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PERMIT CANCELLATIONS UNDER AOPA SECTION 29

Operational Policy 2016-3

Agricultural Operation Practices Act
January 26, 2016

*Updated April 23, 2018 for consistency with the Natural
Resources Conservation Board Administrative
Procedures Regulation*

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1. Introduction

Under section 29(1)(a) of the *Agricultural Operation Practices Act* (AOPA), the NRCB “may cancel” a permit issued (or deemed) under AOPA when the permit holder requests or consents to the cancellation. Under section 29(1)(b) of the act, the NRCB may also cancel an AOPA permit if the confined feeding operation (CFO) or manure storage facility (MSF) to which the permit relates is “abandoned.”¹ (Unless otherwise noted, references below to an “abandoned CFO” apply to both an entire abandoned CFO, and to an abandoned facility at a CFO that is otherwise not abandoned.)

Section 29(2) allows the NRCB to “include terms and conditions” in a cancellation decision. Unless otherwise noted, references below to “permit cancellation decisions” or to “permit cancellations” include decisions regarding what, if any, conditions should accompany an actual cancellation.

Permit cancellations under section 29(1)(b) of the act raise fairness and competing land use issues. For many years after AOPA came into effect in 2002, these issues were not prominent. However, AOPA has now been in effect for more than fifteen years. Because of the passage of time, as well as ongoing attrition, changes of ownership of permitted operations, and increasing development pressures adjacent to many CFOs, the NRCB has begun to be faced with abandonment issues and will likely face them more frequently over time.

AOPA does not state what procedures approval officers should follow when cancelling permits under section 29. In January 2016 the NRCB developed a policy to guide approval officers’ use of discretion when considering whether to cancel an AOPA permit. The policy noted that the board of the NRCB (the board chair and board members) were considering adopting procedures for permit cancellations in a new administrative procedures regulation.

In June 2017 the board adopted these new permit cancellation procedures, in section 12 of the new AOPA Administrative Procedures Regulation, AR 106/2017. That section of the regulation sets out circumstances where notice and an opportunity to comment are required.

This revision of the NRCB’s “Permit Cancellations under AOPA Section 29” policy removes duplication with the new regulation and ensures that the policy is consistent with the regulation. The parts of the original (2016) policy that were not superseded by the new regulation are unchanged in this revision.

Pursuant to section 12 of AOPA, the NRCB’s board members have delegated the NRCB’s permit cancellation functions to NRCB approval officers. Therefore, this policy refers to approval officers rather than to NRCB board members. NRCB inspectors are also appointed as approval officers, so all references to “approval officers” also include inspectors.

While this policy should be followed in most instances, approval officers have discretion to modify the policy when its strict application would be clearly unfair, or in other necessary and appropriate circumstances.

1. Subsection 29(1)(a.1) allows the NRCB to cancel permits in a third circumstance—when two or more parties become joint owners of a CFO and the CFO’s permit essentially needs to be split among those owners. This circumstance rarely arises and does not require the policy guidance provided below. Therefore, this policy applies only to permit cancellations under the two circumstances listed in the text above.

1.1 When abandonment needs to be considered

There are several circumstances when approval officers may need to consider whether to cancel a permit on abandonment grounds under section 29(1)(b). Examples of these circumstances are listed below. Under these or other relevant circumstances, approval officers have broad discretion to decide whether to cancel a permit under section 29(1)(b), and will exercise their discretion in a way that best serves AOPA's underlying purposes.

Circumstances when abandonment may need to be considered include:

- An NRCB inspector is conducting a routine permit compliance inspection and notices that the CFO is no longer being used. Further investigation shows that the owner does not intend to resume using the CFO to confine and feed livestock.
- The NRCB receives a complaint or query from an adjacent landowner or developer of adjacent land, who is questioning the municipal development restrictions that result from the existence of a permit for an abandoned CFO.
- An owner is planning to sell their land and requests confirmation from an approval officer that their grandfathered or NRCB-issued AOPA permit is valid, or, a new purchaser seeks to renovate or upgrade and then resume using CFO facilities that have not been used for livestock purposes for many years.
- An owner obtains an AOPA permit, or has a deemed municipal permit, for a specific facility, but has not constructed the facility within the construction deadline specified in the permit and has not applied to extend the deadline. For purposes of section 29(1)(b), the approval officer may consider a facility to be "abandoned" even though it was never constructed in the first place. The unconstructed facility scenario is addressed in the NRCB's construction deadline policy (Operational Policy 2015-1). That policy applies concurrently with this policy, with respect to unconstructed facilities.

The preceding scenarios might result in a permit cancellation decision. However, under section 29(1)(b) of AOPA, the approval officer has discretion to determine whether it would be appropriate to cancel the permit under these circumstances. The approval officer must also consider the factors discussed in part 3 below.

1.2 CFOs with both abandoned facilities and facilities that have not been abandoned

In addition to the four scenarios in part 1.1 above, abandonment also needs to be considered when a CFO has a single permit for several facilities and one or more of the facilities were abandoned or never constructed, or were constructed and are not being used but have *not* been abandoned.

In this case, the approval officer should not cancel the CFO's entire permit. Rather, the approval officer should consider whether the permit needs to be amended to exclude use of the abandoned facilities. (This may require reducing the CFO's permitted livestock capacity.) This amendment must be carried out under the approval officer's authority to amend permits on their own motion, under section 23 of AOPA. (See operational policies 2016-2: *Approval Officer Amendments under Section 23 of AOPA* and 2015-1: *Construction Deadlines*.)

2. Determining when a CFO has been abandoned and when it is appropriate to cancel a permit for an abandoned CFO

Environmental and natural resource regulatory statutes commonly include provisions for cancelling permits for abandoned operations. Consistent with this practice, and as noted above, section 29(1)(b) of AOPA allows approval officers to cancel or amend a permit for an abandoned CFO or CFO facility. (As stated in part 1 above, unless otherwise noted, “abandoned CFO” applies both to an entire abandoned CFO and to an abandoned facility or facilities at a CFO that has other facilities that are not abandoned.) Under that provision, approval officers have discretion to determine when a permitted CFO has been abandoned and, if so, whether it is appropriate to cancel the CFO’s permit.

2.1 Deciding whether a CFO has been abandoned

AOPA does not define “abandoned” (or “abandonment”). Without a legislative definition, the NRCB uses the term’s common meaning, viewed in light of AOPA’s general purposes, and the legislature’s intent when it adopted section 29(1)(b).

2.1.1 Criteria to consider

There are several common definitions of abandonment, which vary somewhat depending on the context. One relevant definition is to “cease from maintaining, practicing, or using.”² Another definition focuses on *intent*, in the context of property or some other thing: “give up with the intent of never again claiming a right or interest in.”³

The NRCB believes that both of these definitions are generally relevant and useful to consider when deciding whether a permitted CFO has been abandoned.

When deciding whether a CFO has been abandoned, approval officers will typically consider the following factors (other factors that may be relevant to the specific CFO may also be considered), in the context of the definitions of abandonment provided above:

- the CFO’s current use, if any
- the CFO’s current condition
- what, if any, steps are being taken to keep the CFO’s facilities in a condition such that they could resume being used for livestock management or manure storage without major upgrades or renovations
- when the CFO stopped being used to manage livestock or store livestock manure, and the owner’s reason for that stoppage
- whether the CFO has changed ownership during the period of disuse and, if so, whether the new owner purchased the CFO in reliance on the seller’s promise, or on some other basis for reasonably expecting, that the CFO was permitted under AOPA

2. Merriam-Webster Dictionary, online: merriam-webster.com/dictionary/abandon. The Oxford Dictionary has similar definitions: “cease to support or look after (someone); desert,” or to “give up completely (a practice or a course of action).” Online: oxforddictionaries.com/definition/english/abandon?q=abandon.

3. Merriam-Webster Dictionary, online: merriam-webster.com/dictionary/abandon.

- the owner's reason for ceasing or postponing use of the permitted CFO and the owner's intent with respect to future use of the CFO
- the value of the CFO facilities (independent of their permitted status) and the cost of reconstructing them, if reconstruction is needed

2.1.2 Considerations regarding an owner's intent

If a CFO owner has stopped using the CFO, approval officers will consider the owner's *intent* regarding future use when deciding whether the CFO has been abandoned.

The NRCB understands that a CFO owner may stop using a facility for a period of time for a number of reasons. These include commodity market conditions, labour market conditions, feed costs, or the availability of feed. A recent example is a federal government program that subsidized hog producers to stop production for a three year period. These types of production lapses do not reflect an intention to abandon a CFO, and the NRCB does not view these kinds of lapses as grounds to cancel a permit.

When considering an owner's intent, approval officers need to distinguish between the owner's intent to operate a CFO in the future, and their intent to simply retain the CFO's permit.

The reason for this distinction stems from comparing the permit cancellation provisions in sections 29(1)(a) and 29(1)(b) of AOPA. Section 29(1)(a) allows the permit to be cancelled when the permit holder "requests or consents to" the cancellation. Section 29(1)(b) does not refer to the permit holder's "request" for or "consent" to a cancellation.

The differences in these two sections strongly imply that the legislature intended to give the NRCB authority to cancel permits for unused permitted facilities *even when the facilities' owners do not want to relinquish their permits*. Thus, an owner's intent to retain their permit for an unused facility, solely for the purpose of holding the permit, is less important for determining whether the facility has been abandoned, than whether they intend to actually start re-using the facility.

2.1.3 Burden of proof

As noted in the NRCB's approval policy, CFO operators normally have the burden of proving that they are entitled to an AOPA permit or permit amendment.

However, for permit cancellations under section 29(1)(b) of AOPA, the NRCB interprets the act as placing the overall burden of proof on approval officers to find that a permitted facility has been abandoned.

2.2 Whether to cancel a permit for an abandoned CFO

As previously noted, section 29(1)(b) of AOPA gives an approval officer discretion to cancel a permit for a CFO if the approval officer finds that the CFO has been abandoned. In other words, even when an approval officer concludes that a CFO has been abandoned, the approval officer is not *required* to cancel the operation's permit.

To decide whether an abandoned CFO's permit should be cancelled, approval officers will consider the factors outlined in part 3.1, above, in light of the purpose statement for AOPA:

ensure that the province's livestock industry can grow to meet the opportunities presented by local and world markets in an environmentally sustainable manner.⁴

AOPA also respects the land use planning decisions of individual municipalities, while providing a uniform, province-wide level of surface and groundwater protection from manure-related risks and minimum setbacks to minimize nuisance impacts on neighbours. Permit cancellations may serve one or more of these purposes, in certain circumstances.

Approval officers will assess the appropriateness of cancelling a permit on a case by case basis, and only when it is fair and reasonable to cancel the permit, considering all available tools for achieving AOPA's objectives.

3. The notice process for permit cancellation decisions

The following notice procedures apply to permit cancellation decisions under section 29 of AOPA and section 12 of the AOPA Administrative Procedures Regulation. These procedures apply only when an approval officer is *cancelling* a permit because an *entire* confined feeding operation has been abandoned.

If only *part* of a CFO has been abandoned (or one or more of several permitted facilities have not been constructed), the approval officer will *amend* rather than cancelling the CFO's permit (see the NRCB's construction deadline policy: Operational Policy 2015-1.) The approval officer will follow the process for approval officer amendments under section 23 of the act and section 26 of the AOPA Administrative Procedures Regulation.

3.1 Notice before a cancellation decision

3.1.1 Cancellations on request or by consent of the permit holder

Subsection 12(1)(a) of the AOPA Administrative Procedures Regulation states that an approval officer may cancel a permit under section 29(1)(a) of the act—that is, with the permit holder's consent—"without notice to any party."

As a practical matter, when a permit holder requests or consents to a permit cancellation, the permit holder is aware of the cancellation. In other words, the permit holder has effectively been given notice of the cancellation. The permit holder's consent means that they have also had a chance to provide input.

If an approval officer is considering including *conditions* in a cancellation that was requested or consented to by the permit holder, the approval officer will advise the permit holder of the conditions being considered and will solicit the permit holder's input on those conditions.

Although the approval officer is not required to notify and consult with the municipality or other parties, the approval officer may do so, at their discretion.

4. This purpose is reflected in the 2006 Memorandum of Understanding between the NRCB and the ministers of Alberta Agriculture and Rural Development and Alberta Sustainable Resource Development. See also part 1 of Operational Policy 2016- 7: *Approvals*.

3.1.2 Cancellations without the consent of the permit holder

Section 12 of the Procedures Regulation prescribes notice and comment procedures when an approval officer is considering cancelling a permit for an abandoned CFO under section 29(1)(b) of the act—that is, without the permit holder’s consent. Those procedures include giving the permit holder a chance to provide a written objection to a proposed permit cancellation and then notifying and giving other affected parties a chance to provide a written response to the permit holder’s objection.

For some CFOs that appear to be abandoned, the approval officer may have difficulty identifying or locating all of the permit holders. In these circumstances, the approval officer may cancel a permit after the approval officer has made reasonable efforts to locate and notify the permit holder(s). (In some cases, banks or other lenders or creditors may qualify as permit holders even though they are not named as such on a permit.)

3.2 Notice after a cancellation decision

Under subsection (6) of the AOPA Administrative Procedures Regulation, the approval officer must provide the permit holder with a copy of the final cancellation decision. The approval officer must also provide a copy of the decision to any other party that filed a written response to the permit holder’s written objection to the proposed cancellation.

In addition to notifying those parties, approval officers may, at their discretion, notify any other parties who were notified of the proposed cancellation.

Subsection 12(5) of the procedures regulation addresses the *content* of the final cancellation decision. Subsection 12(5) requires the decision to include the approval officer’s reasons for the cancellation decision. The decision must also explain how the approval officer determined which parties that responded to the pre-decision notice were “directly affected.”

In addition to providing the content required by the regulation, the decision (or notice of the decision) must also:

- state where copies of the original permit and permit cancellation record can be obtained,
- state that any directly affected party receiving notice is entitled to request that the NRCB’s board members review the permit cancellation decision (including any cancellation terms or conditions),
- state that any party deemed not to be directly affected is entitled to request that the NRCB’s board members review that determination, and
- explain all other relevant information required to submit a request for review. (See Appendix: Approval officer decision letter—excerpt regarding board review.)

Appendix: Approval officer decision letter—excerpt regarding board review

Under the *Agricultural Operation Practices Act*, you have the right to request that the Natural Resources Conservation Board (the Board) review this decision. To request a Board review, you must file a written application. Requests for Board review must contain:

- a) a clear and concise statement of the facts relevant to the application
- b) the grounds on which the application is made
- c) a brief explanation as to the nature of the prejudice or damage that has resulted or will result from the order, decision or direction
- d) a brief description of the remedy sought
- e) the applicant's name, address in Alberta, telephone number, fax number and, if available, e-mail address
- f) if the applicant has a representative, the representative's name, address in Alberta, telephone number, fax number and, if available, e-mail address.

Standard forms for requesting a Board review are available on our website at: www.nrcb.ca or may be obtained by contacting Board Review staff through the Government RITE line toll-free at 310-0000 and dialing [insert phone number of current board reviews manager](#). Completed requests for Board review should be sent to the attention of: [Insert name](#), Manager, Board Reviews, [office address, phone number and fax number of current board reviews manager](#).

If you decide to request a Board review, you must submit your request by [date \(15 working days from issuance of decision plus 5 for mailing\)](#).

For more information regarding the Board's review process, please contact [name of current board reviews manger](#) at [phone number](#); or by email: [insert email address](#).

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 F 780-427-0607

Calgary Office

19th Floor, Centennial Place
250 - 5 Street SW
Calgary AB T2P 0R4
T 403-297-8269 F 403-662-3994

Lethbridge Office

Agriculture Centre
100, 5401 - 1 Avenue S
Lethbridge AB T1J 4V6
T 403-381-5166 F 403-381-5806

Morinville Office

Provincial Building
201, 10008 - 107 Street
Morinville AB T8R 1L3
T 780-939-1212 F 780-939-3194

Red Deer Office

Provincial Building
303, 4920 - 51 Street
Red Deer AB T4N 6K8
T 403-340-5241 F 403-340-5599

NRCB Response 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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