



BOARD DECISION REQUEST FOR REVIEW

RFR 2024-06 / RA23022

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

Mitchel Kroetsch

September 24, 2024

A correction to this decision was issued on October 1, 2024. The correction has been made to the text and a description of it is appended.

The Board issues this decision under the authority of the *Agricultural Operation Practices Act (AOPA or the Act)*, following its consideration of requests for the Board’s review (RFRs) of Decision Summary RA23022.

1. Background

On August 20, 2024, a Natural Resources Conservation Board (NRCB) approval officer issued Decision Summary RA23022 (Decision Summary). The decision granted NRCB Approval RA23022 (Approval) to Mitchel Kroetsch (Kroetsch) to construct and operate a new beef feeder/finisher confined feeding operation (CFO) located at NW 15-42-16 W4M in Flagstaff County (County).

Following the issuance of the Approval, the Board received eight requests for review (RFRs) of the decision within the filing deadline of September 11, 2024. Six of the RFRs were from directly affected parties Arthur Congdon, Heidi Rohe, Thomas Rohe, Lorraine Congdon, Norman Congdon, and Dallas Oberg. Two of the RFRs were filed by parties who were found by the approval officer to not be directly affected: Lynn Poole and Gary and Carol Scheler. Two RFRs were received on September 16, 2024, after the filing deadline of September 11, 2024, from Wanda Bednarz-Hihn and David Hihn.

On September 12, 2024, the NRCB sent a Notice of Filed Requests for Board Review and provided a rebuttal opportunity to the directly affected parties listed in the Decision Summary and the two parties requesting status reconsideration. The rebuttal opportunity gives parties that may have an adverse interest to the matters raised in the RFRs a chance to submit their views. NRCB Field Services made a submission on September 17, 2024, which was within the rebuttal filing deadline.

Under the authority of section 18(1) of the *Natural Resources Conservation Board Act*, a division of the Board (panel) consisting of Sandi Roberts (chair), Walter Ceroici, and Daniel Heaney was established to consider the RFRs 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.

2. Documents Considered

The Board considered the following information:

- Decision Summary RA23022, dated August 20, 2024
- Technical Document RA23022, dated August 20, 2024
- Approval RA23022, dated August 20, 2024

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

- RFR filed by Arthur Congdon, dated September 6, 2024
- RFR filed by Heidi Rohe, dated September 9, 2024
- RFR filed by Thomas Rohe, dated September 9, 2024
- RFR filed by Lorraine Congdon, dated September 11, 2024
- RFR filed by Norman Congdon, dated September 11, 2024
- RFR filed by Dallas Oberg, dated September 11, 2024
- Request for Status Reconsideration and RFR filed by Lynn Poole, dated September 11, 2024
- Request for Status Reconsideration and RFR filed by Gary and Carol Scheler, dated September 11, 2024
- NRCB Field Services submission, dated September 17, 2024
- Flagstaff County Municipal Development Plan, Bylaw 10/18, dated August 2018

The Board did not consider the RFRs that were filed by Wanda Bednarz-Hihn and David Hihn. Section 20(5) of AOPA specifies the timeline for directly affected parties to apply to the Board for a review of a decision. The submissions from these parties were received after the legislated timeline and AOPA does not give the Board authority to consider RFRs that are late filed.

3. Submissions

3.1 Issues Raised in the RFRs

The RFRs raised the following issues:

- site suitability
- groundwater contamination
- surface water quality impacts
- water supply concerns
- nuisance concerns
- effects of manure spreading and land base
- human health impacts
- road impacts
- property value impacts

3.2 Submission of NRCB Field Services

Field Services took no position on the RFRs.

Fiona Vance, legal counsel for NRCB Field Services, in her email dated September 17, 2024, provided one correction and one update on behalf the approval officer.

The approval officer had corrected the calculated capacity of the catch basins from 170% to 107% of required capacity.

In addition, the approval officer was informed by Mr. Kroetsch on September 10, 2024, that during some preliminary trenching work at the site in the area of proposed catch basin #1 he encountered what was presumably a water table at a depth of less than 4 metres below grade. Since the proposed catch basins were designed to a depth of 3.5 metres below grade, and as

the bottom of the liner must not be less than 1 metre above the water table at the time of construction, the approval officer advised that the catch basins as proposed may not be in compliance with AOPA's Standards and Administration Regulation 9(3)(a). The approval officer directed the operator to not proceed with construction of the catch basins until the next steps are decided, which could include a redesign of the catch basins and submission of an application to amend the permit.

3.3 Mitchel Kroetsch Rebuttal

Mr. Kroetsch had an opportunity to provide a rebuttal to the various RFRs received by the Board. The Board did not receive any rebuttal evidence from him by the September 18, 2024, deadline.

4. Board Deliberations

4.1 Request for Status Reconsideration

The Board received two requests for status reconsideration and accompanying RFRs. Under NRCB policy, a person who is not deemed to be a directly affected party has the burden of demonstrating that they are directly affected by an application. In order to meet their burden of proof, the person has to demonstrate all of the following five elements (see NRCB Operational Policy 2016:7 Approvals, part 7.2.1):

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.

The request for status reconsideration filed by Lynn Poole stated that they live 5 miles from the CFO site and 2.5 miles from manure spreading lands. They raised concerns about water availability for their domestic and business needs, distance from the CFO to common water bodies, and future manure spreading near their property. In considering these potential effects, the Board notes the following:

- i) Granting water licenses is in the purview of Alberta Environment and Protected Areas and falls outside NRCB's regulatory mandate.
- ii) The CFO site meets the statutory requirements under AOPA for offset from common water bodies.
- iii) The applicant provided evidence that they had sufficient land for initial manure spreading and has met AOPA requirements. Manure spreading once a CFO is operational is governed by Standards and Administrations Regulations and deviation from approved practices is a compliance issue.

For the above reasons, the Board finds that Lynn Poole has not met the burden of proof to be considered a directly affected party.

Gary and Carol Scheler also requested status reconsideration. The Decision Summary stated that the approval officer did not consider or address their submission because it was received four days after the legislated response deadline, and exceptional circumstances for the lateness of the submission could not be identified. In their request to the Board, the Scheler's did not provide the Board an explanation about why their submission to the approval officer was late. Without this information the Board has no reason to overturn the approval officer's determination about their status and does not find them to be a directly affected party.

4.2 Site Suitability

Several directly affected parties were concerned about the impact the CFO would have on their quality of life and questioned the suitability of the location within an area with a number of rural residences. As noted in the Decision Summary, the approval officer found that the location of the CFO was consistent with agricultural land use zoning in the Flagstaff County Municipal Development Plan (MDP). Furthermore, the development officer with Flagstaff County provided a written response on behalf of the County stating that the application is consistent with Flagstaff County's land use provisions. The approval officer also independently assessed the distance from the proposed CFO to nearby residences and determined that the minimum distance separation was met in all cases.

Based on the above, the Board finds that the approval officer adequately dealt with this issue and therefore it is not a matter for review.

4.3 Groundwater Contamination

The potential for groundwater contamination from the CFO site was raised in several of the RFRs. One RFR raised concern about a high water table in the area. The Board notes that the consultant's report included in Technical Document RA23022 indicated that five investigative boreholes drilled at the CFO site in May 2023 ranging in depth from 3 to 6 metres did not encounter "saturated water table".

In reviewing the application, the approval officer assessed the potential risk to groundwater posed by the CFO's proposed manure storage facilities and manure collection areas using the NRCB's environmental risk screening tool (ERST). The approval officer was assisted in this assessment by an NRCB Environmental Specialist. Based on the ERST results and a site inspection, the approval officer found that the proposed feedlot pens and both catch basins pose a low potential risk to groundwater. Additionally, the approval officer concluded that the proposed facilities meet the technical requirements set out in the regulations.

The Board agrees that the approval officer's original determination that the feedlot pens and catch basins pose a low potential risk to groundwater and meet the technical requirements set out in the regulations was reasonable based on the available evidence at the time the approval was made. However, new evidence provided by the operator suggests there is a high water table in the feedlot area which may affect the performance of the synthetic liners proposed for the catch basins and consequently groundwater quality. The Board finds that the risk of groundwater contamination, considering new evidence suggesting a high water table, raises questions of environmental risk that may require review.

The Board observes that construction conditions 5 and/or 9 of Approval RA23022 require that construction of the catch basins be suspended if a high water table is encountered, which has been done. The operator now must determine his next steps. This may include redesigning the catch basins and, if required, the pen configuration to meet AOPA requirements. The process for the NRCB to consider such design changes would be for Kroetsch to submit an application to an NRCB approval officer to amend Approval RA23022. An amendment application such as this would require public notification and provide opportunity for parties to submit their responses about the application. Alternatively, Kroetsch may decide to withdraw the application.

4.4 Surface Water Quality Impacts

Several RFRs expressed concerns about contaminated runoff from the CFO leaving the site, potentially impacting water sources, and eventually entering the Battle River. As noted in the Decision Summary, these concerns were general in nature and none of the parties provided details on how they would be directly affected or evidence that surface water contamination was likely.

The approval officer determined that the nearest common body of water is more than 1100 m from the proposed CFO and that the Battle River is approximately 10 km to the west. Using the ERST referred to in the previous section, the approval officer concluded that manure collection and storage facilities at the proposed CFO posed a potential low risk to surface water quality.

The approved project requires the operator to construct two catch basins which in concert must meet the required capacity for containing runoff from an operation of this size. The correction submitted by Ms. Vance about the application's catch basin capacity being 107% rather than 170% still meets the requirement.

The Board agrees that at the time of the approval officer's assessment AOPA's regulatory requirements for surface water protection were met. This issue was adequately dealt with by the approval officer and therefore does not provide a basis for granting a review.

However, based on the discussion in the previous section of this report, it is likely that the design of the proposed catch basins will change and that another assessment may need to occur.

4.5 Water Supply Concerns

Water supply was a common issue raised in the majority of the RFRs submitted by directly affected parties. The concern was that withdrawals to provide the water requirements of 5000 head of cattle would deplete the aquifer and over time this would impact the availability of water for their own use.

The approval officer documented this concern in the Decision Summary and provided comments explaining that water supply, including the licensing of groundwater use, is the responsibility of Alberta Environment and Protected Areas. Applicants have the choice of tying their applications for water licenses to their AOPA application or seeking them independently from the AOPA process. Mitchel Kroetsch provided a declaration that he will be applying for the

licensing separately from the AOPA application. As this meets the requirements of AOPA, the approval officer did not pursue this concern any further.

The Board agrees that the approval officer handled this issue correctly and therefore it is not a matter for review. The Board also notes that proceeding with construction of the feedlot without the required water licenses is at the risk of the project developer should the licenses not be issued.

4.6 Nuisance Concerns (odour, dust, flies, noise)

Many of the RFRs stated that the odour, dust, flies and noise from the approved facility, and periodic manure spreading, would create unacceptable effects.

The Board notes that neighbours would be exposed to nuisance impacts from time to time and that, in some instances, those impacts may be more than trivial. Odour nuisance associated with manure spreading activity will be less frequent and is more likely to occur on the identified land base in the spring and fall.

The Decision Summary stated that all residences in the vicinity of the approved CFO fall outside the prescribed minimum distance separation (MDS) required by AOPA. The MDS requirements are a proxy for minimizing nuisance effects. In reaching this conclusion the approval officer considered that the planned CFO meets the required MDS, and that the location is consistent with the land use planning provisions included in the Flagstaff County MDP.

The Board is satisfied that nuisance issues were adequately considered by the approval officer and that the planned CFO location is an appropriate use within an area of the County that allows CFO development within the statutory requirement of AOPA.

4.7 Human Health Impacts

Impacts to personal health from the CFO were raised as a concern in some of the RFRs.

The approval officer commented on this in the Decision Summary and advised that the NRCB Approvals Policy directs any health-related concerns to be forwarded to Alberta Health Services for its input and responses. The reason for this is that approval officers do not have the knowledge or expertise to assess health related concerns. For this application, these concerns were forwarded to the public health inspector. No comments were provided by the health inspector.

The Board finds that the approval officer followed the direction given by the NRCB Approvals Policy and therefore adequately considered this issue.

4.8 Road Impacts

The potential for negative impacts to local roads including damage, dust, noise, pollution, and accidents was noted in several of the RFRs.

The Decision Summary commented that the NRCB does not have direct responsibility for regulating road use or maintenance. The *Municipal Government Act* gives this responsibility to municipalities; therefore, it would be impractical and inefficient for the NRCB to attempt to manage road use through AOPA permits.

The Board agrees with this determination and finds that the approval officer adequately dealt with this issue.

4.9 Property Value Impacts

Some of the RFRs expressed a general comment that their property values may be reduced if a feedlot is established nearby but did not provide details to substantiate this claim.

The approval officer addressed this concern in the Decision Summary by citing past Board decisions on this matter which state that impacts on property values are a land use issue which is dealt with by the municipality in its Municipal Development Plan (MDP).

The Board notes that this proposal is consistent with the County's MDP and is satisfied that the approval officer adequately addressed this concern.

Board Decision

Section 25(1) of the AOPA describes the Board's legislative options when considering an RFR for a review of an approval officer's decision. Section 25(1) 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.

This provision requires the Board, on an issue-by-issue basis, to either dismiss the RFR if the Board feels the issue was adequately dealt with by the approval officer or to schedule a Board review of the issue.

For the reasons that follow, the Board has determined that the appropriate course of action is to schedule a review of the proposed operation's measures to protect both surface water and groundwater quality. Further details of those issues identified for review are set out in sections 4.3 and 4.4 of this decision.

In deciding to conduct a review, the Board recognizes that the specific circumstances of this application require special procedural considerations. Notably, the approval officer's September 17, 2024, filing identified a distinct likelihood that Kroetsch will have to file an application to amend his permit. Further, the Board is satisfied that the conditions of the approval, as confirmed by the notes provided in the approval officer's September 17 filing with the Board, effectively suspend any potential to operate a CFO at the site. Should Kroetsch determine that he will proceed with an application for an amendment to his approval, normal application amendment procedures will apply and affected parties will receive notice and have the opportunity to comment. While existing parties to the active Board review need not restate their concerns on the amendment application, they may state any specific concerns related to any changes to manure storage facilities included in the amendment application.

In any event, the Board directs the approval officer to provide the Board with updates on next steps and the anticipated timing of those steps. The Board considers this to be an active review, held in suspension pending further action initiated by Kroetsch. Any approval officer decision on an amendment application will be open to filing of new RFRs; however, the Board will merge the approval officer decision on the amendment application with the Board review directed by this decision.

In the event that Kroetsch does not take further steps on a timely basis, the Board may invite parties to make submissions on how they would like the Board to proceed.

DATED at EDMONTON, ALBERTA, this 24th day of September 2024.

Original signed by:

Sandi Roberts (chair)

Walter Ceroici

Daniel Heaney

The Board discovered that it made an error when writing this decision. Section 3.2, paragraph 4, line 2 – the words “proposed catch basin #2” have been replaced with “proposed catch basin #1”. This change does not affect the outcome of this decision.