



BOARD REQUEST FOR REVIEW DECISION

RFR 2022-08 / RA21043

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

Double T Cattle Co. Ltd.

June 24, 2022

The Board issues this decision document under the authority of the *Agricultural Operation Practices Act (AOPA)*, following its consideration of a request for Board review of Decision Summary RA21043.

Background

On May 17, 2022, a Natural Resources Conservation Board (NRCB) approval officer issued Decision Summary RA21043 (Decision Summary) in relation to an application by Double T Cattle Co. Ltd. (Double T Cattle) to convert a swine confined feeding operation (CFO) into a 4500 head beef feedlot CFO. The proposed CFO expansion includes: changing livestock from 700 sows farrow to finish to 4500 beef finishers; constructing a series of concrete lined feedlot pens, constructing a lined catch basin, and converting a portion of the remaining sow barn into a livestock processing facility (an ancillary structure that will not contain manure). The CFO is located at NE 15-42-25 W4M in Ponoka County. The approval officer approved the application.

Seven requests for Board review (RFR) were received; all met the June 8, 2022 filing deadline. Six of the RFR requester groups were identified by the approval officer in the Decision as directly affected parties: Sylvanside Dairy Ltd., Shane Campbell, Donald and Monica Brennan, Stan and Rose Hand, Douglas Smith and Sandy White, and Dennis and Antoinette Ruter. One RFR was from a party not listed as directly affected: Doug Astles. The Board will consider his status as a preliminary matter in this decision.

Portions of the public record maintained by the approval officer were provided on June 9, 2022. As well, on June 9, 2022, the Board sent a Notice of Filed Requests for Board Review and Rebuttal Opportunity, and a copy of the RFRs, to the interested parties. Any party whose interests were contrary to the outcomes requested in the filed RFRs was given the opportunity to submit a rebuttal. No rebuttals were received before the filing deadline of June 15, 2022.

Under the authority of section 18(1) of the *Natural Resources Conservation Board Act*, a division of the Board consisting of L. Page Stuart (chair), Walter Ceroici, and Indra Maharaj was established on June 8, 2022, to consider the RFR. The panel met on June 9 and June 16, 2022.

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. Section 13(1) of the *Agricultural Operations Practices Act (AOPA)* Administrative Procedures Regulation describes the information that must be included in each request for Board review.

Documents Considered

The Board considered the following information:

- Decision Summary RA21043, dated May 17, 2022
- Technical Document RA21043, dated May 17, 2022
- Approval RA21043, dated May 17, 2022
- Water Well Monitoring Requirements, dated May 17, 2022
- RFR#1 filed by the Sylvanside Dairy Ltd., dated May 26 and June 8, 2022
- RFR#2 filed by Shane Campbell, dated June 3 and 8, 2022
- RFR#3 filed by Donald and Monica Brennan, dated June 7, 2022

- RFR#4 filed by Stan and Rose Hand, dated June 7, 2022
- RFR#5 filed by Doug Astles, dated June 7, 2022
- RFR#6 filed by Douglas Smith and Sandy White, dated June 8, 2022
- RFR#7 filed by Dennis and Antoinette Ruter, dated June 8, 2022
- Portions of the public record maintained by the approval officer, dated June 9, 2022
- Ponoka County Municipal Development Plan, dated October 2018
- Ponoka County Land Use Bylaw, dated September 2021
- NRCB Decision Report RA02053, dated July 3, 2007

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: Party asking for directly affected status (Doug Astles)

Doug Astles filed an RFR within the deadline of June 8, 2022, requesting directly affected party status.

AOPA section 19(4) describes the process by which an approval officer is required to determine whether an affected person is 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.

The Board observes that Mr. Astles did not file a submission with the approval officer under AOPA section 19(4).

AOPA section 20(6) addresses the circumstance under which the Board can review a party's status:

- 20(6) A person or organization that was determined under section 19 not to be a directly affected party may, with written reasons,
- (a) within 10 working days of receipt of the decision under subsection (4), apply to the Board, with written reasons, for a review of whether the person or organization is a directly affected party....

Given that Mr. Astles did not request that the approval officer assess his status under AOPA section 19, the Board is unable to review his status under AOPA section 20(6). Therefore, the Board finds that Mr. Astles is not a directly affected party and, as such, will not consider the submitted RFR.

Preliminary Matter: Issues that merit review by the Board

The Board notes that several RFRs included concerns not submitted by directly affected parties in their initial written responses¹ to the application. The approval officer's June 9, 2022 submission of public material to the Board includes a reference to *Wyntjes*, RFR 2007-10, at page 10, which states:

To ensure a fair and timely process, affected parties cannot wait for an Approval Officer's decision and then appeal it to the Board based on issues that were not first brought before the Approval Officer for consideration. Instead, parties are asked to identify all of their concerns up front, so that relevant issues can be considered as part of the decision-making process and included in the written report. In this case, appeals filed with the Board brought forth some new issues and concerns that had not been identified in the petition filed for the Approval Officer's consideration.

In reviewing AOPA's direction under section 25(1), the Board must consider whether the "issues raised in the application for review were adequately dealt with by the approval officer or the issues raised are of little merit".

The Board agrees that if directly affected parties do not present issues to the approval officer prior to the issuance of the decision summary, the approval officer is provided no opportunity to address those issues. The Board finds that it would be inconsistent with the direction in AOPA section 25(1) to consider issues raised in the RFRs to which the approval officer had no ability to respond.

Preliminary Matter: Allegations related to the independence of the NRCB as a decision-making authority and the use of inflammatory language to make unsubstantiated allegations

The Board is compelled to address RFR#7, and revised RFRs #1 and #2, that included various assertions related to the independence of the NRCB. The Board finds that these profoundly serious allegations are inflammatory and not substantiated with facts. Further, the Board finds that the presented language and approach are inappropriate to these proceedings, and

¹ Previously referred to as "statements of concern"

reiterates that professionalism and fair conduct are core principles of the administrative justice process to which the NRCB adheres at both an organizational and Board level.

The Board acknowledges that applications for CFOs can raise anxieties amongst landowners of neighbouring properties. It is for this very reason that the approval officer employs a robust process to receive written responses during the initial stages of an application. The Board, upon a request for review, examines the question of whether the approval officer adequately considered all matters that were properly before him.

Unprofessional and inflammatory language adds no value to the process. The Board examined relevant issues presented in the RFRs in isolation from the unfortunate context within which they were presented.

The Board also wishes to note that inflammatory accusations with respect to other participants in the proceeding add no credibility to the position of the accuser. The panel will attribute an appropriate amount of weight to unsubstantiated allegations and discourages the utilization of unprofessional language in presenting points of view.

Issues Raised in the RFRs

The Board identified that the following issues merit consideration in this request for review:

- Deemed Permit (Grandfathering Determination)
- Consistency with Municipal Development Plan
- Effects on the Environment
- Adequacy of Manure Spreading Lands
- Nuisance Impacts
- Increased Traffic and Road Impacts
- Water Supply
- Land Values
- Dead Animal Disposal
- Cumulative Effects

Deemed Permit (Grandfathering Determination)

The Board recognizes that grandfathered determinations often raise questions as to the diligence with which the operation is scrutinized and the standards to which it is held when subsequent applications for modifications or expansion are presented by the operator. In order to recognize that many operations existed prior to the enactment of AOPA, and to acknowledge that they were constructed at a time when requirements were different than they are now, the NRCB has created a policy with respect to how this specific category of operations ought to be handled.

RFR #2 expressed a concern that facilities associated with the former hog operation might be used for the proposed beef feedlot CFO. The approval officer clearly stated that the proposed beef operation will consist of new pens and a catch basin that will meet AOPA's current technical requirements. The only facility associated with the grandfathered hog operation that will be used by Double T Cattle is half of the remaining sow barn. This will be used as a livestock processing area and is therefore classed as an ancillary structure (not used for manure storage).

It is the Board's view that the approval officer followed the NRCB policy related to grandfathered determinations and weighed the evidence before him fairly and appropriately to support the conclusion that, even though most of the facilities associated with the grandfathered hog operation had been removed, half of the remaining southern barn, with a few minor improvements, could house 513 feeder pigs, which is more than the 500 AOPA registration permit threshold.

The Board notes that while the approval officer performed the grandfathering assessment for the existing facilities, that determination did not factor into the assessment made for the proposed CFO facility. In particular, the approval officer noted that the Double T Cattle CFO will employ new manure collection and storage facilities that are required to meet AOPA technical requirements for new facilities.

The Board is satisfied that although the approval officer first identified the deemed permit, he reviewed the CFO application for 4500 head on its own merit, independent of the existence of the deemed permit, and applied all appropriate technical standards in accordance with current AOPA technical requirements.

The Board finds that the approval officer adequately considered this issue.

Consistency with Ponoka County Municipal Development Plan

Several of the RFRs expressed a concern that the proposed CFO is not consistent with the Ponoka County municipal development plan (MDP). The MDP indicates that "very large" CFOs (defined as being 10 times the approval threshold in AOPA) are not appropriate in the County and contains a request that the NRCB not issue permits for very large CFOs in the County. In Appendix A of the Decision Summary, the approval officer conducted an analysis on whether a CFO size restriction should be considered a land use provision. He also consulted with the County Chief Administrative Officer (CAO) to better understand the intent of this policy.

The Board notes the reference to the conversation with the CAO regarding the intent of MDP Policy 2.2, where the CAO indicated that the head limit was applied with reference to a species other than cattle. Nonetheless, the Board gives greater weight to the approval officer's analysis of the provision as it stands in the MDP. The approval officer referenced section 8.2.5 of the NRCB Operational Policy 2016-7: Approvals (Approval Policy) which interprets land use provisions to:

...not require substantial discretionary, or subjective, evaluations of the merits of individual proposed developments.

The approval officer asserted that "the presence or absence of CFOs in an area is not discretionary, but the size of one is", and concluded that MDP Policy 2.2 is not a land use provision under AOPA. The Board is satisfied that the approval officer appropriately applied the Approval Policy in the determination of whether MDP Policy 2.2 is a land use policy.

The Board finds that the approval officer adequately considered the proposed CFO's consistency with the MDP.

Effects on the Environment

Several RFRs expressed a concern that the grandfathered hog operation and operation of the proposed beef feedlot will have a significant adverse impact on the environment and the community at large. First, for clarity, the Board notes that the application is for the proposed cattle CFO. However, the existing hog operation facilities required an assessment of risk under AOPA.

Section 6 of the Decision Summary, as well as the Technical Document, describe how the Double T Cattle application meets all relevant technical requirements of AOPA, including setbacks from residences, springs and common bodies of water; has sufficient means to control surface runoff of manure; meets the nutrient management requirements for land application of manure; and meets groundwater protection requirements for the design of floors and liners of manure storage facilities. The approval officer used the NRCB Environmental Risk Screening Tool (ERST) to determine that the proposed catch basin and feedlot pens both pose a low potential risk to surface water and groundwater.

Many RFRs also expressed concern that surface water runoff from the proposed feedlot and associated manure spreading areas could impact local surface water quality. The Board recognizes that it can be challenging to identify all surface water features and drainage patterns in the vicinity of a proposed feedlot, as surface water flow can vary within a year and over years. However, the Board agrees that the experts consulted by the approval officer (Dr. Iwanyshyn, NRCB and Mr. Sakib, AEP) provided a reasonable representation of surface water features and flow patterns in the vicinity of the proposed feedlot. The approval officer also conducted a site visit in the winter and two site visits during spring runoff. The Board acknowledges that the usefulness of surface water observations in winter is limited due to a lack of surface water flow and because surface water features are masked by snow, as some of the RFRs raised in their submissions.

Despite the challenges in identifying surface water features and flow patterns, the Board is confident that surface water quality will not be impacted by runoff from the feedlot or manure spreading areas because the operation will be required to meet AOPA surface water runoff/runoff requirements and be required to follow manure application requirements.

Some RFRs expressed concern that the environmental risk of the grandfathered hog operation was not properly assessed. The approval officer noted that since 2009, facilities associated with the hog operation were either closed or converted to non-manure storage collection or storage facilities. Section 8 of the Decision Summary describes action taken by the approval officer to assess potential environmental risks associated with the grandfathered hog operation. The ERST was used in 2009 to determine risk to groundwater and surface water quality associated with the swine operation earthen manure storage. The approval officer determined that the risk to the environment from the former hog operation was low and did not affect the current assessment of the potential environmental impacts of the proposed beef CFO.

In order to be certain that he not only considered the impacts of the proposed operation on the environment, but as an added aspect of environmental protection, in Appendix E of the Decision Summary, the approval officer set out additional information on conditions for Double T Cattle's permit that will ensure that the relevant technical requirements are achieved. The

Board agrees with the approval officer's assertion that these safeguards will aid in mitigating potential adverse impacts on the surface water and groundwater quality. The Board notes that the approval officer took steps to ensure that the conditions applicable to the permit would result in the proposed CFO meeting the AOPA surface water run on/run off requirements.

The Board is satisfied that the approval officer adequately considered the issues of potential environmental impact of the proposed CFO.

Adequacy of Manure Spreading Lands

RFR#1 included concerns related to the adequacy of manure spreading lands. In the Decision Summary, the approval officer referenced the four nutrient and manure management options available under section 24 of the Standards and Administration Regulation. Double T Cattle elected the option requiring they demonstrate "access to sufficient landbase to apply their manure for the first year following the granting of the application".

In the Decision Summary, the approval officer confirmed that 351 hectares of land in the black soil zone are required for manure spreading, and identified that 415 acres of those proposed by the applicant are available for manure spreading. The approval officer concluded that the operation has access to sufficient landbase to apply its manure for the first year following the granting of the application.

The Board is satisfied that the approval officer has adequately dealt with the issue of adequacy of manure spreading lands in the Decision Summary.

Nuisance Impacts

Nuisance impacts, such as noise, dust and odour, are managed through the requirement for minimum distance separations (MDS) that are established based on the type and size of a CFO. Naturally, larger CFOs are required to be sited at greater distances from existing neighbouring residences than smaller CFOs. AOPA employs a prescriptive regulatory framework, using tools such as MDS, in order to achieve a consistent, province-wide approach for the siting of CFOs. The Board notes that the approval officer determined that the MDS for the proposed CFO is 659 m (Category 1). There is no evidence or information in the RFRs to suggest that a different MDS ought to have been chosen or that the CFO does not conform to the MDP. The approval officer confirmed that there are no provisions in Ponoka County's MDP that preclude construction of a CFO in the proposed location.

The Board finds that the approval officer adequately dealt with the issue of nuisance impacts.

Increased Traffic and Road Impacts

Concerns related to increased traffic associated with the proposed CFO were included in RFRs #1, 2, 3, 4, and 6. The approval officer confirmed that the proposed CFO is consistent with the Ponoka County MDP. The Board appreciates that impacts to shared roads are concerning to landowners adjacent to proposed facilities, and that impacts on municipal infrastructure are typically assessed through an examination of the proposed operation's compliance with municipal land use planning considerations such as setbacks, environmentally sensitive areas, or identified CFO exclusion zones. Nonetheless, it is reasonable to expect that a CFO may fully

meet these requirements, while also contributing to infrastructure impacts from increased agricultural activity.

The Board finds that, within the authority of AOPA, the approval officer adequately dealt with the issue of increased truck and smaller vehicle traffic, and road deterioration.

Matters beyond the Board's Mandate

Water Supply

The majority of the RFRs contained concerns that groundwater withdrawals by Double T Cattle could impact yields from local aquifer(s) because there are other large agricultural operations in the area that also rely on groundwater for their main water supply. The approval officer correctly noted, in Appendix C of the Decision Summary, that "... Approval Officers will not consider water supply concerns when reviewing an AOPA application other than ensuring that the applicant signs a Water Act declaration in their Part 2 application" as *Water Act* license applications are administered by Alberta Environment and Parks (AEP). The Board notes that the applicant did sign a declaration acknowledging that their AOPA application will be processed separately from requirements of licensing under the Water Act. In Appendix C of the Decision Report, it is stated by the approval officer that AEP indicated "... the current water license was not adequate for the proposed livestock. The applicant will need to provide AEP with a groundwater evaluation report and apply for additional water licensing,". The Board finds notes that the approval officer acted appropriately in referring the application to AEP for review.

Ensuring that adequate water is available for a CFO operation is a water licensing issue that is managed by Alberta Environment and Parks under the *Water Act*, and therefore lies outside of the jurisdiction of the NRCB.

The Board makes no determination on this matter.

Land Values

Several of the RFRs expressed concern that the value of their land and property will decrease if the proposed CFO is built. In the Decision Summary, the approval officer referenced previous Board decisions where the Board stated that concerns regarding effects on land or property values are "not a subject for [the Board's] review under AOPA or for approval officers' consideration" [Pigs R Us RFR 2017-11]. The approval officer also confirmed that the application is consistent with the County of Ponoka land use provisions in the MDP. The Board and approval officers have consistently stated that impact on property values is an issue that resides outside of AOPA legislation. Specifically, the Board agrees that impacts on property values are a land use issue, best dealt with by municipalities through land use provisions applied in municipal development plans and land use bylaws.

The Board finds that the issue related to a decrease in land values has no merit.

Dead Animal Disposal

Several RFRs raised concerns with respect to the disposal of dead animals by the operator. The disposal of dead animals is a matter directly regulated by the provincial department of Agriculture, Forestry and Rural Economic Development, and therefore also lies outside of the jurisdiction of the NRCB.

The Board makes no determination on this matter.

Cumulative Effects

RFRs #1, 2, and 7 expressed concerns about the cumulative effects of agricultural developments in the region on water and air quality. The Board refers to the Zealand Farms decision (RFR 2011-02) wherein the Board in that matter commented on the role of the NRCB in cumulative effects assessment:

The issue of cumulative effects is not within the Board's regulatory mandate. As a statutory decision maker, the Board takes its direction from the authorizing legislation. AOPA does not provide for cumulative effects assessment.

Accordingly, the Board makes no determination on this matter.

Board Decision

As a result of the Board's deliberations, it has determined that the approval officer adequately considered all issues raised in the filed Requests for Review, or determined that the issue was without merit and therefore, does not direct any matter to a hearing. The RFRs are denied.

DATED at EDMONTON, ALBERTA, this 24th day of June, 2022.

Original signed by:

L. Page Stuart (chair)

Indra Maharaj

Walter Ceroici