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PUBLIC NOTICE FOR GRANDFATHERING DECISIONS

Operational Policy 2016-6

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 18.1(1) of the *Agricultural Operation Practices Act* (AOPA), a confined feeding operation (CFO) is grandfathered if:

- it “existed” on January 1, 2002 (with or without a municipal development permit), and,
- its capacity on that date was greater than the permit thresholds in AOPA’s Part 2 Matters Regulation.

The first of these two grandfathering criteria is expressly stated in section 18.1(1). The second criteria is implied by the statement in section 18.1(1) that grandfathered CFOs are deemed to have either an approval, registration or authorization under the act.

Besides providing the grandfathering criteria, section 18.1(1) is clear that a CFO does not need a certification, registration, or other acknowledgement from the NRCB in order to be grandfathered, as long as it meets the two criteria listed above. In fact, AOPA has no provisions or process whatsoever for the NRCB to make grandfathering determinations. Yet, the NRCB must make these determinations in several circumstances. (These circumstances are discussed in part 2 of this policy.)

In the NRCB’s view, it is important to provide a reasonable notice and engagement process for grandfathering decisions. That process is warranted, in part, to fulfill the NRCB’s duty of procedural fairness—under administrative common law and the *Administrative Procedure and Jurisdiction Act*—to persons who may be adversely affected by the NRCB’s grandfathering decisions. (The NRCB’s duty of procedural fairness was the basis for Justice Hall’s judicial review decision on a file involving a grandfathering determination.¹)

There are several other reasons for providing public notice for grandfathering decisions. One is that it broadens the scope of available information for making grandfathering decisions. This broader scope is likely to become increasingly important because of the increasing difficulty over time of collecting evidence relating to the status of an operation on or before January 1, 2002.

In addition, when affected parties are notified of a grandfathering determination and provided with an opportunity to engage in the decision-making process, they will generally be precluded from appearing some years later to challenge the CFO’s grandfathered status. This result provides greater certainty of the rights of CFO owners, which is useful, not only for those owners, but also for prospective purchasers and lenders, developers of adjacent land, and municipal land use planners.

For these reasons, in January 2016 the NRCB adopted the first version of this policy, which set out a notice and comment process for “stand-alone” NRCB grandfathering decisions—that is, grandfathering decisions that are not part of the NRCB’s established processes for considering approval and registration applications. At that time, the Board Administrative Procedures Regulation under AOPA (AR 268/2001) did not address the process for grandfathering decisions. However, in June 2017 the board of the NRCB’s (the board chair and board members) repealed and replaced that regulation with the AOPA Administrative Procedures Regulation, AR 106/2017.

Section 11 of the new regulation now provides detailed procedures for stand-alone grandfathering decisions. This update to the NRCB’s 2016 operational policy ensures that it is consistent with, and does not duplicate, section 11 of the regulation.

1. See *Unland, et al. v. NRCB*, 2012 ABQB 501 (CanLII).

Part 2 of this policy addresses the general scope and applicability of section 11 of the new regulation. Part 3 sets out several procedures that are in addition to, but do not conflict with, the notice process under section 11. Part 4 addresses the circumstances under section 11 when the notice process does not need to be followed.

As with all NRCB policies, NRCB staff responsible for implementing this policy have discretion to modify the policy when its strict application would be clearly unfair, or in other necessary and appropriate circumstances. NRCB staff must, however, follow the AOPA Administrative Procedures Regulation.

2. The scope and applicability of section 11

2.1 Who can make grandfathering decisions under section 11

Historically, both NRCB approval officers and inspectors have made grandfathering determinations under AOPA.

However, subsection 11(1) of the AOPA Administrative Procedures Regulation calls specifically on NRCB “inspectors” to make those determinations. Subsections (2), (4), (5), and (8) repeat this reference to NRCB inspectors. By contrast, subsection (3) refers to NRCB approval officers, rather than inspectors. That subsection deals with deciding whether to waive the notice process in section 11. However, it would be nonsensical for approval officers to make those waiver decisions, but not to make any other decisions relating to grandfathering.

In practice, NRCB approval officers are all cross-appointed as inspectors (and vice versa). Thus, the regulation’s primary focus on inspectors also includes approval officers. The NRCB therefore interprets section 11 as intending to empower both inspectors and approval officers to make the grandfathering determinations required by that section, and all references below to NRCB inspectors include approval officers.

2.2 The scope of matters addressed in a grandfathering determination under section 11

Section 11 of the regulation is somewhat ambiguous regarding which aspects of the grandfathering determination that the section is addressing.

Subsection 11(1) refers to NRCB investigations into, and determinations of, the “capacity” of a grandfathered CFO. By contrast, several of the remaining subsections of section 11 refer more broadly to a “deemed permit determination.”

The term “capacity” refers to the number and type of livestock that a CFO is permitted to have under AOPA. Accordingly, a CFO’s “deemed capacity” is the capacity allowed by the CFO’s deemed—that is, grandfathered—permit under the act.

Before determining deemed capacity, therefore, it is necessary to determine whether the CFO has a deemed (i.e., grandfathered) permit under AOPA. This generally requires confirming whether the CFO had a municipal development permit on January 1, 2002 (before AOPA came into effect) and the terms and conditions of that permit.

However, some municipal development permits did not specify the CFO’s permitted facilities or its permitted capacity—that is, the maximum number and type of livestock allowed under the permit. Even if the municipal permit specifies the facilities and livestock,

the CFO owner sometimes claims to have deemed facilities, or capacity that is greater than the facilities or the capacity specified in the municipal permit.

In these instances, in addition to identifying the municipal development permit, the NRCB may also need to determine what CFO facilities existed on January 1, 2002, the type of livestock they contained, and the facilities' *physical* capacity (that is, the number of livestock they could reasonably confine) as of that date. These facts must also be determined if a CFO did not have a municipal development permit on January 1, 2002.

Viewing section 11 as a whole, then, and in light of the several components of grandfathering determinations, the NRCB interprets section 11 as setting out procedures for determining *all aspects of grandfathering*, rather than just the CFO's deemed "capacity."

This interpretation is consistent with the 2016 version of this policy and with the NRCB's general practice.

Therefore, approval officers will apply the procedures in section 11 of the AOPA Administrative Procedures Regulation to all aspects of a stand-alone grandfathering determination.

2.3 Grandfathering issues that arise from approval or registration applications

Sometimes grandfathering issues are raised by approval or registration applications for CFO expansions. In those contexts, the NRCB has historically addressed the grandfathering issues through the NRCB's normal process for handling those applications.

A key feature of this process is that applications for approvals and registrations are subject to public notice, and provide an opportunity for municipalities and other directly affected parties to submit written comments. Directly affected parties may submit a request to the NRCB's board members to review permit decisions issued by approval officers. This right presumably includes any grandfathering determinations on which those permit decisions are based.

The 2016 policy adopted the NRCB's historical practice of using the notice process for approval or registration applications to address grandfathering claims that are raised in the context of those applications.

The AOPA Administrative Procedures Regulation does not clearly affirm or reject this approach. Section 11 addresses the procedures for a deemed permit determination, and section 11(1) *requires* an NRCB inspector to make a grandfathering determination in two circumstances. In a nutshell, these circumstances are:

- when the owner or operator of the CFO requests a determination of the CFO's grandfathered status; and
- when it is necessary to resolve a complaint that raises questions about the CFO's permitted status.

The first circumstance implicitly includes the permitting contexts raised through the permit application process, as noted above.² The NRCB therefore interprets section 11(1) as

2. Applicants who wish to expand CFOs that were not originally permitted by the NRCB may not always request a grandfathering determination as part of their expansion application. However, when the approval officer concludes that the grandfathering component must be addressed in order to consider their application, applicants usually agree to include the grandfathering component as part of their

also *allowing approval officers* to use the public notice process for approval and registration applications for grandfathering decisions that arise in the context of those applications. Those procedures are similar to the procedures in section 11.

For greater clarity and certainty, approval officers will use the permit-specific procedures for all aspects of a permitting decision, including the grandfathering aspects.

2.4 Grandfathering issues that arise from authorization applications

Sometimes CFO owners apply for authorizations to modify their CFOs, when the NRCB has not previously permitted those CFOs or determined that the CFOs are grandfathered. In these instances, the NRCB may need to determine whether the CFO is grandfathered before deciding whether to issue the authorization. This grandfathering determination may be needed because the NRCB only issues authorizations to NRCB permitted operations and operations that have a deemed permit under section 18.1 of the act.

Until the NRCB adopted the original version of this policy in 2016, approval officers made the required grandfathering determination as part of their process for deciding whether to issue the authorization. However, AOPA does not call for public notice or an opportunity for affected individuals to comment on authorization applications. Therefore, this consolidated approach precluded public notice and participation in the related grandfathering decisions.

Given the value of a public notice process, the 2016 policy required approval officers to use a public notice process for grandfathering determinations that must be made before they issue their decision on an authorization application. The policy also set out circumstances that would not require public notice and engagement.

Consistent with this approach, approval officers will apply the decision-making procedures in section 11 of the AOPA Administrative Procedures Regulation for grandfathering decisions that must be made before an approval officer can decide whether to grant an authorization.

2.5 Requests for grandfathering determinations by a party other than the CFO owner or operator

As noted in part 2.3 of this policy, above, subsection 11(1) of the AOPA Administrative Procedures Regulation requires an NRCB inspector to make a grandfathering determination when requested to do so by the CFO owner or operator, or when necessary to resolve a complaint.

Historically, lenders and prospective CFO buyers have also asked the NRCB to make grandfathering determinations when their transactions are contingent on confirming a CFO's permitted status. Municipalities have also asked for grandfathering determinations for their own land use planning and for considering permit applications for developments near existing CFOs.

The NRCB believes it is important to try to accommodate these circumstances. However, consistent with section 11(1) and the NRCB's original 2016 policy, inspectors

application. If an applicant disagrees with this conclusion, they may ask the approval officer to deny the application. This allows the applicant to request the board to review the approval officer's conclusion that the CFO's grandfathered status must be determined. See NRCB Operational Policy 2016-4: *Resolving Disputed Permit Information Requirements between the Applicant and Approval Officer* (January 2016).

will only make a grandfathering determination in response to a request made directly by a CFO owner or operator, or when a CFO owner consents to a request made by a lender, buyer or municipality.

3. The notice process

The following procedures are in addition to, but consistent with, those set out in section 11 of the AOPA Administrative Procedures Regulation.

3.1 Who must be notified—calculating the notice “radius”

As discussed in part 1 above, section 11 of the regulation is similar to the NRCB’s 2016 policy by generally requiring the NRCB to provide affected parties with notice of stand-alone grandfathering decisions.

More specifically, subsection 11(2) of the regulation directs notice to be given to

“those parties who would be entitled to notice under section 19(1) or 21(1) of ... [AOPA] for a new manure storage facility or confined feeding operation *with the same capacity.*” (Emphasis added.)

Sections 19(1) and 21(1) of AOPA (and the regulation that they refer to, in turn) define the scope of “affected parties” that are entitled to notice of AOPA permit applications. For a proposed new CFO or CFO expansion, affected parties are local municipalities and all owners of and residents on land within a prescribed distance from the proposed development. The prescribed distance—commonly termed the “affected party radius”—is derived from a formula that is based essentially on the requested number and type of livestock.

To determine the affected party radius under subsection 11(2) of the AOPA Administrative Procedures Regulation, inspectors will base the CFO’s “capacity” on the larger of the following two numbers:

- the deemed capacity claimed by the CFO owner, or
- the CFO’s current physical capacity.

To determine who owns land or resides within this radius, the NRCB inspector will follow the same process used for identifying affected parties in relation to permit applications. See Operational Policy 2016-7: *Approvals*.

The inspector may also contact and seek information from people who own land or reside outside of the area defined by the notice distance. In addition, the inspector may contact other people (or obtain other sources) that may have useful information relating to the grandfathering issues (for example, industry associations that may have historical data on the operation in question).

3.2 Method of notice

Section 31 of the AOPA Administrative Procedures Regulation gives NRCB staff several options for deciding how to provide notice, when notice is required under that regulation, including under section 11.

Inspectors will generally provide notice of stand-alone grandfathering determinations by

individual letters (when notice is required). However, there may be circumstances where a broader method of notice is needed, in addition to or instead of using individual letters. For example, newspaper publication may be appropriate if there are many potentially affected parties or if it is difficult to obtain contact information for people who reside or own land within the affected party radius.

Subsection 11(4) prescribes the content of notices required by section 11, including when responses are due, and any other matters an inspector deems appropriate to include in a notice. In addition to covering the subjects listed in subsection 11(4), the notice will state that all responses will be treated as non-confidential.

The response deadline will be calculated as 20 working days from the date of the notice. When notice is provided by regular mail, an additional five working days for mailing will be added to the 20 day notice period.

3.3 Follow up response

On receipt of a neighbour's response, the inspector will decide whether the response provides useful, relevant information by itself, or whether additional, follow up information should be requested from the neighbour. The inspector has discretion to decide whether any additional information that is needed should be provided in writing or through a face-to-face meeting.

4. When public notice is not needed

The 2016 version of this policy gave NRCB staff discretion to decide, on a case-by-case basis, whether to forego the notice process set out in the policy for CFOs whose primary facilities were indoor barns. The reason for this approach is that, in the NRCB's view, it is generally much easier for staff to make the necessary factual determinations for indoor facilities, based on site visits, aerial photos and other available records, than for outdoor pens. (These facts relate essentially to whether CFO facilities existed on January 1, 2002, their dimensions, their physical capacity, and how they were being used.)

Section 11 of the AOPA Administrative Procedures Regulation adopts a similar approach to the 2016 policy. Under subsection 11(3), the NRCB inspector may waive the section 11 notice and comment process for "indoor" CFOs if the inspector finds that the "livestock type and capacity of the structures can be reliably determined by viewing historical aerial photographs and owner or operator records."

Two aspects of this subsection are worth addressing in this revised policy.

4.1 The scope of "indoor" CFOs

Many CFOs with indoor barns for their primary livestock also have some outdoor pens for replacement or other ancillary livestock, or for temporary confinement of their primary livestock.

Given this reality, the NRCB interprets the reference to "indoor" CFOs in subsection 11(3) as referring to the primary CFO facilities for confining and feeding livestock. Thus, if those primary facilities are indoor, the NRCB will treat the entire CFO as indoor for purposes of this subsection.

4.2 Municipal development permits

A municipal development permit for a CFO is considered a “deemed” permit under section 18.1(1) of AOPA, if the permit was issued before January 1, 2002, and if the livestock capacity allowed by the municipal permit is greater than the AOPA permit threshold. Thus, the 2016 policy stated that, with a few exceptions noted in the policy (and discussed below), it is unnecessary to provide public notice when making a grandfathering determination that is based on a municipal development permit issued before January 1, 2002.

Section 11 of the AOPA Administrative Procedures Regulation appears to adopt this policy approach. Under subsection 11(1), grandfathering determinations are for a CFO:

- (a) That was in place on January 1, 2002, or
- (b) That was constructed pursuant to a development permit issued before January 1, 2002.

Subsection 11(2) then requires public notice *only* for a grandfathering determination “under subsection (1)(a)” —that is, only for the first of these two scenarios. The NRCB interprets this wording as meaning that public notice is not needed for a CFO that was in place on January 1, 2002 *and* that is covered by a municipal development permit issued before that date.

As noted above, the 2016 policy listed two exceptions to the general rule that public notice and comment were unnecessary for a CFO that holds a municipal development permit. These exceptions were:

- The development permit does not state the CFO’s capacity and the NRCB must make a deemed capacity determination.
- The CFO owner claims that they have grandfathered facilities that are not covered by their development permit, or they claim a grandfathered capacity that is greater than the capacity stated in their development permit.

(The 2016 policy did not automatically apply these exceptions to CFOs that were “indoor” operations on January 1, 2002, as discussed in part 4.1 above.)

The two exceptions in the 2016 policy are for circumstances where a grandfathering determination cannot be based solely on the content of a development permit. The NRCB interprets subsections 11(1) and (2) of the AOPA Administrative Procedures Regulation as implicitly incorporating the two exceptions. Presumably, the board considers it unnecessary to solicit public input for a CFO constructed “pursuant to a [pre-2002] development permit” only when the permit resolved all issues as to the CFO’s deemed capacity.

Therefore, the two exceptions in the 2016 policy continue to apply under section 11 of the Administrative Procedures Regulation.

In some cases, a CFO owner claims to have a deemed capacity that is *less than* the capacity allowed by the CFO’s municipal development permit. This scenario usually occurs when the CFO owner did not construct one or more of the permitted facilities. The CFO owner’s reduced actual capacity likely is not a *violation* of the CFO’s development permit, because permits generally *allow* CFO’s to house up to a certain maximum capacity, but they don’t *require* CFOs to have that maximum number of livestock.

In these cases, the CFO is considered to have been constructed pursuant to its development permit. Consistent with section 11 of the AOPA Administrative Procedures Regulation, inspectors are not required to issue public notice to determine the CFO's grandfathered status.

In this situation, an inspector may initiate an approval officer amendment to remove unconstructed facilities from the permit, pursuant to the NRCB's construction deadline policy (Operational Policy 2015-1). This may also involve reducing the permitted livestock capacity.

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

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T 780-422-1977 F 780-427-0607

Calgary Office

19th Floor, Centennial Place
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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

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Morinville AB T8R 1L3
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Red Deer Office

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