



BOARD DECISION

RFR 2020-04 / PR19005

In Consideration of Requests for Board Review filed under the *Agricultural Operation Practices Act* in relation to Grandfathering Decision PR19005

Stant Enterprises Ltd.

June 2, 2020

The Board issues this decision document under the authority of the *Agricultural Operation Practices Act (AOPA)*, following its consideration of requests for Board review of Grandfathering Decision PR19005.

Background

On May 1, 2020, Natural Resources Conservation Board (NRCB) inspector David Smejkal issued Grandfathering Decision PR19005 (Grandfathering Decision). The Grandfathering Decision determined that the Stant Enterprises Ltd. facilities, located at NW 18-40-4 W5M in Clearwater County, is deemed to have been issued an approval for 4800 beef finishers under the *Agricultural Operation Practices Act (AOPA)*.

Requests for Board review (RFR) of Grandfathering Decision PR19005 were filed by Clayton Olson; Stan Black and Darlene Bacque; Brent and Tracey Calvert; and Mathew James representing Cyndy Berry, Rob McPhee, and Clayton Olson. These all met the filing deadline of May 15, 2020.

The directly affected parties, as established by the inspector, were notified of the Board's intent to review these requests and provided with copies of the RFRs. Parties that had an adverse interest to the matters raised in the RFRs were given the opportunity to submit a rebuttal. The Board received a rebuttal from Stant Enterprises Ltd. prior to the rebuttal filing deadline of May 26, 2020.

Under the authority of section 18(1) of the *Natural Resources Conservation Board Act*, a division of the Board (Board) consisting of Peter Woloshyn (chair), Page Stuart, Sandi Roberts, and Keith Leggat was established on May 19, 2020. The Board convened to deliberate on the RFRs on May 22, 2020.

Jurisdiction

The Board's process for granting a review of an inspector or approval officer determination under section 18.1 of AOPA, is set out in section 13 of the AOPA Administrative Procedures Regulation (Regulation). Neither AOPA nor the Regulation establishes the threshold test the Board should apply when considering whether to grant a review; however, the Board finds guidance in section 25 of AOPA which provides that the Board must dismiss a request for review if it determines that the issues raised in the request were adequately dealt with by the inspector or approval officer. The Board also considers that a party requesting a review has the onus of demonstrating that there are sufficient grounds to merit review of the inspector's or approval officer's decision.

Note: The NRCB inspectors and approval officers are cross-appointed. In other words these staff can, when necessary, act in the capacity of either an inspector or approval officer. In this case Inspector David Smejkal was acting under this dual role. The Board's AOPA Administrative Procedures Regulation and Field Services policies related to grandfathering determinations use both 'inspector' and 'approval officer' which are interchangeable. In this document the Board uses 'inspector'.

Documents Considered

The Board considered the following information:

- Grandfathering Decision PR19005 and cover letter, dated May 1, 2020
- RFR filed by Clayton Olson, dated May 7, 2020
- RFR filed by Stan Black and Darlene Bacque, dated May 11, 2020
- RFR filed by Brent and Tracey Calvert, dated May 15, 2020
- RFR filed by the Berry Applicants (Cyndy Berry, Rob McPhee, and Clayton Olson), dated May 15, 2020
- RFR filed by Rob McPhee, dated May 14, 2020 (attached to Berry Applicants' RFR submission)
- Inspector Record, received May 20, 2020
- Email chain between Calvert, Friend, and Vance, dated May 19, 2020
- Rebuttal filed by Stant Enterprises Ltd., dated May 26, 2020

Preliminary Matter – Status Review Request

Brent and Tracy Calvert (the Calverts) filed a request that the Board review their standing to participate in the request for review process. The Calverts stated they were never contacted by the NRCB, and only heard about the Stant Enterprises Ltd. grandfathering decision released May 1, 2020 through word of mouth from a neighbour on May 14, 2020.

Reviewing the May 19, 2020 email chain between Calvert, Friend, and Vance, it is clear from the September 17, 2019 text included in the Calverts' email to the NRCB Manager of Reviews that the Calverts were aware in the fall of 2019 that the inspector was making a grandfathering determination. The inspector published notice of the pending grandfathering decision in the August 20, 2019 edition of *The Mountaineer*. The inspector also mailed courtesy letters on August 16, 2019 to neighbours within a 1.5 mile radius of the operation, a notification radius triggered by the claim of 5,000 beef finishers. The Calverts were included in the mailing list for the courtesy letter.

AOPA grandfathering determinations have two levels of decision-making. In the first level, the approval officer or inspector (NRCB Field Services) initiates a review and publishes notice of the grandfathering determination process, providing the opportunity for interested parties to make a submission to NRCB Field Services related to the grandfathering decision. In the second level, only those parties who made a submission to NRCB Field Services may initiate or participate in a Board review of the NRCB Field Services grandfathering decision. NRCB Field Services did not consider the Calvert's September 17, 2019 email as a submission.

The Board has reviewed the September 17, 2019 email the Calverts sent to the inspector, and finds that the email content is not a submission under section 11(4) of the Regulation. The Board's statutory authority is limited to review the directly affected status of those who made a submission to an approval officer or inspector, and were determined in that process to be not directly affected. Therefore, the Board denies the Calverts' request for standing.

Abandonment Consideration

The RFRs either directly or indirectly asserted that the confined feeding operation (CFO) at NW 18-40-4 W5M are not currently used, and further suggested that they have not been actively used for some time. The Berry Applicants asked the Board to find that the CFO was abandoned and cancel the permit.

The Board notes that NRCB Operational Policy 2016-3 addresses the consideration of permit cancellations due to abandonment:

- (1.1) *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.*

...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”....

The Board does not have an NRCB Field Services decision before it that considers the question of abandonment. The Board further finds that the question of abandonment was not identified in the public notice or courtesy letters by the inspector as an issue for his investigation. It is the Board's view that in this circumstance it has no authority to determine an abandonment question posed in this RFR. The Board also notes that if a CFO was abandoned as of January 1, 2002, it may impact whether the CFO could be grandfathered. In this case, the question of abandonment does not relate to the grandfathering determination as of January 1, 2002.

However, the Board finds merit in referring the question of abandonment since January 1, 2002 to NRCB Field Services for evaluation. Given that this file has now been active and unsettled for some time, the Board encourages NRCB Field Services to expedite a decision on abandonment as quickly as feasibly possible.

In making this referral, the Board is not suggesting it has assessed the evidence related to the abandonment question. Rather, it notes that 18 years have passed since the time window used in the Grandfathering Decision, the inspector did not consider the possibility of abandonment, and the RFRs have now advanced assertions of abandonment.

Grandfathering Determination

Grandfathering decisions are essentially an assessment of whether an operation existed as of January 1, 2002 (the date that the Part 2 provisions of AOPA came into effect). The existence, or not, of a deemed permit pursuant to section 18.1 of AOPA does not engage the considerations that apply to new or expanding operations set out in AOPA sections 20 (approvals) or 22 (registrations and authorizations). The filed RFRs raised a number of issues that would be relevant to an application for a new or expanding operation, but go beyond the scope of review set out in AOPA section 18.1 for determining a deemed permit.

The Board notes that some of these issues were also raised in the submissions filed with the inspector. The inspector acknowledged those issues, and concluded they were not relevant to the grandfathering determination. The inspector further stated that the NRCB would follow up on these concerns in accordance with the NRCB's Compliance and Enforcement Policy. With the exception of the Board's comments on the assertion by some parties that the subject facilities may have been abandoned, the Board did not consider concerns unrelated to the grandfathering determination.

The Board finds that none of the issues raised in the RFRs merit a Board review of the Grandfathering Decision. The Board finds that the inspector focused on the direction provided in AOPA, and that his grandfathering determination of the deemed capacity of 4800 beef finishers was well-reasoned.

Evidence the Board relied on to reach this conclusion primarily includes:

- The Berry applicants acknowledge that a CFO existed, at some point, on the Stant Enterprises lands
- Google earth imagery clearly shows a feedlot existed as of January 1, 2002
- The Feedlot Atlas names the feedlot and indicates its capacity
- Statements from Mr. Taylor, corroborated by Mr. Pauley (an employee at the feedlot between 1996 and 2001), that the facilities under question were used to feed and finish beef feeder animals during the grandfathering period of 2001-2002
- Lack of evidence to sufficiently contradict testimony from Mr. Taylor and Mr. Pauley

The Board recognizes that grandfathering decisions are and will become increasingly difficult with the passage of time. Evidence in support or opposition to a grandfathering determination, now some 18 years past January of 2002, can be challenging to ascertain. In the Board's view, the inspector followed NRCB policy related to grandfathering determinations and weighed the evidence before him fairly and appropriately.

Decision

As a result of its deliberations, the Board has determined that a review of the grandfathering determination is not warranted.

DATED at EDMONTON, ALBERTA, this 2nd day of June, 2020.

Original signed by:

Peter Woloshyn

Page Stuart

Sandi Roberts

Keith Leggat

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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.