

BOARD DECISION

RFR 2021-08 / EO 21-01

In Consideration of a Request for Board
Review filed under the *Agricultural
Operation Practices Act*

John Schooten and Sons Custom
Feedyard Ltd., Cody Schooten, and
Shane Schooten

November 3, 2021

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The Natural Resources Conservation Board (NRCB) issues this decision document under the authority of the *Agricultural Operation Practices Act (AOPA)*, following its consideration of a request for Board review of Enforcement Order 21-01.

I. Background

This decision addresses a request for the Board’s review, and for a temporary suspension pending that review, of Enforcement Order 21-01 (“EO” or “order”).¹

An NRCB inspector issued that order on September 24, 2021, to John Schooten and Sons Custom Feedyard Ltd. (“Schooten Ltd.”) and to Cody and Shane Schooten. The order related to several beef cattle confined feeding operations (“CFOs”), but primarily to one CFO located on the north half of Section 5, and the south half of Section 8, Township 21, Range 24, W4M. This location is roughly 4 km northeast of the town of Mossleigh, in Vulcan County, Alberta. The order referred to the CFO as the “Mossleigh feedlot” and we will use that shorthand in this decision.

According to the order, Schooten Ltd. has owned the Mossleigh feedlot since April 2018.² It appeared from the order that Cody and Shane Schooten operate the feedlot on a day-to-day basis.

On October 8, 2021, Cody Metheral filed a timely written request for the Board’s review of the order. The request states that it is submitted on behalf of Schooten Ltd. However, the Board treats the request as on behalf of Cody and Shane Schooten, as well as Schooten Ltd. (collectively, the “Schootens,” unless otherwise noted). In their review request, the Schootens asked the Board to “suspend” the order until the Board “makes its decision(s).”

On October 13, 2021, the inspector’s legal counsel sent the Board an email stating that the inspector “takes no position” on the Schootens’ request for a temporary suspension of the order. However, the email stated that the order would remain posted on the NRCB’s website, with the notation “operation suspended.”

A panel of the Board consisting of Peter Woloshyn (panel chair), L. Page Stuart, and Sandi Roberts was established to consider Schootens’ request for review and for a temporary

¹ In this decision, the “Board” refers to the Natural Resources Conservation Board’s board members, or a panel of board members, as opposed to the entire NRCB organization which includes the Field Services division. Field Services answers directly to the NRCB’s Chief Executive Officer and includes NRCB inspectors and approval officers. See NRCB Organizational Chart, online: <https://www.nrcb.ca/about/who-we-are/organizational-chart>.

² EO 21-01 at 2.

suspension of the order pending the review.³ The Board panel (the “Board”) met on October 14, 2021, to deliberate on those requests.

On October 14, 2021, Board Chair Peter Woloshyn issued a letter stating that the Board had decided to suspend the order until the NRCB’s Field Services division made a formal grandfathering decision on the Mossleigh feedlot. The letter stated that reasons and further instructions would follow. Those reasons are set out below.

On October 18, 2021, the inspector’s counsel emailed the Board advising that it was “not certain when” Field Services would issue its formal grandfathering decision. According to the email, this uncertainty was because Field Services had originally planned to make the grandfathering decision in conjunction with its processing of a pending permit application for the Mossleigh feedlot (LA21035). However, Schooten Ltd. had recently requested a postponement of that application.

On October 29, 2021, the inspector’s counsel sent the Board another email stating that Schooten Ltd. had “formally withdrawn” its pending permit application (LA21035), but had also filed the Part 1 portion of a new permit application (LA21053) for the same feedlot. The inspector’s counsel stated further that the NRCB approval officer who is processing the new application will make a grandfathering determination for that feedlot “in tandem with” the approval officer’s processing of the permit application. However, the expected date of the approval officer’s decision was not certain.

As explained below, the Board believes that a grandfathering decision should be made as soon as possible, so the Board expects Field Services to proceed with that decision using the most expedited process available.

II. Summary of the order and Schootens’ request for review

EO 21-01 is based on the inspector’s view that the Schootens have over-populated the Mossleigh feedlot. As explained in the order, this conclusion is based on evidence of the feedlot’s actual animal numbers compared to the capacity allowed by the CFO’s municipal permit. The order (p. 4) suggests that this over-population resulted, at least in part, from the Schootens’ recent practice of using the Mossleigh feedlot to accommodate excess livestock at two other feedlots owned by Schootens Ltd. in southern Alberta.

The Mossleigh feedlot’s municipal permit 98-012 was issued by the County of Vulcan before AOPA came into effect in 2002. (According to the order, the county has issued two county permits for this CFO, but it is unclear whether the second permit cancelled and replaced the

³ The Board has authority to consider a request for review of an enforcement order under section 41 of AOPA. Section 18(1) of the *Natural Resources Conservation Board Act* allows the Board Chair to designate a panel of three Board members to decide this matter.

first. For convenience, this decision refers to a single county permit.) The order presumed this permit to be a “deemed”—that is, grandfathered—permit under AOPA.

The order notes, however, that the NRCB has not yet made an *official* grandfathering determination for the Mossleigh CFO, including a determination of the CFO’s “deemed capacity”, which is the number of animals allowed by the CFO’s deemed permit.⁴ According to the order, a Field Services approval officer was in the process of making a grandfathering determination in the course of considering a new permit application by Schooten Ltd. in relation to the Mossleigh feedlot. (The Schootens’ review request indicated that the application was for an expansion of the Mossleigh feedlot.)

Based on these findings, the order provides an “assumed” deemed capacity of 41,250 head for the Mossleigh feedlot, and additional “assumed” deemed capacities for each of the two other Schooten feedlots asserted to have over-population issues. (The order refers to these latter two CFOs as the “Diamond City” and the “North” feedlots.)

The order then requires the Schootens to provide quarterly reports, for at least two years, of livestock numbers and weights at all three of these feedlots as well as for a fourth CFO—called the “East feedlot” in the order, which apparently is also owned and operated by Schootens Ltd. (The order notes at page 4 that, unlike the other three CFOs, the East feedlot is covered by an NRCB-issued permit, so its allowable livestock capacity is stated in that permit.)

Lastly, the order states (in condition 1(b)) that, if the Schootens “dispute the assumed permitted capacity numbers” stated in the order for the Diamond City and North feedlots, the Schootens “may” submit a written request for the NRCB to make a grandfathering determination for those CFOs.⁵ However, this condition of the order added that if the Schootens do not provide this written request by October 15, 2021, the NRCB “will enforce” the assumed capacities stated in the order for these two CFOs.

The Schootens’ request for review of the order

The Schootens’ request for review (“RFR”) asked the Board to consider whether the inspector “followed the correct process to determine feedlot capacity for the Mossleigh and Diamond City feedlots.” This issue is based on two points raised in the RFR.

First, the RFR noted that the inspector based his determination of the Mossleigh feedlot’s deemed capacity solely on the capacity limit in the CFO’s municipal permit. However, according to the RFR, under NRCB policy the inspector should have based his capacity determination on the CFO’s physical capacity on January 1, 2002. (The RFR implied that the CFO’s physical

⁴ EO 21-01 at 1 and 2.

⁵ This condition referred to the Diamond City and the “West” feedlots. However, the Board presumes the inspector’s reference to the “West” feedlot was meant to refer to the “North” feedlot previously identified in the order.

capacity on January 1, 2002 was greater than the capacity limit stated in the CFO's municipal permit.)

Second, the RFR stated that, because an approval officer was already making a deemed capacity determination (in the course of considering Schooten Ltd.'s CFO expansion application), the inspector should have waited for the approval officer's capacity finding before deciding whether an order was even needed.

Although the issue raised in the RFR stated that it relates to both the Mossleigh and Diamond City feedlots, the RFR's explanations appear to relate only to the former of the two.

III. Grandfathering CFOs under AOPA

As summarized in part II above, the order and RFR raises grandfathering issues. Therefore, before discussing the RFR's merits it is useful to summarize how AOPA addresses grandfathering and the NRCB's grandfathering policies.

Under section 18.1(1) of AOPA, a CFO is grandfathered—that is, it is considered to have a “deemed” permit under the act—if it existed on January 1, 2002 *and* either

- was constructed pursuant to a municipal development permit (or an authorization issued under the *Public Health Act*), or
- was not covered by either of those regulatory approvals before that date.

Deemed capacity

Under section 18.1(2), if a CFO existed on January 1, 2002 with a municipal permit (or *Public Health Act* permit), then its “deemed capacity”—that is, its allowable animal numbers—is the capacity authorized by the permit. Under that section, if a CFO existed on January 1, 2002 without a municipal permit, then its deemed capacity is based on the physical capacity of its enclosures to confine livestock on January 1, 2002.

This legislative formula sounds straightforward, but Field Services staff have identified numerous scenarios that do not fit neatly within one or the other of these two legislative categories. To address this problem, Field Services has adopted a policy for determining a grandfathered CFO's deemed capacity. As relevant here, this policy addresses how to determine deemed capacity when a CFO had a deemed municipal permit with a capacity condition, but the CFO's physical facilities on January 1, 2002 had a greater capacity than that allowed by the CFO's municipal permit. In this case, the policy directs Field Services staff to determine the CFO's deemed capacity based on the CFO's physical capacity as of January 1, 2002.⁶

⁶ NRCB, *Determining Deemed Capacity for Grandfathered Confined Feeding Operations – Operational Policy 2016-5* (Jan. 26, 2016), Part 4 at 4.

Processes for making grandfathering determinations

AOPA does not provide a specific process for the NRCB to determine whether a CFO meets the legislative tests for being grandfathered. In particular AOPA did not set a timeline for CFO owners who believe their CFOs are grandfathered to affirmatively make that claim to the NRCB.

Section 11 of the AOPA Administrative Procedures Regulation, AR 106/2017, addresses this legislative gap. This section *requires* an NRCB inspector to conduct an “investigation” and make a formal grandfathering determination for a CFO, at the request of the CFO’s owner or operator, or in response to a complaint. Section 11 also provides procedural requirements, including requirements for public notice and a written final report, for these determinations and for the Board’s review of the inspector’s final grandfathering decisions.

These provisions of section 11 of the regulation fill in gaps in AOPA with respect to grandfathering procedures, but only somewhat. As described above, section 11 only addresses the circumstances (and procedures) when a Field Services inspector *must* make a formal grandfathering determination. As such, that section does not preclude Field Services inspectors or approval officers from making formal grandfathering determinations in other circumstances. The Board interprets AOPA (and section 11 of the regulation) as giving those Field Services staff implied discretion to make grandfathering determinations under appropriate circumstances other than those listed in section 11, and as giving the Board implied authority to review those determinations.

Consistent with this implied authority, Field Services has developed a grandfathering policy to guide its staff’s exercise of discretion in making grandfathering determinations. This policy states, among other things, that an approval officer should make a grandfathering determination in the context of considering a CFO’s approval or registration application to expand or modify a CFO, when that application is premised on the CFO being grandfathered under AOPA. The policy also states that the approval officer should use the public notice procedures required for those applications to provide public notice on the grandfathering determination.⁷

The *Grandfathering Policy* (part 2.2) also interprets section 11 of the regulation as empowering Field Services staff to determine not just a CFO’s deemed capacity, but all relevant aspects of the CFO’s grandfathered status, including an identification of the CFO’s grandfathered facilities.

⁷ NRCB, *Public Notice for Grandfathering Decisions – Operational Policy 2016-6* (Jan. 26, 2016, updated April 23, 2018) (“*Grandfathering Policy*”), part 2.1 at 2; see also NRCB, *Approvals – Operational Policy 2016-7* (updated May 8, 2018), Part 12 at 40. These and other NRCB policies can be accessed from the “documents” link on the NRCB’s website: <https://www.nrcb.ca/documents#category/6289>.

IV. A review of EO 21-01 is warranted

As with requests for review of AOPA permit decisions, a party requesting a review of an AOPA enforcement order has the onus of showing that a review is appropriate or warranted.⁸ For the reasons below, the Schootens have met their burden of showing that their RFR warrants a review.⁹

Relying on a plain reading of municipal permit 98-012, the inspector concluded that the Mossleigh feedlot had exceeded the animal numbers authorized by the CFO's municipal permit. However, given that the permit is not clear on animal type and Field Services' grandfathering policy calls for a formal "capacity" determination, the Board concludes that Enforcement Order 21-01 is not warranted. Until Field Services makes a formal capacity determination, it is unclear whether the Mossleigh feedlot's enclosures exceeded their capacity to confine livestock.

The Board's conclusion about the order is based on several additional factors. First, the order does not require the Schootens to limit animal numbers to its numbers authorized in municipal permit 98-012. Second, the order does not identify any imminent environmental risks. And third, the Board does not identify any prejudice to the Schootens or Field Services if the order is suspended. However, the Board has concluded that a grandfathering determination is needed to resolve the issues raised in the order.

The Board's findings are discussed in more detail below.

Whether the Mossleigh feedlot has exceeded the capacity in its municipal permit

The Board questions the inspector's position that the Mossleigh feedlot has exceeded the capacity allowed by its municipal permit. According to the order, that permit allows 41,250 head of cattle, but it is uncertain whether that number refers to beef finishers or feeders. The order then goes on to say that, regardless, the Mossleigh feedlot's animal numbers have exceeded 41,250 "on a regular basis since 2019".¹⁰

Page 3 of the order refers to several livestock inventories the inspector used to reach this conclusion. Of these inventories, only one—for a specific day in 2021—identifies the actual animal type. The inspector indicated that the NRCB's grandfathering determination was intended to confirm both livestock type and numbers. However, it is unclear to the Board whether the inspector gathered sufficient information to even *presume*—particularly given that a formal grandfathering decision had not been made—that the Mossleigh feedlot was exceeding its deemed capacity. Therefore, the Board is also unclear why the inspector

⁸ *Beumer Cattle*, RFR 2010-04 at 2; cf *Paragon Livestock Exchange*, NRCB Decision 03-07 at 26 (noting that a party seeking a review of an enforcement order "must demonstrate that there is a need for a review").

⁹ The documents considered by the Board for this decision were limited to those cited in this decision.

¹⁰ EO 21-01 at 1.

concluded that formal enforcement action was needed, at least until the approval officer concluded their grandfathering determination.

Whether the order's requirements can be achieved through other means

The prior point is underscored by what appears to be a lack of stated purpose for (or consequences arising from) the requirements listed in the order. As read by the Board, the order does not actually require the Schootens to reduce the livestock numbers in the Mossleigh feedlot to 41,250, or to reduce numbers in the Schootens' other feedlots to the presumed deemed capacities listed in the order for those CFOs. Rather, the order simply lists the inspector's presumed deemed capacities and then requires the Schootens to provide quarterly reports of their livestock numbers.

However, the Board observes that the inspector does not need an enforcement order to obtain those reports, because section 30(2)(d) of AOPA provides inspectors with broad discretion to request CFOs' records. The scope of these records presumably includes a CFO's livestock inventories. *If* an operator refused to produce the records requested by an inspector, *then* it may be necessary for an inspector to compel their production through an enforcement order or through another enforcement tool.¹¹

Here, Enforcement Order 21-01 states that the Schootens have produced all the livestock inventories requested by the inspector up to his issuance of the order. Based on that history, the Board sees no evidence to suggest that the Schootens would refuse to provide additional quarterly inventories on request. Therefore, an enforcement order in this case appears to have been an unnecessarily heavy-handed tool to simply gather quarterly reports.

As noted in part II above, the order also imposes an October 15, 2021 deadline for the Schootens to dispute the inspector's presumed deemed capacities for the Schootens' Diamond City and North feedlots. However, the order does not state that Field Services worked its way through the "enforcement ladder" contained in its Compliance and Enforcement Policy, before deciding it was necessary to address these other CFOs in an order.¹² Here again, the Board believes it was unnecessary for the inspector to use a heavy-handed enforcement order to achieve that result.

As noted in part III above, the Board interprets AOPA as giving inspectors authority to make grandfathering determinations on their own initiative, and certainly when they have reason to believe that a CFO is operating without a required permit—that is, the CFO is not grandfathered and not also covered by an NRCB-issued permit—or where its permitted capacity (animal type/numbers) is unclear.

¹¹ Under sections 33 and 34 of AOPA, a person who refuses to comply with an inspector's request for records under section 30 is guilty of an offense and is liable for a fine for each day the offense continues.

¹² See NRCB *Compliance and Enforcement (Policy 2016-8)* (updated Aug. 11, 2021).

Formal grandfathering determinations may require public notice and an extensive inquiry and written reasons, so they can be resource and time intensive. With this consideration in mind, the Board agrees that an inspector is reasonably entitled to make *initial* presumptions about a CFO's grandfathered status (including its deemed capacity) and to ask the CFO owner whether they agree with the inspector's presumption. As part of this dialogue between the inspector and CFO owner, the inspector can give the owner a reasonable time to state whether they agree with the inspector's presumptions about the CFO's grandfathered status.

If the owner agrees, and the CFO is operating consistently with the presumed deemed permit's conditions, then it may be unnecessary for the inspector to make a formal grandfathering determination *at that time*. To be clear, if the owner does not respond within the time requested by the inspector, the inspector's presumed deemed capacity does not become set in stone—it should still be followed by a formal grandfathering determination. However, the presumption may provide the basis for some enforcement action pending that formal determination.

This multi-stage scenario has not occurred here. At this point, the inspector does not need to issue an enforcement order to request the Schootens' views (by a certain date), on the deemed capacities of their Diamond City and North feedlots.

That said, the Board views the above-described multi-stage scenario as an interim solution; the NRCB remains responsible for uniformly applying the principles of AOPA—including making grandfathering determinations to clarify animal numbers that directly relate to manure production—for any CFO whose permitted capacity is unclear.

In summary, when the inspector issued Enforcement Order 21-01 it was uncertain whether the capacity limit in the Mossleigh feedlot's municipal permit applied to finishers or feeders. It was also uncertain whether the permit limit even defined the CFO's deemed capacity. At that time, a Field Services approval officer was in the process of resolving those uncertainties by making a grandfathering determination in conjunction with the officer's consideration of an application to expand the feedlot. In addition, the actual requirements in the order were unnecessary for the inspector to obtain the quarterly inventories he was seeking and the Schootens' position on the inspector's presumed deemed capacities for the Diamond City and North feedlots.

Given all these circumstances, it appears to the Board that the order was unnecessary and unreasonable.

The grandfathering determination should be made promptly

The Board believes that it would be unwise for Field Services to further delay establishing the Mossleigh feedlot's grandfathered status. Therefore, if the Schootens' new permit application cannot be processed promptly, the Board expects that the inspector will expeditiously undertake the grandfathering investigation and make a formal determination. (Because the deemed capacity issue arose from a public complaint, and absent a parallel permitting process,

the inspector's determination is required by section 11 of the Administrative Procedures Regulation and is subject to the procedural requirements of that section.)

In the interests of time, if the inspector makes the grandfathering determination, the inspector should consider whether the public notice issued by the approval officer for the Schootens' original permit application (LA21035) is sufficient to satisfy the notice requirements in section 11 of the regulations and in Field Services' grandfathering policy.

Next steps in this review proceeding

Section 41(1) of AOPA enables the Board to "review" an enforcement order on request by the person to whom the order is directed. Under that section, the Board has wide discretion to decide how to conduct its "review" proceeding. (That discretion is limited somewhat by the procedural requirements in the Board's Administrative Procedures Regulation, AR 106/2017, relating primarily to notice and the Board's conduct of official "hearings".) However, the Board generally follows the two-stage process that it is required to follow, under section 25 of AOPA, when it receives requests to review various permit decisions under that act.¹³ Under that two-stage process, the Board first decides whether to grant a review request. If it does so, the Board then conducts a more detailed review, based on a written and/or oral hearing.

Here, the Board questions whether additional steps are needed to complete its review of EO 21-01. The Board views Field Services' formal grandfathering determination as the best forum for resolving questions about the Mossleigh feedlot's deemed capacity and, as noted above, the Board expects Field Services to complete that determination soon. However, the Board has decided to keep this review open until after that grandfathering determination has been made. At that point, the Board will meet with the parties to decide what, if any, additional review steps are needed. If the Schootens disagree with Field Service's capacity determination, they retain their ability to request that the Board review that determination.

V. Reasons for temporarily suspending the order

Under section 41(2) of AOPA, a request for review does not automatically suspend an enforcement order. However, under that section the Board "may, if it thinks fit," suspend an order on a temporary basis, pending the Board's final decision on the review. This is a broadly worded test that gives the Board wide discretion to decide whether a temporary suspension is "fit" or appropriate.

In making this decision, the Board generally considers:

- whether the review request has raised a "serious question" about the merits of the order;
- whether there is a reasonable expectation that the requestor will be irreparably harmed by the order while the review is pending; and/or

¹³ See e.g. *Beumer Cattle*, RFR 2010-04.

- the balance of convenience to the parties and the public interest more generally.¹⁴

In deciding whether a review request raises a “serious question,” the Board considers the request’s likelihood of succeeding on its merits.

The Board stresses that it conducts a qualitative rather than quantitative assessment of these factors.

For the same reasons as those in part IV above, the Schootens’ RFR has raised a “serious question” as to whether EO 21-01 should have been issued.

The Board does not believe that the Schootens will be irreparably harmed by the order, given the limited nature of the order’s actual requirements and, as discussed in part IV above, the inspector’s existing authority to achieve the objectives of those requirements without the use of an enforcement order. However, it is not lost to the Board that the existence of the order could have some reputational impact to the Schootens.

On the other hand, a temporary suspension of the order should not materially affect the inspector’s ability to carry out his investigative and enforcement functions under AOPA, given the inspector’s authority to achieve the order’s objectives through other, less heavy-handed investigative and enforcement functions under AOPA.

For these reasons, the balance of convenience and public interest both favour temporarily suspending the order.

¹⁴ See *AAA Cattle Co. Ltd.*, Board Decision 05-02 at 10. The Alberta Environmental Appeals Board applies a similar test. See e.g. Decision Letter: *Patrick McCarthy v. Director, Southern Region-Red Deer, Regulatory Assurance Division, Alberta Environment and Parks* (27 Jan. 2021), Appeal No. 20-007-DLI (A.E.A.B.), 2021 ABEAB2.

VI. Decision

Based on its deliberations, the Board confirms its decision, in its October 14, 2021 letter, to suspend EO 21-01 pending Field Services' completion of its grandfathering determination for the Mossleigh feedlot. Once again, the Board expects that this determination will be completed expeditiously. To be clear, while the grandfathering determination may be linked to the current application process (LA21053), it is not dependent on that process. The grandfathering determination must be completed whether or not application LA21053 proceeds. Given the reputational concerns noted above, the Board also directs Field Services to remove the order from the NRCB's website, pending the completion of this review.

DATED at EDMONTON, ALBERTA, this 3rd day of November, 2021.

Original signed by:

Peter Woloshyn (chair)

L. Page Stuart

Sandi Roberts

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

#901, 620 – 7 Avenue SW
Calgary, AB T2P 0Y8
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 Response Line: 1.866.383.6722

Email: info@nrcb.ca

Web Address: www.nrcb.ca

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