

#9 - REQUEST FOR REVIEW: LA20014 / Granum Colony

Filed By:	Radon Chatterton
Deadline for RFRs:	September 17, 2020
Date RFR received:	September 17, 2020
Status of party as per Decision Summary:	Directly Affected

REQUEST FOR BOARD REVIEW
SUBMITTED TO THE NATURAL RESOURCES CONSERVATION BOARD

Application No:	LA20014
Name of Operator/Operation:	Hutterian Brethren Church of Granum
Type of application (<i>check one</i>):	<input type="checkbox"/> Approval <input checked="" type="checkbox"/> Registration <input type="checkbox"/> Authorization
Location (<i>legal land description</i>):	SE 25-11-28 W4M
Municipality:	MD of Willow Creek

I hereby request a Board Review of the Approval Officer’s Decision and have the right to request a Board review because (*please review all options and check one*):

- I am the producer seeking the approval/registration/authorization.
- I represent the producer seeking the approval/registration/authorization.
- I represent the municipal government.
- I am listed as a directly affected party in the Approval Officer’s Decision.
- I am not listed as a directly affected party in the Approval Officer’s Decision and would like the Board to review my status.

IMPORTANT INSTRUCTIONS

1. You must meet the specified 10-day timeline; otherwise your request will not be considered.
2. Section 1 of this form must be completed only if you are requesting that the Board review your status as “not directly affected”. Sections 2 to 5 must be completed by all applicants.
3. This form must be signed and dated before it is submitted to the Board for its review.
4. Be aware that Requests for Board Review are considered public documents. Your submitted request will be provided to all directly affected parties and will also be made available to members of the public upon request.
5. For more assistance, please call Laura Friend, Manager, Board Reviews at 403-297-8269.

1. PARTY STATUS

(IF YOU ARE NAMED A DIRECTLY AFFECTED PARTY IN THE APPROVAL OFFICER'S DECISION, YOU DO NOT NEED TO COMPLETE THIS SECTION)

Party status (“*directly affected*” or “*not directly affected*”) is determined pursuant to the provisions of the *Agricultural Operation Practices Act (AOPA)* and its regulations. Upon receipt of an application, the Approval Officer must notify any affected parties. Affected parties include municipalities and owners or occupants of land as determined in accordance with the regulations. To obtain directly affected status, the owner or occupant notified in the above process must provide a written submission to the Approval Officer during the stage at which the Approval Officer considers the application. The Approval Officer will then determine who the directly affected parties are and include this determination in the Decision Summary.

Under its governing legislation, the Board can only consider requests for review submitted by directly affected parties. If you are not listed as directly affected in the Approval Officer’s decision, you must request that the Board reconsider your status (*please note that under the provisions of AOPA, the Board cannot reconsider the status of a party who has not previously made a submission to the Approval Officer during the application process*).

In order to request your status be reconsidered, you must explain why your interests are directly affected by the decision of the Board. Please list these reasons below:

My grounds for requesting directly affected status are as follows:

2. GROUNDS FOR REQUESTING A REVIEW

(ALL PARTIES MUST COMPLETE THIS SECTION)

In order to approve an application, NRCB Approval Officers must ensure the requirements of AOPA have been met. Your grounds for requesting a Board review should identify any requirements or specific issues that you believe the Approval Officer failed to adequately address in the Decision.

My grounds for requesting a review of the Approval Officer's decision are as follows:

See attached "Schedule A - Grounds For Requesting A Review"

4. ACTION REQUESTED

(ALL PARTIES MUST COMPLETE THIS SECTION)

I would like the Board to take the following actions with the respect to the Approval Officer's decision:

- Amend or vary the decision
- Reverse the decision

Please describe why you believe the Board should take this action:

See attached "Schedule C - Why the board should take action"

Under AOPA Section 25(6) I would also request that the board suspend the approval until my application is heard. The grounds being that my application contains requests for conditions to be met before construction begins.

If the Board decides to grant a review (*in the form of either a hearing or a written review*), all directly affected parties are eligible to participate. The Board may consider amending the Approval, Registration, or Authorization on any terms and conditions it deems appropriate. **Please note the Board cannot make any amendments unless it first decides to grant a review.**

If a review is granted by the Board, are there any new conditions, or amendments to existing conditions, that you would like the Board to consider? It is helpful if you identify how you believe your suggested conditions or amendments would address your concerns.

See attached "Scheduld D - Requested Actions"

5. CONTACT INFORMATION

(ALL PARTIES MUST COMPLETE THIS SECTION)

Contact information of the person requesting the review:


Name: Radon Chatterton

Address in Alberta: ██████████, Claresholm AB, T0L 0T0

Legal Land Description: NW 4-12-27 W4

Phone Number: ██████████ Fax Number:

E-Mail Address: ████████████████████

Signature:  Date: September 17, 2020

Please note that all sections of the form must be completed in order for your request to be considered. Also, if you do not meet the timeline identified, your request will not be considered. Form must be signed and dated before being submitted for Board consideration

If you are, or will be, represented by another party, please provide their contact information (Note: If you are represented by legal counsel, correspondence from the Board will be directed to your counsel)

Name: _____

Address: _____

Phone Number: _____ Fax Number: _____

E-Mail Address: _____

When you have completed your request, please send it, with any supporting documents to:

Laura Friend, Manager, Board Reviews
Natural Resources Conservation Board
19th Floor Centennial Place
250 – 5th Street SW
Calgary, AB T2P 0R4

Phone: 403-297-8269
Email: laura.friend@nrcb.ca

Please note, Requests for Board Review are considered public documents. Your submitted request will be provided to all directly affected parties and will also be made available to members of the public upon request.

For more assistance, please call Laura Friend, Manager, Board Reviews at 403-297-8269.

Definitions

AEP - Alberta Environment and Parks

AGL - above ground level

AIM or TC AIM - Transport Canada's *Aeronautical Information Manual*

Note: This document is publically available on the TC website.

<https://tc.canada.ca/en/aviation/publications/transport-canada-aeronautical-information-manual-tc-aim-tp-14371>

AIM RAC - "Rules of the Air and Air Traffic Services" Section of TC AIM

AIM GEN - "General" Section of TC AIM

AOPA - Agricultural Operation Practices Act

CARs - Canadian Aviation Regulations

CFO - Confined Feeding Operation

"My Original Submission" - my submission expressing concerns about Application LA20014

"My Previous Submission" - as above

"The Decision Summary" - NRCB Decision Summary LA20014

Schedule A - Grounds For Requesting A Review

Item 1 - Level of Compliance with AOPA Section 20(1)(b)(iii)

Section 20(1)(b)(iii) of the AOPA states that the approval officer,
"must give directly affected parties a reasonable opportunity to review
the information relevant to the application that is submitted to the approval
officer and a reasonable opportunity to furnish evidence and written
submissions relevant to the application,"

My concerns under this section are twofold.

1. I was neither informed of, nor given a chance to respond to one piece of relevant information found on page 19 (Appendix C) of Decision Summary LA20014. Namely:

"Response from the applicant (the agent responded on Granum Colony's behalf)

The newest information from the Alberta Aviation Council shows that the land strip of Allan Minor is no longer in existence."

In this particular case, the required opportunity to respond would have been valuable to me as a pilot. For the sake of brevity I will only include one part of the additional information I would like to have supplied relative to this claim. TC AIM GEN 1.1.1 states, "Transport Canada is the responsible aeronautical authority in Canada."

2. The second concern is in regards to reasonable opportunity to furnish evidence. Below is a second excerpt from page 19 of Decision Summary LA20014.

"...it has never come to my attention that there are airspace restrictions in respect to chicken barns. Looking at several websites, I have not been able to find conclusive information that the claimed 2000 feet airspace above the barns is off limits for local, small aircrafts, ..."

It seems as though footnote 6 on my original submission was completely overlooked, as it referred the reader to AIM RAC 1.11.1;

"Experience has shown that aviation noise caused by rotary wing and fixed wing aircraft flying at low altitudes can cause serious economic losses to the farming industry. The classes of livestock particularly sensitive are poultry (including ostriches and emus), because of the crowding syndrome and stampeding behaviour they exhibit when irritated and frightened, and foxes who, when excited, will eat or abandon their young. Avoid overflying these farms below 2000 ft AGL."

I do not believe I had a reasonable chance to furnish evidence. I provided a reference to a publicly available Transport Canada resource, and the officer was still unable to find the source of my information.

Item 2 - Compliance with AOPA Section 20(1)(b)(ix)

Section 20(1)(b)(ix) of the AOPA states that the approval officer, “must consider the effects on the environment, the economy and the community and the appropriate use of land.” Concerns under this section are:

1. Eight directly affected persons submitted concerns about water quantity (page 17 & 18 or Decision Summary LA20014). The approval officer responded, in part, with the following.

“Alberta Environment and Parks (AEP) is responsible for licencing the use of surface water and groundwater in the province. Operations or residences that do not hold an AEP water license have to obtain a water license from AEP. ... Granum Colony’s application includes a signed declaration indicating that Granum Colony does not need a water licence.

The email response from AEP confirmed that a water license is required and stated that they have not yet receive an application for a water licence. The applicant is reminded that it is their responsibility to ensure that they obtain necessary water licensing for the proposed CFO.”

In the case that the applicant plans to haul water; then in my opinion, the approval officer has addressed the water quantity concern. However they seem to feel the applicant needs a water license, as per their reminder to ‘obtain necessary water licensing’. If this is the case, then I can foresee two possible outcomes.

- A well to take groundwater. This has potential to affect neighbors drinking water. Losing a well would affect quality of life. New infrastructure would need to be installed. Water would have to be hauled regularly. Most likely on a daily basis for those with cattle. This would either take a non trivial amount of extra time and funds. The officer must consider effects on the community.
- Taking water from the nearby creek would necessitate reevaluation of the effect on Northern Leopard Frog habitat. The officer “must consider the effects on the environment”.

Both of these contingencies should have been addressed if the effects were considered as required.

2. In addressing “Impact to local wildlife” concerns (page 19 Decision Summary LA20014), the officer states:

“AOPA and its regulations do not address requirements relating to other land uses, including natural habitat for wildlife.”

In response to this I will restate AOPA Section 20(1)(b)(ix),

“must consider the effects on the environment, the economy and the community and the appropriate use of land.” Emphasis added.

To be frank, I struggle to believe that the effects on the environment were adequately considered when the approval officer leads out with a sentence like the one quoted above.

Item 3 - **Level of Rigor in Decision Making Process**

Impact on Local Wildlife

In my original submission I cited concerns about protecting Northern Leopard Frog habitat. I also submitted a photo I had taken of a frog near the proposed CFO location. I stated their conservation status and included in the footnotes a reference to my sources.

I was then listed as having asserted that the frog was an endangered species, and “the operator is reminded that the northern leopard frog is an endangered species.” It seems for a second time, footnotes including sources were ignored. A quick look at either of the websites sourced in my original submission (Governments of Canada & Alberta), would have shown that the status was in fact not ‘endangered’. I understand that this is a matter of nuance, but the Decision Summary is a matter of public record; and feel the need to correct a statement that could be construed to show I submitted misinformation.

I also included no credentials as a biologist. I do appreciate the officer giving me the benefit of the doubt when I identified the frog in the photo. But given the other information available a qualified person should have confirmed the frog species. Specifically because of the information brought forward on page 19 of the Decision Summary.

“Looking at available information from AEP, it appears that the quarter section in question is not identified as habitat for any endangered species,…”

Also of note, is that the frog is not classified as ‘endangered’, as previously mentioned. So the frogs habitat would not be listed as endangered species habitat. The Government of Alberta website (referenced in my original submission) does comment on the state of the Leopard Frog.

“Previously common and widespread but has disappeared from most of its Alberta and Canadian range. Protection of remnant breeding areas essential. Designated as "Threatened" under the Wildlife Act.” See image C of my original submission.

AOPA Section 20(1)(b)(ii) authorizes an approval officer to make or require reports. This course of action would have helped to clarify the status of the land in question as habitat for the Northern Leopard Frog. It would have also provided grounds for a more thorough assessment of the potential impact a CFO might have on the frogs, if any. This would also signal a strong commitment to evaluating environmental concerns as required under AOPA Section 20(1)(b)(ix).

In my mind, part of the reason nearby parties are given a chance to submit concerns about a CFO is because of their firsthand knowledge of the area. Just because AEP does not have a record of a species living in a particular area, does not mean that it is not present. This is why locals are given a chance to submit concerns. We are all responsible for the preservation of our environment, and can not simply rely on the AEP as a sole source of information.

Impact on Air Traffic

As stated earlier, the approvals officer was not “able to find conclusive information...” after “Looking at several websites...”. Again, my original submission included a reference to the TC AIM. AIM GEN 1.1 contains several points of contact for Transport Canada. The Decision Summary Section 3. *Responses from the municipality and referral agencies* does not make any reference to an attempt to contact Transport Canada, even though aviation falls squarely within their jurisdiction.

I again quote a previously mentioned part of the Decision Summary.

“Response from the applicant (the agent responded on Granum Colony’s behalf)

The newest information from the Alberta Aviation Council shows that the land strip of Allan Minor is no longer in existence.”

While the name of the organization may sound official, the “WHO WE ARE” section of their website is an informative source of information.

“Alberta Aviation Council began before the 1980s when a group of like-minded individuals came together with a common goal. Their vision was and still is to be a catalyst for industry growth and the recognized voice of aerospace, airport and aviation interests in Alberta.”

Source: <https://www.albertaaviationcouncil.com/who-we-are>

Reliable sources of information are key to good decisions.

Response from The Municipal and Referral Agencies

“Ms. Brittain stated in her response, that all efforts should be made to protect drinking water sources during construction and operation of the facility and that water testing of drinking water should be conducted.”

Source: Decision Summary LA200114 page 3

I am reminded of AOPA Section 20(1)(b)(ii).

“(ii) may make, or require the applicant to make, inquiries and investigations and prepare studies and reports,”

Yet the applicant has not been required to prepare any study or report on drinking water. Nothing has been done, despite a clear recommendation from a public health inspector. How then can we claim a reasonable degree of rigour was used to evaluate the effect on the community. Section 20(1)(b)(ix) of the AOPA surely demands more than simply considering the outcome and then ignoring the conclusions.

Item 4

Unaddressed concerns

My original submission stated a concern that the proposed CFO would limit the altitude at which aircraft could overfly the area. Of specific concern were the setbacks to agricultural operations. The response was a declaration of uncertainty regarding the rules and a reminder to follow the CARs. There is nothing substantial in the Decision Summary to address my concern.

Schedule B - Reasons You Are Affected By The Decision

I believe that, as a result of the Approval Officer's decision, the following prejudice or damage will result:

Legal Consequences

Decision Summary LA20014, in addressing concerns regarding flight over the CFO reminded readers are reminded that "all aircraft are required to abide by the requirements set out in the Canadian Aviation Regulations."

CARs 602.14 (2) and 602.14 (2)(b) state:

"(2) Except where conducting a take-off, approach or landing or where permitted under section 602.15, no person shall operate an aircraft"

"(b) in circumstances other than those referred to in paragraph (a), at a distance less than 500 feet from any person, vessel, vehicle or structure."

It seems as though the approval officer would have me believe that I can freely overfly the proposed CFO at 500 feet above the buildings. As previously stated, AIM RAC 1.11.1 reads in part:

"Experience has shown that aviation noise caused by rotary wing and fixed wing aircraft flying at low altitudes can cause serious economic losses to the farming industry. ... Avoid overflying these farms below 2 000 ft AGL."

From AOPA Nuisance Section:

"2(1) A person who carries on an agricultural operation and who, in respect of that operation, does not contravene

...

(c) the generally accepted agricultural practice

is not liable to any person in an action in nuisance resulting from the agricultural operation and is not to be prevented by injunction or other order of a court from carrying on the agricultural operation because it causes or creates a nuisance.

...

- (4) In an action in nuisance against a person who carries on an agricultural operation, a court may
- (a) order the party that commenced the action to furnish security for costs in any amount the court considers proper;
 - (b) award costs in the action.”

Transport Canada describes the AIM as follows:

“The Transport Canada Aeronautical Information Manual (TC AIM) provides flight crews with a single source for information on rules and procedures for aircraft operation in Canadian airspace.

It has been developed to bring together pre-flight reference information of a lasting nature into a single primary document.”

Source: <https://tc.canada.ca/en/aviation/publications/transport-canada-aeronautical-information-manual-tc-aim-tp-14371>

Given the nature of the AIM, I do not believe a pilot can responsibly ignore what it says about overflying poultry barns and still meet “generally accepted agricultural practice” as described in the AOPA. Asking pilots to ignore the altitudes laid out in the AIM, at risk of their own liability, is a grossly irresponsible request for the approval officer to make.

Biodiversity

Further reduction of Northern Leopard Frog habitat may occur.

Extra Time and Resources Required

Given that the water quantity concerns were not addressed (in the case that a water license is applied for in the future), a shortage can not be ruled out. If this is the case, then extra time and resources would be required to haul water. Extra infrastructure would likely also be required. For my family's particular operation, water resources adjacent to the proposed CFO are already stretched some years/seasons. We are fortunate to have the infrastructure in place already. This still necessitates hauling water once every day or two. This takes up a nontrivial amount of time and has some cost associated. For the neighbors who stand to lose the water source to their house, there would be an added stress. I feel the effects can best be conveyed through a thought exercise.

Imagine turning on the tap in your house and not having water. Then having to wait close to a week for a cistern and pumps to be delivered and installed. During this week, how would you cook? How would you attend to your personal hygiene, especially after working outside with animals most of the day? Where would you get and store your drinking water? How much free time would you lose traveling to get clean water? Once you have installed a cistern, you would still likely need to make a trip to town for water weekly or pay someone to haul it.

The public health inspector recommended testing for water near the CFO (as mentioned earlier). This implies some kind of risk to drinking water quality. Contamination would cause all the hardship of losing quantity for a person's house. It may also affect animals if the contamination is bad enough.

Schedule C - Why the board should take action

As outlined in Schedule A, due process was not followed. Including but not limited to meeting the requirements under AOPS Sections 20(1)(b)(iii) and 20(1)(b)(ix).

Covid-19 restrictions, while necessary, have hindered the approval officers ability to meet the requirements. A board review would allow directly affected parties more opportunity to ask questions and share relevant information.

As outlined in Schedule A, concerns were left unaddressed. As outlined in Schedule B, one particular concern could trigger liability for neighbors.

The concerns around water licenses (as per Schedule A) voiced by the approval officer, combined with the seemingly misleading statement (regarding the existence of an airstrip) by the applicants Agent also draw into question the transparency of this application. In such a case, a board review may benefit both parties as there will be multiple neutral parties involved.

Schedule D - Requested Actions

I believe my more prominent concerns could be address as follows:

1. Given the CFO was approved an application requiring no water license, and that the approval officer only evaluated it as such,

(see *Schedule B, Item 2 - Compliance with AOPA Section 20(1)(b)(ix)*)

There should be conditions limiting the future application of water licenses in regard to this facility. Specifically that in the case such a water license is applied for in the future,

- An application for an amendment to an approval needs to be filed
- AOPA Section 20(1.2)(a) will not apply to the application to amend approval
- Previous compliance with CFO approval conditions shall be considered as part of the application to amend an approval

Because the concerns of neighbors regarding the quantity of water were only addressed in terms of no water license being needed. I think the above would provide some security and protection to those concerned, in regard to this issue.

2. The applicant is required to sign a document acknowledging their awareness that there is previous and ongoing use of aircraft engaged in agricultural activities in the area. That they acknowledge the risk of economic losses resulting from aviation noise, and that they accept responsibility for such risk. That they will not pursue action against pilots engaged in lawful activities, notwithstanding such pilots may overfly the CFO at below 2000 feet AGL.

A signed affidavit relieving pilots of potential legal burdens would clarify the rights of pilots in the area to use aviation in their agricultural practices. This also assures that the applicant is aware of potential risks that could be costly for them.

3. Prior to the start of construction, have a qualified person confirm the identity and presence of the Northern Leopard Frog in the area. Also, evaluate the level of risk associated with the CFO on the frogs and their habitat. The specifics of such would be better left to the board, as I have limited knowledge of best practices. But in fairness to the applicant, I suggest that their deadline to complete construction of the CFO be extended proportionately.

AOPA Section 20(1)(b)(ix) requires that the impact on the environment be considered. I believe such an evaluation would satisfy this requirement.

4. Water testing for neighbors who rely on nearby water sources, as recommended by the public health inspector. Not at the expense of the neighbors.

This would set a baseline for the water in the area, and could serve to protect both the applicant and neighboring affected parties. I presume that the public health inspector is a qualified individual such recommendations should be followed.