

***Agricultural Operation
Practices Act***

BOARD DECISION

Review 2008-04 / RA07043

Review of Decision Summary
RA07043

761714 Alberta Ltd. (John and
Marlene Ekkel)

May 23, 2008

Introduction and Background

On January 2, 2008, NRCB Approval Officer, Andrea Hiba Brack, issued Decision Summary RA07043. The Decision Summary explained the Approval Officer's decision to deny an application by 761714 Alberta Ltd. (John and Marlene Ekkel) for a registration permit to construct and operate a new 100-milking cow dairy operation at SE 01-41-28 W4M in Lacombe County.

The Approval Officer concluded that the application for this confined feeding operation (CFO) was "*inconsistent with the municipal development planning documents for Lacombe County*" and she was thus obligated to deny the application by section 22(1)(a) of the *Agricultural Operation Practices Act (AOPA)*. This inconsistency was the only reason provided by the Approval Officer to account for denial of the application. Aside from inconsistency with the Municipal Development Plan (MDP) planning documents, the Decision Summary otherwise suggested the application could meet *AOPA's* technical requirements, with the inclusion of a condition for annual sampling and testing of the water well.

The Board received a Request for Board Review, filed by Keith Wilson, legal counsel on behalf of 761714 Alberta Ltd. and John and Marlene Ekkel (the Applicant) on January 21, 2008. The Request for Board Review met the established filing deadline.

The Board provided all parties with copies of the filed Request for Board Review along with an opportunity to file rebuttal submissions. The Board received a rebuttal submission from Lacombe County on January 31, 2008, meeting the filing deadline of February 1, 2008.

The Board met to deliberate on this matter on February 5, 2008. As outlined in Decision Report RFR 08-01, it decided to grant a review to address the issue and questions raised regarding the application's consistency with the land use provisions of the MDP. Accordingly, the Board requested input from the parties to clarify the following:

1. What requirements or limitations does the Lacombe County MDP create for CFOs? In answering, please address the following:
 - a. Should the Gull Lake Management Plan be considered as part of the MDP?
 - b. Are there any existing or intended residential or recreational areas located between the proposed CFO and the lake, and if so, what is the distance between the proposed CFO and the boundary of the development?
 - c. Are there any other relevant plans that would further restrict the development of a CFO?
2. Is the Ekkel application consistent with the land use provisions of the Lacombe County MDP?
3. Section 25(4)(g) of *AOPA* gives the Board jurisdiction to approve an application even if it is inconsistent with an MDP. Should the Board determine that this provision be used, what factors, criteria or information should it examine in making its decision.

A Board panel consisting of Jim Turner (panel chair), Gordon Atkins and Donna Tingley was appointed to conduct this written review.

The Board invited all parties to respond to these questions by March 3, 2008. All parties were then provided with each other's submissions and the Board granted an opportunity to file reply submissions by March 10, 2008. All parties met this filing deadline.

After reviewing these submissions, the Board met on March 18, 2008 and determined that additional information was necessary to complete its review. By letter dated March 20, 2008, the Board requested all parties to provide the following information:

1. Considering the specific categories defined in Section 3.10(a) of the Lacombe County MDP and listed below (in “i, ii, and iii”), identify the residential or recreational boundary point which is closest to the proposed confined feeding operation and provide your rationale:
 - i) a town, village, summer village, hamlet;
 - ii) an area developed or designated for multi-lot residential use; or
 - iii) a provincial or municipal part or recreation area, or other area used or intended to be used for a recreational facility development.
2. Provide a scale drawing or map that defines a one mile radius **originating from the “closest boundary point”** that you have determined above. (Draw a circular radius outward from the “closest boundary point” that you defined in number 1 above). Also include the proposed CFO facility in your scaled drawing or map, identifying the quarter section border and the closest portion of the proposed manure storage facility.
3. Once you have determined the “closest boundary point” in relation to the proposed confined feeding operation, provide the Board with the following two measurements:
 - i) The distance from the “closest boundary point” to the edge of the quarter section on which the operation is proposed; and,
 - ii) The distance from the “closest boundary point” to the nearest border of the proposed manure storage facility.

The Board received information from Kurt Stilwell (counsel for the Approval Officer), Bill Barclay (counsel for Lacombe County) and Keith Wilson (counsel for the Applicant). All parties’ submissions met the April 15, 2008 deadline. The Board then met on April 17, 29, May 13 and 15 to review the information provided by the parties and deliberate the issue.

The Board would like to thank the participants for their thoughtful and responsive submissions which have provided the necessary information to reach a decision.

Documents Considered

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

- Approval Officer’s Decision Summary RA07043, dated January 2, 2008;
- January 21, 2008 Request for Board Review filed by Keith Wilson on behalf of 761714 Alberta Ltd. and John and Marlene Ekkel (the Applicant);
- January 31, 2008 rebuttal submission filed by Lacombe County;
- Letter from Lacombe County to the Approval Officer dated December 6, 2007 with attached portions of the MDP and Gull Lake Management Plan (GLMP) (obtained from the Approval Officer’s public record);
- Board Decision RFR 2008-01/RA07043, dated February 13, 2008;
- Submission of the Approval Officer dated March 3, 2008;
- Submission of Lacombe County dated March 3, 2008;
- Submission of the Applicant dated March 3, 2008;
- March 10, 2008 reply submission from Lacombe County;
- March 10, 2008 reply submission from the Applicant;

- Board correspondence dated March 20, 2008 requesting additional information to support the written review;
- April 10, 2008 additional information from the Approval Officer;
- April 15, 2008 additional information from Lacombe County;
- April 15, 2008 additional information from the Applicant;
- Correspondence and documents from the Approval Officer's public record;
- Gull Lake Management Plan (full copy) dated April 4, 2000;
- Lacombe County MDP (full copy) dated August 27, 2007;
- Board Decision 04-05 dated August 17, 2004 (Eric Meinders and Meinders Farm); and,
- Board Decision 05-09 dated November 22, 2005 (DJ Hog Farms Ltd.).

Issues

In Decision Report RFR 2008-01, the Board reviewed submissions from all parties regarding the Approval Officer's decision to deny the Ekkels' registration-sized application on the basis that it was inconsistent with the land use provisions of the Lacombe County MDP. The Board determined that a review was warranted to gather additional information necessary to establish whether an inconsistency existed. The Board notes that while consistency with the land use provisions of the MDP is fundamental to whether an Approval Officer approves or rejects an application, Section 25(4)(g) of *AOPA* provides the Board with additional discretion regarding land use provisions of the MDP since it states the Board "*must have regard to, but is not bound by, the municipal development plan.*"

1. What requirements or limitations does the Lacombe County MDP create for CFOs?

There are two municipal planning documents relevant to this discussion: the Lacombe County Municipal Development Plan (MDP), dated August 28, 2007, and the Gull Lake Management Plan, 2000 Update (GLMP). The GLMP was adopted by resolution by Lacombe County on April 4, 2000. It was also adopted on various dates in April 2000 by Ponoka County, the Summer Village of Parkland Beach and the Summer Village of Gull Lake.

In arriving at its decision regarding any restrictive limitations created for the proposed CFO by the MDP, the Board carefully reviewed the Lacombe County MDP, the GLMP and the submissions from all responding parties. The Board notes that Section 3.10 of the MDP has two subsections, each of which are relevant to this review. Section 3.10 reads as follows:

3.10 The County shall provide input on applications for confined feeding operations to the Natural Resources Conservation Board (NRCB) under the Agricultural Operation Practices Act. The County's support is subject to the following:

- a) *no new confined feeding operation shall be permitted less than 1.6 kilometres (1 mile) from the boundary of:*
 - (i) *a town, village, summer village or hamlet;*
 - (ii) *an area developed or designated for multi-lot residential use; or*
 - (iii) *a provincial or municipal park or recreation area, or other area used or intended to be used for a recreational facility development,*

except that where provincial regulations require a larger setback distance, that distance shall apply; and

- b) *further restrictions on the development of confined feeding operations may apply as directed by an Intermunicipal Development Plan or other local plan approved by Council.*

The relevant provisions of the GLMP are the following:

3.3.2 *Intensive Livestock Operations*

3.3.2.1 *Recommendation:*

That no new intensive livestock operations are to be permitted within the watershed of Gull Lake. Expansions to existing facilities will be permitted provided there is no negative effect on lake water quality and/or the potential for development of recreational or residential land within the lake management area.

Rationale:

The area around the lake has an important potential for recreational and residential development that cannot be replaced. New development or expansion of intensive livestock operations should not compromise realization of this potential.

The Board notes that, included as part of the MDP, is a county map that shows an area of land around Gull Lake identified as a “*lakeshore policy area*.” A caption on the map describes the “*lakeshore policy area*” as having “*potential lakeshore residential/recreational development opportunities to be determined through future area structure plans*.” In addition, the Board notes that a map was included with the GLMP showing an outer boundary that is labelled as the “*watershed boundary*.” The boundary is unevenly shaped and presumably represents the actual watershed boundary of Gull Lake. The Board finds that this is the area the Approval Officer considered an exclusion zone for new CFOs.

In reaching a decision regarding the possible restrictive limitations created by the Lacombe County MDP, the Board addressed the effect of subsections 3.10(a) and (b).

Subsection 3.10(a)

The Board agrees with the parties that MDP subsection 3.10(a) establishes a 1 mile (1.6 km) CFO exclusion zone from the boundary of:

- a town, village, summer village or hamlet;
- an area developed or designated for multi-lot residential use; or
- a provincial or municipal park or recreation area, or other area used or intended to be used for a recreational facility development.

Subsection 3.10(b)

The Board notes that there was general consensus amongst the parties that the GLMP should be considered as part of the MDP. The Board notes that Lacombe County took the position that the 2000 GLMP is a local plan within the meaning of the MDP. The Board also notes that the Applicant was prepared to accept this assertion and that the Approval Officer relied upon the combined effect of the two plans when she denied the application.

The Board accepts that the GLMP is a local plan as contemplated by subsection 3.10(b) and thus forms part of the Lacombe County MDP. The Board finds that, on its face, subsection 3.3.2.1 of the GLMP prohibits new CFOs within the Gull Lake Watershed.

2. Is the Ekkel application consistent with the land use provisions of the Lacombe County MDP?

Subsection 3.10(a)

While all parties agreed that subsection 3.10(a) establishes a CFO exclusion zone, there was disagreement as to whether the proposed CFO was located within such an exclusion zone. To clarify both the measuring points and the distance involved, the Board requested answers to several supplementary questions.

To decide whether the proposed CFO was located within the 1 mile (1.6 km) exclusion zone, the Board needed to make three determinations: one, where to begin the measurement from the CFO end; two, where to begin the measurement at the “*residential/recreational land use*” end; and three, the actual distance between the two points.

In its rebuttal submission, Lacombe County indicated that its measurements were taken from the CFO property line and not the CFO itself. However, Lacombe County pointed out that even if the measurement was taken from the proposed barn, it would still be within 1 mile (1.6 km) of lands “*which are within the Gull Lake Lakeshore Policy Area.*” In its response to the supplementary questions, Lacombe County provided a scale drawing showing that there was a distance of 1452 metres from the CFO to the closest boundary-point of land it considered to be designated for future residential development.

The Applicant stated that no residential or recreational development, as identified in subsection 3.10(a) of the Lacombe County MDP, was within 1 mile (1.6 km) of the proposed dairy site. The Applicant further submitted that the boundaries identified for “*Residential Lake Area District,*” “*Recreation District,*” and “*Country Residential District*” were all beyond a 1 mile (1.6 km) radius of the proposed dairy facility and referenced the “*Lacombe County LUB Detail Map*” in support of this proposition. The Applicant submitted that, as the County had already stated, “*all lands in Lacombe County are deemed to be designated as agricultural land unless an express designation is made otherwise.*” The Applicant further stated that land use designations can only be made or changed by bylaw and that the County’s own land use bylaw map contradicted the County’s contention that land in section 2 is designated “*residential.*”

The Applicant pointed out that the lands referred to by Lacombe County were not zoned for residential development but rather for agriculture. The Applicant argued that the County’s contention that these lands are intended for residential use is not reflected in their zoning, their maps, or any other documents submitted by Lacombe County. The Applicant also submitted that the public consultations initiated by the County in 2007 would have provided an opportunity for the County to take steps to change the land zoning but there was no evidence of support for such a change.

In her original decision denying the registration application, the Approval Officer did not consider whether the proposed CFO fell within the exclusion zone established by subsection 3.10(a). Instead, the Approval Officer’s assessment was based upon the stated rationale in the GLMP that, “*The area around the lake has an important potential for recreational and residential development that cannot be replaced.*” The Board notes that the Approval Officer found that no new CFOs were allowed to be

developed within the watershed boundary of Gull Lake and she considered the watershed to be an exclusion zone for new CFOs.

Both the Applicant and the Approval Officer, in response to the supplemental questions, identified that the residential/recreational area boundary closest to the proposed CFO was the boundary of the Country Residential District located in the southeast corner of the NW ¼ 2-41-28-W4. The Applicant determined the distance from the closest portion of the CFO to the boundary of the Gull Lake Baptist Camp & Retreat Centre to be about 7,220 feet (about 1.3 miles or 2.09 km). The Board observes that this distance is consistent with the scale drawing provided by the Approval Officer. The Board finds that, when comparing the submissions of the Applicant and Lacombe County, the source of the distance discrepancy between the proposed CFO and the residential land results from differing views regarding the designation of the land between the lake and the proposed CFO and whether this land meets the definition given in MDP subsection 3.10(a)(ii) of: “*An area developed or designated for multi-lot residential use.*”

To determine whether the land in the SE ¼ 2-41-28-W4 should be considered land designated for future multi-lot residential, as asserted by the County, the Board considered the following factors:

- This land is identified in Figure 1, “*Development Concept*” of the Gull Lake Management Plan and is included in the Lakeshore Policy Area shown in Map 2 of the MDP named “*Future Land Use Concept.*”
- On Map 2 of the MDP, the lakeshore policy area surrounding Gull Lake is highlighted with the caption that “*Potential Lakeshore or residential/recreational development opportunities to be determined through future area structure plans.*”
- There is a second caption pertaining to the lakeshore policy area that states, “*The Boundaries of the Lakeshore Policy Area, shown on Map 2, are not intended to be specifically defined, and are subject to future growth.*”

Having considered the foregoing, the Board finds that the descriptions of the land in question in the GLMP lack the necessary certainty to be “*an area developed or designated for multi-lot residential use.*” In the Board’s view, the captions describing the Lakeshore Policy Area and the GLMP speak to the possibility of future development following further public consultation and a full and transparent planning process. Since the land in SE ¼ 2-41-28-W4 is currently classified as agricultural, the Board finds that the boundary point used by Lacombe County is not supported by its current land use designation and therefore does not qualify as an area developed or designated for multi-lot residential as required under subsection 3.10(a)(ii) of the Lacombe County MDP.

The Board notes that subsection 3.10(a)(ii) identifies the measuring points for the 1 mile (1.6 km) CFO exclusion zone to be the boundary of the multi-lot residential development and the CFO. As a result, the Board finds that the measurement proposed by the Applicant is appropriate and that the location of the proposed CFO is more than 1 mile (1.6 km) from any of the closest area designated for multi-lot residential.

Subsection 3.10(b)

While both the County and the Applicant agreed that the GLMP is a local area plan as contemplated in the Lacombe County’s MDP, they provided differing views on whether the proposed application was inconsistent with section 3.3.2.1 of the GLMP.

Lacombe County argued that the GLMP contemplated the area within the plan could be utilized for future recreational and residential development. It further pointed out that the GLMP specifically

provides that no new intensive livestock operations are to be permitted within the watershed of Gull Lake and that it is good planning to recognize the inevitable residential development that will occur in this area and to take steps to avoid land use conflict.

The Applicant indicated that the MDP does not include a single reference to the GLMP and the GLMP was not addressed as part of the 2007 public consultations regarding the County's MDP. The Applicant also highlighted the fact that the GLMP refers to Alberta Agriculture's former *Code of Practice*. Further, the GLMP indicates that the *Code of Practice* was being revised, and acknowledges that restrictions imposed may become unjustifiable in the future with the "*advances in mitigation techniques*" which came to pass through the establishment of *AOPA*. As a result, the Applicant submitted that the GLMP has not been subject to any review or received any public input since 2002 when *AOPA* was introduced and the jurisdiction over CFO development was transferred from municipalities to the NRCB. The Applicant contends that it is therefore not a current or meaningful document.

The Board observes that no party disagreed that the proposed CFO was located within the boundary identified as the Gull Lake Watershed. Having determined that the GLMP is incorporated by reference into the Lacombe County MDP, the Board finds that the location of the proposed CFO is inconsistent with the CFO exclusion zone defined by the Gull Lake Watershed. The Board therefore upholds the Approval Officer's determination that the proposed CFO is inconsistent with subsection 3.10(b) of the Lacombe County MDP.

3. Should the Board exercise its discretion under Section 25(4)(g) of AOPA not to be bound by the restrictive provisions of the MDP?

The respective mandates of an Approval Officer when considering an application for a registration, and the Board, when reviewing the decision of an Approval Officer, as it pertains to the provisions of an applicable MDP, are not the same. The regulatory regime established by *AOPA* provides the Approval Officer with no discretion to approve a registration application once that Approval Officer has determined that it is inconsistent with the land use provisions of the applicable MDP. As a result, the Approval Officer's jurisdiction is limited to a determination of whether an inconsistency exists. The Board, however, in conducting a review of an Approval Officer's decision, has the discretion to "*have regard to*" but not be bound by the provisions of an MDP. In other words, the Board can approve a registration-sized CFO irrespective of the fact that it is not otherwise consistent with the land use provisions of the applicable MDP.

In determining whether to apply section 25(4)(g) of *AOPA*, the Board finds that it must use its discretion to determine the appropriateness of the CFO exclusion zone established by the GLMP and incorporated into the Lacombe County MDP. The Board has noted in previous decisions that it is difficult to establish what is an appropriate buffer from recreational or residential areas and that "*it is a matter of judgment and not a matter of pure science.*"

In past decision reports that considered CFO exclusion zones, the Board has been clear that, while it places a high priority on science-based decisions in *AOPA*, "*it recognizes that good planning, supported by a transparent public process, must also be respected in the regulatory process.*" However, the Board has also stated that in exercising its obligation defined in *AOPA*, "*it must evaluate the rationale for the designation of a zone or area where CFOs are excluded by the terms of an MDP.*" In the Meinders Decision¹, the Board examined the appropriateness or rationale for the circular exclusion zone defined in the MDP, with the Bear Lake Campground and Bible Camp at its centre. The

¹ Eric Meinders and Meinders Farm, Board Decision 04-05 dated August 17, 2004.

Board upheld the exclusion zone and denied the application even though the exclusion zone was much greater than the minimum distance setback required under *AOPA*.

The Board notes from these previous decision reports that the exclusion zones were identified with precise distance parameters identifying the specific development boundaries and the relevant setback distances established to mitigate land use conflicts. These precise setback distances made it possible to accurately determine which lands were within or outside the exclusion zone.

The Board finds that the boundary of the exclusion zone, in this case, is unlike any exclusion zone boundary previously considered by this Board, in that it corresponds to a natural feature and is, as a consequence, irregularly shaped. Although the Board observes that it could be difficult to discern whether a proposed CFO is within or outside the boundary given the lack of a definitive legal description of the watershed boundary in the GLMP, the Board finds as a fact that the proposed dairy is clearly situated within the watershed boundary described in the GLMP. The Board notes that some land within the watershed appears to be almost 4 miles (6.4 km) from the shore.

The Board finds that CFO exclusion zones identified by municipalities must be justified on the basis of land use planning since section 22(2.1) of *AOPA* directs that an Approval Officer, when considering consistency with an MDP, “*shall not consider any provisions respecting tests or conditions related to the construction of or the site for a confined feeding operation or manure storage facility nor any provisions respecting the application or manure, composting materials or compost.*”

The Board observed that there was no dispute as to whether Lacombe County followed a “*fair, complete and transparent process*” when adopting its 2007 MDP and the 2000 GLMP. Both the MDP, in section 1.3, and the GLMP, in section 1.2.1, document the various information sessions and public meetings that preceded the formal adoption of the respective plans. It was apparent in both instances that a concerted effort was made to inform residents of the planning process, present opportunities where input could be provided and make draft documents available for further public comment. The Board finds that the 2007 MDP and the 2000 GLMP were adopted following processes that were fair, complete and transparent.

The more challenging question arises from the Board’s need to determine whether the GLMP creates an exclusion zone that is reasonable in the circumstances and reflective of good planning. In making such a determination, the Board recognizes that whether a CFO exclusion zone established by an MDP is “reasonable” will depend on the specific needs of the municipality; what is reasonable in one municipality in one part of the province may not be reasonable in another municipality in another part of the province.

In order for the Board to determine whether the provisions in an MDP creating a CFO exclusion zone are reasonable and represent good planning, it must inquire into the purposes for which the particular exclusion zone was established and whether those purposes related to good planning practice and whether there is a clear and direct link or rationale which links those purposes and the exclusion zone itself.

According to the GLMP, the purpose of the CFO exclusion zone is:

“The area around the lake has an important potential for recreational and residential development that cannot be replaced. New development or expansion of intensive livestock operations should not compromise realization of this potential.”

On its face, the purpose of the CFO exclusion zone relates to a legitimate planning purpose: the preservation of land near a lake for recreation and residential purposes without limitation as a result of new or expanded CFOs. However, the Board was not made aware of any rationale which links the entirety of the land included in the CFO exclusion zone, with planning purpose in the GLMP. The Gull Lake Watershed, where the GLMP prohibits the establishment of new confined feeding operations, is illustrated in a map within the GLMP, entitled "*Figure 1 Development Concept*" (attached as Appendix 1 of this Decision Report). The map shows that the Gull Lake Watershed is divided into a number of areas. According to the map, immediately around the lake are several relatively narrow bands of land, classified as existing development, accrued land, restricted shoreline, public recreation area, semi-public area, residential area, and environmental management area. The proposed Ekkel dairy is not located within any of these areas; rather it is to be sited in the larger area surrounding these specific use areas which are classified as "*residual watershed*" with the outer edge of the residual watershed being the watershed boundary.

While Lacombe County might successfully demonstrate a clear and direct link between some of those areas in the GLMP classified as "*public recreation*" and "*residential*", including a reasonable buffer, with the County's need to preserve land for recreational and residential development, there is no similar direct link with the larger area referred to as the residual watershed. In fact, the GLMP itself identifies the residual watershed area as "*all the land within the Gull Lake watershed boundary that is not designated in this plan for potential residential or recreational development.*" There is no rationale in the GLMP as to why new CFOs must be prohibited in the residual watershed to preserve land for residential or recreational purposes or to create a buffer which is greater than the separation distances set out in *AOPA*.

There is further complexity to this issue arising from the fact that the outer limit of the CFO exclusion zone is defined by a watershed boundary. In the Board's view, a municipality must define the limits of a CFO exclusion zone in terms that relate to land use planning issues. A municipality might successfully define a CFO exclusion zone by reference to a natural feature such as a watershed boundary, if there were a demonstrated link between that boundary and the municipality's planning objective in establishing the CFO exclusion zone. But the fact that the Gull Lake watershed boundary and the CFO exclusion zone boundary are identical, without further explanation or rationale, implies that the Lacombe County CFO exclusion zone was established at least in part to achieve the environmental objective of protecting the watershed. It is the Board's view that *AOPA* was designed to create province-wide standards that would protect both surface and ground water from harm resulting from confined feeding operations and it is not necessary, at least in this case, for Lacombe County to create a CFO exclusion zone for these purposes.

The Board has further concerns arising from the interplay and timing of the adoption of the relevant planning documents by Lacombe County in relation to the enactment of *AOPA*. The GLMP was updated from the 1979 version in 2000 (with some subsequent amendments not relevant to this matter). *AOPA* was enacted in 2002, after the GLMP was adopted by Lacombe County. This factor alone distinguishes the Ekkel application from the Board's decisions regarding Meinders Farm and DJ Hog Farms Ltd., as the exclusion zones considered in both those decisions were established after *AOPA* came into force.

Exclusion zones adopted by municipalities before *AOPA* included numerous environmental protection standards, including setback distances for all land use categories, that are now included in *AOPA* and apply province-wide. While the Board has previously recognized additional CFO setbacks adopted by municipalities when they could be justified on the basis of land use planning needs, the GLMP was not adopted with the knowledge of *AOPA*'s setback requirements or other environmental protection

measures included in the act. In fact, some background text in the GLMP refers to requirements which pre-date *AOPA*.

The Board recognizes that a municipality will take into account many factors when determining how often to update its various planning documents. Clearly, a plan that is updated too frequently is not really a plan. Conversely, a plan which is not updated to take into account significant changes in legislation affecting that plan, in this case, *AOPA*, may, in certain circumstances, be considered to be out of date. Lacombe County updated its MDP in 2007, and while the MDP references the “*lake management plans*” in a general way, Lacombe County did not take the opportunity at that time to reconsider the stipulations in the GLMP in light of the requirements in *AOPA*.

Accordingly, the Board finds that the CFO exclusion zone created by subsection 3.10(b) of the Lacombe County MDP, including the GLMP, does not meet the Board’s established standards for upholding a municipal CFO exclusion zone, as inadequate planning rationale was provided for limiting new CFOs in the “*residual watershed*” area of the Gull Lake Watershed. Further, the GLMP has not been updated to account for new environmental protection and minimum distance setback requirements included in *AOPA*.

Having made this finding, the Board is required to decide whether to apply the MDP provisions or to use its discretion to not be bound by the Lacombe County MDP. Applying the MDP provisions would disallow the Ekkel’s dairy application; on the other hand, by exercising the Board’s discretion under *AOPA* section 25(4)(g), the application’s inconsistency with the MDP would no longer be a barrier to approving the proposed dairy.

In the case of the proposed Ekkel dairy, the Board has decided to exercise its legislative discretion under *AOPA* section 25(4)(g) to not be bound by all the provisions of Lacombe County’s MDP. The Board therefore directs that a registration permit be granted to the dairy, despite its inconsistency with the MDP, provided that all technical requirements established by *AOPA* and appropriate conditions determined by the Approval Officer, are also met.

While the Board respects the process followed by Lacombe County to create an MDP that preserves land around Gull Lake for residential and recreational purposes, it would be unfair to deny a permit for the proposed Ekkel dairy, which is otherwise lawful, on the basis of provisions in the MDP and GLMP which do not provide a sufficient rationale for the exclusion zone and which have not been updated to account for the environmental and minimum distance setback requirements now found in *AOPA*.

Summary

- 1. The Board concludes that, with the limited jurisdiction granted by AOPA, the Approval Officer was correct in her determination that the application was inconsistent with the MDP.*
- 2. The Board concludes that the proposed CFO is not located within the one mile CFO exclusion zone established in section 3.10(a) of the 2007 Lacombe County MDP.*
- 3. The Board concludes that the GLMP represents an “approved plan” as referenced in section 3.10(b) of the 2007 Lacombe County MDP and should be considered as part of the MDP.*
- 4. The Board concludes that the proposed CFO is located within the Gull Lake watershed established by section 3.3.2.1 of the GLMP.*

5. *The Board concludes that neither section 3.10(b) of the 2007 Lacombe County MDP or section 3.3.2.1 of the 2000 GLMP provide sufficient rationale to substantiate establishing the entirety of the Gull Lake watershed as a valid CFO exclusion zone to impede the Ekkel's application .*
6. *The Board concludes that the 2000 GLMP, an "approved plan" as referenced in section 3.10(b) of the Lacombe County MDP, was not updated to account for environmental and minimum distance setback requirements now found in AOPA.*
7. *The Board concludes that it is appropriate to utilize the discretionary provision granted to it by section 25(4)(g) of AOPA and not be bound by the Lacombe County MDP.*

Decision

The Board finds it is appropriate to utilize the jurisdiction granted to it by section 25(4)(g) of AOPA and concludes that the Ekkels' application is not bound by the additional restrictive land use provisions of the Lacombe County MDP.

The Board notes that no other issues were raised by parties regarding the proposed dairy and that the Approval Officer determined in Decision Summary RA07043 that the application would meet AOPA's technical requirements, with the inclusion of a condition for annual sampling and testing of the water well.

The Board directs the Approval Officer to issue a registration permit to the dairy, despite its inconsistency with the MDP, subject to the condition for annual sampling and testing of the water well and standard construction, operating or inspection conditions as appropriate.

DATED AT CALGARY, ALBERTA, this 23rd day of May, 2008.

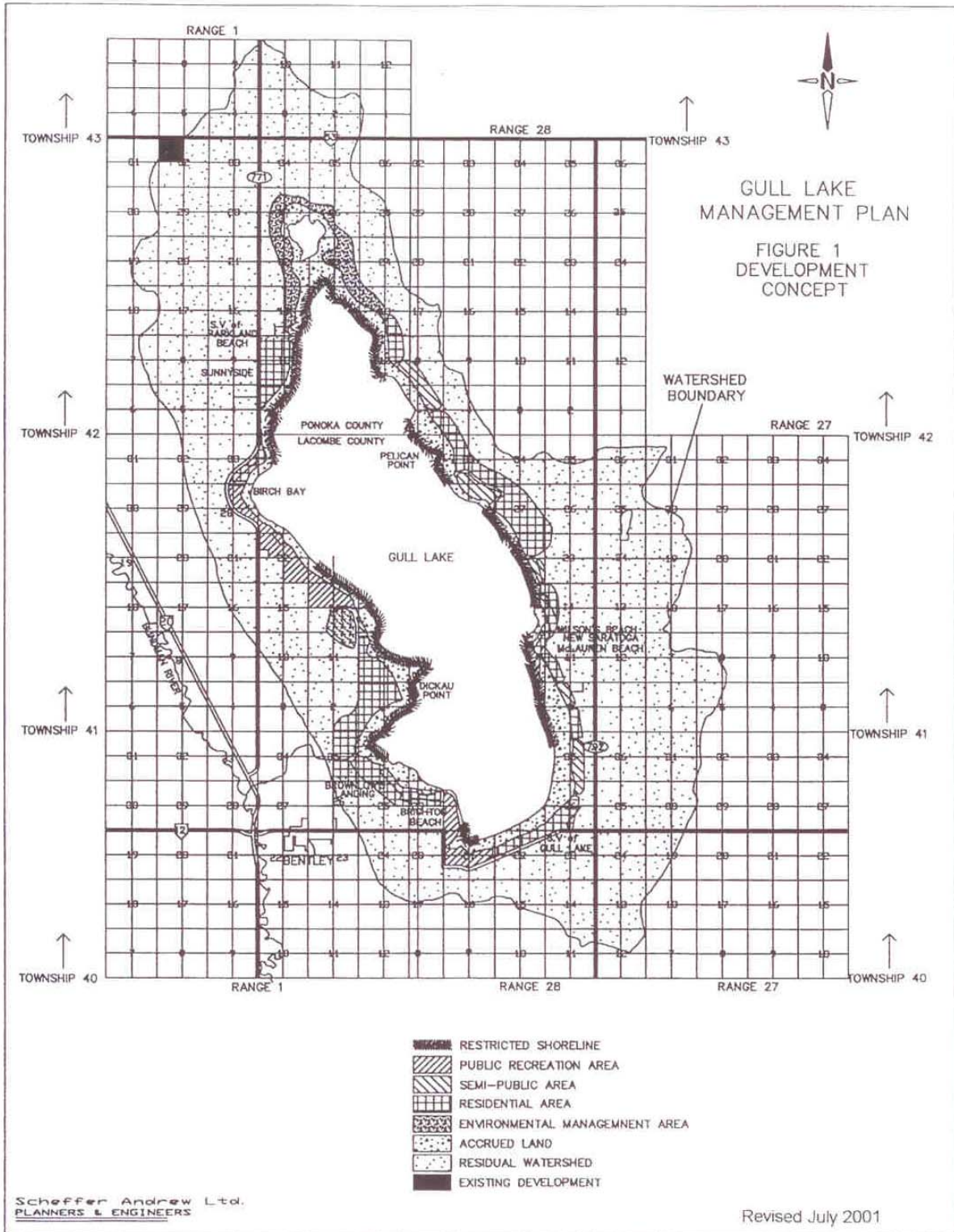
Original signed by:

Jim Turner
Panel Chair

Dr. Gordon Atkins
Board Member

Donna Tingley
Board Member

APPENDIX 1:



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
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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.