of the MDP and the County land use bylaw (No. 189-16). The MDP establishes an exclusion zone based on a number of setbacks that effectively exclude CFO development within the

County's White Area (titled lands). These various setbacks are cumulatively portrayed in MDP Schedule G. While the scale of the Schedule G map may result in some inaccuracies in identifying CFO exclusion and permitted areas, the map appears to identify a single location in Township 86 Range 11 as a CFO permitted area. The total area appears to be between 3 and 4 sections in size and located on Crown land, rather than White Area. Finally, the map does not show any developed roads in the entire township where the CFO permitted area is located. Based on these factors, the Board finds that the effect of the MDP Schedule G setbacks is to effectively prohibit confined feeding operation development throughout the entire land that is under direct zoning authority of the County.

In past reviews, the Board has consistently respected municipal exclusion zones when it finds that the zones are reasonable, and established to support current and future land uses. For example, in granting a review on Registration LA03038, the Board stated:

In principle, the Board does not believe the intent of Section 22 of AOPA was to allow municipalities to broadly command a higher standard than that legislated under AOPA, but rather to allow a higher standard in circumstances where a municipality can provide special or unique reasons that justify the need for a higher standard in a particular area within the municipality.

(P & P Van Driel; NRCB letter to M.D. of Willow Creek No. 26, January 16, 2004)

Previous Board decisions have stated that the purpose of AOPA section 25(4)(g) is to establish common rules for the siting of CFOs across the province. When the AOPA amendments were presented to the Alberta Legislature in 2001, one of the key purposes was described as follows:

.... Firstly, by broadening the mandate of the Natural Resources Conservation Board to include the approval, monitoring, and enforcement of new and expanding CFOs, we will provide a one-window approach for the livestock industry and the public. Secondly, we will achieve consistency and transparency, because the NRCB will be the single agency that will approve applications for new and expanding CFOs rather than a myriad of municipal councils. Finally, we will achieve our goal of science-based decisions rather than, as we have sometimes seen, emotion and political expediency.

Municipalities will continue to play an important role in this process. We encourage municipalities to develop land use plans that identify where CFOs would not be compatible with new or future developments. Each municipality will automatically be notified and its input will be sought when an application is received for a CFO within its municipal boundaries.

....

.... Through the work of municipal land use planning we'll be able to identify areas where the development of CFOs would not be compatible with current or future land uses, and through a consistent process across Alberta we'll be able to ensure the

successful development and expansion of the livestock industry in our province, an industry that can produce world-class product while creating economic activity and jobs.

(Alberta Hansard; 15 November 2001, Mr. Klapstein, second reading of Bill 28, the Agricultural Operation Practices Amendment Act, 2001)

The Board's mandate is limited to determining whether to approve the Hines Creek Farms' CFO application, notwithstanding an inconsistency with the MDP land use planning provisions. Therefore, despite finding that the effect of the MDP setbacks is to effectively prohibit confined feeding operation development throughout the County, the Board must determine whether any of the MDP setbacks that apply to the Hines Creek Farms proposed CFO are reasonable, and were established to support current and future land uses.

In responding to a specific question posed in Board Decision RFR 2020-01/FA19003, the County stated that it was not in a position to provide rationale for the content of the MDP, as the MDP bylaw results from public input and lengthy debate and that minutes are made without notation or comment. Given this, the Board looks to the specific MDP provisions to understand the planning objectives of the setbacks in relation to the CFO lands.

The Board examined all criteria used by the County in generating its exclusions zone. The legend on Schedule G shows the following criteria:

- 152.4 m from roads
- 3.2 km from residence
- 3.2 km from licenced CFO
- 3.2 km from water bodies, rivers, streams, tributaries, wetlands
- 3.2 km from town/hamlet
- 3.2 km from Grimshaw Gravels aquifer
- 3.2 km from intensive recreation area
- 3.2 km from environmental sensitive area

The County's October 28, 2019 submission to the approval officer referenced both the MDP and the land use bylaw; however, with respect to the MDP, the only inconsistency referenced was the 3.2 km setback to existing rural residential development. As the Schedule G setbacks apply equally to the entire County, the Board concluded that that the MDP setbacks are not intended to protect land uses associated with specific local features located within the County.

In assessing the value of the MDP setback to residences to protect current and future land uses, the Board looked to understand the MDP setback in relation to the AOPA MDS. To mitigate nuisance-based land use conflicts associated with new or expanding CFOs, AOPA establishes a MDS that is calculated on the type and size of the CFO operation. As a consequence, larger proposed or expanding CFO operations require greater distances to existing neighbouring residences. As stated earlier, the calculated MDS for the Hines Creek Farms' CFO is 345 metres. The AOPA MDS provisions provide for a province-wide standard of nuisance mitigation to neighbouring residences.

In addition to identifying the failure to meet the MDP setback to rural residential development, the approval officer stated that the proposed CFO did not meet the MDP setbacks to roads or to water bodies or wetlands. The Board is satisfied that the AOPA setbacks to water bodies and wetlands provide province-wide environmental protection to both surface and ground water. The Board can find no specific MDP land use objective related to Hines Creek Farms' proposed CFO that would warrant a setback to water bodies or wetlands greater than that provided by AOPA.

Finally, the Board noted the approval officer's statement that the proposed CFO is not consistent with the MDP setback to roads. The Board received no submissions that would allow it to consider the proposed CFO facilities' setback from Range Road 53, and expects that this matter should be easily resolved directly with the County and in a manner consistent with setbacks established for non-CFO structures on AG-1 lands. In the event that this matter requires the NRCB's attention, it should be raised with the approval officer.

Decision

The Board exercises its discretion under AOPA section 25 to direct the approval officer to grant an approval to Hines Creek Farms.

DATED at EDMONTON, ALBERTA, this 23rd day of April, 2020.

Original signed by:

Peter Woloshyn

Sandi Roberts

L. Page Stuart

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

Calgary Office

19th Floor, 250 – 5 Street SW
Calgary, AB T2P 0R4
T (403) 297.8269

Lethbridge Office

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

Morinville Office

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

Red Deer Office

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

NRCB Response Line: 1.866.383.6722

Email: info@nrcb.ca

Web Address: www.nrcb.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.