



# NORTH & COMPANY<sup>LLP</sup>

## LAW OFFICES

Our File: 11048.011

March 26, 2019

Natural Resources Conservation Board  
19th Floor, Centennial Place  
250 - 5 Street S.W.  
Calgary, AB T2P 0R4

**Attention: Bill Kennedy**

Dear Sir:

**Re: LA 18085A Review**

With respect to Approval Amendment LA 18085A (the "Approval Amendment"), we take this opportunity to respond on behalf of the Hofer family to the questions posed in your March 7, 2019 letter, as well as to the Approval Officer's submission dated February 26, 2019.

### **March 7, 2019 Questions**

1. *What is the appropriate method to determine the s.18.1 deemed approval capacity authorized by Development Permit #98-25 (the "Development Permit")?*

Nelson Family Ranches Ltd. ("Nelson Family Ranches") confined feeding operation was constructed pursuant to a development permit issued prior to January 1, 2002. As such, under section 18(2) of the *Agricultural Operation Practices Act* ("AOPA"), the capacity authorized for Nelson Family Ranches' confined feeding operation is that authorized by the development permit. The Development Permit states an increase from 4,000 to 7,000. The issue before the Board is whether the increase is for 7000 head of cattle as the Hofer family submits or for 7,000 beef finishers as the NRCB submits.

We agree with the Board's findings that the Approval Officer made a grandfathering determination when amending the Development Permit under section 23(1) of AOPA. We will not repeat, but do confirm the position taken in our December 18, 2018 letter that the Development Permit application, when read as a whole clearly states the increase was for 7,000 head of cattle.

In the Development Permit application, the County of Warner waived the minimum distance separation ("MDS") as recommended by the 1995 Code of Practice from 2378 feet to 1575 feet from the Hofer family's residence. According to the 1995 Code of Practice, the MDS method is based on Livestock Sitting Units ("LSU") which incorporates factors including livestock type, manure production and manure handling systems. Appendix D of the 1995

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Code of Practice provides some pre-calculated MDS distances for ease of use. We note, in Appendix D-1: *Recommended MDS (ft) for Beef Finishers*, for 7,000 animals the MDS is listed as 2543 feet for a Category 1 neighbor. If the Development Permit was intended to be for 7,000 beef finishers, as the Approval Officers has stated, we would expect that the MDS in the Development Permit would be 2543 feet. Alternatively, the Board has calculated the MDS for a 450 – 1300 feedlot at 2365 feet, which more closely aligns with the Development Permit application. This would seem to suggest that at the time the Development Permit was being considered and the MDS calculated, the LSU factor used was closer to 0.367, not 0.441. We would argue that the above facts strongly suggest that the Development Permit was issued for 7,000 head of cattle, ranging in weight from 450-1300 lbs., which would include both feeders and finishers.

We would like to once again highlight the fact that Nelson Family Ranches' confined feeding operation should be 830 feet further away from the Hofer family's residence and a confined feeding operation of its size would not be permitted to be built so close to a neighboring residence today. It is further important to note that the MDS requirement was waived in 1995 for 7,000 head of cattle, not beef finishers. The proximity of Nelson Family Ranches' confined feeding operation to the Hofer family's residence has been cited on several occasions by the NRCB as a significant limitation to controlling feedlot emissions from the confined feeding operation.

2. *Referencing the determination made in response to Question 1 regarding the deemed approval capacity authorized by Development Permit #98-25, is there evidence to warrant a different deemed approval capacity for the type and number of livestock?*

We submit that there is no evidence to warrant a deemed approval capacity different from that authorized by the Development Permit. Not only does the Development Permit application package clearly state the expansion was for 7,000 animals, but the size of the feedlot was only constructed to accommodate 7,000 animals.

Further and most important, section 18.1 of AOPA clearly states that the deemed approval capacity of a confined feeding operation which existed prior to January 1, 2002 is the capacity authorized by the development permit. Any deviation from this authorized capacity would require an application to be made for an expansion to the feedlot.

### **Response to Approval Officer Submission**

We would also like to take this opportunity to respond to the Approval Officer's submission dated February 26, 2019 (the "Submission").

### **Introduction**

Our first issue with the Submission stems from ongoing concerns of bias and the NRCB's ability to carry out its inspection and enforcement obligations in an unbiased manner. The Approval Officer states that he exercised his power under section 23 of AOPA after being requested to do so by the NRCB Compliance and Enforcement Division. The mandate of the Compliance and Enforcement Division is to ensure that operators are compliant with AOPA and the terms of their permit. The Hofer

family has been lodging complaints to the Compliance and Enforcement Division for several years that Nelson Family Ranches is operating over their authorized capacity of 7,000 head of cattle. The Compliance and Enforcement Division has acknowledged on several occasions, as has Nelson Family Ranches that there are consistently more than 7,000 animals at the feedlot. The Compliance and Enforcement Division has taken no steps to enforce the terms of the Development Permit and continue to justify breaches made by Nelson Family Ranches. The Compliance and Enforcement Division has now gone as far as to initiate a section 23 amendment instead of enforcing authorized capacity under the Development Permit. In our opinion this clearly demonstrates a lack of impartiality by the NRCB and leads the Hofer family to have serious concerns regarding the motivation behind the Approval Amendment.

We have further concerns regarding what due diligence the Approval Officer conducted before issuing the Approval Amendment. We note in Fiona Vance's covering letter she specifies that the Approval Officer did not review or consider the 1998 file from the County of Warner. One would think this would be pertinent information when deciding that the Development Permit was intended to stipulate 7,000 beef finishers not animals. It would appear that the Approval Officer's motivation in the exercise of power under section 23 was simply so that the Compliance and Enforcement Division would not have to deal with the Hofer family's legitimate complaints and to justify Nelson Family Ranches operating over their authorized capacity.

### Response to Panel's Directives

*1. Panel Directive: The approval officer provide reasons to support his conclusion 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.*

In his response, the Approval Officer states that in making his decision he referred to NRCB Operational Policy 2016-5. We note this policy deals with determining capacity for grandfathered confined feeding operations and only applies to deemed capacity determinations made by field services staff. It would therefore seem that the Approval Officer was making a grandfathering determination when issuing the Approval Amendment. It is our understanding that grandfathering determination are to be done under section 18.1 of AOPA, not section 23(1) as the Approval Amendment was issued under and such applications are typically initiated by owners or operations. If the Approval Officer wanted to initiate a grandfathering determination, we would expect that this should have been done in accordance with the proper section of the legislation and the procedures put in place for such an application.

In our review of Operational Policy 2016-2 *Approval Officer Amendments Under Section 23 of AOPA*, we note that approval officers only use section 23 to amend permits in limited circumstances. The policy provides examples of such circumstances, which we've paraphrased as follows:

- Fixing typos or clerical errors in recently issued permits
- Amending monitoring requirements under the leak detection program
- Consolidating old permits with new permits

- Adding or amending conditions as needed, to address risks to the environment or other matters that were an outcome of a compliance action
- Deleting or amending municipal permit conditions under certain circumstances

Based on the above examples, it would appear that a section 23 amendment was intended to cover situations where minor changes to permits were required. Although Operational Policy 2016-2 does not preclude the possibility of other circumstances warranting a section 23 amendment, we would argue that making grandfathering determinations falls outside the scope of section 23. As such we submit that the Approval Officers exercise of power under section 23 was inappropriate in the circumstances.

1. *Panel Directive: The approval officer provide reasons to support his conclusion 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 the Approval Officer's response to this directive, it is stated that there was very little information available to the Approval Officer when making the amendment and it was difficult to ascertain the livestock type intended by the Development Permit. We question why the Approval Officer would take it upon himself to make such an important amendment without obtaining adequate information to do so. We further wonder if the Approval Officer considered the possibility of livestock types other than beef finishers. Our concern is that the Approval Officer worked from the assumption that the Development Permit authorized 7,000 beef finishers and only sought out information that supported this assumption, rather than looking at the available evidence as a whole.

The Approval Officer also cites section 2(2) of Part 2 Matters Regulation, pointing out that a CFO can change the type of livestock within a livestock category, provided the change doesn't increase the amount of manure produced. The Approval Officer also notes that there may be other practical restraints, such as minimum distance separation. We wonder if the Approval Officer considered minimum distance separation and the impact on the Hofer family when making the section 23 amendment.

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.*

In response to this directive, it's stated that the directive relates to NRCB compliance and not to the Approval Amendment. We would however point out that the Approval Amendment is the response to the Hofer family's complaints regarding animal numbers at Nelson Family Ranches' confined feeding operation and is therefore quite relevant to the amendment. We have already discussed our concerns of bias and reiterate them here.

We also note the Approval Officer's reference to Board Decision 2006-01 *Van Driel* for the authority that a change in livestock type under sections 2(2) and (3) of *Part 2 Matters Regulations* does not require public notification. We note in the same paragraph of the *Van*

*Driel* decision, the Board states that the owner or operator must provide notification in writing of the intended change in livestock or number of animals before the change takes place. Given that Nelson Family Ranches only notified the NRCB of its livestock management cycles in July and October 2018, they clearly failed to comply with the prior notification requirement under section 2(2). Further it is apparent that the NRCB took no regulatory action against Nelson Family Ranches' for breach of this requirement.

3. *Panel Directive:*

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

The Hofer family maintains that the area adjacent to Nelson Family Ranches' feedlot is not a seasonal feeding and bedding site. NRCB Operational Policy 2015-2 *Distinguishing between Confined Feeding Operations and Seasonal Feeding and Bedding Sites*, provides that an adjacent site is only a seasonal feeding and bedding site if it meets all of the characteristics listed in Table 1.

We submit that the site does not meet all of the characteristics listed in Table 1 and wonder if the NRCB has conducted a full analysis and investigation into the matter. In 2015 Nelson Family Ranches' replaced portable feeders at the site with concrete feed bunks, which means the cattle no longer have 360-degree access to feed. Despite Nelson Family Ranches' insistence, the pasture is not annually cropped and Nelsons have completed dirt work to slope the pen for water drainage. Up until this year, pens have been constructed from steel pipes and panels. The Hofer family has also observed livestock types in the site which appeared to be feeders/finishers. Further, Nelson Family Ranches' has a seasonal feeding facility a few miles south east of the confined feeding operation and should not need a seasonal feeding and bedding site at the feedlot.

### **Concluding Remarks**

The Approval Officer's exercise of power under section 23(1) of AOPA has not affected a formalization to the Development Permit but has allowed for a fundamental change to the Development Permit and as such is inappropriate. The Approval Officer has made a grandfathering determination which properly belongs under section 18.1 of AOPA. The Hofer family has series concerns regarding the motivation behind the Approval Amendment and strongly believes that it was done to legitimize breaches of Nelson Family Ranches' Development Permit. The Hofer family maintains that the Development Permit authorizes 7,000 animals and submits that Nelson Family Ranches' has been operating over this capacity for years.

The Hofer family requests that the Board exercise their power to refuse to grant the Approval Amendment. The Hofer family further requests that Nelson Family Ranches' immediately be required to reduce the number of animals in the feedlot to 7,000 in accordance with their Development Permit. Finally, the Hofer family requests that the Board provide a directive to the NRCB Compliance and Enforcement Division requiring them to strictly enforce the authorized capacity of 7,000, 450-1300 lbs. head of cattle at the confined feeding operation.

We appreciate the opportunity to provide this submission and the Board's time and attention to this matter.

Yours truly,

**NORTH & COMPANY LLP**

  
**PER: R. PHILLIP M. NORTH**