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DETERMINING DEEMED CAPACITY FOR GRANDFATHERED CONFINED FEEDING OPERATIONS

Operational Policy 2016-5

Agricultural Operation Practices Act
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1. Introduction

Section 18.1 of the *Agricultural Operation Practices Act* (AOPA) addresses the grandfathering of confined feeding operations (CFO) under the act, in essentially two steps:

- Sub-section 18.1(1) lists three categories of CFOs (or manure storage facilities) that are considered to have a “deemed” (i.e., grandfathered) approval, registration or authorization under the act.
- Sub-section 18.1(2) states how a grandfathered CFO’s “capacity” is to be determined for each of the three categories described in sub-section 18.1(1).

Sub-section 18.1(2) applies specifically to CFOs with deemed approvals or registrations. Sub-section 18.1(3) addresses the capacity of CFOs with deemed authorizations, using the same methods set out in sub-section 18.1(2). For simplicity, this policy focuses on the methods for determining capacity in sub-section 18.1(2).

The three categories of grandfathered CFOs, and accompanying methods for determining their deemed capacity, are listed in the table on page 2. The three categories and methods seem straightforward. However, in reality there is a wide range of CFO types, and it is challenging to apply the three methods consistently and fairly across this range. This policy explains how the NRCB interprets and applies these methods to the wide range of CFO types when it needs to determine a CFO’s deemed capacity.

As with all operational policies, approval officers and inspectors (NRCB field services staff), have discretion to modify this policy when its strict application would be clearly unfair, or in other necessary and appropriate circumstances.

This policy applies only to deemed capacity determinations made by field services staff. Under AOPA, a directly affected municipality, or other directly affected party, can request the NRCB’s board members to review a capacity determination made by field services staff.

The processes for making these deemed capacity determinations, and for determining whether CFOs are grandfathered in the first instance, are addressed in Operational Policy 2016-6: [Public Notice on Grandfathering Decisions](#).

Unless otherwise noted:

- All further references to “capacity” in this policy refer to a CFO’s livestock *numbers*, not to the scope of the CFO’s facilities (that is, their number, size, and other specifications).
- The term “deemed capacity” refers to the maximum number of livestock allowed by a CFO’s deemed permit.
- “Physical capacity” refers to the number of livestock that a CFO can confine and feed based on the scope of its facilities.
- “CFO” refers to a CFO that is grandfathered under sub-section 18.1(1) of AOPA.

2. Ambiguities in the methods for determining deemed capacity in sub-section 18.1(2)

The following table lists the three types of grandfathered CFOs and accompanying three methods for determining their capacity, in sub-sections 18.1(1) and (2).

Determining Deemed Capacity for Grandfathered CFOs

Categories of grandfathered CFOs	Method for determining a grandfathered CFO's deemed capacity
CFOs that "existed" on January 1, 2002 without a municipal development permit ¹ S. 18.1(1)(a)	Capacity of the CFO's enclosures to confine livestock on Jan. 1, 2002 (for purposes of this policy, the "physical capacity method") S. 18.1(2)(a)
CFOs that "existed" on January 1, 2002 with a municipal development permit that was in effect on January 1, 2002 S. 18.1(1)(b)	Capacity stated in the municipal permit (the "permitted capacity method") or, if not stated, the capacity of the CFO's enclosures to confine livestock on Jan. 1, 2002 S. 18.1(2)(b)
CFOs that were constructed before or after January 1, 2002 pursuant to a municipal permit that was issued before that date (or issued after that date, in response to an application submitted before January 1, 2002) S. 18.1(1)(c)	Capacity allowed by the municipal permit (the "permitted capacity method") S. 18.1(2)(c)

In sub-section 18.1(2), "capacity" appears to refer to the number of animals allowed by a CFO's deemed approval or registration. However, in sub-section 18.1(3), "capacity" appears to refer to the amount or volume of livestock manure allowed by a deemed authorization for one or more grandfathered manure storage facilities.

The NRCB's experience is that many CFOs had more livestock and/or more or different facilities, on or around January 1, 2002, than the maximum livestock number or scope of facilities allowed in their municipal permit. The three simplistic categories of grandfathered CFOs in subsection 18.1(1) do not reflect the full range of CFOs that were issued municipal development permits before January 1, 2002.

As a result, it is difficult to choose between the "physical capacity" and "permitted capacity" methods in sub-section 18.1(2), for determining a CFO's deemed capacity.

From the NRCB's experience, CFOs with municipal permits fit one or a combination of several different scenarios, described below.

Scenario 1: The CFO was originally constructed without a municipal permit because the municipality did not have a permit requirement at that time.² After the permit requirement was adopted, the CFO obtained a municipal permit specifically for a new facility or other modification or expansion to the original CFO. The municipal permit was therefore not meant to cover all of the facilities that the CFO had when the permit was issued. (In some cases, the municipal permit for the new facility also referred to the CFO's total capacity with the new facility. However, in some of these cases, the wording and history of the permit suggest that the capacity reference was intended more for descriptive purposes than as a regulatory limit on the CFO's total capacity.³)

1. Sub-section 18.1(1) refers to both municipal development permits and permits issued under the *Public Health Act* (PHA). In practice, few if any PHA permits were ever issued for CFOs, so this category has become irrelevant for grandfathering purposes.

2. For example, in the County of Wheatland, development permits for CFOs were not mandatory until 1998. See *Hutterian Brethren Church of Mountain View*, NRCB Board Decision 04-09, p. 4.

3. See *Hutterian Brethren Church of Mountain View*, NRCB Board Decision 04-09 (concluding that the CFO's county permit was mainly for the siting of CFO facilities; livestock number stated in the permit was not meant as an enforceable maximum).

Scenario 2: The municipality dropped or waived its permitting requirement for CFO expansions or modifications that were made *after* the CFO was originally permitted.

Scenario 3: The CFO owner constructed new facilities or added livestock numbers beyond those authorized by the owner's municipal permit, in violation of the municipality's permitting requirements. However, in the NRCB's experience, municipal enforcement of these permit requirements varied widely. In many instances, the municipality did not appear to have vigorously enforced its permit requirement when such construction or expansion occurred.

Scenario 4: The CFO didn't expand its facilities after receiving its municipal permit but, as of January 1, 2002, its municipally-permitted facilities were physically capable of confining more livestock than the total number allowed by its permit. In some instances, these CFOs were actually confining and feeding more livestock than their permitted number on January 1, 2002. In other instances, CFOs had stayed below their permitted maximum of livestock, but are now requesting a deemed capacity based on their physical capacity.

3. Fairness considerations in determining deemed capacity

Field services staff will apply the "physical capacity method" in sub-section 18.1(2)(a) of AOPA to establish the deemed capacity of any grandfathered CFO whose physical capacity on January 1, 2002 was greater than its permitted capacity. The reasons for this approach are explained below.

3.1 No permit was required for the CFO expansion

Under a plain reading of sub-section 18.1(2)(b), if a grandfathered CFO had a municipal permit with a cap on the CFO's capacity, the cap should be the CFO's deemed capacity. In other words, the "permitted capacity rule" should apply.

Applying the permitted capacity rule makes sense for a CFO that was originally permitted by a municipality, and then later expanded under a new municipal permit. However, it would be unfair to the CFO owner, and absurd, to apply the permitted capacity rule as directed in AOPA if the municipality did not require a permit for the expansion. (This is the second scenario discussed above.)

When interpreting legislation, courts generally presume that legislatures do not intend to produce "absurd" results.⁴ For this reason, the NRCB believes that the legislature did not intend the permitted capacity method in sub-section 18.1(2)(b) to apply to CFOs in this scenario. The physical capacity method in sub-section 18.1(2)(a) provides a much fairer and more logical result for this scenario.

3.2 A permit was required for the CFO expansion

From the NRCB's experience, in practice, many municipalities did not require permits for CFO expansions, even when their permitting requirement was still officially in effect. This approach led some CFO owners to believe that it was unnecessary to apply for a permit to expand beyond their original permitted capacity. In addition, since AOPA came into effect on January 1, 2002, municipalities have rarely expressed any concerns to the NRCB about unauthorized CFO expansions before that date. In these circumstances, it would be unfair to use the permitted capacity rule in sub-section 18.1(2)(b) to determine the CFO's deemed capacity.

4. E.g. R.V. Thinktank Advertising & Design Inc., 2012 ABCA 48 (CanLII) at para. 22 (noting this presumption as a "well established principle of statutory interpretation....") (citing Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27 at para. 27).

3.3 The CFO increased livestock numbers without a new municipal permit

Similar fairness considerations arise when the CFO increased its livestock numbers beyond its permitted capacity before January 1, 2002, without actually constructing new facilities other than those covered by its municipal permit. (This is a variation under the fourth scenario discussed above.) Once again, if the municipality did not enforce the capacity limit in its municipal permit up until January 1, 2002, it seems unfair to now (some fifteen years later) use that permit limit, rather than the CFO's physical capacity as of January 1, 2002, to set the CFO's deemed capacity.

4. Case-by-case or blanket approach

The scenarios on pages 2 and 3 illustrate the wide range of municipal permitting scenarios. There are also many variants of these scenarios. The fairness implications of applying one deemed capacity rule or another may also vary. This variability might suggest that field services staff should consider the pre-2002 regulatory history of each CFO, in order to decide whether to apply the physical capacity rule or the permitted capacity rule to determine the CFO's deemed capacity.

However, such a case-by-case approach is impractical, in part, because it would be time consuming and labour intensive. More importantly, it would likely be fruitless in many instances, due to the difficulty of obtaining useful, relevant evidence so many years after the regulatory events in question. The problems in collecting evidence arise, in part, from the turnover of municipal permitting staff since 2002. In addition, current municipal officials are unlikely to have sufficiently reliable knowledge of the pre-2002 history of an operation. Another problem is that many, if not most, municipalities have already discarded their pre-2002 regulatory files (other than their actual permits).

Therefore, field services staff will use the physical capacity method in all cases in which a CFO's physical capacity on January 1, 2002 was greater than the CFO's permitted capacity.

For the reasons given above, the NRCB believes that this approach is a reasonable interpretation of the deemed capacity rules in sub-sections 18.1(2)(a) and (b) of AOPA. This approach is also consistent with several review decisions issued by the NRCB's board members⁵ and with prior NRCB policy.⁶

5. How to determine physical capacity

For benchmarks of a CFO's physical capacity, staff will consider best practices in the relevant livestock sector as of January 1, 2002. These practices are evolving, so it would be unfair to keep revising a CFO's January 1, 2002 deemed capacity, based on changes in the industry that have periodically occurred since that date.

5. See *Hairy Hill Colony*, RFR 2007-07, pp. 2-3 (CFO was grandfathered based on its existence on January 1, 2002, even though its 1996 and 1998 municipal permits may have each expired within one year after they were issued). See also *Diamond Valley Dairies Ltd.*, Decision letter RA02027 (July 25, 2002), p. 2 (grandfathering a CFO under the AOPA grandfathering provisions preceding section 18.1, based on the CFO's actual operation as of Jan. 1, 2002, even though the CFO had "at one time" applied for a municipal permit, but "later withdrew" its application") and *De Vries Farms*, Decision RA02050 (Dec. 10, 2002), p. 5 (explaining that a CFO with a 1998 municipal permit is grandfathered under AOPA provisions preceding s. 18.1 based on its existence on January 1, 2002). But see *De Jong* (LA04029), Nov. 15, 2004 letter (concluding that the CFO's deemed capacity is limited to the capacity stated in its municipal permit and rejecting the operator's claim that this permitted capacity was incorrect); *Prairie Feeders (Bassano) Ltd.* (EO 02-03), Decision 02-03 (Aug. 2002), pp. 8-9 (concluding that a CFO pen is not grandfathered because it was not covered by the CFO's municipal permit).

6. See Oct. 30, 2006 email from Peter Woloshyn to NRCB staff, Subject: Update on Capacity; Nov. 17, 2006 letter from Andy Cumming to Sharon J. Shearer, M.D. of Willow Creek No. 26; Oct. 12, 2006 email from Wayne Inkpen to misc. NRCB staff, Subject: RE: explanation of capacity. For clarity and simplicity, this policy replaces and supersedes those previous policy statements.

6. Determining deemed capacity for grandfathered CFOs constructed after January 1, 2002

This NRCB policy focuses on a CFO's physical capacity as of January 1, 2002. The policy therefore does not apply to CFOs that were constructed after January 1, 2002, because they did not have a physical capacity at that time.

As noted in the third category of the table on page 2, these CFOs may still be grandfathered if they received a municipal permit—before or after January 1, 2002—based on an application they submitted before that date. For these CFOs, the NRCB will make a case-by-case determination as to whether to use the CFO's physical capacity (as of the date of their construction) or their permitted capacity, or some other appropriate benchmark.

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