

#13 - REQUEST FOR REVIEW: LA20014 / Granum Colony

Filed By:

Vonda Chatterton

Deadline for RFRs:

September 17, 2020

Date RFR received:

September 17, 2020

Status of party as per Decision Summary:

Not Directly Affected

REQUEST FOR BOARD REVIEW
SUBMITTED TO THE NATURAL RESOURCES CONSERVATION BOARD

Application No:	
Name of Operator/Operation:	
Type of application (<i>check one</i>):	<input type="checkbox"/> Approval <input type="checkbox"/> Registration <input type="checkbox"/> Authorization
Location (<i>legal land description</i>):	
Municipality:	

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.

5. CONTACT INFORMATION

(ALL PARTIES MUST COMPLETE THIS SECTION)

Contact information of the person requesting the review:

Name: _____

Address in Alberta: _____

Legal Land Description: _____

Phone Number: _____ Fax Number: _____

E-Mail Address: _____

Signature: _____ Date: _____

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: _____

Address: _____

Phone Number: _____ Fax Number: _____

E-Mail Address: _____

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

Laura Friend, Manager, Board Reviews
Natural Resources Conservation Board
19th Floor Centennial Place
250 – 5th Street SW
Calgary, AB T2P 0R4

Phone: 403-297-8269

Email: 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.

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Appendix A - Party Status

The Approval Officer's Incoherent Decision

In Appendix B of Decision Summary LA20014 (Page 9), the Approval Officer wrote, in relation to me and other parties: “The following individuals who submitted responses to the public notice reside on or own land outside of the affected party radius. However, they may still qualify as directly affected parties based on their ‘exposure to potential nuisances or risks’ posed by the proposed CFO” (emphasis added).

After listing me and other parties and noting the burden of proof in establishing standing as a “directly affected party”, the Approval Officer wrote: “Using these factors I concluded that none of the persons who submitted timely concerns and who are not presumed to be directly affected are not directly affected parties.” (Page 10, emphasis added).

On its face, this statement indicates that all of the persons who submitted timely concerns and who were not presumed to be directly affected, including me, were, nevertheless, found to be directly affected parties. (If none of the persons are not directly affected parties, then, grammatically and logically, all of the persons are directly affected parties.) However, this conclusion does not appear consistent with some of the Approval Officer’s comments in the balance of Appendix B.

Therefore, in the event that the Approval Officer concluded that I was not a directly affected party (despite an express statement to the contrary), I present these submissions in support of that decision being reviewed and reversed.

Failure to Recognize and Assess Individual Characteristics and Circumstances

Section 19(4), (5), and (7) of the *Agricultural Operation Practices Act* (the “AOPA”) outlines a person’s right to seek recognition as a directly affected party:

19(4) An affected person and any other person or organization that is notified under subsection (1) may apply, with written reasons, within 10 working days of being notified to an approval officer, and any member of the public who has viewed the application under subsection (3) may apply, with written reasons, within 20 working days after the date the application was determined to be complete, for a determination whether the affected person, other person or organization or member of the public is a directly affected party.

(5) An applicant under subsection (4) must provide, on the request of an approval officer, further information relevant to the application.

(7) The approval officer must notify the affected person, organization or member of the public that applies under subsection (4) in writing of the approval officer’s determination whether the applicant is a directly affected party.

That section focuses on a single “affected person”, rather than on a class of “affected persons”, thereby highlighting the requirement that an approval officer make an individual determination

as to the standing of each affected person, based on that person's individual characteristics and circumstances. The Approval Officer in this matter failed to discharge that duty, and, consequently, improperly denied me (and likely others as well) directly affected party status.

The Decision Summary LA20014 (Page 3) notes that 29 "respondents" (who, under section 19(4) of the AOPA would more properly be referred to as "applicants"), including me, were not presumed to be directly affected by the Application. Schedule B of the Decision Summary LA20014 (Pages 9-10), lists the names and places of residence of those 29 respondents. Beyond that, however, the Approval Officer fails to note any individual characteristics or circumstances of those respondents. Instead, the Approval Officer lumps all of those respondents together – respondents who reside in the Town of Claresholm, and respondents who reside on rural properties; respondents who are land owners, and respondents who are not; respondents who have close spatial connections to the site of the proposed CFO, and respondents whose spatial connection to the site is further removed; respondents whose occupations and activities are directly impacted by the proposed CFO, and those whose occupations and activities are only tangentially impacted – and makes a single global assessment that none of them is a directly affected party.

Perhaps the Approval Officer wished to expedite the approval process or to streamline her work. Perhaps the Approval Officer felt that the current pandemic justified relaxation of standards. Whatever her motivation, in making a single global assessment of 29 different individuals' status, the Approval Officer failed to comply with the statutory requirements of the AOPA. This dereliction of duty is particularly troublesome in light of the power granted to the Approval Officer under section 19(5) of the AOPA to demand further information from a person seeking directly affected party status. If the Approval Officer required further information to assess the individual characteristics and circumstances of each of the 29 respondents, she could have readily obtained it. However, the Approval Officer did no such thing. Had the Approval Officer done so, or even diligently reviewed my original submissions, she would have discovered that my individual characteristics and circumstances establish my entitlement to directly affected party status.

I am immediately related to two of the parties who were presumed to be directly affected, namely, my brother, Don Chatterton, and my nephew, Radon Chatterton. I reside on the same home quarter section as those two directly affected parties. I participate in the same farming operation, Chatterton Farms, as those two directly affected parties, which farming operation includes land within the affected party radius. I share the same historical family connection to Chatterton Farms as those two directly affected parties. The only factor that distinguishes me from those two directly affected parties is the fact that my name is not on legal title to land within the affected party radius, even though, as mentioned above, I am involved in the farming operations on that land.

In light of those characteristics and circumstances, the Approval Officer's decision to lump me in with the other 28 "respondents", including residents of Claresholm who likely are less directly affected by the Application, is indefensible. A Board Review is required.

Asymmetrical and Illogical Standard

In light of the foregoing, should the Board fail to reverse the Approval Officer's decision and acknowledge my status as a directly affected party, an asymmetrical and illogical standard will result. Specifically, if, in the face of Don Chatterton's and Radon Chatterton's status as directly affected parties, I am found not also to be a directly affected party, the Board will have, effectively, reduced the individual and nuanced consideration prescribed by the AOPA to a binary determination based solely on legal land ownership within the affected party radius. Imposition of such a standard would ignore the express language of section 19 of the AOPA, and cannot be accepted.

On that basis, the Board Review should conclude that I am a directly affected party.

Application of Approval Officer's Factors

Although my status as a directly affected party can arguably be established solely on the basis of the patent absurdity of the asymmetrical standard outlined above, I also address the specific factors articulated by the Approval Officer. In Appendix B of Decision Summary LA20014 (Page 10), the Approval Officer described the burden that I must discharge in order to establish my status as a directly affected party as follows:

“Under NRCB policy, a person who is not presumed directly affected has the burden of demonstrating that they are directly affected by an application. A person demonstrating the following likely meets their burden of proof:

- A plausible chain of causality exists between the proposed project and the effect asserted;
- The effect would probably occur;
- The effect could reasonably be expected to impact the party;
- The effect would not be trivial; and
- The effect falls within the NRCB regulatory mandate under AOPA. (NRCB Operational Policy 2016:7 – Approvals, part 6.3; see also Ijtsma, page 4.)”

As mentioned above, the Approval Officer lumped me in with the other 28 “respondents” in making a global assessment of directly affected party status, entirely ignoring my individual characteristics and circumstances. Therefore, find myself at a distinct disadvantage in trying to identify specific bases for a Board Review, since I have no way of knowing which of the Approval Officer's comments related to me, as opposed to some other party. Nevertheless, I consider each of the factors listed above in turn in relation to the effects that I asserted, namely: nuisance impacts, negative community impacts, negative health impacts, and water contamination.

Plausible Chain of Causality

The Approval Officer acknowledged, in Appendix B of Decision Summary LA20014 (Pages 11-13), the existence of a plausible chain of causality in relation to nuisance impacts, negative community impacts, and water contamination.

In relation to negative health impacts, however, the Approval Officer stated in Appendix B of Decision Summary LA20014 (Page 13): “For the most part, the negative health impacts were characterized in general terms. I have no information, e.g. from a health professional, that this kind of CFO would cause the health impacts asserted, or would probably affect these individuals in particular. From AHS’ response, I am unable to conclude that a plausible chain of causality would exist between the proposed CFO and the asserted effects on the individuals.”

I recognize that I would typically bear the burden of establishing each of the factors articulated by the Approval Officer, including a plausible chain of causality. However, in relation to negative health impacts, individual parties arguably lack access to relevant professional sources of information, especially during the pandemic. Even the Approval Officer, who arguably, by virtue of her position, has improved access to Alberta Health Services officials, was initially unable to receive a response to her query. Therefore, in this context, I submit that the Approval Officer was best positioned to obtain relevant information in relation to negative health impacts.

I further submit that, given the Approval Officer’s mandate to “consider the effects on the environment ... and the community”, pursuant to section 20(1)(b)(ix) of the AOPA, as well as the Approval Officer’s authority to “make, or require the applicant to make, inquiries and investigations and prepare studies and reports”, pursuant to section 20(1)(b)(ii) of the AOPA, the Approval Officer was, in fact, obligated to obtain reliable evidence in relation to the question of health impacts, so as to assess whether a plausible chain of causality exists.

Regrettably, however, the Approval Officer did not identify a plausible chain of causality, due to the Approval Officer’s failure to obtain the required confirmation from Alberta Health Services. In Appendix C of Decision Summary LA20014 (Page 15), the Approval Officer noted that the Alberta Health Services representative “did not comment on any specific health concerns or outcomes in respect to the operation of the chicken layer barn.” The Approval Officer therefore “presume[d] that AHS ha[d] no specific concerns in respect to this proposal” (emphasis added). That logical leap from a lack of comment to a presumption is tantamount to the Approval Officer accepting an absence of evidence of something as evidence of the converse. That logical leap is impermissible, and I, as a party, should not be prejudiced by the Approval Officer’s own failings in conducting inquiries.

Effect Would Probably Occur

The Approval Officer appears to have acknowledged, in Appendix B of Decision Summary LA20014 (Pages 11-13), that the effects relating to nuisance impacts, negative community impacts, and water contamination would probably occur. The Approval Officer did not, however, reach that same conclusion in relation to negative health impacts. That conclusion is flawed for the same reasons as outlined above.

Effect Could Reasonably Impact Me

The Approval Officer appears to have acknowledged, in Appendix B of Decision Summary LA20014 (Pages 11-13), that nuisance impacts could reasonably impact me. The Approval Officer did not, however, reach that same conclusion in relation to negative community impacts, negative health impacts, or water contamination.

The Approval Officer's finding in relation to negative health impacts is flawed for the same reasons outlined above. The Approval Officer's conclusion that water contamination could not reasonably impact me ignores my involvement in a farming operation with land within the affected party radius and other land bordering Willow Creek. Contamination of surface water has the potential to reasonably impact me by harming my health and the health of my family members who live and work in proximity to such water, as well as the health of our livestock that drink from such water sources.

Effect Would Not Be Trivial

The Approval Officer did not give any indication, in Appendix B of Decision Summary LA20014 (Pages 11-13), that negative community impact, negative health impacts, or water contamination would be trivial. The Approval Officer did, however, state that nuisance impacts would be trivial. That conclusion ignores my direct involvement in a farming operation with land within the affected party radius.

The potential nuisance impacts on me and my activities is not at all trivial. A significant volume of dust will likely be generated in connection with traffic to and from the proposed CFO. That dust will be generated in proximity to the land that we use in our farming operation. That dust could result in respiratory issues for me and my family, as well as increased calf mortality, which are not trivial outcomes. Similarly, the odour produced by the proposed CFO stands to have a material (non-trivial) impact on our ability to work on our land in immediate proximity to the proposed CFO.

Effect Falls within Board Mandate

The Approval Officer appears to have acknowledged, correctly, in Appendix B of Decision Summary LA20014 (Pages 11-13), that all of the effects that I asserted fell within the Board's mandate. Therefore, I do not address this factor further.

Summary

In light of the foregoing, I submit that I have met the burden of proof establishing my status as a directly affected party. The Board should review and reverse the Approval Officer's decision and confirm that status.

Appendix B - Grounds for Requesting a Review

The Board Should Conduct a Review and Refuse to Grant Approval of the Application

According to Section 20(5) of the Agricultural Operation Practices Act (the “AOPA”) grants directly affected parties the right to apply to the Board for a review of an approval decision. As mentioned above, with the way Appendix B of Decision Summary LA20014 was written, I am assuming to be directly affected. I am, therefore, entitled to submit this Request for Board Review.

The current COVID-19 pandemic certainly changed the way things were done, to keep all parties safe. While I empathize with the Approval Officer and the Board to perform their duties within the restrictions that are placed, there still remains the need to show due diligence and transparency. Upon hearing of the process used, whereby the agent for the Applicant was allowed to rebut those who oppose the application, and then had the opportunity to change the application if deemed necessary, I questioned the fairness of this moving target approach. I was informed it may be linked to precautions due to the COVID-19 pandemic. If this indeed was what happened, the safeguard to protect all parties may have been from COVID-19, but it certainly did not maintain the prescribe standards for NRBC nor justify the abandonment of duty by the Approval Officer.

The process used was flawed, whether done as a precautionary measure because of COVID-19 or some other factors. Unfortunately, in this case the agent for the Applicant has misled the Approval Officer either intentionally or due to the agent’s lack of knowledge. Therefore, it would be incumbent upon the Board to grant a request for a review and should reverse the Approval Officer’s decision. .

Overarching Deficiencies in Approval Officer’s Work

In reading the decision, there were at least three overarching deficiencies in how the Approval Officer conducted her report. First, the Approval Officer based her comments on assumptions, instead of facts. Second, the Approval Officer did not show due diligence by accepting inaccurate comments without validating them. Third, the Approval Officer’s approach was procedurally unfair for those of us who are directly impacted by the chicken barn. The issues discussed below have underpinnings of a combination of these deficiencies.

Procedural Unfairness in LA20014

In Section 20(1)(b)(iii) of the AOPA states that, in considering an application, the approval officer:

“must give directly affected parties a reasonable opportunity to review the information relevant to the application that is submitted to the approval officer and a reasonable opportunity to furnish

evidence and written submissions relevant to the application” (emphasis added). I believe the Approval Officer regrettably failed to fully comply with this requirement.

Further Pattern of Procedural Unfairness

There seems to be a pattern of procedural unfairness, as I have now been involved in both LA20014 and LA20004. The process used, where the agent for the applicant is allowed to rebut those who oppose the application is so wrong. The agent does not live in the area, nor are her resources as accurate as those “who have lived in the area for more than sixty years”. We do not feel our concerns were heard nor given the same regard as the agent’s opinion. The approval of LA20014 needs to be rescinded on the grounds of procedural issues, thereby our concerns were marginalize or summarily disregarded.

Furthermore, how is it the Applicant can amend the application without allowing those opposed the courtesy of knowing of the changes? It’s like the agent is capitalizing on those who know the area well enough to oppose the project, then provide inaccurate information to refute our submissions. In the case of LA20004, they were given four attempts to get all their “duck in a row”. In this case it was all their land in a row. While I recognize this request for a review is not regarding LA20004, it does speak to the numerous attempts to get an approval accurate. Even after using information gleaned from the submissions there was still an error, or at least it should be an error. How is it that both LA20004 and LA20014 projects are using the same field to spread manure? With SE32-11-27 W4M running right along the Willow Creek that is certainly detrimental to the environment.

Additionally, had Approval Officer asked those who know, instead of taking the agent’s limited research from an app as her go-to-source, she would have learned the landing strip on Allan Minor’s property is recorded. We recognize an agent is hired by the applicants and it is his/her job to represent them. With the process that was used, this agent provided false information, which has negated the actual truth from being shared.

Water Supply

It is noted the Board does has limited jurisdiction regarding water supply. However, the Approval Officer did not sufficiently deal with the concerns that were raised. In Section 20(1)(b)(ix) of the AOPA it states that an approval officer “must consider the effects on the environment, the economy and the community and the appropriate use of land”. Simply explaining NRCB’s limitations, in Appendix C of Decision Summary LA20014 (Page 18), discharged her statutory requirement. Had the Approval Officer’s shown due diligence, she would have not only picked up the contradictory information provided by the Applicant and that of Alberta Environment and Parks but would have done further investigation in order find the discrepancy .

On page 6 of the Application the Applicant stated, “the CFO will not need a new licence from AEP under the *Water Act* for the development or activity proposed in this AOPA application.”

Yet, in Appendix C of Decision Summary LA20014 (Page 18), the Approval Officer pointed out that Alberta Environment and Parks contradicted the Applicant's declaration, "that a water license is required and stated that they have not yet receive an application for a water licence." Instead of doing a more thorough scrutiny, the Approval Officer merely stated: "The applicant is reminded that it is their responsibility to ensure that they obtain necessary water licensing for the proposed CFO."

Since the Approval Officer did not obtain the relevant information, that certainly negated her ability to "consider the effects on the environment, the economy and the community and the appropriate use of land". Had the Approval Officer followed up, she may have found perhaps the Applicant will "not need a new license" because:

- a) the Applicant plans on hauling the water. If that is the case, then that would have negative effects on the environment, the economy, and the community, which does fall squarely within the Board's jurisdiction.
- b) the Applicant plans on drawing water from one of the wells on their property. If this be the case, that could have harmful effects on the environment, the economy, and the community, which does fall squarely within the Board's jurisdiction.
- c) the Applicant plans on drawing water from Meadow Creek. If this be the case, that it would have deleterious effects on the environment, the economy, and the community, which does fall squarely within the Board's jurisdiction.

With a call into Alberta Environment and Parks the Approval Officer would have learned that there is only one well on the property with citing different depths, not two different wells. This would corroborate the following section regarding assumptions.

Consequently, with the Approval Officer failure to confirm the Applicant's intentions with respect to water supply, as it was mentioned in many of the submissions, a Board Review is, necessary. The Applicant needs to explain the specific plans regarding water supply, so that the Board can assess to what extent its jurisdiction is engaged.

Approval Officer's Assumptions about the Applicant's Future Conduct

In the Decision Summary LA20014, the Approval Officer repeatedly makes the assumption of the behaviour of the Applicant, in the future. The entire approval of this Application, it seems, hangs on the hope the Applicant will do the right thing. This is reflected in the repeated dismissal of our concerns since there is a 1-800 number we can call to report any non-compliance.

Unfortunately, my personal experience does not match the Approval Officer's assumption. As was stated in my submission. Their irrigation end gun is not programmed to shut off when it is near the road. It shoots across the road and into the opposite ditch. Those travelling along Range Road 274 need to be careful to not get wet or wait it out. If this were done periodically, I would see it as perhaps an oversight. However, I have only lived here for a year and have personally witnessed three other similar incidents. Water was not only wasted but it became a hindrance to passersby. Furthermore, our hay was damaged after being doused with water from their end gun. While not programing the irrigation end guns may seem to be irrelevant to the

proposed chicken barn, it does show the total disregard for environmental and safety protocols by those who will be operating that chicken barn.

There is a disconnect between the assumption and the conduct of the Applicant. Since my submission further additional information was learned. Associates, who live near a chicken barn similar in nature to this one, have enlightened us on the stench, the flagrant disregard for regulations, and the deplorable living environment the neighbours have to endure. This goes far beyond “perception and odour sensitivity” (see Decision Summary LA20014 page 11). We also learned once approval is granted for a project by the NRCB follow up is minimal. I’ve experienced firsthand, not only the stench from Claresholm Feed Producers’ stock piled of manure for months, but also the damage the frozen trails of manure across the road can have on a vehicle, not to mention the stench that stays with a vehicle when the frozen trail has thawed – not pleasant. Then, of course there is the 4000 pig barn on NW15-27-11 which actually contains 6000 hogs, 2000 more pigs than their approval. Furthermore, pig barn was not even mentioned in report as one of the CFOs that is in close proximity to the chicken barn. It looks like we have now become the *de facto* enforcement officers, policing our neighbours. That certainly does not make for good neighbourly relations.

Had the process been more transparent, at least we would know we were given an equal voice and the Approval Officer would learn why we question the Applicant’s willingness to comply with the conditions.

Appendix C – Reasons I am Affected by the Decision

Under the current situation there is no other way than to allow those who oppose this project to have equal representation. If not, it will be seen as prejudicial.

In Approval Officer’s risk assessment to surface water and groundwater she states “poses a low potential risk to groundwater and surface water” (Decision Summary LA20014 (page 3). In the flood of 1936 Meadow Creek and Trout Creek met. As a result the fertile hay field on NW20-27-11 is now either a large alkali patch or a shallow pond dependent upon the year. Over the years several different things have been done to recover the land, with limited or no positive effects. So, what the Approval Officer considers as a low risk does impact the surrounding area for decades.

As was mentioned above, the Applicant’s planned water supply could most definitely have irreparable damage to the environment and the economic impact on their surrounding neighbours.

Furthermore, approved Application has the potential to contaminate Willow Creek, from drainage off the land where manure spreading was identified in the Application. Our family has already experienced the heartache and anguish that accompanies watching a child fight for her life, due to a neighbour’s negligence in causing E.coli contaminated water flooding our place. The decision could negatively impact the health and wellness of the entire community, as many rely on the Willow Creek for economic and recreational activities.

Appendix D - Actions Requested

Actions

As has been outlined previously, the Approval Officer's procedural faux pas, by disregarding the comments of those whose lives and livelihoods are most impacted by the decision while allowing the applicants' agent to speak against our concerns, is grounds for discrimination. A review of the Board would at least level the playing field and allow our voice to be heard. Furthermore, there are deficiencies in the Application. I believe once our voices are heard, there will be a reversal to this Application.

In doing some investigation it seems NRCB's bar is set high, which is as it should be. In the event the Board does not agree to reverse the Approval Officer's decision there needs to be more safeguards and conditions put into place to ensure the protection of the environment, the economy, and the community. Those conditions should be done in consultation with all that will be affected by this decision instead of the assumption of the Approval Officer.

New Conditions & Amendments

If a reversal is not granted, then the following new conditions, but not limited to, should include:

- There needs to be a water drilling report of the area, this will at least set a benchmark for all who are worrying about additional water usage. And, in the event problems arise, those living within the area the longest are given access to the water first.
- There needs to be an appeasement for those who use planes for checking cattle or crop-dusting.
- The Applicant should find land more suitable for spread the manure, farther away from Willow Creek and Meadow Creek.
- As suggested by the Approval Officer in Appendix C of Decision Summary LA20014 (Page 16), the Applicant should be required to enter into binding agreements regarding dust control, with all directly affected parties.
- Something needs to be in place to ensure the endangered leopard frog be protected.