



BOARD REQUEST FOR REVIEW DECISION

RFR 2022-10 / LA22029

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

Hutterian Brethren of Parkland

October 13, 2022

The Board issues this decision under the authority of the *Agricultural Operation Practices Act (AOPA)*, following its consideration of requests for the Board’s review of Decision Summary LA22029.

Background

On September 7, 2022, a Natural Resources Conservation Board (NRCB) approval officer issued Decision Summary LA22029. That decision granted an application by the Hutterian Brethren of Parkland (Parkland or the applicant) for an Approval to construct and operate a new confined feeding operation (CFO) for 18,000 chicken layers and 24,000 chicken pullets. The proposed CFO includes a layer barn (84 m x 13.5 m) with attached manure pad (10.7 m x 13.5 m), and a pullet barn (72.6 m x 13.5 m) with attached manure pad (10.7 m x 13.5 m). The proposed CFO would be located at SW 32-15-26 W4M in the Municipal District of Willow Creek (the MD).

The Board received requests for Board review (RFRs) of the approval officer’s decision from Thomas and Loretta Berger (Berger Land and Cattle Co. Ltd.), Hans Lievaart, and Jared and Kirby Duyns. In his decision, the approval officer considered the Bergers to be a “directly affected” party, but not Mr. Lievaart or the Duyns. Accordingly, the Lievaart and Duyns RFRs asked the Board to review the approval officer’s findings with respect to those parties’ non-directly affected status, in addition to asking the Board to review the merits of the approval officer’s decision to issue the CFO Approval.

All three RFRs were filed by the September 28, 2022 deadline set out in the approval officer’s decision letter.

Under the authority of section 18(1) of the *Natural Resources Conservation Board Act*, a division of the Board consisting of Daniel Heaney (chair), Sandi Roberts, and Earl Graham was established on October 3, 2022, to consider the RFRs and decide whether a review is warranted. 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 (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.)

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.

For the reasons explained below, the Board concludes that a review of the approval officer’s decision to issue Approval LA22029 is not warranted, and that Mr. Lievaart and the Duyns have not met their burden of showing that they are adversely affected by that Approval.

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>.

Documents Considered

The Board considered the following information:

- Decision Summary LA22029, dated September 7, 2022
- Technical Document LA22029, dated September 7, 2022
- Approval LA22029, dated September 7, 2022
- RFR filed by Hans Lievaart, received September 13, 2022
- RFR filed by Thomas and Loretta Berger (Berger Land and Cattle Co. Ltd.), received September 27, 2022
- RFR filed by Jared and Kirby Duyns, received September 28, 2022
- Letter filed by the MD of Willow Creek, dated and emailed on September 29, 2022
- Emails from Peter and Rosemary Hodorek, sent on October 4, 2022
- Portions of the public record maintained by the approval officer which included responses to the application from Mr. Lievaart, Thomas and Loretta Berger, the Duyns, and Peter and Rosemary Hodorek (provided to the Board by legal counsel for the approval officer on October 4 and 6, 2022)
- Municipal Development Plan, Bylaw No. 1841, Municipal District of Willow Creek August 2019
- Land Use Bylaw No. 1908, Municipal District of Willow Creek, June 2021
- Intermunicipal Development Plan, Municipal District of Willow Creek and Vulcan County, April 2015

Board Jurisdiction

The Board's authority for granting a review of an approval officer's decision is found in section 25(1) of AOPA, which states:

- 25(1) The Board must, within 10 working days of receiving an application under section 20(5), 22(4) or 23(3) and within 10 working days of the Board's determination under section 20(8) that a person or organization is a directly affected party,
- (a) dismiss the application for review, if in the opinion of the Board, the issues raised in the application for review were adequately dealt with by the approval officer or the issues raised are of little merit, or
 - (b) schedule a review.

Board Deliberations

Preliminary Matter—Consideration of whether parties are directly affected

In his decision, the approval officer found that eleven parties who responded to the application, including Jared and Kirby Duyns and Hans Lievaart, were not directly affected by the proposed CFO. According to the approval officer, these parties lived outside the affected party radius so they were not automatically directly affected, and they had "not demonstrated a chain of causality as to how they would be directly affected."² The approval officer's conclusion appears

² Decision Summary LA22029 at 10.

to be based on the first part of the NRCB's longstanding, five-part test to be considered directly affected. As noted by the approval officer, that five-part test is whether:

1. A plausible chain of causality exists between the proposed project and the effect asserted;
2. The effect would probably occur;
3. The effect could reasonably be expected to impact the party;
4. The effect would not be trivial; and
5. The effect falls within the NRCB regulatory mandate under AOPA.

Jared and Kirby Duyns

In their request for review, the Duyns claimed that they are directly affected because the CFO will adversely affect their view. They also expressed concern about the effects that a potential colony with 85 people at the site will have on them. As for their grounds for review, the Duyns' request stated that "many logistics of this application have been overlooked and simply shrugged off as being 'in the opinion' of the approvals officer."

The Duyns reside at NE 36-15-27 W4 which is to the northwest of the project site at SW 32-15-26 W4. The Duyns' property is separated from the project site by section 31-15-27 W4.

When assessing the Duyns' review request, the Board considered whether the approval officer had appropriately applied the test of directly affected status. NE 36-15-27 W4 is more than a mile from SW 32-15-26 W4, or at minimum twice the affected party radius of ½ mile based on the type and size of facility approved.

The Board does not question the Duyns' claim that completion of the facilities allowed under this Approval will change their view. The Board understands that they consider this change a negative effect on their aesthetic enjoyment of the landscape in the CFO's direction. However, the Board recognizes that the approved CFO site is in an area zoned general agriculture in the Willow Creek Land Use Bylaw. This zoning category allows development of CFOs so they should not be unexpected by residents. Agricultural infrastructure in general, including barns, grain storage facilities, feed mills, and silos, is an expected part of the viewscape in areas where agriculture is the dominant rural activity.

Regarding the Duyns' concern about the potential for a colony to be established at the site in the future, this is not a matter within the NRCB's regulatory mandate under AOPA.

For these reasons, the Board affirms the approval officer's decision that the Duyns are not directly affected by the CFO. Therefore, the Board denies the Duyns' request for review.

The Board notes also that the approval officer's job is essentially to make findings as to whether a CFO application meets the relevant legislative criteria. The officers necessarily must form an "opinion" on these issues to carry out their job.

Hans Lievaart

Mr. Lievaart owns section 4-16-26 W4. Three of the four quarters identified in the technical document as available for manure application border his section. In his request for review, Mr.

Lievaart claimed that he will be directly affected by manure-contaminated runoff from the proposed manure spreading lands, which will cross his property boundary and flow into a dam he uses for watering cattle.

The Board accepts that there is a plausible chain of causality between manure spreading on lands adjacent to Mr. Lievaart's property and manure runoff entering the dam on his property.

The Board finds that this cause and effect is only possible, rather than probable, because manure constituents have a low likelihood of running off onto Lievaart's property if spread according to AOPA requirements. Additionally, the approval officer reviewed the relevant aspects of the quarters listed for manure spreading, including adjusting for necessary setbacks and unsuitable areas, and found that they met applicable AOPA requirements relating to manure spreading.

Therefore, the Board affirms the approval officer's conclusion that Mr. Lievaart is not directly affected. This finding is consistent with past Board decisions (for example, Board Decision RFR 2006-13 / RA06017), in which the Board concluded that proximity to manure spreading lands is an insufficient basis for being directly affected. Even if Mr. Lievaart was directly affected, the Board would deny his request for review on the merits, because the approval officer adequately dealt with the manure runoff issues raised by determining that the proposed manure spreading lands met applicable AOPA requirements.

Status and timing of two parties' submissions

As noted above, the approval officer set September 28, 2022 as the deadline for submitting review requests to the Board. The Board then issued a notice (dated September 29, 2022) allowing directly affected parties who believed they were adversely affected by the review requests to submit written rebuttals to those review requests. In other words, the Board's notice allowed the submission of *rebuttals to the requests for review of the approval officer's decision*, not to the approval officer's decision itself. According to this notice, rebuttals were due by October 5, 2022.

On September 29, 2022, the Board received a letter (via email) from the MD of Willow Creek. On October 4, 2022, the Board received two emails from Peter and Rosemary Hodorek, the first of which included a completed request for review form. (Later that day, the Hodoreks sent a second email whose content essentially mirrored the substantive parts of their earlier submitted request for review form. In both their emails, the Hodoreks referred to their submissions as a "rebuttal.") The approval officer considered the Hodoreks and the MD to both be "directly affected" by the approval officer's decision.³ Both parties' submissions raised concerns about the proposed CFO.

The Board must therefore determine whether the Hodoreks' and MD's submissions are requests for review or rebuttals to the requests for review. If they are requests for review, the

³ According to the approval officer, both parties automatically qualified as "directly affected" parties because the Hodoreks own land within the "affected party" radius and the proposed CFO is within the MD's boundaries. Decision Summary LA22029 at 3 and 10 (Appendix B).

Board must then decide whether they can be accepted given that they were filed after the September 28, 2022 deadline for review requests.

The Hodoreks' October 4, 2022 email

The Hodoreks' second October 4 email stated that the Hodoreks "strongly support the position of the other affected parties." They describe artesian wells in the area, concerns about runoff to their pond, potential for additional livestock facilities and a colony at the site, and effects on their quality of life. The Board finds that neither October 4 email is a valid rebuttal because the points expressed are not adverse in interest to the RFRs filed by the September 28 deadline.

However, given that their first October 4 email included a request for review form, and that both October 4 emails were opposed to the approval officer's decision, the Board will treat their October 4 emails as a late filed review request.

Under section 20(5) of AOPA, a directly affected party may, "within 10 working days of receipt" of an approval officer's decision to issue an approval, "apply to the Board in accordance with the regulations for a review of the decision." There is no other provision in the act giving the Board any discretion to extend or otherwise waive this 10-day deadline. In addition, the Board does not believe it has *implied* authority to extend that deadline.⁴

Section 15(1) of the Board's Administrative Procedures Regulation, AR 106/2017, echoes section 20(5) of AOPA by stating that a person's request for review of an approval officer's permit decision "must be filed with the Board within 10 working days of the date the person received the approval officer's written decision on the permit application."⁵ In contrast with AOPA, section 30 of the Board's regulation gives the Board broad discretion to "vary" any procedure—including presumably a deadline—set out *in the regulation*. (This discretion is also implicit in section 29 of the regulation, which allows the Board to issue an order that the Board "considers appropriate to ensure the fair determination of an issue," when a party fails to comply with the regulation.) However, the Board cannot by regulation give itself discretion to extend a deadline set out in AOPA where, as here, the act itself does not give the Board that discretion.

⁴ See, e.g. NRCB Decision RFR 2019-05, *Beekman Farms Ltd. and P & H Wessels Farms Ltd.* at 1-2 (rejecting a late-filed review request because the Board "has no authority to extend a statutory deadline").

⁵ 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 7 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. Apparently relying on this provision, the approval officer's notice of the permit decision set September 28 as a uniform filing deadline for all review requests. The Board recognizes that this has been and continues to be standard practice for the NRCB's Field Services division.

In summary, the Board cannot accept the Hodoreks' October 4 emails as a review request, because they were filed after the September 28 deadline for filing review requests and the Board has no authority to extend that deadline.

The MD's September 29, 2022 letter

The MD's letter stated that its purpose is to provide "comments" on the approval officer's permit decision and the letter ended by noting that the MD "is opposed to" that decision. Given this position, the MD is not adversely affected by the other review requests, so its letter is not a valid "rebuttal" to those requests. In addition, the MD's letter does not itself request the Board's review of the approval officer's decision.

Therefore, the Board does not view the MD's letter as either a rebuttal or an official review request. Even if the MD intended its letter to be a review request, the Board cannot accept it as such because the MD submitted it to the Board after the statutory deadline for filing review requests.

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While the Board cannot accept the Hodoreks' emails or the MD's letter as a review request, the Board has read and considered those two parties' submissions and finds, for the reasons set out below in relation to the Bergers' review request, that the Hodoreks' and MD's concerns were adequately addressed by the approval officer. Therefore, the Board would not have granted a review based on the Hodoreks' emails or the MD's letter, even if those emails or letter had been filed by the deadline for filing review requests (and even if the MD had intended its letter to be a review request).

That said, the Board acknowledges again that the Hodoreks and the MD are directly affected parties. For this reason, had the Board decided to grant a review, the Board would have invited the Hodoreks and the MD to participate in that review proceeding, provided they did not raise issues beyond those selected by the Board from the Bergers' and Duyns' review requests.

Issues Raised in the Bergers' RFR

The Bergers were deemed a directly affected party by the approval officer and their RFR was received by the Board before the submission deadline.

The Berger's RFR reiterated the concerns they expressed to the approval officer in their response to the application. Additionally, they highlighted to the Board their belief that the application for this site "is but a mere piece of the entire project (i.e., Ivy Ridge Colony)", and suggested that the application should be reviewed as a complete colony. They also suggested that the land zoning should change from agriculture to village status. The Bergers provided the Board with a suggestion for an alternate location for the CFO and stated that they strongly believe that the application for water should be considered first. The Board's consideration of the issues raised in the Berger's RFR is discussed below.

Future Plans for the CFO Site

In his Decision Summary, the approval officer stated that Parkland's initial Part 1 application was for a CFO including not only chickens, but also dairy livestock, ducks and geese and associated facilities. However, Parkland's Part 2 application was only for chickens and facilities

associated with that livestock type. The application also did not cover the residences and other non-CFO infrastructure needed to establish a new Hutterite colony.

In their review request, the Bergers argued that the approval officer erred by considering only Parkland's proposed chicken CFO and not the "entire project." This concern echoes those raised by the MD and other parties in their responses to the application. In his Decision Summary (Appendix C), the approval officer addressed this concern by stating that approval officers can only consider what is submitted in an application, not what an operator may propose in future applications. The approval officer also noted that non-CFO related developments such as residences are not regulated under AOPA. The Board agrees with the approval officer's reasoning and therefore finds that the approval officer adequately dealt with this concern.

The Board likewise notes that the specific project—the poultry numbers and poultry facilities—is all that has been approved. AOPA requirements, such as the Minimum Distance Separation setbacks, may become more stringent if additional CFO facilities are proposed on-site.

Alternate Location for the Proposed CFO and Village Status Zoning

The Bergers proposed an alternate location for the proposed CFO, on other land apparently owned by Parkland. The Bergers considered this other land to be a "superior, alternate" location for Parkland's CFO. AOPA requires an approval officer to carefully review the appropriateness of a CFO site proposed by the applicant but does not require the applicant to justify that site relative to other possible sites. The applicant is simply required to show that its preferred site meets AOPA requirements. Therefore, the Bergers' proposed alternate site is without merit and the Board will not consider this matter.

Land zoning does not fall within the NRCB regulatory mandate under AOPA; therefore, the question of whether or not establishment of residences and other infrastructure unrelated to the application for a CFO constitutes a village is without merit.

Water Quantity and Quality Issues

Impacts on water quantity, quality and potential for contamination from runoff on manured lands were raised as issues by the Bergers and others.

The approval officer correctly commented that water quantity is addressed by Alberta Environment and Parks (AEP) through the water licensing process. The applicant signed a declaration that they are pursuing the necessary water licenses separately from the AOPA permit. The declaration notes that they must comply with the *Water Act* and any construction undertaken prior to receiving water licenses from AEP is undertaken at the applicant's risk.

To address the risk of manure contamination of water from the CFO, the approval officer included a condition in the Approval requiring Parkland to construct a concrete liner (according to specifications set out in the condition) in the barns and manure storage areas. (Construction Condition #2.). Condition #3 provides that the constructed facilities must be inspected before they can be used to store livestock or manure, to ensure that they have been constructed according to all AOPA requirements. These conditions will ensure that the CFO facilities do not cause manure contamination of surface or sub-surface waters.

Regarding contaminated runoff from manure spreading, the approval officer discusses this in the Decision Summary (Appendix C). As stated earlier in this document, the approval officer assessed the land base for the manure spreading and calculated the acceptable area after making allowances for required setbacks and other features that would preclude manure application, noting that they met the initial requirements under AOPA. As noted earlier, the Board reiterates that manure constituents have a low likelihood of running off if spread according to AOPA requirements.

The Board believes that these matters were adequately considered by the approval officer.

Increase of Odour, Noise, and Insects

AOPA deals with these issues through Minimum Distance Separation (MDS) setback requirements. The Board finds that the approval officer correctly determined the MDS setback distance for the size and species of the proposed CFO and correctly determined that the proposed CFO met this MDS setback. Therefore, the approval officer adequately addressed these nuisance-related issues.

Increased Threat of Avian Influenza

The approval officer concluded that AOPA does not delegate the responsibility to manage risks of avian flu outbreaks to the NRCB. The Board finds that this concern was adequately considered by the approval officer.

Increased Traffic and Impacts on MD Roads

AOPA does not require that the proponent have a road use agreement in place prior to the approval of a project. This is an issue for the municipality to negotiate with the proponent and the Board finds that the approval officer appropriately declined to include a condition requiring Parkland to have a road use agreement with the MD.

Impacts on Land Values, Quality of Life, Twin Valley Reservoir Recreation Area

The approval officer determined that the use of this land parcel for a CFO is compliant with the MD's municipal development plan and land use bylaw. Therefore, development of a CFO in this location is an appropriate use of land. The Board has consistently stated that concerns about property values are a land use issue that is best addressed by municipalities through land use provisions in municipal development plans and land use bylaws. The issue of property values has no merit within the context of a review under AOPA.⁶

The Board believes that the approval officer adequately considered these concerns.

⁶ See e.g., NRCB Decision RFR 2021-07, *JBC Cattle Inc.* at 3.

Decision

In the Board's opinion, the issues raised in Berger's request for review were either adequately addressed by the approval officer in the approval process or are without merit. Therefore, the Board denies Berger's request for the review.

For the reasons provided in the above section (under the heading: Preliminary Matter— Consideration of whether parties are directly affected), the Board affirms the approval officer's decision that Jared and Kirby Duyns and Hans Lievaart are not directly affected by the CFO.

For the reasons provided in the above section (under the heading: Status and timing of two parties' submissions), the Board finds that the submissions from the MD of Willow Creek and Peter and Rosemary Hodorek are not rebuttals to the three timely RFRs and cannot be accepted as review requests because they were filed after the September 28 deadline for filing review requests. The Board has no authority to extend that deadline.

DATED at EDMONTON, ALBERTA, this 13th day of October, 2022.

Original signed by:

Daniel Heaney (chair)

Sandi Roberts

Earl Graham