



BOARD REQUEST FOR REVIEW DECISION

RFR 2022-12 / RA21030

In Consideration of a Request for Board
Review filed under the *Agricultural
Operation Practices Act*

McKelvie

October 26, 2022

The Board issues this decision under the authority of the *Agricultural Operation Practices Act (AOPA)*, following its consideration of a request for the Board’s review of Decision Summary RA21030.

Background

On September 15, 2022, a Natural Resources Conservation Board (NRCB) approval officer issued Decision Summary RA21030. That decision granted an application by Richard, Linda, and Curtis McKelvie for an approval to expand a beef confined feeding operation (CFO) on W ½ 1-44-25 W4M, roughly 8.5 km north of the Town of Ponoka. More specifically, the approval allows the McKelvies to:

- Use 9 pens and 2 catch basins that had already been constructed without a permit
- Construct a new catch basin
- Expand livestock numbers to 1,950 beef finishers total at the site

The approval officer’s decision also included a determination of the CFO’s grandfathered status under AOPA.

In a Notice of Decision letter accompanying the approval decision, the approval officer provided a deadline of October 6, 2022, for directly affected parties to submit a written request for the Board to review the approval officer’s permitting decision. (References to the “Board” below are to decisions of one or more of the NRCB’s board members and to findings of the panel of board members established specifically for this file.)

As used here, a “review” is a de novo, quasi-judicial hearing in which the parties can generally submit expert and other witness testimony, and other evidence, when relevant to the issues selected by the Board for the hearing.¹

On October 14, 2022, the Board received a request for review (RFR) on behalf of Samson Cree Nation, Samson Cree Nation Consultation and Samson Cree Peoples (collectively “SCN” unless otherwise noted). The approval officer considered SCN a directly affected party because its reserve boundaries were within the 1.5 mile notice radius for affected parties and because it was responding on behalf of its members who resided within that radius.²

Under the authority of section 18(1) of the *Natural Resources Conservation Board Act*, a division of the Board consisting of Peter Woloshyn (chair), Sandi Roberts, and Walter Ceroici was established on October 18, 2022, to consider SCN’s RFR.

Documents Considered

The Board considered the following information, in addition to SCN’s RFR:

- Decision Summary RA21030, dated September 15, 2022
- Technical Document RA21030, dated September 15, 2022

¹ For more information on Board reviews, see NRCB, *Board Reviews & Court Decisions – Board Review Process*, online: <https://www.nrcb.ca/confined-feeding-operations/board-reviews-court-decisions-revamp>.

² Decision Summary RA21030 at 24 (Appendix D).

- Approval RA21030, dated September 15, 2022
- Approval officer’s Notice of Decision letter, dated September 15, 2022
- Email correspondence between Kaylyn Buffalo (SCN) and Laura Friend (NRCB Manager, Board Reviews), from October 6-14, 2022
- NRCB Compliance Directive 21-03, issued to Curtis, Richard, and Linda McKelvie, on May 7, 2021

Whether the Board has Jurisdiction to Consider SCN’s Late-filed RFR

The RFR Filing Deadline in AOPA

Section 20(5) of AOPA states that a directly affected party may, “within ten working days of receipt” of an approval decision, “apply to the Board in accordance with the regulations for a review of the decision.”³

Under section 25(1) of the act, when the Board receives an RFR “under section 20(5),” the Board must, within ten working days of receiving the RFR, decide to either “dismiss” the RFR or “schedule a review.” Under subsection 25(1)(a), a dismissal is warranted if, in the Board’s opinion, either the approval officer “adequately dealt with” the issues raised in the RFR, or those issues “are of little merit”.

Reading sections 20(5) and 25(1) of the act together, when the Board receives an RFR, before it can determine whether the RFR’s substance warrants a review under section 25(1)(a), the Board must first decide whether the RFR met the requirements of section 20(5)—that is, whether the RFR was submitted “in accordance with the regulations” and within the ten working day deadline.

The applicable regulation is the Board’s Agricultural Operation Practices Act Administrative Procedures Regulation, AR 106/2017. Section 13 of that regulation states that an RFR of an approval decision must be in writing and must contain several items, including a “clear and concise statement” of relevant facts, the “grounds” for the RFR, and a “brief description” of the desired “remedy”. (The Board has developed a generic RFR form to facilitate applicants’ preparation of review requests that meet these requirements. [Online](#))

³ Because the 10-working day period begins from a person’s “recei[pt]” of the approval officer’s decision, the filing deadline for review requests could vary from person to person depending on when they “received” the decision. However, the *Interpretation Act*, RSA 200, c. I-8, standardizes this individual process by providing, in section 23, a “presumption” that a document was received seven days from the date of mailing (if the document was mailed to an address in Alberta), where an enactment allows the document to be sent by regular mail. The Board recognizes that this has been and continues to be standard practice for the NRCB’s Field Services division. See NRCB Decision RFR 2022-10, *Hutterian Brethren of Parkland* at 5 n 5.

There is no provision in AOPA giving the Board discretion to extend or waive the ten working-day deadline in section 20(5) of the act. The Board has consistently held that, absent any such provision, the Board lacks authority to extend or waive that deadline.⁴

The Timing of SCN's Request for Review (RFR)

As noted above, the approval officer issued the decision on September 15, 2022 and his decision notice listed October 6, 2022 as the RFR deadline. The October 6 deadline allowed for seven days to receive the decision plus ten working days (as provided in section 20(5) of AOPA) to submit the RFR. (As previously noted, under section 23 of the *Interpretation Act*, when a notice is sent by regular mail, it is presumed the recipient receives the notice seven days after the notice is mailed. SCN has not provided any information to suggest that this presumption is inappropriate—that is, that it took longer than seven days for SCN to receive the approval officer's notice.)

On October 6, 2022, Ms. Kaylyn Buffalo, SCN's representative, sent the Board an email noting her intent to submit an RFR but requesting an extension for that filing for bereavement reasons. In her email, Ms. Buffalo did not request a specific extension date, but she noted that she "expect[ed]" to have the RFR "fully authorized" by SCN's "leadership" by the "middle of next week".

In a response emailed later on October 6, Ms. Laura Friend, the Board's Manager, Board Reviews, advised Ms. Buffalo that the RFR deadline is "legislated," so the Board "cannot grant an extension." Ms. Friend advised Ms. Buffalo to submit an RFR "in its current form" by midnight that day. Ms. Friend then stated that the Board would be willing to receive "any additional information" by noon on the next Tuesday, October 11, 2022.

The Board did not receive any further communication from Ms. Buffalo until the morning of Friday, October 14, when she sent Ms. Friend an email advising that she would be submitting the RFR later that day. In a later email sent on October 14, Ms. Buffalo submitted SCN's RFR.

October 14 was five working days past the October 6, 2022, RFR filing deadline in the approval officer's Notice of Decision letter.

Because the RFR was filed well after the October 6 deadline, and the Board lacks authority to extend that deadline, the Board must deny SCN's request for review. The Board is mindful of the compelling personal circumstances that SCN's representative reported as having prevented her from meeting the October 6 deadline. However, the Board has no authority to extend the RFR filing deadline on this or any other basis.

In case the Board's interpretation of its authority under AOPA is incorrect, the Board has read and considered SCN's review request. The Board finds, for the reasons set out below, that SCN's concerns were adequately addressed by the approval officer. Therefore, the Board would not have granted a review even if the Board had authority to consider the late-filed review request.

⁴ See e.g., NRCB Decision RFR 2022-10, *Hutterian Brethren of Parkland* at 5-6 (rejecting a late-filed review request because the Board "has no authority to extend" the 10-day deadline); NRCB Decision RFR 2019-05, *Beekman Farms Ltd. and P & H Wessels Farms Ltd.* at 1-2 (same).

Issues Raised in Samson Cree Nation's RFR

The Board considers that a party requesting a review has the onus of demonstrating that there are sufficient grounds to merit review of the approval officer's decision. The Board will generally dismiss a review request if the Board finds that the approval officer's decision adequately dealt with the issues raised in the request, or if the issues are otherwise without merit.

Samson Cree Nation's Procedural Concerns

In its review request, SCN raises several concerns with the approval officer's permitting process and with municipal planning processes. Each of these concerns is addressed below.

Inadequate notice to and consultation with Samson Cree Nation and inadequate assessment of Samson Cree Nation's inherent and treaty rights

In its RFR, SCN claims that it was unable to "carry out engagement activities with the Proponent" and that the approval officer treated SCN like a municipality, which "undermines and diminishes" SCN's rights and sovereignty under Treaty No. 6.⁵

The RFR adds that SCN received a "courtesy letter" from the approval officer, but did not receive the "notice from the NRCB as indicated in Appendix A." According to the RFR, SCN received "notice of the project" through a "concerned SCN member" rather than through the NRCB or "Mr. McKelvie himself."⁶

SCN also states that its "desktop" review of the CFO application was an inadequate "replacement for further community-based studies and assessments that should be undertaken" to "assess effects and to develop recommendations for appropriate mitigation or redress for impacts."⁷

On similar lines, the RFR notes that the project has not "incorporated" "historical information pertaining to SCN". According to the RFR, the approval officer requested "further quantitative and qualitative historical data" from SCN without giving SCN sufficient time or resources to collect and provide that data.⁸

The RFR concludes by noting SCN members' rights to "hunt, fish, trap" and its "governance rights and environmental stewardship rights." The RFR further explains that SCN's "ability to practice" these rights "relies on sufficient quantity and quality of tangible resources including fish, culturally important plants, water and game and intangible resources such as language, spiritual sites, cultural landscapes and the transmission of knowledge." The RFR then states that these rights "have not been considered for the Project at this time."⁹

⁵ RFR at pdf p. 1. (All further references to pages of the RFR are to the pdf page numbers.) See also *ibid* at 2 (noting that First Nation reserves are "implicitly not part of any municipality, and it is an inadequate and problematic for the Approval Officer to consider Samson Cree Nation to function as municipalities").

⁶ *Ibid* at 3.

⁷ *Ibid* at 2.

⁸ *Ibid*.

⁹ *Ibid* at 3.

In the Board's view, none of these procedural claims have sufficient merit to warrant a review of the approval officer's decision. To begin with, the NRCB has a role in fulfilling the Crown's duty to consult, but the NRCB can satisfy its role by providing the notice and comment procedures set out in AOPA and the accompanying regulations.¹⁰

In this case, the approval officer met those procedural requirements and then some. According to the approval officer's Decision Summary, the approval officer published notice of the permit application in the local newspaper and posted the application on the NRCB's website. The approval officer also sent a copy of the application notice directly to SCN, and considered SCN a directly affected party, because its reserve lands were within the 1.5 mile notification radius.¹¹

The approval officer also apparently requested that SCN provide the names and addresses of all persons within the reserve who resided on land within the affected party radius, but SCN did not provide those names and addresses.¹²

The approval officer's notice to SCN was apparently effective, because SCN provided a timely written response to the application.¹³ The approval officer then requested clarification of SCN's response and gave SCN nearly one month to provide that clarification. SCN requested an additional minimum two-week extension of that deadline. The approval officer granted a three-week extension. Notwithstanding these generous timelines, SCN did not provide the requested clarification.¹⁴

Under these circumstances, the Board finds that the approval officer provided SCN with a sufficient opportunity to participate to meet AOPA requirements and to enable the NRCB to fulfil its role in satisfying the Crowns' duty to consult with SCN.

In his Decision Summary, the approval officer acknowledged that SCN was not a municipality but he nevertheless considered SCN to "function" as a municipality.¹⁵ The Board recognizes that First Nations differ from municipalities in many respects. However, the Board does not believe that the approval officer erred in considering SCN to function as a municipality, at least from the narrow standpoints of being able to receive and respond to notices within given timelines, especially when those timelines have been extended at SCN's request, and to make reasonable efforts to identify its members who reside within the notice radius.

Finally, the Board does not believe that the approval officer was required to conduct any further assessment of the effects of the CFO expansion on SCN or on the lands and resources used by SCN's members. AOPA does not require approval officers to routinely conduct comprehensive environmental assessments when deciding whether to issue approvals, and no such assessment was warranted here. The Board has long held that approval officers can generally presume that environmental effects are acceptable if a proposed CFO (or CFO

¹⁰ See NRCB Decision RFR 2017-10 at 4-5.

¹¹ Decision Summary RA21030 at 2 and 5.

¹² *Ibid* at 3.

¹³ *Ibid* at 5.

¹⁴ *Ibid* at 5.

¹⁵ *Ibid* at 5.

expansion) meets the act's technical requirements.¹⁶ The approval officer has made that determination here (with conditions included in the approval) and the Board sees no flaws in that determination.

The SCN claims that their ability to practice and carry out its traditional rights rely on sufficient quantity and quality of water and game (among other things). However, SCN make no case or provide any evidence that the proposed CFO will actually negatively impact water, game or fish. As stated previously, the operation meets all technical requirements of AOPA and the Board sees no reason to conclude that the operation will have any significant impact on SCN's traditional resources or impinge on SCN's ability to exercise their treaty rights.

The Board notes that the approval officer contacted the Government of Alberta's Ministry of Culture and Status of Women (ACWS) regarding this application. The ministry's response was that their geographic information system does not have a record of traditional use sites located in the area of the feedlot. The approval officer was advised about an Online Permitting and Clearance system, and as a result included as a condition of approval that the co-permit holders consult with ACWS to determine if a clearance or permit is required prior to starting construction.

The approval officer also contacted the Aboriginal Consultation Office (ACO) and he was advised that the ACO has no formal role within the NRCB process.

Inadequate opportunity to participate in municipal planning

Besides criticizing the approval officer's permitting process, SCN's RFR notes that SCN "was not approached by Ponoka County to participate within the Municipal Development plan" and SCN's inherent and treaty rights "were not considered when the plan was developed." SCN also raises a similar complaint with the Ponoka-Wetaskiwin Inter-Municipal Development Plan.¹⁷

Presumably, SCN's concern relates to section 20(1)(a) of AOPA which requires approval officers to deny an approval application if it is inconsistent with the land use provisions of the local municipal development plan. Here, the approval officer concluded that the proposed CFO expansion is consistent with Ponoka County's MDP. SCN has provided no basis for the Board to question that conclusion.

In contrast with the approval officer's duty under section 20(1)(a), section 25(4)(g) of the act states that, in a review of an approval decision, the Board "must have regard to, but is not bound by, the municipal development plan" (MDP). In this context, the Board may consider the process for an MDP's adoption, among other factors, in deciding whether to uphold an approval officer's denial of an application that is inconsistent with the MDP.

However, neither section 20(1)(a) or section 25(4)(g) of the act give approval officers, or the Board, respectively, authority to question whether a municipality afforded a proper procedure for its adoption of an MDP, when the CFO application is *consistent* with that MDP, as it is here.

¹⁶ See, e.g. NRCB Decisions RFR 2022-11 at 5-6, *G&S Cattle Ltd.* and RFR 2019-04 at 6, *Sundown Feeders Ltd.*

¹⁷ RFR at 3.

For this reason, the Board cannot consider whether Ponoka County adequately accounted for SCN's rights in its MDP development process.

Adverse Effects

Besides raising several procedural concerns, SCN's RFR makes several claims about the adverse effects of the proposed CFO expansion on SCN's members' use and enjoyment of lands and other natural resources. However, these claims are made at too general a level to have any merit. For example, the RFR refers to a "loss of ... landscape" and raises a general concern about impacts to water used by residents on the SCN reserve for ceremonies and drinking.¹⁸ The RFR also raises a somewhat more specific concern about impacts to the aquifer underlying the SCN reserve.

At another point, the RFR claims that the "cumulative effects and impacts" of the proposed CFO expansion, combined with a proposed gravel pit operation, would "devastate the health of [the] Battle River, the aquifer and the livelihoods of many traditional land users who call the riverbanks home."¹⁹ (According to the RFR, the gravel operation is proposed by a relative of the McKelvie family in the same location as the CFO.)

Once again, these concerns are too general to satisfy SCN's burden of showing that a review is warranted (even if the Board had authority to accept SCN's late-filed RFR). As noted above, the approval officer found that the application met all of AOPA's technical requirements and reasonably presumed, based on long-standing AOPA policy, that meeting those requirements would provide adequate protection for water resources and for community effects.²⁰

McKelvie's Non-compliance with AOPA

The RFR notes that the McKelvies had increased their CFO's livestock numbers before receiving the approval, and that the NRCB "only advised" the McKelvies to "fix [their] property up to NRCB standards and compliance" and did not issue any "fines".²¹

Under longstanding NRCB policy, approval officers generally presume that permit applicants intend to meet the requirements in the act and in their permits and that the NRCB's compliance staff can adequately resolve any compliance issues that might arise. Following these presumptions, the policy then states that approvals will generally not consider an applicant's past compliance record when deciding whether to issue a new permit. However, under the policy, approval officers have discretion to address "intentional and persistent past non-compliance," and instances when compliance may be hard to determine, through special permit conditions.²²

Here, the NRCB's compliance staff have addressed the McKelvie's unauthorized construction by issuing Compliance Directive CD 21-03, in May 2021. That enforcement action presumably

¹⁸ *Ibid* at 2. See also *ibid* (noting that "any impact to the aquifer will be detrimental to the health and well-being of all the residents, their domestic animals, and to the health of the land they reside on").

¹⁹ *Ibid* at 3.

²⁰ See NRCB *Approvals – Operational Policy 2016-7 ("Approvals Policy")* (last updated May 2018), part 8.7.3, [online](#)

²¹ RFR at 3.

²² *Approvals Policy*, part 8.12.2.

prompted the McKelvies to apply for an approval. In the Board’s view, this history and the terms and conditions of Approval RA21030 adequately address the McKelvies’ past non-compliance and provide reasonable assurance of future compliance, for permitting purposes. If non-compliance issues arise in the future, the NRCB’s compliance staff have ample tools to address those issues.

Decision

The Samson Cree First Nation filed its RFR after the filing deadline set by the approval officer and after the deadline specified in AOPA. The Board has no authority to extend that deadline so it must deny the RFR for that reason alone. However, the Board nevertheless considered the RFR and, for the reasons given above, concludes that a review would not have been warranted had the RFR been timely filed.

DATED at EDMONTON, ALBERTA, this 26th day of October 2022.

Original signed by:

Peter Woloshyn (chair)

Sandi Roberts

Walter Ceroici