



BOARD DECISION REQUEST FOR REVIEW

RFR 2024-03 / RA24001

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

Ference Land and Cattle Corp.

May 16, 2024

The Board issues this decision under the authority of the *Agricultural Operation Practices Act* (AOPA or the Act), following its consideration of a request for the Board’s review (RFR) of Decision Summary RA24001.

1. Background

On April 12, 2024, a Natural Resources Conservation Board (NRCB) approval officer issued Decision Summary RA24001 (the Decision Summary). That decision granted an application by Ference Land and Cattle Corp. (FLCC or Craig Ference) for an NRCB Approval to construct a new beef finisher confined feeding operation (CFO), including permitting of previously constructed feedlot pens. The proposed CFO is located at E ½ 17-34-2 W4M in Special Area No. 4.

On September 15, 2023, an NRCB inspector had issued Compliance Directive CD 23-06 related to unauthorized construction of a CFO at this site, construction that had been done without a permit under AOPA. The unauthorized construction consisted of two rows of feedlot pens. Based on a review of aerial photographs, the inspector determined that one row of pens had been constructed between 2013 and 2018, while Mr. Ference told the inspector that the other row had been constructed in 2020.

The inspector noted that Mr. Ference stated he was unaware of AOPA requirements at the time of construction and did not know that a permit was needed for the feedlot pens. An additional series of pens, that Mr. Ference indicated were part of his cow-calf operation, were being remodelled at the time of the inspection. The Compliance Directive required FLCC to stop using the feedlot pens by April 15, 2024, if an NRCB permit had not been issued for these facilities.

Following the issuance of the Decision Summary, the Board received one request for review (RFR) of the Decision Summary within the filing deadline of May 3, 2024, from Kevin Clark, a party who had been found to be directly affected by the approval officer. On May 6, 2024, the NRCB sent a Notice of Filed Request for Board Review and provided a rebuttal opportunity to the directly affected parties listed in the Decision Summary. The rebuttal opportunity gives parties that may have an adverse interest to the matters raised in the RFR a chance to submit their views. NRCB Field Services made a submission on May 7, 2024. Ference Land and Cattle Corp. submitted a rebuttal on May 8, 2024. All submissions were made within the filing deadlines.

Under the authority of section 18(1) of the *Natural Resources Conservation Board Act*, a division of the Board (panel) consisting of Peter Woloshyn (chair), Sandi Roberts, Rich Smith, and Dan Heaney was established to consider the RFR and decide whether a review is warranted.

As used here, a “review” is a quasi-judicial hearing or written review in which the parties can submit expert and witness testimony and other evidence, when relevant, to the issues selected by the Board to be considered at the oral hearing or written review.¹ References to the “Board” in this document are to findings of the panel of Board Members established specifically for this file.

¹ For more information on Board reviews, see NRCB, *Board Reviews & Court Decisions – Board Review Process*, [online](#).

2. Documents Considered

The Board considered the following information:

- Decision Summary RA24001, dated April 12, 2024
- Technical Document RA24001, dated April 12, 2024
- RFR filed by Kevin Clark, received May 1, 2024
- Special Areas 2, 3, and 4 Land Use Order, Ministerial Order No. MSL: 007/15, dated March 3, 2015
- NRCB Field Services submission, dated May 7, 2024
- NRCB Compliance Directive CD 23-06 Ference Land and Cattle Corp., September 15, 2023
- Ference Land and Cattle Corp. rebuttal, dated May 7, 2024, received May 8, 2024

3. 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.

4. Submissions

4.1 Issues Raised in the RFR

The basis for the RFR, as outlined by Mr. Clark, was a failure by the NRCB to conduct a proper investigation of the site before issuing the Approval, and the inclusion in the Decision Summary of a false accusation against Mr. Clark and modifications to the questions raised by Mr. Clark in his response to the application. Mr. Clark noted that the nature of the damage arising from the approved CFO is contamination of his land from previous livestock operations at the site and the potential for future contamination to occur. The remedy sought by Mr. Clark is third party testing of groundwater, surface water, and soils on his property and FLCC land, with the results of the tests being made publicly available. He also sought reclamation of his land from alleged FLCC contamination.

The RFR included specific questions and concerns that Mr. Clark asked the Board to address. These questions and concerns are summarized as follows:

1. Why was the operation of a CFO without a permit not identified during the NRCB investigation of a complaint filed with the NRCB by Special Area No. 4 in 2016?
2. How has this feedlot been able to operate since 1985 without the NRCB addressing the absence of permits for a CFO?

3. Given that a CFO has been in operation at the site without a permit, why has the NRCB not required testing of groundwater, surface water, and soils before issuing the Decision Summary?
4. How was the direction of runoff from the CFO determined during consideration of the application?
5. Mr. Clark requested two changes to Appendix B of the Decision Summary. He stated that his questions and concerns in response to the application had been modified without his consent and asked that these questions be amended, or his name be removed from association with the questions. He further asserted that the statement that he had made the 2016 complaint was false and asked that this accusation be removed from the Decision Summary.

4.2 Submission of NRCB Field Services

NRCB Field Services took no position on the RFR. The Field Services' submission included copies of Compliance Directive CD 23-06 and Mr. Clark's response to Application RA24001. The submission contained clarifications related to the Compliance Directive and to points in the Decision Summary raised by Mr. Clark in the RFR. The submission also noted that the NRCB does not disclose the identity of complainants, consistent with section 35 of the Administrative Procedures Regulation under AOPA.

4.3 Ference Land and Cattle Corp. Rebuttal

The FLCC rebuttal was submitted by Craig Ference on behalf of the company. In contrast to the statement attributed to him in Appendix B of the Decision Summary, Mr. Ference asserted that he was unaware of who made the 2016 complaint. He said that he understood at the time of the 2016 complaint and investigation that the original feed yard was grandfathered and could continue to operate as a CFO. Mr. Ference acknowledged that FLCC did not take the proper course of action when they began adding feedlot pen space.

Mr. Ference further asserted that not all the feeder cattle to which Mr. Clark refers in his RFR and his response to the application are being fed at this site, with significant numbers of FLCC feeder cattle being kept at custom feedlots in other locations. Mr. Ference noted that they do regular testing of water and soil at their operation and have tried to ensure that the planning, construction, and renovations of the CFO fully comply with all AOPA requirements.

5. Board Deliberations

Upon receipt of an application for review, section 25(1) of AOPA states that the Board must:

- (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.

The Board carefully considered the grounds on which Mr. Clark requested a review, the nature of the damage that Mr. Clark identified, and the remedies sought by Mr. Clark in the RFR. The Board also considered the specific questions and concerns raised by Mr. Clark in the RFR and will address these concerns in the following paragraphs.

The Board understands that runoff from this site can flow to the south, through a culvert, to land owned by Mr. Clark. The Board acknowledges Mr. Clark's legitimate concerns about the potential for contamination of his land from this runoff and the need to ensure that runoff from the approved CFO does not enter Clark land. With respect to the remedies sought by Mr. Clark in the RFR, the Board will address the matter of groundwater, surface water, and soil testing. The remedy of reclamation of Clark land from alleged FLCC contamination is not within the authority of the Board in responding to an RFR.

Following are the Board deliberations and conclusions with respect to the specific questions and concerns raised in the RFR and listed on pages 2 and 3 of this decision.

1. Why was the operation of a CFO without a permit not identified during the NRCB investigation of a complaint filed with the NRCB by Special Area No. 4 in 2016?

It is unclear to the Board why the permit status and permitted footprint of this CFO was not confirmed during the investigation of the 2016 complaint. The aerial photograph from 2015 shows that feedlot pens had been constructed prior to the site visit related to this complaint and the Board finds it unfortunate that the unauthorized construction of these pens was not identified and addressed in 2016.

2. How has this feedlot been able to operate since 1985 without the NRCB addressing the absence of permits for a CFO?

The Compliance Directive noted that livestock pens were very likely constructed at this site before 2002, when the NRCB was given responsibility for regulating CFOs. Section 18.1 of AOPA states that facilities and operations that existed on January 1, 2002, are deemed to have an AOPA permit. The Board is not aware of the NRCB receiving any indication that a CFO was operating at this site before the complaint was received in 2016.

The Board therefore accepts that the NRCB was not aware that there was a CFO at this site before 2016, but the construction and operation of CFO facilities beyond those that would meet the deemed permit provisions of section 18.1 should have been addressed at that time. Nevertheless, the unauthorized construction of feedlot pens was recognized and addressed by the Compliance Directive of 2023. The Board finds that past compliance issues raised by Mr. Clark are not subject to review in application RA24001.

3. Given that a CFO has been in operation at the site without a permit, why has the NRCB not required testing of groundwater, surface water, and soils before issuing the Decision Summary?

The Board notes that the approval officer employed the Environmental Risk Screening Tool (ERST) to assess the risks from the existing and proposed CFO facilities at this site and concluded that they pose a low risk to both surface water and groundwater. The geotechnical review and evaluation included in Technical Document RA24001 concluded that the naturally

occurring materials at the site meet the requirements of AOPA for protection of groundwater. The approval officer determined that the natural slope of the land and the earthwork done around the feedlot pens will direct runoff from the pens into the catch basins. The Board recognizes that FLCC is subject to the manure application and soil testing requirements set out in the Standards and Administration Regulation of AOPA and these requirements are designed to protect soils from adverse effects. The Board finds that the approval officer adequately dealt with the risks posed to groundwater and surface water and was justified in not requiring further testing of groundwater and surface water.

4. How was the direction of runoff from the CFO determined during consideration of the application?

As described in the Decision Summary, the approval officer determined the direction of runoff from the land through two site visits where the topography of the site and the general slope of the land were examined. The approval officer noted that the land on the east side of the north feedlot pens would drain to the south, meaning that runoff from this area could flow through the culvert to Mr. Clark's land. The approval officer was satisfied that the earthwork around the feedlot pens and the natural slope of the land would ensure that all runoff from these pens would be directed to the catch basins. The Board accepts that the CFO has sufficient means to control surface runoff of manure and finds no evidence rebutting the assessment of runoff direction at the site. The Board finds that the approval officer adequately dealt with surface water runoff at the site of the CFO in relation to the application at hand.

5. Mr. Clark requested two changes to Appendix B of the Decision Summary. He stated that his questions and concerns in response to the application had been modified without his consent and asked that these questions be amended, or his name be removed from association with the questions. He further asserted that the statement that he had filed the 2016 complaint was false and asked that this accusation be removed from the Decision Summary.

Mr. Clark requested changes to the Decision Summary because he asserted that his questions and concerns in response to the application had been modified without his consent and that he had been falsely accused of making the complaint in 2016. The Board finds that in Appendix B of the Decision Summary, the approval officer outlined the key issues expressed by Mr. Clark in his questions and concerns, but he did not purport to provide the exact wording of these questions and concerns. The Board finds that the approval officer reasonably described the key issues and did not make significant alterations to the substance of the questions and concerns.

The Board notes and agrees with the NRCB Field Services policy of not disclosing the identity of complainants, consistent with section 35 of the Administrative Procedures Regulation of AOPA. In the Decision Summary, the approval officer quoted a statement made by Mr. Ference that Mr. Clark was the complainant in 2016. While the approval officer did not make the assertion himself, using the quote from Mr. Ference nevertheless amounted to disclosure of Mr. Clark's name. The approval officer could have satisfactorily answered Mr. Clark's enquiry regarding the outcome of the 2016 complaint without any disclosure of the complainant. The Board identified no reason for the approval officer to include the statement from Mr. Ference and finds the disclosure of Mr. Clark's name unnecessary and unfortunate.

The Board finds no reason for changes to the section of the Decision Summary dealing with Mr. Clark's questions and concerns. The disclosure of Mr. Clark's name in connection to the 2016 complaint is unfortunate, but only the approval officer has the authority to amend a Decision Summary or an error therein. The Board does recognize that the statement by Mr. Ference that is quoted in the Decision Summary is countered by the statement by Mr. Ference in the RFR rebuttal that he is unaware of who made the 2016 complaint.

Summary of Board Deliberations

The Board recognizes that there have been significant non-compliance issues at this operation in the past and that many of Mr. Clark's concerns are a legitimate reaction to these issues. Indeed, Mr. Clark's request for third party testing of groundwater, surface water, and soils at the site and on Mr. Clark's land is directed more at addressing the impacts of past operations at the site than at the future operation of the approved CFO. Given Mr. Ference's active participation in the agriculture industry and the people with whom he works in the cattle feeding sector, the Board has questions about the credibility of his assertion that he was unaware of AOPA requirements and did not know FLCC needed a permit for the feedlot pens.

However, despite these past non-compliance issues, the NRCB Field Service Approvals Operational Policy 2016-7 states that approval officers generally do not address an applicant's past compliance record as part of their decision to issue a permit. When an application meets the requirements of AOPA, approval officers presume that the applicant has the intent and the resources to meet the requirements of AOPA and that the Field Services compliance division can adequately deal with any compliance issues that may arise. The Board is satisfied that the application meets the requirements of AOPA and expects that FLCC will operate the CFO in full compliance with these requirements. The Board also expects that the Field Services compliance division will take appropriate steps to ensure that the operation is in compliance with AOPA.

6. Board Decision

As a result of the Board's review of the documents under consideration for this RFR and its deliberations on the issues raised in the RFR, the Board finds that the approval officer adequately dealt with the issues raised in the RFR that pertain to the issuance of Approval RA24001. Ancillary issues raised in the RFR with respect to past compliance are not the subject of review in this matter. The RFR is denied.

DATED at EDMONTON, ALBERTA, this 16th day of May, 2024.

Original signed by:

Peter Woloshyn (chair)

Sandi Roberts

Rich Smith

Dan Heaney