

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD
2811 Agriculture Drive, P.O. Box 8911
Madison, Wisconsin 53708-8911

Aaron R. Johnson, v. Jefferson County,	Aggrieved Person Political Subdivision	DOCKET NO. 18-LFSRB-01 DECISION OF THE BOARD
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BEFORE the Wisconsin Livestock Facility Siting Review Board:

Bob Topel, Chair (abstention); Dr. Jerome Gaska, DVM, Vice Chair; Robert Selk, Secretary;
Raymond Diederich, Lee Engelbrecht, Scott Godfrey, Scott Sand

PROCEDURAL HISTORY

Aaron R. Johnson (“Aggrieved Person”) filed a Request for Review with the Wisconsin Livestock Facility Siting Review Board (“LFSRB”) on April 16, 2018. The Aggrieved Person challenged the decision of the political subdivision, Jefferson County (“Jefferson County”), granting a Conditional Use Permit (“CUP”) to Daybreak Foods Inc. (“Applicant”) for an expansion of the Applicant’s chicken layer and pullet operation located on Crossman Road in the Town of Lake Mills. In the Request for Review, the Aggrieved Person alleged that Jefferson County failed to properly consider air quality and odor concerns in issuing the CUP.

On April 17, 2018, pursuant to authority of the LFSRB and its bylaws, LFSRB Attorney Cheryl Furstace Daniels sent a Notice of Request for Review and a Request for Certified Copy of Decision-Making Record, to the Aggrieved Persons, and Jefferson County, attaching the Request for Review and Statement of Positions. These documents set May 18, 2018, as the date for the certified copy of the record and all position statements to be e-mailed or postmarked to the LFSRB.

On April 17, 2018, the LFSRB Attorney authorized the sending of a news release to news outlets that cover the area where the Applicant’s facility is located or are statewide news outlets

covering the agricultural subject matter under review. This was to give notice, per the LFSRB bylaws, to all potential aggrieved persons, as defined in Wis. Stat. § 93.90(5) (a), that they could file a statement of position on this particular review.

By May 11, 2018, the LFSRB received the County's Certified Decision-Making Record. Within the period allowed for filing, the LFSRB received Statements of Position from the Applicant, the County, and e-mails from other aggrieved persons: Anne Werner, Joe Bell, William Haakenson, Matthew Jones, Steven Weber, P.E., Michael and Sherry Hellekson, Marge and Louie Johnson, Tyler Jones, Dan and Stacy Weger, Andrew & Leonor Klug, Ralph and Margaret Krueger, A & L Johnson, Inc., and Sally Jones.

On June 13, 2018, the LFSRB held a meeting, properly noticed under the Wisconsin Open Meetings Law, to review the appeal in this matter. Based upon the record in the matter, including the certified record submitted by the County, the submitted statements of position, the discussion by the LFSRB at the meeting, and the vote of the LFSRB, the LFSRB issues the following decision.

ISSUES FOR DECISION

1. Pursuant to Wis. Stat. § 93.90(4) (d) and Wis. Admin. Code § ATCP 51.34, did the Applicant, Daybreak Foods, Inc., in its application for approval, provide sufficient credible information to show that the proposed facility meets the odor standard in Wis. Admin. Code § ATCP 51.14?

2. Pursuant to Wis. Stat. § 93.90(4) (d) and Wis. Admin. Code § ATCP 51.34, is there sufficient evidence in the record to find, by clear and convincing information or documentation, that the applicant cannot meet the standard in Wis. Admin. Code § ATCP 51.14, and therefore the county's issuance of the CUP cannot be sustained by the LFSRB?

3. Are there sufficient grounds to review the conditions placed on the Applicant's CUP by Jefferson County?

RELEVANT STATUTES AND RULES

S. 93.90 Livestock facility siting and expansion.

(2) DEPARTMENT DUTIES. (a) For the purposes of this section, the department shall promulgate rules specifying standards for siting and expanding livestock facilities. . .

(3) POLITICAL SUBDIVISION AUTHORITY.

(ae) A political subdivision that requires a special exception or conditional use permit for the siting or expansion of any of the following livestock facilities shall require compliance with the applicable state standards under sub. (2) (a) as a condition of issuing the special exception or conditional use permit:

1. A new or expanded livestock facility that will have 500 or more animal units.

(ar) Notwithstanding par. (ae) a political subdivision may apply to a new or expanded livestock facility described in par. (ae) 1. or 2., as a condition of issuing a special exception or conditional use permit, a requirement that is more stringent than the state standards under sub. (2) (a), if the political subdivision does all of the following:

1. Adopts the requirement by ordinance before the applicant files the application for approval.
2. Bases the requirement on reasonable and scientifically defensible findings of fact, adopted by the political subdivision, that clearly show that the requirement is necessary to protect public health or safety.

(4) POLITICAL SUBDIVISION PROCEDURE.

(b) A political subdivision shall make a record of its decision making on an application for approval, including a recording of any public hearing, copies of documents submitted at any public hearing, and copies of any other documents provided to the political subdivision in connection with the application for approval.

(c) A political subdivision shall base its decision on an application for approval on written findings of fact that are supported by the evidence in the record under par. (b).

(d) Except as provided in par. (e), a political subdivision shall approve or disapprove an application for approval no more than 90 days after the day on which it notifies the applicant that the application for approval is complete. If an applicant complies with the rules promulgated under sub. (2) (e) 1. and the information and documentation provided by the applicant is sufficient to establish, without considering any other information or documentation, that the application complies with applicable requirements for approval, the political subdivision shall approve the application unless the political subdivision finds, based on other clear and convincing information or documentation in the record, that the application does not comply with applicable requirements.

(5) REVIEW OF SITING DECISIONS.

(a) In this subsection “aggrieved person” means a person who applied to a political subdivision for approval of a livestock facility siting or expansion, a person who lives within 2 miles of a livestock facility that is proposed to be sited or expanded, or a person who owns land within 2 miles of a livestock facility that is proposed to be sited or expanded.

(b) An aggrieved person may challenge the decision of a political subdivision on an application for approval on the grounds that the political subdivision incorrectly applied the state standards under

sub. (2)(a) that are applicable to the livestock facility siting or expansion or violated sub. (3), by requesting the board to review the decision. . .

(bm) Upon receiving a request under par. (b), the board shall notify the political subdivision of the request. The political subdivision shall provide a certified copy of the record under sub. (4) to the board within 30 days after the day on which it receives the notice.

(c) Upon receiving the certified copy of the record under par. (bm), the board shall determine whether the challenge is valid. The board shall make its decision without deference to the decision of the political subdivision and shall base its decision only on the evidence in the record under sub. (4) (b). . . The board shall make its decision within 60 days after the day on which it receives the certified copy of the record under par. (bm), except that the board may extend this time limit for good cause specified in writing by the board.

(d) If the board determines that a challenge is valid, the board shall reverse the decision of the political subdivision. The decision of the board is binding on the political subdivision, subject to par. (e). If a political subdivision fails to comply with a decision of the board that has not been appealed under par. (e), an aggrieved person may bring an action to enforce the decision.

Chapter ATCP 51 LIVESTOCK FACILITY SITING

ATCP 51.14 Odor and air emissions. (1) ODOR STANDARD. Except as provided in subs. (2) to (4), a livestock facility shall have an odor score of at least 500. The operator shall calculate the odor score according to *Appendix A, worksheet 2*, or by using the equivalent spreadsheet provided on the department's website. An application for local approval shall include *worksheet 2* or the spreadsheet output.

Note: The spreadsheet equivalent of *Appendix A, worksheet 2* is available on the department's website at <http://livestocksiting.wi.gov/>.

Odor score is based on *predicted odor generation* (based on size and type of livestock facility), odor practices, and the proximity and density of "affected neighbors." See *Appendix A, worksheet 2*.

An *odor score* is a predictive estimate. The standard in sub. (1) applies only for purposes of local livestock facility siting decisions under this chapter. Failure to comply with the standard in sub. (1) does not constitute evidence of a public or private nuisance, negligence, or a taking of property.

Odor control practices may also control air pollution emissions. The department will work to coordinate odor and air emissions field research with DNR, the Wisconsin agricultural stewardship initiative (WASI), and the University of Wisconsin. The department will consider research results when it reviews this chapter at least once every 4 years (see s. 93.90 (2) (c), Stats.). As part of its review, the department will consult with an advisory committee that includes representatives of livestock producers, local government and environmental interests. The department will consider amendments to this rule, as appropriate, based on research findings.

(2) EXEMPTIONS. The odor standard in sub. (1) does not apply to any of the following livestock facilities unless the facility operator voluntarily completes and submits *worksheet 2* or the equivalent spreadsheet output with the operator's application for local approval:

(b) An expanded livestock facility with fewer than 1,000 animal units.

ATCP 51.30 Application. (1) GENERAL. If local approval is required for a new or expanded livestock facility, a person seeking local approval shall complete and file with the political subdivision the application form shown in *Appendix A*. The application shall include all of the information required by *Appendix A* and attached *worksheets*, including any authorized modifications made by the political subdivision under sub. (2). The information contained in the application shall be credible and internally consistent.

(5) COMPLETE APPLICATION. Within 45 days after a political subdivision receives an application under sub. (1), the political subdivision shall notify the applicant whether the application contains everything required under subs. (1) to (4). If the application is not complete, the notice shall specifically describe what else is needed. Within 14 days after the applicant has provided everything required under subs. (1) to (4), the political subdivision shall notify the applicant that the application is complete. A notice of completeness does not constitute an approval of the proposed livestock facility.

ATCP 51.34 Granting or denying an application. (1) GRANTING AN APPLICATION. Except as provided in sub. (2), a political subdivision shall grant an application under s. ATCP 51.30(1) if all of the following apply:

- (a) The application complies with s. ATCP 51.30.
- (b) The application contains sufficient credible information to show, in the absence of clear and convincing information to the contrary, that the proposed livestock facility meets or is exempt from the standards in subch. II. To the extent that a standard under subch. II vests discretion in a political subdivision, the political subdivision may exercise that discretion.

(3) WRITTEN DECISION. (a) A political subdivision shall issue its decision under sub. (1) or (2) in writing. The decision shall be based on written findings of fact included in the decision. The findings of fact shall be supported by evidence in the record under s. ATCP 51.36. Findings may be based on presumptions created by this chapter.

(4) TERMS OF APPROVAL. An approval under sub. (1) is conditioned on the operator's compliance with subch. II and representations made in the application for approval. This chapter does not limit a political subdivision's authority to do any of the following:

- (a) Monitor compliance.
- (b) Withdraw an approval, or seek other redress provided by law, if any of the following apply:
 1. The operator materially misrepresented relevant information in the application for local approval.
 2. The operator, without authorization from the political subdivision, fails to honor relevant commitments made in the application for local approval. A political subdivision may not withhold authorization, under this subdivision, for reasonable changes that maintain compliance with the standards in subch. II.
 3. The livestock facility fails to comply with applicable standards in subch. II.

FINDINGS OF FACT

1. Jefferson County has a zoning ordinance that requires a conditional use permit in the A-1 zoning district “for more than 150 animal units or a poultry farm housing more than 10,000 birds.” The ordinance adopts and incorporates by reference the provisions of § 93.90 of the Wisconsin Statutes and ATCP 51 of the Wisconsin Administrative Code inclusive of all future amendments. **(Certified Record pgs. 480, 498-499)**
2. On January 22, 2018, the Applicant filed an application for local approval for an expansion of its livestock facility to a maximum size of 27,500 animal units (2,750,000 birds). **(Certified Record pgs. 16-20)**
3. The Applicant calculated an odor score of 648 points using Worksheet 2—Odor Management as part of the application filed for local approval. The odor score was based on the submission of optional advanced odor management plan. **(Certified Record pgs. 24-30, 187-189)**
4. On February 9, 2018, the Jefferson County Planning and Zoning Committee determined that the Applicant had submitted a complete application, based on recommendation from the Land and Water Conservation Department (LWCD). **(Certified Record pgs. 351-355)**
5. On February 12, 2018, the Jefferson County Planning and Zoning Department sent notification to adjacent landowners of the Daybreak Foods, Inc., application. **(Certified Record pgs. 357-359)**
6. On March 15, 2018, the Jefferson County Planning and Zoning Committee held a public hearing where it read public comment letters into the record and accepted testimony regarding the Daybreak Foods, Inc., application. **(Certified Record pgs. 403-415)**
7. The evidence in the record shows that the Applicant’s proposed facility, with a passing score of 648 points, meets the odor standard. There was not clear and convincing evidence in the record to rebut the presumption of compliance with odor standard, as required by Wis. Admin. Code § ATCP 51.14 (7).
8. On March 26, 2018, Jefferson County Planning and Zoning Committee voted to grant Applicant’s CUP, as presented, and incorporate the following conditions communicated by the LWCD in a January 30, 2018 memo:
 - Annual nutrient management plan updates shall be submitted to the LWCD by September 30th of each year for the following crop year. These updates shall account for any nutrients applied to farmland.
 - The LWCD must be informed of the pre-construction conference and when work will begin on the manure storage structures.
 - Per Jefferson County Zoning Ordinance [1 1.05(d)2.d], the manure storage structure certification "shall be filed at least 10 days prior to population of the facilities by the animal unit count approved under the permit." As-builts should be sent to the LWCD upon certification.

- Per the Livestock Siting Law [ATCP 51.08 (2)] within 2 years the livestock operator must begin populating the approved facility and begin construction on every new or expanded livestock housing structure, as well as every new or expanded waste storage structure, proposed in the application.
- Any alterations or additions to the operation after the permit is issued that changes one of the worksheets or application requires a permit update or new Livestock Siting Application depending on the circumstance.
- In addition, the operation shall be conducted as submitted in the completed ATCP 51 application and worksheets and all supporting documents. **(Certified Record pg. 422-423):**

CONCLUSIONS OF LAW

1. The evidence in the record shows that the application for local approval was complete, and contains credible information and documentation that the Applicant's proposed facility meets the odor standard as specified in Wis. Admin. Code § ATCP 51.14.

2. There is not clear and convincing evidence in the record to conclude that the Applicant failed to meet the standard in Wis. Admin. Code § ATCP 51.14.

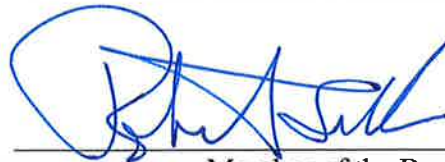
3. There are insufficient grounds to review the conditions placed on the Applicant's CUP by Jefferson County. The request for review did not raise this issue on appeal. Moreover, the conditions in the CUP are reasonably related to monitoring compliance of the applicable standards, and none of the conditions create new standards.

ORDER

NOW, THEREFORE, IT IS ORDERED, pursuant to s. 93.90(5) (d), Stats., that the challenges to the CUP issued to Daybreak Foods, Inc., for a 27,500 animal unit facility are not valid, and the decision of the Jefferson County is affirmed.

Dated this 2 day of July, 2018.

ON BEHALF OF THE STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD



Member of the Board

Robert Selk