

#6 - REQUEST FOR REVIEW: RA21045 / G&S Cattle Ltd.

Filed By:	<b>G&amp;S Cattle Ltd. (Greg Thalen)</b> <b>(c/o Shawn Munro)</b>
Deadline for RFRs:	September 22, 2022
Date RFR received:	September 22, 2022
Status of Party as per Decision Summary:	Operator

**REQUEST FOR BOARD REVIEW**  
**SUBMITTED TO THE NATURAL RESOURCES CONSERVATION BOARD**

<b>Application No:</b>	RA21045
<b>Name of Operator/Operation:</b>	G&S Cattle Ltd.
<b>Type of application (<i>check one</i>):</b>	<input checked="" type="checkbox"/> <b>Approval</b> <input type="checkbox"/> <b>Registration</b> <input type="checkbox"/> <b>Authorization</b>
<b>Location (<i>legal land description</i>):</b>	NW 3-47-2 W5M
<b>Municipality:</b>	County of Wetaskiwin

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.

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## 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)

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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:**

As noted in the decision, G&S Cattle Ltd. is the applicant and proposed operator in respect of the proposed confined feeding operation.

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## **2. GROUNDS FOR REQUESTING A REVIEW**

(ALL PARTIES MUST COMPLETE THIS SECTION)

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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:**

Please find the attached "Schedule A."

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### **3. REASONS YOU ARE AFFECTED BY THE DECISION**

(ALL PARTIES MUST COMPLETE THIS SECTION)

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In order to support your reasons for requesting a review, please explain how you believe you would be affected by the Approval Officer's decision.

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

Please find the attached "Schedule A."

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## 4. ACTION REQUESTED

(ALL PARTIES MUST COMPLETE THIS SECTION)

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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:**

Please find the attached "Schedule A."

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.

Please find the attached "Schedule A."

## 5. CONTACT INFORMATION

(ALL PARTIES MUST COMPLETE THIS SECTION)

### Contact information of the person requesting the review:

Name: G&S Cattle Ltd. c/o Greg Thalen

Address in Alberta: [REDACTED]  
Ponoka, AB T4J 1R1

Legal Land Description: NW 3-47-2 W5M

Phone Number: [REDACTED] Fax Number:

E-Mail Address: [REDACTED]

Signature: \_\_\_\_\_

Date: Sept 21<sup>st</sup> 2022

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: Shawn Munro

Address: Bennett Jones LLP  
Bankers Hall East, 855 - 2nd Street SW  
Calgary, AB, T2P 4K7

Phone Number: 403-298-3481

Fax Number: 403-265-7219

E-Mail Address: [MunroS@bennettjones.com](mailto:MunroS@bennettjones.com)

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

Laura Friend, Manager, Board Reviews  
Natural Resources Conservation Board  
John J. Bowlen Building  
#901, 620 – 7 Avenue SW  
Calgary, AB T2P 0Y8

Phone: 403-297-8269

Email: [laura.friend@nrcb.ca](mailto: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.**

## SCHEDULE "A"

### Introduction

Pursuant to section 20(5) of the *Agricultural Operation Practices Act* ("**AOPA**" or the "**Act**"), G&S Cattle Ltd. ("**G&S**" or the "**Applicant**") hereby requests a review by the Natural Resources Conservation Board ("**NRCB**" or the "**Board**") of Decision Summary RA21045 (the "**Decision**") issued by the Approval Officer on August 31, 2022, which denied Application No. RA21045 (the "**Application**") put forward by G&S.

The Application sought approval of a confined feeding operation (the "**CFO**") located at NW ¼ 3-47-2 W5M (the "**Lands**") within the County of Wetaskiwin (the "**County**"). As the Applicant for and proponent of the CFO, G&S is a directly affected party for the purposes of the *AOPA*.

### Facts and Overview of the Decision

The CFO is a proposed new facility located on the Lands. It is comprised of four pens (each being 304.8 m x 32.97 m in area), and one catch basin (being 96 m x 66 m in area, and 1.75 m in depth). The CFO also requires permitting for 4,000 beef finishers. The Lands are located more than three kilometers west of Pigeon Lake.

In preparing the Application, G&S undertook a detailed review of the residences and other developments in proximity to the proposed CFO, as well as an assessment of the CFO's location relative to water bodies and other geographical features. G&S also prepared a detailed technical document in support of its Application, which included a geotechnical field investigation.

The Decision concluded that the proposed location for the CFO is consistent with the municipal development and land use planning provisions currently in force at the County level.<sup>1</sup> Specifically, the CFO conforms with the minimum setback requirements established by Objective 1.4.3 of the County's *Municipal Land Use Development Plan* (2010) as amended by Bylaw 2020/58 (the "**MDP**"), which incorporates water body setback distances established under the *AOPA* (with which the CFO is also compliant). In particular, the proposed location for the CFO is well beyond 1.6 kilometers from Pigeon Lake.

The Decision further concluded that the proposed design for the CFO meets all technical requirements set out in the *AOPA* and the *Agricultural Operations, Part 2 Matters Regulation* (the "**Part 2 Regulation**"), save for certain reservations regarding the depth of the proposed catch basin and the setback distances to two existing water wells. As is apparent from the Decision, these considerations did not form the basis for the denial of the Application, and these matters be addressed through the implementation of mitigation or design measures.

With respect to concerns regarding effects of the CFO on the Pigeon Lake Watershed, the Decision concluded that: (i) the CFO complies with the *AOPA*'s technical requirements designed to prevent contamination of surface water, while additional landscaping would be recommended as a precaution; (ii) the information was not sufficient to make a determination regarding groundwater contamination; (iii) cumulative effects on the watershed are beyond the jurisdiction of an approval

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<sup>1</sup> See NRCB Decision Summary RA21045 (31 August 2022) at 5 ("**Decision Summary**").



officer making a determination under the *AOPA*, being properly the subject of decisions made by land use planning and zoning authorities; and (iv) concerns about runoff and nutrient loading through manure application are not relevant to a permitting decision and are properly dealt with on an ongoing basis under sections 24(1) and 24(5) of the *Standards and Administration Regulation* made under the *AOPA*.<sup>2</sup>

To summarize the foregoing, there is no dispute in this matter that:

- a) the CFO complies with the *MDP* and its setback requirements; and
- b) the CFO complies with the technical requirements of the *AOPA* and the *Part 2 Regulations* (save for two potential issues which may be eliminated with modifications to the proposed design for the CFO).

However, the Decision denied the Application on the basis that the CFO would have an overall negative effect on the community and is not an appropriate use of the land.

### **Grounds for Review of the Decision**

For the reasons that follow, G&S respectfully submits that:

1. the Decision's assessment with respect to potential adverse effects on the community and whether the CFO is an appropriate use of the Lands is based on conclusions not supported by the information before the Approval Officer;
2. the Decision disregards established processes and principles for approvals under subsection 20(1) of the *AOPA*;
3. the Decision misinterprets the authority of the Pigeon Lake Watershed Management Plan (the "**PLWMP**") and the extent to which it represents the community interest;
4. by adopting the conclusions of the PLWMP, the Decision unfairly focuses on the concerns of unaffected parties to the exclusion of agricultural operators; and
5. the Decision improperly relies on the PLWMP as being determinative of whether the Application should be granted.

G&S' submissions in respect of each of these grounds are detailed in the following sections.

#### ***1. Assessment of Community Effects and Land Use***

The Decision did not undertake an independent review of whether the CFO would have "materially negative and long lasting effects on the community," or whether the CFO is an appropriate use of the Lands, but rather adopts the generalized and unsubstantiated conclusions in the PLWMP.

In particular, the conclusions regarding adverse effects and inappropriate use of the Lands appear to be based substantially on the CFO's purported negative impacts on the health of Pigeon Lake,

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<sup>2</sup> Decision Summary at 26-27.

despite the CFO's compliance with legislative standards designed to prevent adverse effects on watersheds, and despite the Decision's acknowledgement that there is insufficient information to establish tangible adverse effects. The Decision notes that Pigeon Lake is susceptible to nutrient accumulation and potential overloading, and that the proposed CFO is located within the Pigeon Lake Watershed, which is the primary source of water entering Pigeon Lake;<sup>3</sup> however, the Decision contains no findings as to whether the CFO will have any impact on the health of Pigeon Lake or the nutrient levels therein.

The Decision further refers to odour and nuisance concerns as being among the "unacceptable negative impacts on the community," without making any specific findings to this effect.<sup>4</sup> As noted in the Decision, the *AOPA*'s minimum distance separation requirements are a proxy for minimizing nuisances associated with confined feeding operations, and nuisance and other impacts beyond these specified distances are typically not considered in permitting decisions. The decision provides no justification for why the *AOPA*'s minimum distance separation requirements are not appropriate for the location of the CFO, which is approximately six kilometres from the nearest recreational community.

In addition to taking unsubstantiated concerns at face value, and the Decision does not contain any actual assessment of the potential impact of the proposed CFO on the surrounding community or the Pigeon Lake Watershed. The Decision also points to a number of factors as being part of the "unacceptable negative impacts on the community" resulting in the proposed CFO not being an appropriate use of Land, which the Applicant submits are not made out, and are adequately addressed by setback distances and other requirements. The Decision found only two concerns justified denying the approval: (i) the purported effects on the community; and (ii) the location of the CFO within the Pigeon Lake Watershed. In G&S' submission, in light of the Application's broad compliance with the *AOPA* and other applicable requirements, neither of these points provide adequate support for the conclusions reached in the Decision.

In G&S' further submission, in addition to inappropriately prioritizing a policy objective over actual statutory provisions now in effect, the Decision is based on general, unsubstantiated concerns, and fails to specify what "materially negative and long lasting effects on the community" would result from the CFO. To summarize, not one of the specific concerns raised was sufficiently established with evidence to justify denial of the Application.

## ***2. Disregard for Established Principles and Processes***

An approval officer's authority to approve or deny an application for a new CFO exists under subsection 20(1) of the *AOPA*. Where an approval officer is satisfied that an application complies with technical requirements under the *AOPA* and land use provisions in the applicable municipal development plan, as is the case here, any residual discretion is governed by paragraph 20(1)(b). An approval officer's decision-making authority under subparagraph 20(1) must also be exercised in accordance with the Board's established processes and procedures, and must ultimately be consistent with the Board's mandate.

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<sup>3</sup> Decision Summary at 34-35.

<sup>4</sup> Decision Summary at 25.

Under the *AOPA*, persons who are outside a 1.5 mile radius of a confined feeding operation that is the size of the CFO are presumed not to be affected by the proposed operation, being outside the definition of "affected parties" in the legislation. In addition, and as noted in Appendix F to the Decision, there is a further presumption that compliance with the *MDP* indicates that a proposed development is an appropriate use of land. The Approval officer noted that these are rebuttable presumptions, and determined that "the presumptions of both the appropriate use of land and acceptable effects on the community are rebutted and because of this I am denying the application" [emphasis added].<sup>5</sup> While these presumptions are rebuttable, it does not follow that broad, non-binding statements of public policy, such as those contained in the PLWMP, should result in denial of the Application. An independent enquiry as to whether the CFO is an appropriate use of the Lands, and whether there is a demonstrable adverse impact on the community as a whole, is required. Yet, the Decision contains little evidence or consideration of these matters.

The Decision relies on the PLWMP to justify its conclusion that the Application fails to satisfy subparagraph 20(1)(b)(ix) of the *AOPA*, which provides that, where an application meets the requirements of the *Act* and the regulations and is consistent with the *MDP*, the approval officer "must consider the effects on the environment, the economy and the community and the appropriate use of land." G&S would note, however, that subparagraph 20(1)(b)(ix) of the *AOPA* is not limited to consideration of effects on the community and the appropriate use of the land, but also includes the consideration of effects on the environment and the economy. Furthermore, the Approval Officer was also empowered under subparagraph 20(1)(ii) to require further investigations, studies, and reports to determine the environmental impact of the CFO, and under subparagraphs (iv) and (v) to hold meetings or facilitate meetings to resolve potential conflicts with the community. The Approval Officer did not weigh these options, or the detailed technical evidence provided by G&S, against the PLWMP.

Simply put, the Approach taken in the Decision reduced the Approval Officer's determination to a yes-or-no decision based on a single factor: community approval, as expressed in the PLWMP. This is contrary to the intent of the *AOPA*, which expressly limits the ability to obtain standing and furnish evidence and written submissions to directly affected parties.<sup>6</sup> In G&S' view, this result also reflects an unreasonably narrow interpretation of the Board's public interest mandate under section 2 of the *Natural Resources Conservation Board Act*.

### **3. Misinterpretation of the Authority of the PLWMP**

On June 1, 2018, the former County Reeve signed a municipal resolution to "work collaboratively with other Pigeon Lake watershed municipalities, the Pigeon Lake Watershed Association, and the Pigeon Lake Watershed Steering Committee to implement the Pigeon Lake Management Plan – 2018," and to "reference and consider the recommendations of the Pigeon Lake Management Plan – 2018 in the development of new or updated Statutory Plans" [emphasis added].<sup>7</sup> A commitment to "work collaboratively" with lakeside municipalities on implementation and to "consider" the plan when revising bylaws does not equate to an acknowledgement that the requirements of the PLWMP will be followed. The PLWMP stands alone as a non-binding statement of public policy,

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<sup>5</sup> Decision Summary at 6.

<sup>6</sup> See *Agricultural Operation Procedures Act*, s 20(1)(b)(iii).

<sup>7</sup> Pigeon Lake Watershed Management Plan – 2018 (4 May 2018) at iii ("PLWMP").

and does not form part of the requirements that apply to agricultural operations such as the CFO under the *AOPA* and the *MDP*.

The only reference to restrictions on intensive livestock operations in the PLWMP is found at Objective OB-2e, which specifies an ongoing policy goal that "statutory land use restrictions on new or expanded intensive livestock operations (including CFO's) are supported...." [emphasis added].<sup>8</sup> This objective is expressly described under the column header "Type" as a "Policy," which the PLWMP defines as:

1. A governing principle, plan, or consistent course of action developed in order to meet recognized needs and to achieve specific measurable outcomes. Policies are normally broad, conceptual documents that outline approaches and/or considerations to be taken into account by decision makers. Policies do not act as constraints, but provide information. (SEM)
2. A statement of intent that is not legally binding. It sets direction and expectations for activities. [emphasis added]<sup>9</sup>

Read properly in its context, Objective OB-2e proposes a particular legislative reform for a collection of municipalities, of which the County is only one. It is certainly not a "municipal development plan land use provision," which an approvals officer is required to consider under section 20(1) of the *AOPA*. Rather, it is a broad policy objective to achieve future statutory restrictions, with a stated blanket success measure: that there should be no intensive livestock operations in the Pigeon Lake Watershed.

In short, Objective OB-2e is merely a stated goal to achieve statutory prohibitions; no municipal or provincial statutory prohibitions have been enacted beyond the current *AOPA* and the *MDP*. Moreover, the *AOPA* and *MDP* stand as the only authoritative guidance on the requirements that are applicable to the CFO, and the PLWMP is not grounded in the requisite authority to support the Decision's denial of G&S' Application.

#### ***4. Unfair Focus on the Concerns of Unaffected Persons***

The vast majority of the stakeholders with input into the PLWMP are not affected parties, as defined in the *Part 2 Regulation*, with respect to a confined feeding operation that is in excess of three kilometres from the lake. As a result of the Decision's reliance on the PLWMP, the definition of "community" employed in the Decision effectively excludes agricultural business in the area directly affected by the Decision, such as G&S, and instead focusses heavily on the recreational users of Pigeon Lake.

The PLWMP's goals are to "reduce the frequency and intensity of algal blooms," to "improve the health of the watershed and the lake," and to "improve the recreational value of the lake and economic health of the region."<sup>10</sup> In this context, economic health is clearly tied to the recreational value of the lake, and not agriculture in the broader region. From such a perspective, it is not surprising that the PLWMP would specify as one measure of success that there be no intensive

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<sup>8</sup> Decision Summary at 33-36, refg PLWMP at 17. Note that the Decision also considers the Pigeon Lake Area Concept Plan at pages 36-38, but acknowledges at 32 that this is not a statutory plan and was superseded by the *MDP*, and therefore considers it only with respect to demonstrating an indication of development planning expectations for the Pigeon Lake watershed.

<sup>9</sup> Decision Summary at 67.

<sup>10</sup> PLWMP at 1.

livestock operations in the Pigeon Lake Watershed; however, it is unreasonable to rely on Objective OB-2e of the PLWMP as a conclusive statement on the appropriate use of land within the County, or the effects of the proposed CFO on the community. To do so unfairly favours the view of the Pigeon Lake Watershed Association at the expense of other community members.

### ***5. Improper Reliance on the PLWMP***

When considering an approval application, an approval officer is to consider a broad scope of factors under section 20(1) of the *AOPA*, and an approval officer's assessment is not confined to whether an application complies with land use planning proposals such as the PLWMP. If this were the case, it would give other associations or local authorities the ability to usurp the Board's authority under the *AOPA*.

A ban on confined feeding operations throughout the Pigeon Lake Watershed is inconsistent with the County's current *MDP*, which, as the Approval Officer correctly determined, clearly permits the CFO on the Lands. Unlike the *MDP*, the PLWMP is not legislation. In G&S' respectful submission, the Decision effectively disregards the Application's compliance with the *AOPA* and the *MDP* by relying on the PLWMP as being the foremost authority on whether the CFO constitutes an appropriate use of the Lands. Objective OB-2e of the PLWMP is merely a stated goal to achieve statutory prohibitions; no municipal or provincial statutory prohibitions have been enacted that might override the *AOPA* and the *MDP*.

The case law is clear that a statutory decision-maker cannot fetter their discretion afforded under the enabling legislation by mechanically applying a policy or guideline without considering the particulars of an individual case.<sup>11</sup> As described above, the Approval Officer did not undertake an independent inquiry into the CFO's effects on the community or into the appropriateness of the land use, but in both cases relied on the PLWMP as being determinative. Rather, the Approval Officer reduced the decision-making process to a simple determination of whether the Application was consistent with the PLWMP, thereby inappropriately overriding the broader considerations of the Application's compliance with 20(1) of the *AOPA* and the applicable *MDP*.

Simply put, the Decision prioritizes a policy objective of achieving future statutory provisions over actual statutory provisions now in effect. This is not the intention of the residual discretion afforded to approval officers under subparagraph 20(1)(b)(ix) to consider the effect of a CFO on the community and its appropriateness to the lands, and amounts to fettering of that discretion.

### **Effects of the Decision on the Applicant**

The construction and operation of the CFO is important to the long term viability of G&S' agricultural operations, as well as the ongoing operation of a large agricultural land holding, the full capability of which cannot be realized without approval of the Application. The proposed CFO is also central to G&S' broader business structure, and is vertically integrated with processing plants and other facilities to serve consumer demand for beef and other commodities on an international scale.

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<sup>11</sup> See, for example, *BC College of Optics Inc v The College of Opticians of British Columbia*, 2016 BCCA 85 at paras 32-34; *Kanhasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 32.

Beyond the impacts to G&S' business and the use of its farmland, the Decision also affects G&S' current and potential future employees, who will benefit from employment opportunities created or sustained by the proposed CFO. Approval of the CFO will result in G&S consuming additional goods and services, will further benefit the local economy, and will result in the production of a commodity that is valued internationally. In addition, G&S is recognized as a responsible operator and is committed to operating the proposed CFO within all applicable regulatory requirements.

**Relief Requested**

G&S respectfully requests that the Board undertake a review of the Decision.