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APPROVAL OFFICER AMENDMENTS UNDER SECTION 23 OF AOPA

Operational Policy 2016-2

Agricultural Operation Practices Act
January 26, 2016

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1. Background

Section 18 of the *Agricultural Operation Practices Act* (AOPA) allows approval officers to consider applications for approvals, registrations, or authorizations and for amendments to any of those three types of permit. However, section 23(1) of the act states that, despite section 18, approval officers may amend AOPA permits on their “own motion”—i.e., without an application from the permit holder. Amendments under this section are commonly referred to as “approval officer amendments.”

The *Agricultural Operation Practices Act*, Administrative Procedures Regulation, at section 9, sets out some procedural requirements for approval officer amendments. This policy is intended to complement the legislative scheme.

While there are similarities between approval officer amendments under section 23 and applicant-driven, “minor alteration” amendments under sections 19(1.1) or 21(1.1) of AOPA, this policy applies only to section 23 amendments.

As with all operational policies, approval officers have discretion to modify this policy when its strict application would be clearly unfair, or in other necessary and appropriate circumstances. However, approval officers must follow the AOPA Administrative Procedures Regulation, where applicable.

2. Restricted use of approval officer amendments

While providing some guidance on procedures, section 23 is completely silent as to the *scope* or types of permit amendments that approval officers can make on their own motion. (The AOPA Administrative Procedures Regulation is also silent on this issue.) This silence implies that approval officers have wide discretion to decide the scope of amendments they can make under section 23.

In the context of permit applications, approval officers use section 23 to consolidate existing permits with new permits. Consolidation entails carrying forward all appropriate terms and conditions from existing permits into the new permit. This is done under the NRCB’s *Approvals* policy and under the NRCB’s *Amending Municipal Permit Conditions* policy. Approval officers also update, amend, or delete outdated conditions in NRCB-issued permits where permitting requirements change due to new or updated information, or if those conditions are:

1. less stringent than AOPA requirements, or
2. based on requirements in regulations that are no longer in effect.

Approval officers also may use section 23 on a “stand alone” basis in restricted circumstances. The circumstances must functionally be restricted given AOPA’s focus on applicant-driven permits, and the limited notice and comment process used under section 23 (see below).

In general, approval officers should only use section 23 for “stand alone” amendments on their own motion where the amendment is minor in nature, does not dilute or reduce requirements under AOPA or under existing permit requirements, and does not increase risk to the environment. If the nature of the amendment is substantive or requires fair advance notice to neighbours, the approval officer will not process the amendment as a section 23 amendment and will inform the applicant that they will need to apply for an amendment, which would follow the normal permit amendment processes including pre-decision notification requirements.

To date, examples where approval officers have used the restricted “stand alone” amendment authority include:

1. amending monitoring requirements under the leak detection program
2. deleting unconstructed facilities, and consequently adjusting livestock capacity, from a permit, under NRCB’s *Construction Deadlines* policy
3. adding or amending conditions as needed, to address risks to the environment or other matters that were an outcome of compliance action (For example, converting a requirement in an enforcement order into a permit condition that is enforceable over the long term, after the enforcement order is no longer in effect.)

For clarity, correcting typographical or clerical-type errors is not an amendment under section 23 of AOPA. Corrections are appropriate where the intended meaning is clear on the face of the documents and where the correction does not affect the terms or conditions of the permit. In those cases, the approval officer issues a “corrected” version of the decision documents to the persons who were sent the documents that contained the error. Examples of typographical or clerical-type errors include:

1. changing a term to clarify interpretation or update terminology, where the old and new words are synonyms (e.g. “finisher” to be read as “feeder” for swine)
2. changing a term or condition, where the approval officer inadvertently misread the original application, and where the new term or condition reflects the application
3. replacing an erroneous date or reference with the correct date or reference

3. Public notice and comment

This part of this policy applies only to “stand alone” approval officer amendments under section 23 of AOPA (not to permit consolidation as part of a permit application).

Section 23 of AOPA has two provisions that expressly address notice. Under section 23(1), an approval officer may amend a permit on their own motion “on notifying the [permit] holder....” And, under section 23(3), an approval officer who amends a permit on their own motion must provide a written copy of the amendment decision to the directly affected parties (who can then request a board review of the decision).

Besides these specific directions in sections 23(1) and (3), section 23(2) states that sections 20(1) and (3) apply to an approval officer amendment of an approval; and, that sections 22(1) and (2) apply to an approval officer amendment of a registration or authorization. These cross-referenced sections provide specific procedures for approval officers’ review of an application for an approval, registration, or authorization.

However, the procedural directions in section 23 are unclear in several respects, as addressed in 3.1 and 3.2, below.

3.1 Pre-decision notice to the permit holder and opportunity to comment

Section 9 of the AOPA Administrative Procedures Regulation expressly requires an approval officer to notify the permit holder *before* amending the holder’s permit. More specifically, that section requires the approval officer to give the permit holder a

1. clear and concise statement of reasons for the amendment being considered,

2. copy of any evidence or information that the approval officer has considered, and
3. description of the amendment being considered.

Neither that section of the regulation, nor section 23 of AOPA, expressly requires the approval officer to give the permit holder an opportunity to comment on the amendment being considered. However, the NRCB believes this step is implicit in the legislation and is consistent with the principles of procedural fairness in administrative law.

Therefore, approval officers will give permit holders a reasonable chance to respond to items 1 to 3 listed above, before approval officers decide whether to adopt an amendment on their own motion. Approval officers typically provide this opportunity to comment through informal, direct conversations with permit holders.

Approval officers will also provide permit holders with a reasonable chance to submit written comments, if permit holders wish to do so.

3.2 Pre-decision notice to the local municipality and opportunity to comment

Section 23(3) of the act requires approval officers to provide a written copy of the decision to directly affected parties. This focus on the final decision implies that approval officers do *not* need to provide pre-decision notice to these parties (other than the permit holder) or an opportunity for them to comment. However, this implication is not certain in the case of an amendment of an approval. While section 23(2) does not cross-reference the approval notice provision in section 19 of AOPA, section 23(2) does cross-reference section 20(1), which includes an opportunity to comment for directly affected parties.

Similarly, section 9 of the Administrative Procedures Regulation does not address whether pre-decision notice should be given to directly affected parties (other than the permit holder).

In light of this legislative ambiguity regarding pre-decision notice to parties other than the permit holder, this policy restricts the use of an approval officer amendment (see part 2 above). Further, the NRCB has adopted the following procedures:

1. An approval officer will consult with the local municipality, *if* the approval officer is considering deleting a municipal condition on the ground that it is unrelated to managing manure and minimizing its impact (see part 2.2.6 of NRCB Operational Policy 2016-1: *Amending Municipal Permit Conditions*).
2. An approval officer should *consider* consulting with the local municipality, if the approval officer is considering deleting a municipal permit condition on the ground that it provides a level of protection from environmental or nuisance risks that is equivalent to an AOPA requirement (see part 2.1 of Operational Policy 2016-1: *Amending Municipal Permit Conditions*).

3.3 Post-decision notice for directly affected parties

Section 23(3) of the act requires approval officers to provide directly affected parties with a written copy of a decision issued under that section. The legislation is unclear about the process for determining who is a directly affected party to be notified of a final decision under section 23. In the NRCB's view, the scope of parties to be notified of an approval officer amendment is different for amending NRCB-issued permits than for amending "deemed" (i.e. grandfathered) pre-2002 permits. For NRCB-issued permits, the NRCB has used AOPA to identify directly affected parties, whereas municipalities did not identify

directly affected parties, as defined by AOPA, for pre AOPA permits.

The NRCB has therefore adopted the following procedures:

1. *After* amending an *NRCB-issued* permit on their own motion, the approval officer will send a written copy of the decision to the following directly affected parties:
 - a. the permit holder
 - b. the local municipality
 - c. those parties that were determined to be directly affected when the original permit was issued or most recently amended.
2. *After* amending a *deemed* permit on their own motion, approval officers will send a written copy of the decision to these directly affected parties:
 - a. the permit holder
 - b. the local municipality

Notices of a final permit amendment (under either of the two post-decision notice scenarios listed above) will refer to the opportunity for the notified parties to request an NRCB board review of the amendment. The NRCB will also post the decision on its website.

Contact the Natural Resources Conservation Board at the following offices. Dial 310.0000 to be connected toll free.

Edmonton Office

4th Floor, Sterling Place
9940 - 106 Street
Edmonton AB T5K 2N2
T 780-422-1977

Calgary Office

19th Floor, Centennial Place
250 - 5 Street SW
Calgary AB T2P 0R4
T 403-297-8269

Lethbridge Office

Agriculture Centre
100, 5401 - 1 Avenue S
Lethbridge AB T1J 4V6
T 403-381-5166

Morinville Office

Provincial Building
201, 10008 - 107 Street
Morinville AB T8R 1L3
T 780-939-1212

Red Deer Office

Provincial Building
303, 4920 - 51 Street
Red Deer AB T4N 6K8
T 403-340-5241

NRCB Reporting Line: 1-866-383-6722

Email: info@nrcb.ca

Web address: www.nrcb.ca

Copies of the *Agricultural Operation Practices Act* can be obtained from the Queen's Printer at www.qp.gov.ab.ca or through the NRCB website.

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