

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
held in person on July 24, 2019
of a decision by an Approval Officer set out in Decision Summary LA18058A

OUTLINE OF PRESENTATION OF THE APPROVAL OFFICER

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On behalf of the Approval Officer

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INTRODUCTION

1. This is an outline of the presentation that the Approval Officer will give on July 24, 2019 at the Board Review of Amendment LA18058A. Approval Amendment LA18058A was issued on December 5, 2018 in relation to the Nelson Family Ranches Ltd. feedlot on NE 07-006-19 W4M.
2. The Approval Officer takes no position on the outcome of this review.
3. The Approval Officer's presentation will be limited to summarizing
 - a. the statutory framework under the *Agricultural Operation Practices Act* ("AOPA") that underlies Approval Amendment LA18058A,
 - b. the NRCB policy on deemed capacity determinations, and
 - c. the nature of Approval Amendment LA18058A.

I. STATUTORY FRAMEWORK

4. The Approval Officer made the Amendment under section 23 AOPA, which provides:

23(1) Despite section 18, an approval officer may, on the approval officer's own motion on notifying the holder, amend an approval, registration or authorization.

(2) Section 20(1) and (3) apply to the amendment of an approval and section 22(1) and (2) apply to an amendment of a registration or authorization under this section.

(3) The approval officer must provide a written copy of the decision to the directly affected parties, and a directly affected party may apply to the Board for a review of the amendment in accordance with section 20(5) or section 22(4).

5. It is under section 23(3) that the Hofer Family has sought review of Approval Amendment LA18058A.
6. In making Approval Amendment LA18058A, the Approval Officer recognized that Development Permit #98-25 represents a deemed approval under AOPA as a deemed approval. Section 18.1 AOPA provides the framework for deemed permits, in part as follows:

18.1(1) If a confined feeding operation or manure storage facility

- (a) existed on January 1, 2002 with respect to which a licence, permit or other approval was not issued pursuant to the Public Health Act or with respect to which a development permit was not issued,
- (b) existed on January 1, 2002 with respect to which a licence, permit or other approval was issued pursuant to the Public Health Act or with respect to which a development permit was issued and that licence, permit, approval or development permit was in effect on January 1, 2002, or
- (c) was constructed pursuant to a development permit that was issued before January 1, 2002 or was issued as described in section 10 of the Agricultural Operation Practices Amendment Act, 2001,

the owner or operator of the confined feeding operation or manure storage facility is deemed to have been issued an approval, registration or authorization under this Act.

7. The Nelson feedlot existed on January 1, 2002 with respect to which a development permit was issued – #98-25 from the County of Warner¹ – and was in effect on January 1, 2002. Section 18.1(1)(b) applies: Nelson Family Ranches Ltd. is deemed to have been issued an approval under AOPA.

8. Section 18.1(2) addresses capacity determination as follows:

18.1(2) The capacity allowed by a deemed approval or registration² pursuant to

- (a) subsection (1)(a) is the capacity of the enclosures to confine livestock at the confined feeding operation on January 1, 2002,
- (b) subsection (1)(b) is the capacity authorized by the licence, permit, approval or development permit or, if a capacity was not so authorized, the capacity of the enclosures to confine livestock at the confined feeding operation on January 1, 2002, and
- (c) subsection (1)(c) is the capacity authorized by the development permit.

¹ Development Permit #98-25 issued on October 6, 1998 is Exhibit 5(h).

² Section 18.1(3) addresses capacity of deemed authorizations.

9. Because section 18.1(1)(b) applies, so then does section 18.1(2)(b). The capacity of the Nelson feedlot is the “capacity authorized by the development permit” #98-25.

II. NRCB POLICY

10. Under NRCB Operational Policy 2016-5: *Determining Deemed Capacity for Grandfathered Confined Feeding Operations* (Jan. 26, 2016),³ “capacity” refers to livestock numbers, not to number, size etc of the facilities (p 1).

11. Under Policy 2016-5, there are two circumstances where the dimensions of the facilities are relevant to deemed capacity determinations:

- 1) where there is no pre-2002 municipal permit that states capacity (livestock numbers), or
- 2) where the operator or owner of the CFO claims that the actual livestock numbers on January 1, 2002 were greater than those specified in a pre-2002 municipal permit.

12. In those cases, an NRCB inspector will determine the maximum number of animals (per type) that could be confined in enclosures of the dimensions that existed on January 1, 2002. Typically, the inspector will use Technical Guideline Agdex 096-81, *Calculator for Determining Livestock Capacity of Operations as They Existed on January 1, 2002*. This process is referred to in the NRCB Operational Policy 2016-05 as the “physical capacity” method, by which an approval officer determines the number of livestock a CFO can confine and feed based on the scope of its facilities on that particular date (January 1, 2002).

13. Conversely, under NRCB Operational Policy 2016-5, the NRCB uses the “permitted capacity method” (table on page 2) to determine livestock numbers for a confined feeding operation where the capacity is authorized in the development permit, under section 18.1(1)(b) and (2)(b).⁴

³ NRCB Operational Policy 2016-5 is available on the NRCB website at www.nrcb.ca.

⁴ and under section 18.1(1)(c) and (2)(c).

III. NATURE OF THE AMENDMENT

14. On December 5, 2018, the Approval Officer issued Approval Amendment LA18053A. The decision documents were:

- a. Approval Amendment LA18053A (Exhibit No. 1)
- b. Decision Summary LA18058A (Exhibit No. 2)

15. There was no Technical Document accompanying Amendment LA18058A. The Amendment did not originate from an application by the operator. Rather, this was an amendment issued on the approval officer's own motion under section 23 of AOPA.

16. Approval Amendment LA18058A made the dust control condition responsive to NRCB enforcement, and clarified the permitted livestock type in Development Permit #98-25. The Approval Officer's interpretation was that Development Permit #98-25 permitted 7,000 beef finishers.

17. In relation to the permitted livestock type clarification, the reasoning of the Approval Officer within the Decision Summary was 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.

Decision Summary LA18058A [Exhibit No. 2] at page 1

18. As stated in his Response to Panel Directives dated February 26, 2019, and as the Approval Officer will likely state in his testimony at the Review, the Approval Officer understood from the NRCB Compliance and Enforcement Division that effective enforcement of AOPA needs a specified type of animal in a permit.

19. With the information he had at the time, the Approval Officer could not ascertain the livestock type associated with the 7000 head value in Development Permit #98-25. He considered the records he had before him at the time, and concluded that the livestock type intended in Development Permit #98-25 was finishers.

Response to Panel Directives dated February 26, 2019 [Exhibit No. 11] page 4

20. The Compliance Division of the NRCB acquired additional information after December 5, 2018 relating to the Nelson CFO. The NRCB provided two document sets to the Board, the Nelsons and the Hofers on February 26, 2019 [Exhibit 11]. Because this information came too late to be considered in Amendment LA18058A, the Approval Officer declines to interpret the documents.

IV. CONCLUSION

21. As stated by the Board in RFR 2019-01 dated January 18, 2019, the issue for review is:

What is the deemed capacity of the Nelson CFO in Approval LA18058A?

RFR 2019-01/LA18058A Nelson Family Ranches [Exhibit 8] at page 4

22. Consistent with his decision in December 2018, the Approval Officer suggests that the deemed capacity under section 18.1(2)(b) AOPA is that authorized by the Development Permit #98-25 as amended by Approval Amendment LA18058A.

23. For clarity, however, the Approval Officer takes no position on whether the Board should dismiss, uphold or vary Approval Amendment LA18058A.

July 18th, 2019



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Natural Resources Conservation Board