



In the matter of a Review by the
Natural Resources Conservation Board under section 25
of the *Agricultural Operation Practices Act*, RSA 2000, c A-7
of a decision by an Approval Officer set out in
Decision Summary LA18058A

**RESPONSES BY THE APPROVAL OFFICER
TO THE DIRECTIVES ISSUED BY THE PANEL
ON FEBRUARY 5, 2019**

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On behalf of the Approval Officer and Field Services

I. INTRODUCTION AND KEY FACTS

In fall 2018, NRCB Compliance and Enforcement Division requested that I amend Development Permit #98-25 on my own motion under section 23 of the *Agricultural Operation Practices Act* (“AOPA”). I understood the reason for that request was to align Development Permit #98-25 with AOPA as closely as possible, in order to make compliance with, and enforcement of, Development Permit #98-25 transparent and certain. Without a flexible dust condition or a specified type of beef animal other than “7,000,” the NRCB Compliance and Enforcement Division felt it would perpetually be mediating a dispute between the operator and neighbours in this case.

As the Approval Officer whose decision will be reviewed, I feel that the following facts are critical:

1. Under NRCB Operational Policy 2016-5: *Determining Deemed Capacity for Grandfathered Confined Feeding Operations* (Jan. 26, 2016),¹ “capacity” refers to livestock numbers, not to number, size etc. of the facilities (p 1).
2. Under NRCB Operational Policy 2016-5 (table on page 2), the NRCB uses a “physical capacity method” only under
 - a. section 18.1(1)(a) AOPA where there is no municipal development permit, or
 - b. section 18.1(1)(b) where the capacity is not stated in the municipal permit.
3. Approval Amendment LA18058A did not address physical capacity. The word “physical” appeared nowhere in the Decision Summary.
4. Under NRCB Operational Policy 2016-5, the NRCB uses the “permitted capacity method” (table on page 2) to determine numbers for a confined feeding operation where the capacity is authorized in the development permit, under section 18.1(1)(b) and (2)(b) (and under section 18.1(1)(c) and (2)(c)).
5. Approval Amendment LA18058A:
 - a. did not authorize an increase in permitted animal capacity;
 - b. did not authorize a change in animal type; and
 - c. did not authorize an increase in physical confinement area.

¹ NRCB Operational Policy 2016-5 is available on the NRCB website at www.nrcb.ca.

6. The materials that I considered when issuing Approval Amendment LA18058A on December 5, 2018 are contained within the “Approval Officer Materials” submitted to the Board on January 9, 2019.
7. In issuing Approval Amendment LA18058A, I had not seen, and did not consider, the documents in the “Field Services Materials” (including the October 12, 2018 letter).
8. The sole purpose of the Field Services Materials was to provide a more complete context for the allegation of bias against the NRCB. The Field Services Materials were not provided to supplement the Approval Officer Materials, or to suggest that compliance issues should be considered in a Review of LA18058A.

II. RESPONSES TO PANEL’S DIRECTIVES

1. *Panel directive: The approval officer provide reasons to support his conclusions that:*

- a. *the County of Warner Development Permit #98-25 for a 7,000 head 450 lb – 1,300 lb beef feedlot should be “formalized” to 7,000 finishers.*

For clarity, Approval Amendment LA18058A did not characterize Development Permit #98-25 as being for a 450-1,300 lb beef feedlot. Neither the Decision Summary nor the Approval Amendment document for LA18058A mentioned a weight range. Decision Summary LA18058A stated that Development Permit #98-25 “authorized an ‘increase in intensive livestock operation from 3,000 to 7,000 [head cattle].”

I interpret Panel Directive 1.a. as seeking support for my conclusion that the County of Warner Development Permit #98-25 for a 7,000 head feedlot should be clarified to 7,000 finishers.

I do not read Panel Directive 1.a. as an invitation to develop new reasons for a decision that I made on December 5, 2018. I set out the reasons for my conclusions in relation to permitted animal capacity in Development Permit #98-25 in Decision Summary LA18058A, as follows:

Development Permit #98-25 authorized an increase in capacity from 3,000 to 7,000, but does not specify a beef animal category. Further, the Development permit application included reference to multiple beef livestock types which are not included in the municipal permit. I was not able to find any reference to how these livestock numbers were dealt with in the municipal permit itself. However, an Alberta Agriculture letter dated September 25th, 1998 which accompanied Development Permit #98-25, included information clarifying what was being proposed. It stated that “the proposed expansion is slated for the feeding of weaner calves through to full slaughter weight.” As such, I determined it is appropriate to clarify the total permitted livestock capacity at the CFO as 7,000 beef finishers.

I confirm that the explanation below formed a part of my reasoning at the time I issued Approval Amendment LA18058A.

In processing the amendment under section 23 of AOPA, I tracked the language in NRCB Operational Policy 2016-5. In that Policy,

- a) references to “capacity” are “to a CFO’s livestock *numbers*, not to the scope of the CFO’s facilities (that is, their number, size, and other specifications)” (part 1, p 1) [italics in original];
- b) “physical capacity” “refers to the number of livestock that a CFO can confine and feed based on the scope of its facilities” (part 1, p 1); and
- c) “permitted capacity” is not defined, but the “permitted capacity method” is the “capacity stated in the municipal permit” (part 2, p 2).

Nowhere did the application for Development Permit #98-25 state the weight of animals that were to be raised on the Nelson site. The Alberta Agriculture letter dated September 25, 1998 also did not expressly state the size range of calves or the intended finishing weight.

Because the 1995 Code of Practice indicated a slaughter weight of 1,300 lbs, and because the Alberta Agriculture letter stated “the proposed expansion is slated for the feeding of weaner calves through to full slaughter weight,” I concluded that in 1998 the feedlot was finishing cattle at a weight more than 900 lbs.

The *Part 2 Matters Regulation* under AOPA identifies a beef animal of 900 lbs or more as a finisher. A permit for this AOPA beef type does not require all animals to be above 900 lb at all times, but practically allows animals to be fed from weaning through finishing.

1. Panel directive: The approval officer provide reasons to support his conclusions that:

- b. development permit #98-25 was not meant to limit Nelson, in the case of a change of livestock type, from increasing the total number of beef animals above 7,000.*

In Nelson’s application for Development Permit #98-25, the sum of the individual animals listed was 8550. The application listed the following “numbers of animals to be fed” at the CFO:

- 50 bulls
- 7,000 calves
- 500 cows
- 1,000 feeders

Development Permit #98-25 clearly specifies “7,000” while providing no information on the animal type (e.g. finishers, feeders, calves). The lack of clarity regarding animal types in Development Permit #98-25 greatly limited the information that I could extrapolate regarding operational practices or manure production for this feedlot.

I understood from the NRCB Compliance and Enforcement Division that effective enforcement of AOPA needs a specified type of animal in a permit. It is unworkable to have no type of livestock in a permit. With the information I had at the time, I could not ascertain the livestock type associated with the 7,000 head value in Development Permit #98-25. Considering the records I had before me, I concluded that the livestock type intended in Development Permit #98-25 was finishers.

Approval Amendment LA18058A does not authorize a change in livestock type. A regulation under AOPA allows a CFO to change the type of livestock within a livestock category, provided that specified requirements are met. Under section 2(2) of the *Part 2 Matters Regulation*:

2(2) Subject to subsection (3) [requiring notification to the NRCB], an owner or operator of a confined feeding operation who holds an approval is not required to apply for an amendment to the approval or for another approval when the owner or operator wishes to change the type of livestock within the same category, and as a result, change the number of animals, at the confined feeding operation unless the change will increase the amount of manure produced, on an annual basis, at the confined feeding operation beyond the amount of manure produced by the type of livestock and number of animals allowed by the owner's or operator's approval.

As an additional practical restraint, sometimes the minimum distance separation ("MDS") and the ability of the facilities to confine the livestock may also limit permissible change of type within category.

2. Panel directive: The approval officer confirm whether or not Nelson has identified an intention to pursue a capacity determination under AOPA s.18.1(2)(a) or 18.1(2)(b).

To the best of my knowledge, Nelson has not identified an intention to the NRCB to pursue a capacity determination under section 18.1(2)(a) or 18.1(2)(b). I confirmed this with the NRCB's Field Services Divisions.

3. Panel directive: The approval officer provide:

- a. both a calculation and drawing (with dimensions) for the total CFO pen area at the Nelson feedlot;*

These are attached as per the most recent information (though the pen space has not changed since 2002). While I did not use this information in my decision, I prepared Attachments A and B in February 2019 in order to respond to this Panel Directive.

3. Panel directive: The approval officer provide:

- b. calculations for the number of animals that could be confined at the Nelson CFO for each of the beef livestock types set out in Schedule 1 of the Agricultural Operations, Part 2 Matters Regulation;*

Under AOPA, calculating the number of animals that could be confined at any CFO is determined by annual manure production. As noted previously, MDS and CFO facilities or management practices may also be limiting on a practical basis. AOPA has no rules about animal density or required pen space per animal. I provide the calculations because the Panel has directed me to do so, not because they relate to my capacity clarification in LA18058A. These calculations do not speculate about the possible effect of MDS or management practices.

I am not certain whether Panel Directive 3.b. seeks calculations for confined animals based on 7,000 finishers, or based on physical dimensions of the Nelson pens from Panel Directive 3.a. To assist the Panel, I am providing both sets of calculations.

(1) Based on 7,000 beef finishers:

Based on the Manure Characteristics and Land Base Code (adopted under section 2.1 of the *Standards and Administration Regulation* under AOPA), a beef finisher produces 2.2 tonnes of manure per year, a beef feeder produces 1.4 tonnes of manure per year, and a beef feeder calf produces 0.54 tonnes of manure per year.

7,000 beef finishers produce 15,400 tonnes of manure per year. Based purely on manure production, to produce the equivalent 15,400 tonnes per year, that operation would have 11,000 beef feeders or 28,518 beef feeder calves.

(2) Based on pen dimensions

AOPA does not regulate animal density. In making space determinations, individual operators commonly take into account a variety of operational considerations (i.e. animal welfare, economics, resource availability, etc.).

Agdex 096-81 “Calculator for Determining Livestock Capacity of Operations as They Existed on January 1, 2002”² is used only in cases where there is no municipal permit, or where the municipal permit does not specify the permitted livestock capacity. In those cases, the NRCB needs to determine “physical capacity” on January 1, 2002. This Calculator provides “typical” or “average” space allocations for different livestock in 2002, and may not be accurate for every CFO capacity determination. In my view, this Calculator is not useful in this case because:

- (a) the existing municipal Development Permit #98-25 does specify the permitted livestock capacity for this feedlot (7,000), and

² This Technical Guideline is available on the NRCB website at www.nrcb.ca.

- (b) Nelson has not requested a physical capacity determination of the CFO at January 1, 2002 (confirmed in my response to Panel Directive 2).

Nonetheless, based on the measurements I provided in response to Panel Directive 3.a. above, and the suggested space allocation in Agdex 096-81, the calculated animal numbers would be:

Type of Livestock	Space allocation (sqft/hd)	Calculated Animal #s
Cows/ Beef finisher 900 lbs+ Southern Alberta	200	6,856 *
Cows/ Beef Feeder 450-900 lbs Southern Alberta	175	7,836
Feeder Calves (<550 lbs) Southern Alberta	150	9,142

* the space allocation per head if 7,000 beef finishers were accommodated within the existing pens is 195.9 square feet.

I note that, under text for Panel Directive 3, the Panel

reminds the approval officer that the facility must have the physical capacity to enclose an increase in animal numbers (due to livestock type). The legislation did not contemplate that a manure equivalence between livestock types within a category could automatically be accommodated in the same physical space.

As noted above in Key Fact 5, Approval Amendment LA18058A does not change the permitted animal capacity. Nelson would need a new permit for that. The Amendment also does not authorize change in animal type. While Nelson may not need a permit for that, AOPA requires that Nelson notify the NRCB if they plan to change animal type within category. The number of a particular type of animal that could be confined would only be considered at such time the CFO operator notifies the NRCB of such change in writing.

3. Panel directive: The approval officer provide:

- c. the response received to its commitment to follow-up with Nelson concerning the type and numbers of animals at the CFO (Fiona Vance letter to Philip North, June 1, 2018), and details of when and how that response was communicated to the Hofers.

The Fiona Vance letter to Philip North, June 1, 2018, was not part of the Approval Officer Materials. I did not know about it until I reviewed the Field Services Submission in the course of this RFR. I understand that the letter was part of the separate "Field Services Materials," provided to the Board for context regarding the allegation of bias in the RFR.

However, to assist the Panel, I asked Field Services to help me respond to Panel Directive 3.c. The information below is what was provided to me.

Field Services advised me that, in its view, this Panel Directive relates to NRCB compliance activity and not to Approval Amendment LA18058A. In response to the Panel, however:

- 1) With regard to animal numbers, in that letter of June 1, 2018, Ms. Vance advised the Hofers that the NRCB had opened a complaint file relating to animal numbers and manure dust.
- 2) With regard to animal type, Ms. Vance's letter of June 1, 2018 drew the Hofers' attention to sections 2(2) and (3) of the *Part 2 Matters Regulation*. The NRCB did follow up with Nelson about notification of a change in livestock type in June and received information from Nelson in July and October 2018 about livestock management cycles. The NRCB did not understand the Hofers to be complaining about notification to the NRCB of livestock type change. There is no requirement to advise neighbours of an operator's notification of livestock type change, and the NRCB did not communicate Nelson's notification about change in livestock type to the Hofers. Board Decision 2006-01 *Van Driel* says that switching type within livestock category requires notice to the Board, not to the public (see Attachment C, p. 8, p. 10).
- 3) With regard to both animal numbers and type, in October 2018, the approval officer copied the Hofers as a courtesy with notice of his intention to amend Development Permit #98-25 under section 23 of AOPA to clarify permitted animal type at 7,000 finishers.

3.

- d. *Panel directive: The approval officer confirm whether Nelson has constructed additional pen space at the CFO after January 1, 2002 requiring an NRCB approval.*

Based on the collective imagery available for this site, there is no evidence that the CFO has expanded since 2002. See the imagery from 2002, June 2003 and July 2018 in Attachment A to this response.

I interpret the Panel's reference to "additional pen space" as to the area identified on the attached 2018 aerial photo adjacent to the feedlot. I understand, from NRCB Compliance and Enforcement, that this area has been used to house the cow-calf operation since 2009. The NRCB has viewed this as a seasonal feeding and bedding site, which is not part of the confined feeding operation under AOPA. I understand that the operator has been advised that, in order for this "additional pen space" to be considered a seasonal feeding and bedding site under AOPA, the operator needs to comply with NRCB Operational Policy 2015-2 *Distinguishing Between Confined Feeding Operations and Seasonal Feeding and Bedding Sites (for Cattle Operations)* (July 5, 2018).³

Note, I did not use the seasonal feeding and bedding site in my calculations in response to Panel Directive 3.a.

³ NRCB Operational Policy 2015-2 is available on the NRCB website.

III. CONCLUDING COMMENTS

As stated in the Field Services Submission on January 10, 2019 – and on the face of the Decision Summary itself – the amendments made in LA18058A were to make the dust control condition responsive to NRCB enforcement, and to clarify the permitted livestock type in Development Permit #98-25. My interpretation was that Development Permit #98-25 permitted 7,000 beef finishers.

IV. ATTACHMENTS

A. Imagery:

- 1999 or 2000 aerial photograph from the Alberta Environment Geocortex site (formerly the Alberta Internet Mapping Framework)
- 2002 farm photograph submitted to NRCB Compliance and Enforcement Division by Nelson Family Ranches
- June 2003 aerial photograph from the County of Warner
- July 2018 aerial photograph from the County of Warner

B. Pen area measurements as completed by the approval officer. The areas were delineated and measured utilizing a 2015 image and tools from the Alberta Environment Geocortex site

C. Board Decision 2006-01 *Van Driel*

Respectfully submitted this 26 day of February 2019.



Joe Sonnenberg, Approval Officer
NRCB

Natural Resource Conservation Board



0.1 0 0.04 0.1 Kilometers

Projection: NAD_1983_10TM_AEP_Forest

Map Scale: 4,514

Printed on: February 15, 2019 14:47:47 -07:00



Comments:

Valtus indicated this photo is taken in 1999 or 2000 (phone conversation January 23, 2019)

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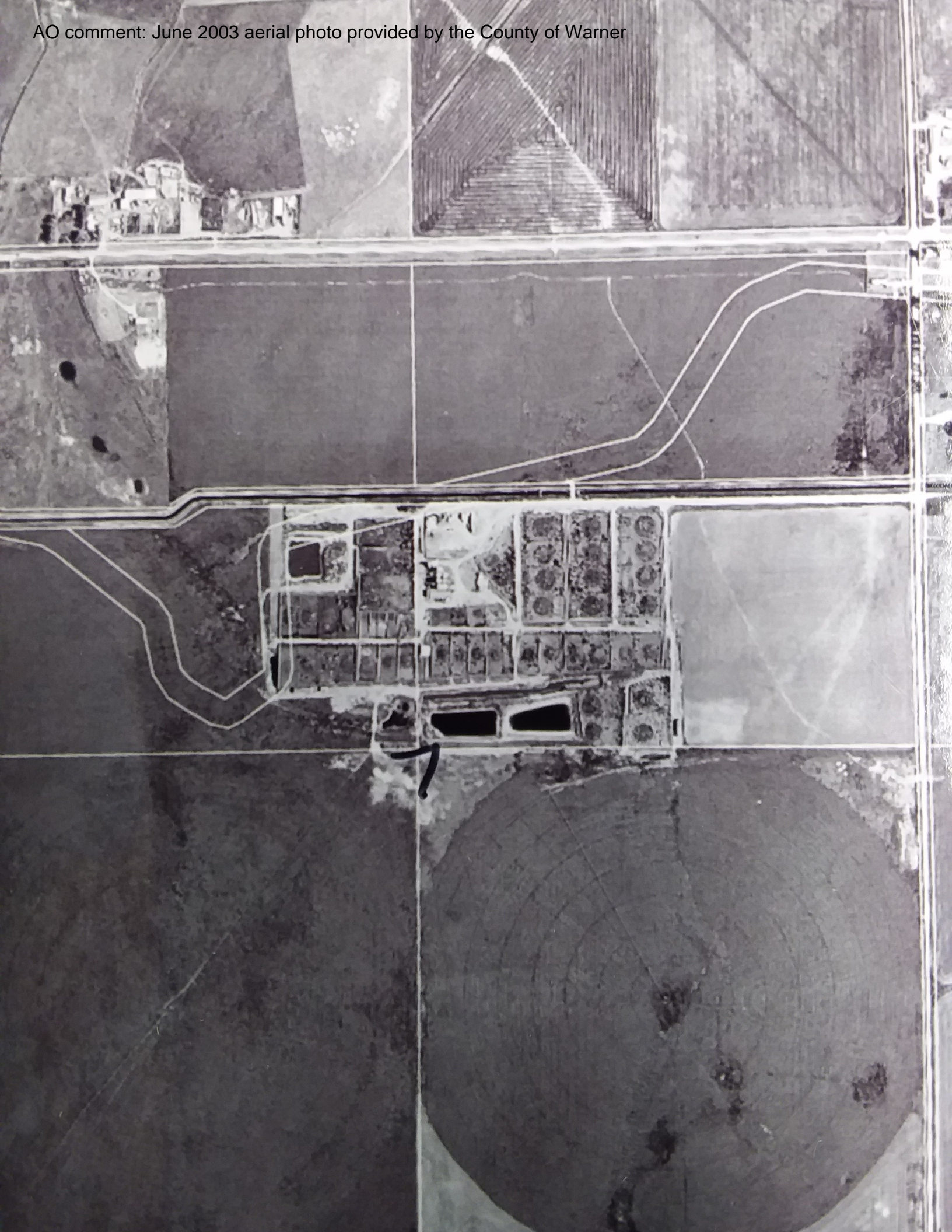
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AO comment: 2002 photograph submitted by Nelson Family Ranches to NRCB compliance division



◆ NELSON FAMILY RANCHES FEEDLOT - 2002 ◆

AO comment: June 2003 aerial photo provided by the County of Warner



AO comment: July 2018 aerial photo provided by the County of Warner



AO comment: Seasonal feeding and bedding area. Currently being monitored by NRCB compliance division

ATTACHMENT "B"

	Pen area (m2)
Pen A	9725.8
Pen B	14598.8
Pen C	10923.8
Pen D	6166.2
Pen E	3970.9
Pen F	8843.5
Pen G	12891.9
Pen H	12157.1
Pen I	13678.5
Pen J	15451.1
Pen K	7053.6
Pen L	7412.6
Pen M	4517.6

Total area in m2	127391.4
Total area in ft2	1371229.6

Natural Resource Conservation Board



0.1 0 0.04 0.1 Kilometers

Projection: NAD_1983_10TM_AEP_Forest

Map Scale: 4,514

Printed on: February 22, 2019 8:50:09 -07:00



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Natural Resource Conservation Board



0.0 0 0.02 0.0 Kilometers

Projection: NAD_1983_10TM_AEP_Forest

Map Scale: 2,257

Printed on: January 21, 2019 10:03:21 -07:00



Comments:

IMF 2015

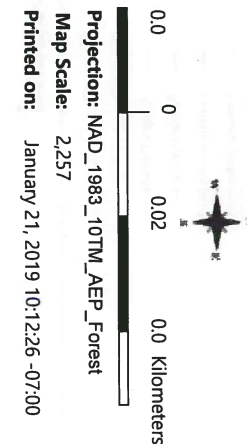
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Natural Resource Conservation Board



Comments:
 IMF 2015

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Projection: NAD_1983_10TM_AEP_Forest
Map Scale: 2,257
Printed on: January 21, 2019 10:10:14 -07:00



Comments:
 IMF 2015

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Conservation Board

Agricultural Operation Practices Act

Board Decision 06-01

Pieter Van Driel
Review of Decision Report & Approval LA 05020

Review Hearing Held:
Lethbridge, Alberta
January 17, 2006

NRCB
3rd Floor, EUB Building
640 – 5th Avenue SW
Calgary, Alberta T2P 3G4
Telephone: (403) 662-3990
Facsimile: (403) 662-3994

1. INTRODUCTION

On September 21, 2005, NRCB Approval Officer Myndy Machan issued Approval LA 05020, approving Pieter Van Driel's application relating to a confined feeding operation located at NE ¼ 22-08-25 W4M in the Municipal District of Willow Creek. The proposed application was for an approval to convert an existing dairy barn to a 600 head swine feeder barn and an existing dairy liquid earthen manure storage (EMS) to a concrete lined solid manure storage. This proposal was in addition to the existing 1746 dairy calf feeding facility, which was considered the equivalent of and was previously a dairy cow operation with a capacity of 250 milking cows.

October 7, 2005 was established as the deadline to request a review of the Approval Officer's decision. The Board received a Request for Board Review, filed on October 6, 2005, plus additional information supplied on October 7, 2005, on behalf of Stan McNab and McNab Ranch Ltd., deemed directly affected as per the Decision Report.

The Board met on October 24, 2005 to consider the Request, and determined a review was warranted to determine whether the decision of the Approval Officer should be confirmed, varied, amended, or rescinded. However, the Board determined that it would narrow the scope of the review to consider the following four issues:

- how the deemed capacity for the grandfathered operation was established;
- feasibility of the modified 600 feeder hog and 1746 dairy calf confined feeding operation (CFO) fitting into the same footprint as the grandfathered operation;
- whether the classification of the 1746 dairy calves belongs in the same category as the 250 dairy cows, and whether the Approval Officer had the discretion to make the determination; and
- completeness of the Application, as well as the significance of omitted information. Specifically, the lack of engineering plans, the accuracy of the site plans and the requirement for a surface water control system design and implementation.

On October 27, 2005, the Board advised that it was granting a review in the form of a public hearing to consider the above issues. The October 27, 2005 letter also identified the Review Panel designated for this review, including: Dr. Gordon Atkins (Panel Chair), Mr. Jim Turner, and Mr. Bob Clark.

In consideration for the special circumstances of the requesting party, as well as other participants' feedback regarding scheduling constraints the Panel set the hearing date as January 17, 2006 in Lethbridge.

This Decision Report highlights the parties' positions presented at the Board hearing conducted in Lethbridge on January 17, 2006 and provides the Board's decision.

2. APPEARANCES

The following list identifies the hearing participants:

<u>Participant:</u>	<u>Representative:</u>
NRCB Approval Officers: <ul style="list-style-type: none">• Myndy Machan, Approval Officer• Orin Kenzie, Approval Officer	Kurt Stilwell, Counsel
Applicant: <ul style="list-style-type: none">• Pieter Van Driel• Petro Van Driel	Keith Wilson, Counsel
Requesting Party: <ul style="list-style-type: none">• Stan McNab & McNab Ranch Ltd.	Ken G. Torry, Q.C., Counsel
MD of Willow Creek <ul style="list-style-type: none">• Sharon Shearer, Development Officer	Evan Berger, Reeve

At the review, the Board was assisted by Board Counsel, JP Mousseau. Additional staff support was provided by Marianne Wright (Review Officer) and Susan Schlemko (Manager, Board Reviews).

3. VIEWS OF THE PARTICIPATING PARTIES

The following is an overview of parties' positions regarding the issues set for review and does not purport to include all of the testimony, opinions, or evidence advanced at the hearing or provided in written materials.

Views of the NRCB Approval Officer

Approval Officer Myndy Machan entered no initial written submission, however provided response to the January 11, 2006 request of the Panel for further information, as well as testimony at the hearing supporting her rationale in issuing the Approval. The deemed capacity of the Van Driel's CFO had previously been established by another Approval Officer, Mr. Orin Kenzie, who also provided testimony at the hearing.

In the January 13, 2006 response to the Panel, Counsel for Approval Officer indicated the basis for Mr. Kenzie's determination that 0.252 was the appropriate LSU Factor for dairy calves (100-500 lbs) resulting from consulting "Table 1 – Livestock Siting Unit Table for Various Types" (as it existed prior to June 1, 2004)¹. Through testimony, Mr. Kenzie disclosed past experience in

¹ Table 1 – Livestock Siting Unit (LSU) Table for Livestock Categories and Types is located in *AOPA's Standards and Administration Regulation*. In June 2004 *Alberta Regulation 85/2004* included amendments to this Table. Throughout this Decision, Table 1 as it existed prior to June 2004 is referenced as Table 1 in the "former AOPA", while Table 1 as it exists today is referenced as Table 1 in the "current AOPA."

considering conversion equivalencies, identifying one such instance as Approval LA 03028 issued to Drogeda Ranch, where he used a ratio of 1:3.2 for an adult horse compared to a feeder colt. His preference for livestock siting units over manure production units in determining capacity was to account for overall nuisance and odour production, in addition to manure production.

Mr. Kenzie clarified that his December 15, 2004 letter to the Applicant was the first recognition by the NRCB that the deemed capacity of the operation was 250 milking cows (plus dries and replacements). This was based on his acceptance of this number, as provided by the Applicant in a letter of November 20, 2004. The letter also inquired as to the protocol involved in changing the permitted animal type at the facility to reflect housing dairy calves up to 350 lbs.

Mr. Kenzie stated that he had inspected the Van Driel's operation and had satisfied himself that 250 milking cows was a reasonable capacity, despite an initial reference to the dairy as being for 80 milking cows. Mr. Kenzie calculated that the existing capacity of 250 milking cows, plus associated stock, equated to a total of 440 livestock siting units ($250 \times 1.760 = 440$). He noted that calf hutches were not included in this capacity, as they are moveable structures which preclude their consideration as part of the confined feeding operation (CFO). As an additional note, he provided that due to Southern Alberta's mild climate milking cows could also be housed outside during the winter months.

To arrive at an LSU Factor appropriate for dairy calves weighing 100-500 lbs, Mr. Kenzie averaged the LSU Factors for dairy calves (0.112) and heifers (0.392), yielding an LSU Factor of 0.252. Using this LSU Factor to determine the total number of calves equivalent to 440 LSU, he found the result to be 1746 dairy calves. Mr. Kenzie indicated that if the LSU Factor of 0.112 had been used, the equivalency for a 250 milking cow operation would be 3929 dairy calves.

Regarding completeness of the application materials, both Approval Officers noted the discretion granted them under Section 2 of the *Board Administrative Procedures Regulation*. Both indicated that in general, deeming an application complete signifies that documentation provided would fully enable their subsequent decision-making: to ascertain both the scope and impact of the project, and to ensure, if issued, the approval would meet the standards of *AOPA*. Ms. Machan elaborated that engineering plans were unnecessary; as the proposed concrete structures (floors and walls) and the roof would control run-on and run-off, and the site plan drawings, which included dimensions, were satisfactory though not drawn to scale.

Ms. Machan clarified that Approval LA 05020 was issued as a new approval, though her consideration was solely for addition of the concrete floor and the concrete lined solid manure storage for the 600 swine feeders. It was only after the Approval Officer was satisfied that all the requirements for the modification to the manure liners were met, that she combined her approval of this segment of the operation with the previous deemed approval for the 1746 dairy calves and issued Approval LA05020.

Both Approval Officers concurred that the entitlement for housing the dairy calves was grandfathered and that this part of the operation was not required to meet the requirements of the regulations. However, Ms. Machan confirmed that Mr. Van Driel was not permitted to house dairy calves beyond the grandfathered footprint of the operation.

Views of the Applicant

Mr. Pieter Van Driel, as represented by Mr. Keith Wilson, submitted that Approval LA 05020 be upheld, as it was issued properly, and in accordance with the regulations and requirements of *AOPA*.

With regard to the capacity of his operation, Mr. Van Driel felt the capacity of the Van Driel farm, as it existed on January 1, 2002 was 250 milking cows. Though the dairy had only ever functioned with 70 - 80 milking cows housed in the barn, Mr. Van Driel proposed the 250 milking cow number was reasonable, based upon his knowledge of dairy management in Holland and South Africa. He proposed the increased capacity through utilizing a different stall configuration and utilizing outside housing of the animals on a straw pack. Mr. Van Driel agreed that the change in livestock type from milking cows to dairy calves would result in an equivalency of 1746 dairy calves, as set by the Approval Officer.

While he had addressed the issue of grandfathered capacity as above in his January 3 submission, in his January 9 rebuttal, Mr. Van Driel submitted that the issue of the proposed operation fitting within the existing footprint was simply irrelevant, except for determining the measuring points of the Minimum Distance Separation (MDS). Further, Mr. Van Driel stated that *AOPA* does not require an existing operation to fit within its grandfathered footprint, unless a producer seeks to make a change to his operation without obtaining an approval or authorization. Subsequent to his application for approval, the Approval Officer based her MDS calculations on the total livestock numbers and measured from the outside edge of the footprint. The Applicant stressed that since there is no issue with either MDS calculation or footprint determination, it is immaterial whether the proposed operation remains entirely within the old footprint.

In his January 13, 2006 response to the Board's request for additional information, the Applicant stressed again that Section 2(2) of the *Matters Regulation* referenced in Mr. Torry's submissions and implicitly in the Board's request was irrelevant. Arguing that Section 2(2) of the *Matters Regulation* pertains only to approval exemptions which he, as an operator who had applied for an approval, was not seeking, the Applicant questioned the appropriateness of focusing the hearing on this issue.

Regarding categorization of livestock types, the Applicant felt that the conclusion reached by the two Approval Officers (Mr. Orin Kenzie and Ms. Myndy Machan) and expert from Alberta Agriculture was both reasonable and correct. Irrespective of the type of classification used, 1746 light dairy calves plus 600 swine feeders produce less manure than a 250 milking cow operation.

Mr. Van Driel provided that in his view, materials supporting the approval application were sufficient, as the Approval Officer had determined a run-on/run-off control plan was not required in this case, and the use of concrete barn floors and liner in the existing EMS address potential groundwater impacts. Despite the fact that the site plan submitted was not to scale, the Applicant noted that dimension measurements were included, and his operation meets the MDS requirements by more than four-fold.

Views of the Requesting Party

Mr. Stan McNab (McNab Ranch Ltd.) questioned the Approval Officer's decision to approve Mr. Van Driel's proposed expansion on a number of grounds, especially with regards to the completeness of the application materials. Omissions of concern identified in the Request for Review included the lack of engineering plans for manure storage facilities, the accuracy of the site plans and the requirement for a surface water control system design and its implementation. The Requesting Party submitted that the requirement for a surface water control system is a mandatory provision under Section 6 of the *Standards and Administration Regulation*, not a discretionary one, and that it is the responsibility of the Applicant to provide such information, as required under the regulations. Further, without completeness of application documentation, it is not possible for Approval Officers to make properly informed decisions, nor for interested parties to comment properly in their statements of concern without opportunity to review the appropriate information.

Mr. McNab maintained that his key concern was potential water contamination of both his well and dam resulting from run-off from the Van Driel's operation. He related his observation of the heavy rainfall events of June 2005 and submitted photos, aerial photos, and maps as evidence of water flow from the Van Driel's operation, north onto his property. While he conceded that the June 2005 rainfall (which led to his reservoir topping over) was an extraordinary event, he noted that in the past decade, there had been three such major rainfalls, creating the same types of water flows in 1995, 2002, and 2005. Contingent upon the Municipality granting permission to build within the road allowance, he suggested the Applicant might build a berm to contain the water on his property, to alleviate his concerns. Despite the fact that his concerns centred on water quality, he acknowledged that he did not have a monitoring program in place to determine whether the three major rainfalls had any significant impact to the quality of his well water.

Mr. McNab submitted that the Approval Officer erred in accepting that the January 1, 2002 capacity of the operation was 250 dairy cows including dries and replacements. In Mr. McNab's view, the figure of 250 dairy cows should have been independently verified, rather than simply accepted as provided by Mr. Van Driel in a November 20, 2004 letter to NRCB Approval Officer Mr. Orin Kenzie. It was submitted that a more appropriate basis for calculating capacity might have been to rely upon documents such as the property listing of June 2002, which described it as a 75 cow dairy, as well as Mr. Van Driel's 2003 Application LA 03038, and the Approval Officer's Decision Report LA 03038, both of which indicated that the dairy on the NE of 22-8-25-W4 was for 80 cows. He submitted that capacity set forth in the original development permit issued by the Municipality is 1 animal per 900 square feet. Depicting the operation as 90,000 square feet, the scale version of the development permit (*Exhibit 2*) thus allows 100 animals.

Estimating the dairy barn as it existed in January 1, 2002 to be 13,000 square feet (of which 1,800 square feet comprise a milk tank, parlour, office and mechanical room), this party countered that the grandfathered capacity of the operation would have been a maximum of 75 to 80 animals. It was further suggested that in terms of comparing grandfathered to existing facilities, additional corrals have been built since Mr. Van Driel's purchase of the property in 2003, and that the operation had expanded without proper approval. Countering the Approval Officer's interpretation of the legislation, Mr. McNab submitted that the calf hutches constituted a confined feeding operation and should not be considered peripheral to the calculation of capacity, based purely on the structures' movability.

Finally, Mr. McNab asserted that the deemed approval of 1746 dairy calves contravenes *AOPA*, as the change from dairy cows to dairy calves is not a change in the *type of livestock within the same category*, as provided for in Subsection 2(2) of the *Matters Regulation*. Feeders are raised for beef purposes not for dairy purposes, and thus fall only within the beef category. Similarly, the only livestock specified under the category of dairy is milking cows. In addition, if it were possible to convert dairy cows to dairy calves, this change in type of livestock is to remain within the confines of the existing operation, yet the application by Mr. Van Driel to use the dairy barn for the additional 600 swine feeders renders it impossible to contain the dairy calves within the original footprint.

Views of the MD of Willow Creek

Ms. Sharon Shearer, Development Officer with the Municipal District of Willow Creek, did not make a formal presentation, however she made her self available for cross-examination with respect to the issuance of the original municipal development permit. She indicated that no corrals were identified on the development permit and that their construction would have required the municipality's approval.

4. VIEWS OF THE BOARD

Nature of the Approval

A significant issue raised at the proceeding and addressed by all of the participants pertained to the exact nature of the approval sought by the Applicant. The Board considers that the uncertainty surrounding the nature of the approval was, in part, generated by its status as a "grandfathered operation" pursuant to Section 18.1 of *AOPA*. The Board notes that the way in which the approval is characterized has direct implications with respect to which regulatory requirements will be applied to the facility pursuant to Section 20(1.2) of *AOPA*. As such, the Board finds that it must make a determination on this issue to allow it to effectively consider the four questions that it asked parties to address in this review proceeding.

It was the Van Driels' contention that they were seeking an entirely new approval in order to achieve the following:

- Provide certainty with respect to the number of livestock allowed by their grandfathered approval;
- To allow modifications/alterations to two existing facilities: the dairy barn and the manure storage facility; and,
- To add 600 swine feeders to its operation.

Counsel for the Van Driels argued that, while a new approval was granted by the Approval Officer, the application was governed by Section 20(1.2)(a) of *AOPA* and the existing buildings and structures were not to be considered with regard to meeting the requirements of the regulations unless they posed a risk to the environment.

Ms. Machan characterised the application to be for the addition of 600 swine feeders to the existing grandfathered operation, including the proposed changes to the manure storage facility and the dairy barn. She stated that the approval she issued consisted of two elements: the

deemed approval for the dairy calves, and the new approval for the swine feeder operation. The McNabs essentially agreed with Ms. Machan's characterisation of the approval as being for the proposed swine feeder operation, including the requisite changes to the existing facilities and for the grandfathered dairy calf operation.

In the Board's view, the obvious starting point for a determination on this issue is a review of the application documents filed by the Van Driels. Section C.1 requires the applicant to describe the activity for which it is seeking approval and the Board notes that the Van Driels checked the box marked "*change or add animal category/type*". The Board finds that it also would have been appropriate for the Van Driels to check the box marked "*modify or reconstruct existing manure collection area or manure storage facility*" as the modifications/alterations to the existing barn and manure storage facility were necessary components of the proposal to add 600 swine feeders to their operation. Section C.2 requires applicants to provide livestock numbers at maximum capacity. In this section, the Van Driels listed 600 swine feeders as additional or new livestock and 1746 dairy calves as existing livestock. The application listed the subject dairy barn and manure storage facilities as existing facilities and described the modifications/alterations they intended to make to these existing facilities in Sections I and J of the application.

The Board notes that while a single new approval was issued for the Van Driel's operation, it finds that the nature of the approval sought and obtained was an amendment to the Van Driel's existing deemed approval. The Board observes that the Van Driel's proposed operation would essentially house two distinct operations. The first operation is that which has been described by the parties as the grandfathered operation. This operation involves a CFO for dairy calves and is housed in existing outdoor pens and corrals. No modifications/alterations to these existing facilities have been proposed, and the Board understands that this element of the operation was rolled into the new approval to provide the Van Driels with certainty with respect to the number of dairy calves they are entitled to feed in its grandfathered facilities. The Board finds that this aspect of the approval is properly governed by Subsection 20(1.2)(a) of the *AOPA* which states:

(1.2) In considering whether an application for an amendment to an approval meets the requirements of the regulations, an approval officer

(a) shall not consider whether the existing buildings and structures meet the requirements of the regulations unless in the opinion of the approval officer the existing buildings and structures may cause a risk to the environment...

The second aspect of the operation requires the alteration of existing buildings or structures, specifically, the proposed modifications/alterations to the dairy barn and the manure storage facility. The Board finds that this aspect of the approval must be governed by Subsection 20(1.2)(b) which states:

(1.2) In considering whether an application for an amendment to an approval meets the requirements of the regulations, an approval officer

(b) must consider whether the proposed expansion or alteration of an existing building or structure or any proposed new building or structure meets the requirements of the regulations [emphasis added].

Establishing Deemed Capacity for the Grandfathered Operation

The Board heard evidence that the Van Driel's dairy was not being used as a functional dairy operation when Mr. Van Driel purchased the property. However, he did verify that the dairy had functioned as an 80 milking cow facility, with associated dries and replacements, while under previous ownership. The Board notes that on November 20, 2004 Mr. Van Driel indicated by letter to the Approval Officer that he had an empty dairy operation with a capacity for milking 250 cows. The Board further notes that he expressed a desire to use the facility for raising dairy calves and asked the Approval Officer to provide the deemed equivalency capacity for raising dairy calves up to 350 lbs. The Board finds that the Approval Officer accepted the 250 milking cow capacity proposed by Mr. Van Driel and confirmed this deemed approval in his letter of December 15, 2004.

The Board understands that Approval Officers use livestock siting units (LSU) as the common denominator to calculate such an equivalency and that the LSU Factor is an important factor in the calculation of LSU. The Board observes that for this dairy calf equivalency calculation, the Approval Officer used a LSU Factor of 0.252. In addition, the Board notes that by using an LSU Factor of 1.76 for lactating cows with associated dries and replacements, the Approval Officer calculated an LSU of 440 for the 250 head milking cow deemed approval and concluded that an equivalent capacity for dairy calves at the Van Driel's dairy would be 1746 dairy calves ($440 / 0.252$). The Board understands that the Approval Officer informed Mr. Van Driel that written notification to the NRCB was necessary to change the type and number of livestock within a category.

In June of 2005, after observing the presence of dairy calves already at the facility, a second Approval Officer deemed the CFO to have a capacity for 1746 dairy calves based on the conclusions made previously by the first Approval Officer.

The Board observes that much discussion revolved around the issue of how the 250 milking cow number was established and justified, since it is a very significant factor in the determination of a deemed capacity equivalency. The Board notes that the 250 milking cow number was proposed by Mr. Van Driel as a result of his knowledge of dairy practices in Holland and South Africa; however, the Approval Officer also felt this number was reasonable. The Board finds that Mr. Van Driel acknowledged that the barn had previously been used to house only an 80 milking cow dairy and that it had never been used as a 250 milking cow dairy. Also he confirmed that with a 250 milking cow dairy at this facility, many of the cows would have to be housed outside on a straw pack.

The Board notes that the Approval Officer stated that the deemed capacity does not refer to the number of animals that can be crowded into a facility but rather the "common sense" number that can be reasonably managed according to acceptable standards. The Board finds that *AOPA* and its associated regulations are silent with respect to a public notification process for conversions of animal type within a category provided the manure production is not increased. The only statutory requirement is that the owner or operator must notify the Board in writing of the intended change in the type of livestock or number of animals before the change takes place. From evidence submitted by Mr. Van Driel, the Board is aware that a 250 milking cow dairy would include about 600 head in total (including dries and replacements).

The Board finds that the LSU Factor is the other very significant component in this calculation and is not surprised that considerable discussion also revolved around the LSU Factor of 0.252 proposed by the first Approval Officer. The Board notes that the LSU factor was developed by averaging the LSU factor for dairy calves (0.112) and dairy heifers (0.392). The Board understands the Approval Officer used both of these numbers from Table 1 in the “former AOPA” since the only dairy category in the “current AOPA” (including the June 1, 2004 amendments) is for milking cows including replacements and dries. However, the Board recognizes that Section 5.1 of the *Matters Regulation* specifies that if a type of livestock within a category identified in the Schedules, is not listed in the Schedules, “*the Board may, based on the manure production of that type, determine, for that type, the relevant factors, units and other measurements required to apply the regulations to that type*”.

The Board finds that the Approval Officer used an LSU Factor greater than 0.112 to accommodate dairy calves up to 500 lbs. instead of calves less than 350 lbs. as Mr. Van Driel indicated in his letter of November 20, 2004. The Board notes that Approval LA 05020 also identifies dairy calves (100 - 500 lbs). By way of comparison, using Table 1 of the “former AOPA”, the Board notes that the LSU Factor of 0.252 was much greater than that listed for beef calves up to 550 lbs (0.135) and even greater than the LSU Factor used for 450 - 900 lbs. beef feeders (0.245).

In addressing how the deemed capacity for the grandfathered operation was established, the Board also found it important to confirm that the deemed capacity was reasonable. With regard to the original milking cow capacity, the Board is unable to endorse Mr. Van Driel’s assertion that his dairy had adequate capacity to house 250 milking cows (a total of about 600 dairy cattle) and maintain the “common sense” management practices referred to by the Approval Officer. The Board reached this decision through the following findings of fact:

- The facility has never been operated as a 250 milking cow dairy.
- The evidence provided at the proceeding suggested that it had been previously operated only as a 70-80 cow dairy.
- There was inadequate space in the barn to house 250 milking cows and, as a result, a large number of milking cows would be housed and fed outdoors even in the winter.
- No space requirements were provided to confirm enough corral space and feeding space to properly manage the total number of cattle (many mature cows and large replacement heifers) associated with a 250 milking cow herd.
- The Board’s physical inspection of the facility, along with the applicant’s testimony confirmed that there was limited milking capacity for 250 cows.

However, since the operation is not to be used as a 250 milking cow dairy, the question the Board finds germane to this decision is whether the deemed capacity of 1746 dairy calves was reasonable. The Board has previously identified the operation’s deemed capacity for dairy calves to be the LSU for the grandfathered milking cow capacity divided by the value assigned for the dairy calf LSU Factor. The Board finds that even though the Approval Officer accepted Mr. Van Driel’s proposed grandfathered capacity of 250 milking cows and generated an LSU of 440, by using the extremely conservative LSU factor of 0.252, he used his own discretion considering the available facilities and calculated an equivalent deemed capacity for dairy calves that was reasonable.

The Board heard no objection to the Approval Officer's conclusion that the outside pen facilities at the Van Driel's confined feeding operation (CFO) had the capacity to contain 1746 dairy calves. As a result, the Board finds the Approval Officer's June 2005 decision that the Van Driel's CFO had a deemed approval for 1746 dairy calves to be reasonable and in accordance with the spirit and intent of the legislation.

The Board is mindful of the position taken by Counsel for Mr. Van Driel regarding the relevance of Section 2(2) of the *Matters Regulation* and notes that he stated in the rebuttal submissions that, "*The Board need not determine the deemed capacity of the Van Driel farm because Mr. Van Driel applied for an Approval and the deemed capacity would only be relevant where Mr. Van Driel had been seeking to change his operation without obtaining an approval.*" The Board agrees that a deemed capacity is not relevant when an approval application has been made for the entire CFO. However the Board finds that this was not the case with the Van Driel's application.

As noted previously, the Board considers the Van Driel's application is governed by Section 20(1.2) of *AOPA* since the application contemplated the modification of the existing structures to appropriately accommodate the 600 swine feeders and the conversion to a new category of livestock, all within the existing facilities of their deemed approval. Having considered all of the evidence at the proceeding, the Board has concluded that the Van Driels were not seeking approval for the grandfathered portion of its operation but were merely seeking formal confirmation of their deemed approval.

The Board finds that this confirmation is granted without the need to meet the requirements of the regulations as a result of three separate regulatory provisions. For the grandfathered portion, the Board finds that the deemed capacity is granted pursuant to Section 18.1(2) of *AOPA*, the livestock conversion is granted pursuant to Section 2(2) of the *Matters Regulation*, and the exemption from the requirements of the regulations is granted pursuant to Subsection 20(1.2)(a) of the *AOPA*. The Board observes that the Approval Officer declared a deemed approval for 1746 dairy calves at the facility several months before the approval for the 600 swine feeders was issued. Further, the Board notes that it was only after the Approval Officer was satisfied that all the requirements for the manure liner modifications to the existing structures were met, that she combined her approval of this segment of the operation with the previous deemed approval for the 1746 dairy calves and issued Approval LA05020 to cover both components.

The Board also heard considerable discussion with regard to the responsibility of the Approval Officer when exercising his/her jurisdiction under Section 2(2) of the *Matters Regulation*. The Board finds that, as previously noted, the Act and the regulations are silent on the process to be followed when an owner or operator wishes to change the type of livestock within a category, if the change does not increase the amount of manure produced. The Board finds there is no requirement to notify affected parties and that a reasonable identification of the deemed capacity is dependent on the knowledge and common sense of the Approval Officer.

As a result, the Board finds that Approval Officers must develop extensive knowledge of the facility requirements for all classes of livestock to ensure their deemed capacity decisions are credible and reasonable when compared to acceptable livestock handling standards. Although a request under Section 2(2) may occur relatively infrequently, the Board considers this to be an

important role for Approval Officers and finds that they must have an opportunity for the necessary continuing education to maintain credibility in exercising their jurisdiction.

The Board considered with interest Mr. Kenzie's evidence regarding his general practice of notifying municipalities when he makes a determination with respect to deemed capacity pursuant to Section 18.1 of *AOPA*. While the Board recognizes that such notification is not required by the NRCB's governing legislation, it considers this may be an appropriate practice. The Board finds that this approach effectively documents the Approval Officer's determination and provides notice of that determination to an important stakeholder. The Board believes that the Director of Applications and the CEO should review the merits of adopting such an approach for all Approval Officers.

The Board also wishes to comment on the LSU Table (Table 1 *Standards and Administration Regulation*) in relation to changing a livestock type within a category. The Board notes that prior to the amendments of June 1, 2004, Table 1 in that regulation contained a complete list of LSU factors and components used in their calculation for a large range of livestock types. The Board notes that many of these livestock types were removed in Table 1 of the current version of the same regulations after the June 1, 2004 amendments. In addition, the Board notes that a similar reduction has occurred in the solid and liquid manure production tables.

The Board is mindful that Section 5.1 of the *Matters Regulation* was added with the June 1, 2004 amendments and it grants special discretion to the Board to provide the flexibility of calculating LSU Factors for animal types not listed in the tables. However, to calculate appropriate LSU Factors for any livestock type, the Board finds that many of the manure production values in the former tables are required to calculate LSU Factors for animal types not in the current table. Also the Board finds that the presence of already calculated LSU Factors for many different animal types promotes consistency and simplifies the process.

As a result the Board recommends that the Legislators strongly consider replacing Table 1 of the *Standards and Administration Regulation* of the "current *AOPA*" with Table 1 of the same regulation from the "former *AOPA*" and replacing Table 5 and 6 *Standards and Administration Regulation* of the "current *AOPA*" with Table 6 and 7 of the same regulation from the "former *AOPA*". Since Approval Officers constantly refer to the values in the "former *AOPA*" tables, the Board finds that that this demonstrates a legitimate need for these tables to be made part of the current regulations.

Feasibility of Fit into Existing Footprint

The Board requested that each party address the issue of the footprint of the original grandfathered operation and the feasibility of the modified CFO fitting within that same footprint. Counsel for Mr. Van Driel stated in his first submission that, "*Once a producer decides to apply for an Approval, however, the only relevance the footprint can have is for determination of the measuring points of the MDS.*" However, when asked if the new approval gave Mr. Van Driel an entitlement to house dairy calves beyond the original footprint, the Approval Officer clearly stated that the Applicant was still limited to the grandfathered footprint. Therefore, for reasons expressed above regarding the relevance of Section 2(2) of the *Matters Regulation*, the Board finds that because the entitlement to house the 1746 dairy calves in the

outside pens arises solely from the Section 18.1 deemed approval, the original footprint is relevant.

The Board noted that there was considerable confusion in the identification of the exact boundaries of the original footprint. The Development Officer of the Municipal District of Willow Creek confirmed that no corrals were identified on the development permit drawing for the Van Driel's operation, but indicated her inexperience at the time the application was received as she had only been on the job for two weeks. The Board is mindful of the position taken by Counsel for the McNabs regarding the lack of flexibility with the diagram on the development permit; however, the Board finds that outside corrals are common components of dairy operations for the housing of dry cows and replacement heifers. In addition, the aerial photos identified in *Exhibits 3 and 6* clearly show the presence of the corrals prior to January 1, 2002 (when *AOPA* came into effect).

From the testimony provided by Mr. Van Driel as well as the above mentioned aerial maps and observations on their site visit, the Board identified the original footprint to be located north of the barn and lagoon and bordered on the east and north by the current fences and on the west by the row of trees. The Board provided these findings as part of their site visit report and heard no further discussions with regard to these observations. Therefore, the Board considers this to be the footprint that applies to the deemed approval for the 1746 dairy calves.

The Board understands that the barn, with the proposed modifications, will be used to house the 600 swine feeders and that the dairy calves will be housed entirely in the outside pens. Based on its site visit and the evidence provided regarding the size of the dairy calves and general management practices, the Board finds that 1746 dairy calves can be enclosed in the corrals contained within the footprint of the deemed approval.

On its site visit, the Board observed additional corrals to the west of the tree line which formed the west border of the grandfathered footprint. The Board noted that these corrals contained beef calves and they estimated the weight range to be between 400 and 800 lbs. The Board assumed that this was a seasonal feeding and bedding site. The Board finds that Mr. Van Driel confirmed this assumption in his testimony and notes that he also elaborated on the short term management of these cattle from November to March depending on the availability of feed supply.

The Board finds that this is not an expansion of the dairy calf confined feeding operation and has determined that it must be considered as any other seasonal feeding and bedding site. Specifically, the Board finds that an approval is not required for the seasonal feeding of cattle in this manner and it is not considered to be an expansion of the CFO beyond the boundaries of the footprint. As a result, the Board finds that it is feasible to house 600 swine feeders and 1746 dairy calves within the same footprint as the grandfathered operation.

Livestock Category Classification and Approval Officer Discretion

The Board noted that, in their submissions, Counsel for Mr. McNab asserted that the change from dairy cows to dairy calves is not permissible under Section 2(2) of the *Matters Regulation*. Further, the Board noted that he submitted that the Approval Officer does not have discretion which would permit such a change. The Board agrees with Counsel for Mr. McNab that, in the current *AOPA* Regulations, under the category of dairy the only type of livestock specified is

milking cows (including replacements and dries). The Board further agrees that feeders are specified as a type of livestock under the beef category only.

The Board is mindful that the former *AOPA* Regulations contained many more types of livestock under the dairy category but it did not contain Section 5.1 of the *Matters Regulation* which gives the Board discretion to determine the relevant factors, units and other measurements required to apply the regulations if a type of livestock, within a specified category, is not listed in the Schedules. While the Board has already made a recommendation for the Legislators to consider returning the complete tables to the *AOPA* Regulations, the Board is aware that the interpretation of the Van Driel's application must be made without that change in place.

The Board finds that Section 5.1 of the *Matters Regulation* does not preclude using the former *AOPA* tables as a reference and in fact it finds these tables to be the most appropriate reference. In addressing the concern raised by Counsel for Mr. McNab regarding whether the Approval Officer has the discretion to make this determination, the Board referred to Section 12 of *AOPA*. This section deals with Board delegation and states that: "*The Board may delegate any of its powers and duties under this Part or the regulations to approval officers and inspectors except the power to make regulations or to hold a review.*" In that regard, the Board made the following delegation to its Approval Officers on January 22, 2002:

"Pursuant to Section 12 of the Agricultural Operation Practices Act (Ch. A-7, RSA 2000) the Board delegates, to approval officers, the powers and discretion necessary to properly consider any application under the Act. This shall include the powers to interpret and apply the provisions contained in the Act and regulations and related to applications and operating standards, including the power to determine information requirements in relation to any particular application..."

The Board finds that this delegation clearly provides the Approval Officers with the necessary powers and discretion to interpret and apply Section 5.1 of the *Matters Regulation* to determine an appropriate capacity to accommodate the change in livestock type contemplated in Section 2(2) of the *Matters Regulation*.

With regard to the concern expressed by the McNabs that the change from dairy cows to dairy calves is not permissible, the Board does not agree with this position. The Board notes that the Approval Officer's calculation of the LSU factor of 0.252 was achieved by averaging the LSU factors for two livestock types within the dairy category of the former *AOPA* tables. However, had appropriate values not been available from the same category, the Board finds that the Approval Officer has the discretion to determine the most appropriate LSU Factor. Therefore, the Board finds that the change from dairy cows to dairy calves is permissible under Section 2(2) and Section 5.1 of the *Matters Regulation*.

Completeness and Accuracy of the Application

The Board heard testimony relating to the completeness of the application and the significance of possible omitted information. In this regard, the McNabs expressed concern that not all of the information required by Section 2 of the *Board Administrative Procedures Regulation* had been

provided by the Van Driels. Specifically, the McNabs cited the absence of engineering plans and accurate site plans in this regard.

Section 2 of the *Board Administrative Procedures Regulation* states:

2(1) Unless the approval officer specifies otherwise, an application for an approval or an amendment of an approval must be filed with the Board and contain the following:(a)..... (1)

(2) The Board may require that documents filed under subsection (1) be prepared and stamped by a professional engineer or a land surveyor.

The Board considers that the information requirements included in Section 2 were designed to solicit sufficient information from applicants so as to allow the NRCB and all affected parties to understand the scope of the proposed project and the potential impacts associated with that project. The Board finds that this provision provides NRCB Approval Officers with significant discretion with respect to what information must be included in a particular application for an approval or an amendment to an approval. In the Board's view, the flexibility provided by the provision allows Approval Officers to tailor the information requirements to the unique circumstances of each application while recognizing the need to provide affected parties with appropriate notice of the proposed project. The Board considers such flexibility to be necessary given the breadth of applications that Approval Officers are required to consider.

The Board heard testimony from both Approval Officers with respect to how they address the information requirements of Section 2. The Board understands that the Approval Officers' general practice is to review an application with the aim of determining whether sufficient information has been provided to allow affected parties to understand the scope and nature of the proposed project. Should the Approval Officer determine that additional information is required, he/she will issue a deficiency letter to the applicant. However, when an Approval Officer is of the view that the Applicant has provided sufficient information to allow a determination on the matter, he/she will issue a letter to the Applicant and other affected parties to inform them that the application has been deemed complete. The Approval Officer also advised that not all sections of an application form necessarily need to be completed. Each application is considered upon its own merits, and portions of an application that are not required are normally struck out on the application form.

The Board notes that the alterations/modifications proposed by the Van Driels were neither technical nor complex, and essentially involved the addition of concrete floors and walls to its existing dairy barn and manure storage facility. In that regard, the Board questions whether a detailed site plan or greater detail with respect to the proposed cement floors and walls to be installed therein would have materially added to Mr. McNab's understanding of the proposed project. The Board carefully reviewed the application materials and is of the view that they provided sufficient information to allow Mr. McNab to understand the scope of the proposed project and its potential implications on his own operations.

However, the Board notes that both Approval Officers conceded that there may be instances where an affected party could benefit from knowing why a particular item listed in Section 2 of

the *Board Administrative Procedures Regulation* was deemed unnecessary by an Approval Officer. In that regard, the Board recommends that the Director of Applications and the CEO consider including such information in the letters Approval Officers issue to affected parties when deeming an application complete. The Board does not consider that this would create an onerous task for Approval Officers and is of the view that it would provide greater transparency to the Approval Officer's decision making process.

The Board noted that Counsel for Mr. McNab asserted that regardless of how the application was classified, a surface water control system was mandatory. He referred specifically to Section 5(3) of the *Administrative Procedures Regulation* and Section 6(1) and (2) of the *Standards and Administration Regulation*. The Board agrees with Counsel for the McNabs that some uncertainty arises from the curious wording of Subsection 5(3) and it intends to bring this matter to the attention of the Legislators. However, regardless of this, the Board also noted that Counsel for Mr. McNab stated that this Section clearly did confirm that engineered plans are required and Section 6 of the *Standards and Administration Regulation* is perfectly clear that an owner or operator must construct a surface water control system for the operation or facility. The Board is aware that Counsel for Mr. Van Driel did not support the mandatory nature of this requirement, and pointed out that even if it were so, *AOPA* Section 20(1.2)(a) removed the requirements for all of the regulations including the run-on and run-off control.

As noted previously Section 20(1.2)(a) of *AOPA* deals with an application for an amendment to an approval with no expansion or alteration of existing buildings or structures and Section 20(1.2)(b) deals with the same type of application except that a proposed expansion or alteration to an existing building or structure is contemplated.

The Board agrees with Counsel for Mr. Van Driel that for the grandfathered portion of the facility, the Approval Officer was correct in only assessing a potential risk to the environment and not considering if the buildings and structures meet the requirements of the regulations. The Board finds that for this portion of the application, it is Section 20(1.2)(a) of *AOPA* that gives the Approval Officer discretion over the mandatory provisions of Section 5(3) of the *Administrative Procedures Regulation* and Section 6(1) and (2) of the *Standards and Administration Regulation*. Furthermore, the Panel agrees with the Approval Officer's assessment and conclusion that the existing grandfathered facilities do not pose an environmental risk.

However, the Board finds that part (b) requires that the Approval Officer must consider whether a proposed alteration of an existing building or structure meets the requirements of the regulations. With this application, the Board finds that there are alterations proposed for the manure liner in the barn and the lagoon and the alterations are within existing structures. The Board carefully reviewed the evidence to determine what had changed with regard to the potential risk from run-on and run-off issues at the Van Driel's operation before and after the application to modify the manure liners in the barn and solid manure storage structure.

The Board concluded that there would be less total volume of manure produced, the manure was to be handled in solid rather than liquid form, the manure liners would be concrete rather than dirt, the concrete floor for the swine feeders would be contained within the existing barn, and the concrete walls of the solid manure storage would extend above the ground. As a result, the Board finds that the only part of the alteration that pertains to run-on and run-off control is the

water seals between the floor and the pony walls in the hog barn, and the water seals between the portions of the side walls that extend above ground for the concrete solid manure storage. The Board notes that this portion is already required to be approved by a professional engineer and as a result the Board finds that it addresses Section 20(1.2)(b) of *AOPA* by meeting the requirements of Section 6(1) and (2) of the *Standards and Administration Regulation*.

The Board had regard for Mr. McNab's statement that the surface water control was his main concern with the Van Driel's operation. However, with all of the above observations, the Board finds that the surface water control would be at least as good and most likely considerably better than what existed with the grandfathered operation. The Board finds that this is consistent with the Approval Officer's assessment as she did not contemplate the need for any run-on or run-off controls beyond the engineered construction requirements of the manure liners. Based on these observations and the Board's interpretation of the Legislation, the Board concluded that the Approval Officer adequately dealt with the run-on and run-off issues for this operation.

5. LEGISLATIVE CLARIFICATION

In the course of rendering this decision, the Board has identified the following areas where increased clarity in the *AOPA* Regulations would be helpful:

- The Board recommends that the Legislators review the wording in Section 5(3) of the *Board Administrative Procedures Regulation* to clarify what may be required to be included with the plans for a surface water control system.
- The Board recommends that the Legislators strongly consider replacing Table 1 of the *Standards and Administration Regulation* of the "current *AOPA*" with Table 1 of the same regulation from the "former *AOPA*" and replacing Table 5 and 6 of the *Standards and Administration Regulation* of the "current *AOPA*" with Table 6 and 7 of the same regulation from the "former *AOPA*".

6. POLICY RECOMMENDATIONS

In the course of rendering this decision, the Board has also identified areas where increased clarity in the NRCB's policies would be helpful:

- *AOPA* and its regulations do not include a public notification process when an owner/operator wishes to change the type of livestock within a category, as long as manure production is not increased. The panel believes the CEO and the Director of Applications should review the merits of adopting the practice of notifying municipalities when a determination is made relating to an operation's deemed capacity.
- The Panel recommends that the CEO and Director of Applications consider the merits of revising the Approval Officer's process for deeming an application complete. The Panel proposes that this process could benefit from including a step to provide affected parties with the Approval Officer's reasons for excluding specific information requirements listed under Section 2 of the *Board Administrative Procedures Regulation*.

7. BOARD DECISION

In conducting a review of an Approval Officer's decision, the legislation provides that the Board may confirm, vary, amend, or rescind the decision. The Board upholds the Approval Officer's decision to approve Mr. Van Driel's application to convert an existing dairy barn to a 600 head swine feeder barn and an existing dairy liquid earthen manure storage (EMS) to a concrete lined solid manure storage. The Board also upholds the Approval Officer's decision to combine this Approval with the previous deemed approval for an existing 1746 head dairy calf operation at the same facility and to issue Approval LA05020 to include both components.

DATED at CALGARY, ALBERTA, this 14th day of February 2006.

Original signed by:

Dr. Gordon Atkins
Panel Chair

Jim Turner
Board Member

Robert C. Clark
Interim Board Chair