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GRANDFATHERING (DEEMED PERMIT)

Operational Policy 2023-1

Agricultural Operation Practices Act
April 3, 2023

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1.0 Definitions

The terms “**deemed**” and “**grandfathered**” are interchangeable in this policy.

References to “**capacity**” in this policy, in relation to deemed approvals and registrations, refer to a confined feeding operation’s (CFO’s) livestock numbers, not to the scope of the CFO’s facilities. “Capacity” in relation to deemed authorizations means volume for liquid manure storage and tonnage for solid manure storage.

“**Confined feeding operation**” means fenced or enclosed land or buildings where livestock are confined for the purpose of growing, sustaining, finishing, or breeding by means other than grazing, and any other building or structure directly related to that purpose, but does not include residences, livestock seasonal feeding and bedding sites, equestrian stables, auction markets, race tracks, or exhibition grounds (section 1(b.6) of the *Agricultural Operation Practices Act* (AOPA)).

The term “**deemed capacity**” refers to the maximum number of livestock, or maximum volume or tonnage of manure storage, allowed by a CFO’s deemed permit as determined under section 18.1(2) of AOPA.

“**Deemed approval, registration, or authorization**” refers to a permit held by the owner or operator of a CFO or manure storage facility (MSF) that is grandfathered under section 18.1(1) of AOPA.

“**Field services staff**” for the purposes of this policy means an NRCB-appointed approval officer or inspector (see [section 2.4](#) of this policy).

“**Grandfathered CFO footprint**” means the dimensions of the entire CFO including all MSFs or manure collection areas (MCAs) that held a municipal development (MD) permit, or existed on January 1, 2002.

“**Grandfathered facility**” means an MSF or MCA that is covered by an MD permit, or existed on January 1, 2002 at above AOPA thresholds, with identified dimensions.

“**Manure collection area**” (MCA) means the floor of a barn, the under-floor pits of a barn, the floor of a feedlot pen, and a catch basin where manure collects, but does not include the floor of a livestock corral.

“**Manure storage facility**” (MSF) means a facility for the storage of manure, composting materials, and compost, and a facility for composting, but does not include such a facility at an equestrian stable, an auction market, a race track, or exhibition grounds.

“**MD permit**” means a municipal development permit, or a licence, permit, or other approval issued under the *Public Health Act*.

“**Physical capacity**” refers to the number of livestock that a CFO can confine and feed based on the capacity of the enclosures to confine livestock.

2.0 Introduction

2.1 Purpose

The purpose of this policy is to guide participants in grandfathering determinations under AOPA. The frequency and complexity of grandfathering determinations have increased in recent years, as we move further away from January 1, 2002. While the process of determining a grandfathered (deemed) permit under AOPA is unchanged, the documentation involved in the process has evolved.

This policy combines the substance of two previous grandfathering policies, and fills in policy and procedural gaps that have become evident. A goal of operational policies is to contribute to transparency in how the NRCB administers AOPA. A single, comprehensive policy on grandfathering determinations enhances consistent decision-making among NRCB approval officers and inspectors. This policy also aims to streamline the grandfathering process.

In enacting this policy, the NRCB is repealing Operational Policy 2016-6 Public Notice for Grandfathering Decisions, and Operational Policy 2016-5 Determining Deemed Capacity for Grandfathered Confined Feeding Operations.

2.2 Historical background

When Part 2 of the AOPA came into force on January 1, 2002, the grandfathering of CFOs was a transitional matter in the legislation that enacted Part 2 (*AOP Amendment Act, 2001*). At that time, in brief, if a confined feeding operation did not hold a MD permit as of January 1, 2002, the new standards under Part 2 of AOPA applied to that operation (in terms of permits), but only when the operation expanded.

In 2004, section 18.1 was added to AOPA to provide for deemed permits where a confined feeding operation held an MD permit on January 1, 2002, or where it did not have a permit but “existed.” There is no end point to the operation of section 18.1. As a result, CFOs or manure storage facilities (MSFs) that existed or had a permit on January 1, 2002 are still eligible to be “grandfathered” today.

For many years, the NRCB Board had no jurisdiction to hear a dispute over grandfathering determinations, and a party could only seek a remedy at the Court of Queen’s (King’s) Bench. In a 2012 judicial review of a grandfathering determination, *Unland v Natural Resources Conservation Board*, 2012 ABQB 501, the Court of Queen’s Bench stated that an NRCB grandfathering investigation must be thorough, objective, and supported with written reasons.

In 2017, the Natural Resources Conservation Board (NRCB) Board added section 11 to its AOPA Administrative Procedures Regulation, to provide some guidance on authority and procedure for grandfathering determinations. The Regulation also provided a way to dispute a grandfathering determination at the NRCB Board, instead of in court. Since section 11 was added, the Board has treated grandfathering determinations somewhat like permit applications – e.g. the notice procedure for grandfathering determinations uses AOPA’s application notice procedures. However, because grandfathering determinations determine the state of affairs at January 1, 2002, they require findings of fact that are not part of AOPA permit applications.

2.3 Current context

Grandfathering is generally how legislation exempts existing operations from new regulatory requirements. Lawmakers typically create “grandfathering” exceptions in order to respect prior policies and regulations that generated legitimate expectations and to avoid unfairness for investors who expected a specific regulatory regime.

AOPA recognizes CFOs and MSFs that held an MD permit, or that existed, on January 1, 2002. The owners or operators of those facilities are “deemed” to hold a permit under AOPA. Before that date, CFOs and MSFs were regulated by municipalities or under the *Public Health Act*.

Section 18.1 of AOPA addresses the grandfathering of CFOs in essentially two steps:

1. Section 18.1(1) lists three categories of CFOs (or MSFs) that are considered to have a “deemed” (i.e., grandfathered) approval, registration, or authorization under AOPA.

2. Sections 18.1(2) and (3) state how grandfathered “capacity” is to be determined for each of the three categories described in section 18.1(1).

In a grandfathering determination, an NRCB field services staff will need to address the following questions regarding the state of the site on January 1, 2002:

1. Was the operation a “confined feeding operation” or something else (e.g. a seasonal feeding and bedding site, a cow/calf site)?
2. Was the operation operating at, or permitted for, livestock numbers that exceeded the thresholds in AOPA for requiring a permit?
3. What, if any, permits or licences did the operation hold (or had pending applications for)?
4. What facilities (manure storage facilities or manure collection areas) existed, or were permitted?
5. What was the footprint of the CFO or MSF?
6. What category(ies) of livestock was the CFO confining and feeding, or permitted to confine and feed? What type(s) of livestock in that category? What livestock numbers were permitted or being held for each type of livestock?
7. How were the facilities being used?

In the case of a grandfathering determination requested by an operator or landowner, the onus is on the operator or landowner to provide sufficient evidence to support their claim. The operator has the responsibility to locate and provide records and other evidence to meet the standard of proof for each relevant fact. The standard of proof is on a balance of probabilities (more likely than not). Field services staff may ask clarifying questions and seek particular documents (see [section 6, Investigation](#), below). The quantity, quality, and type of records and other supportive evidence required to meet the onus will vary from case to case. If the grandfathering determination is not being requested by the landowner or operator, the inspector will notify both the landowner and operator to give them an opportunity to provide input and evidence.

The NRCB recognizes the inherent difficulties in grandfathering investigations and determinations. With the passage of time since January 1, 2002, the likelihood of locating records and the reliability of witness evidence fades. Some municipalities have not retained their records. Some operations have changed ownership and relevant records may not have accompanied the shift in owners. Some neighbours who lived near the operation in 2002 may no longer live there. These issues naturally present increasing challenges not just to operators, but also to neighbours, municipalities, and NRCB field services staff.

As with all operational policies, field services staff have discretion to deviate from this policy when its strict application would be clearly unfair, or in other necessary and appropriate circumstances. However, field services staff may wish to seek guidance from management before deviating from this policy. If they do choose to deviate from this policy, field services staff should provide written reasons to support their approach.

2.4 Who can make grandfathering decisions

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

However, section 11(1) of the AOPA Administrative Procedures Regulation calls specifically on NRCB “inspectors” to make those determinations. Sections 11(2), (4), (5), and (8) repeat this reference to NRCB inspectors. By contrast, section 11(3) refers to NRCB approval officers, rather than inspectors. That provision deals with deciding whether to waive the notice process in section 11. However, it may be impractical for approval officers to make those waiver decisions, but no other decisions relating to grandfathering.

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

As for division of tasks on a given grandfathering determination, if a grandfathering determination is:

1. associated with an application = approval officer
2. not associated with an application and there are no NRCB-issued permits = inspector
3. not associated with an application, has received NRCB permits in the past (including authorizations) and the approval officer is still in an active role = the approval officer, though they may consult with the inspector if the inspector has more recent interactions with the operation. If the approval officer is not still in an active role = inspector.

3.0 Types of grandfathering determinations

Field services staff may issue a grandfathering determination in the following three ways:

3.1 In conjunction with an approval or registration application

Type of trigger – approval or registration application for CFO expansion where:

1. the application is likely to be denied, and the operator seeks assurance of what capacity and facilities the operation is currently permitted for
2. there is a dispute about whether construction is unauthorized (i.e. built after January 1, 2002 without a permit)
3. it is necessary to determine which existing facilities or footprint are grandfathered and exempt from having to meet AOPA regulations (section 20(1.2) and 22(2.2) of AOPA).

In those contexts, the NRCB has historically addressed grandfathering through the NRCB's permitting process.

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. Public notice for the grandfathering determination runs simultaneously with public notice for the application. Directly affected parties may submit a request to the NRCB's Board to review permit decisions issued by approval officers. Under section 11(7) of the Administrative Procedures Regulation, this right also exists for seeking review of grandfathering determinations on which those permit decisions are based.

3.2 In conjunction with an authorization application

Type of trigger – authorization application for a facility at an existing CFO with a deemed permit where:

1. an approval officer needs to verify what the operator is claiming, to determine minimum distance separation (MDS) at a CFO or MSF, where the proposed MSF or MCA is moving closer to a neighbouring residence, or
2. an approval officer is uncertain whether the CFO was over threshold on January 1, 2002 and therefore would have required a permit under AOPA.

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 to operations that have a deemed permit under section 18.1 of AOPA.

Until the NRCB adopted the original version of the Public Notice for Grandfathering Decisions policy in 2016 (Operational Policy 2016-6), approval officers made the grandfathering determination as part of their process for deciding whether to issue the authorization. However, AOPA does not require public notice or an opportunity for affected individuals to comment on authorization applications. In this way, the consolidated approach effectively precluded public notice and participation in the related grandfathering decisions.

The 2016 policy outlined how approval officers should use the public notice process for grandfathering determinations. Since June 2017, section 11 of the AOPA Administrative Procedures Regulation for grandfathering decisions has codified this approach.

3.3 As a stand-alone grandfathering decision

“Stand-alone” grandfathering determinations are those investigated and made in a context other than part of a permit application.

Types of trigger:

1. a request by the owner or operator of a CFO or MSF for a grandfathering determination
2. a complaint where determination of the existence of a deemed permit – or the terms and conditions of a deemed permit – is required for the NRCB to respond to the complaint
3. a question whether the operation requires an AOPA permit or not – in other words, whether the operation was above threshold on January 1, 2002
4. a dispute about construction being unauthorized (i.e. built after January 1, 2002 without a permit); an inspector may need to resolve what is grandfathered and what is unauthorized (not grandfathered) in the context of whether to assess an existing facility’s risk to the environment or to require a permit, or
5. a question about sufficiency of manure storage capacity or a manure handling plan.

An inspector will use their judgment to determine whether all parts of a grandfathering determination are required to respond to the complaint.

Lenders, prospective CFO buyers, or municipalities may ask the NRCB to make a grandfathering determination for purposes of financial contingencies or land use planning. Under these circumstances, field services staff will only make a grandfathering determination in response to a request made directly by a CFO owner or operator, or when a CFO owner (or landowner) consents to a request made by a lender, buyer, or municipality.

4.0 Initiating the grandfathering process

Prior to initiating a grandfathering determination, field services staff may wish to obtain the following information:

1. legal land description(s) of the facility or operation to be grandfathered
2. corporate name of the operator (if applicable)
3. landowner name(s)
4. operator name(s), if different from landowner names. Note, if an operator is requesting a grandfathering determination and the operator is not listed on the land title then consent from the landowner must be given
5. categories and types of livestock being confined in 2002
6. number of livestock being confined in 2002
7. a list of all MSFs or MCAs associated with the operation
8. supporting documentation (see records section at [section 7.1](#) of this policy below)

4.1 Preliminary deemed capacity estimate (no claim from owner/operator)

The NRCB Board has recognized that grandfathering determinations may be resource- and time-intensive (RFR 2021-08 / EO 21-01 Schooten and Sons at page 8). In the absence of a claim from the owner or operator, it is sometimes difficult for field services staff to identify the claimed capacity for the public notice of a grandfathering determination. It is also difficult for NRCB inspectors to address an overpopulation complaint in a timely way without knowing the (deemed) permitted capacity of the CFO.

As such, it may be helpful for field services staff to conduct a preliminary assessment to estimate the deemed capacity of a CFO or MSF. This preliminary assessment may be based on:

1. conversations or correspondence with the operator
2. existing MD permits, and other permits or documents that might mention capacity (e.g. water licensing), from the NRCB CFO database and hard copy file
3. aerial photos or satellite imagery of the site around January 1, 2002. For example, field services staff may be able to estimate rough square footage of the footprint and facilities using GeoCortex or Google Earth
4. applying the rough square footage of the footprint in the Agdex 096-81: Calculator for Determining Livestock Capacity for Operations as they Existed on January 1, 2002, and
5. site inspection to determine what facilities appear to have been built pre-2002 and what facilities appear to have been constructed or altered post-2002.

In general, field services staff use this information to develop a preliminary estimate of deemed capacity. Field services staff communicate the preliminary estimate to the operator, and the operator may agree or disagree with it. If the operator agrees, field services staff will use the estimated capacity for the public notice (and may use that capacity as foundation for compliance action in relation to an overpopulation complaint). If the operator disagrees, field services staff will use the larger capacity in the public notice. Either way, field services staff will proceed with a grandfathering determination under the following procedures.

5.0 Public notice

5.1 When public notice is required

Public notice of a grandfathering determination is required if the situation does not fall into either of the two exceptions discussed below ([section 5.2](#)).

The following procedures are in addition to, and consistent with, those set out in section 11 of the AOPA Administrative Procedures Regulation. They apply when public notice is required.

If the grandfathering determination is part of an expansion application (i.e. an approval or registration), notice of the grandfathering determination should be combined with notice of the application to expand. If the grandfathering determination is part of an authorization application or conducted as a stand-alone process, and does not meet the exceptions outlined in [section 5.2](#)., then public notice is required.

5.1.1 What must be included in the public notice

All public notices must identify the location and the CFO or MSF being claimed as grandfathered, as required in subsection 11(4) of the AOPA Administrative Procedures Regulation. Subsection 11(4) prescribes the content of notices, including when responses are due, and any other matters field services staff deem 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.

For a stand-alone grandfathering determination of a CFO, the public notice, when required, must also include a number and type of livestock that is being claimed. If the operator does not specify a claimed number and type of livestock, the field services staff may do a preliminary deemed capacity assessment ([section 4.1](#)).

If the deemed capacity at the end of the investigation is determined to be lower than the capacity in the public notice, there is no need to re-publish a notice. If the deemed capacity is determined to be higher, notice may need to be re-published.

For grandfathering determinations associated with an approval, registration, or authorization application, public notice should include the fact of a grandfathering claim as part of the application and the type of livestock claimed. The claimed livestock capacity is optional for the notice.

For grandfathering of a manure storage facility only, notice to affected parties under AOPA must include the dimensions of the facility being claimed as grandfathered, and type of manure stored in the facility.

5.1.2 Method of notice

Field services staff will adopt the process for notification used in applications under sections 19 and 21 of AOPA, and as further explained in NRCB Operational Policy 2016-7: Approvals.

Section 31 of the AOPA Administrative Procedures Regulation gives field services staff several options for deciding how to provide notice, when notice is required.

5.1.3 Who must be notified

Field services staff inform the municipality in which the operation is located that the operation has requested the NRCB to conduct a grandfathering determination. This notification may act as notice to the municipality as a directly affected party. At this time, field services staff should determine if public notice is required as mentioned above.

Section 11(2) of the AOPA Administrative Procedures Regulation directs notice 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.

Sections 19(1) and 21(1) of AOPA (and the Part 2 Matters Regulation that they refer to, in turn) define the scope of “affected parties” that are entitled to notice of AOPA permit applications. For approval and registration applications, affected parties include owners of and residents on land within a prescribed distance from the proposed development. The prescribed notification distance is derived from a formula that is based on the requested category, number, and type of livestock. For authorization applications, affected parties will include the local municipality as well as any other municipalities that are “affected” under the Part 2 Matters Regulation.

Solely for the purpose of determining the notification distance, approval officers and inspectors will base the CFO's "capacity" on the largest of the following three numbers:

1. the deemed capacity claimed by the CFO owner
2. the estimated capacity determined by field services staff, or
3. the CFO's current physical capacity.

To determine who owns land or resides within this distance, the NRCB will follow the same process as that used for permit applications according to NRCB Operational Policy 2016-7: Approvals.

5.2 When public notice is not required

5.2.1 Existing MD permits

Public notice is not required if an MD permit pre-dates January 1, 2002 and specifies the capacity and livestock type. The AOPA Administrative Procedures Regulation considers it unnecessary to solicit public input for a CFO constructed "pursuant to a [pre-2002] development permit" when the permit resolved all relevant issues as to the CFO's deemed capacity. Under section 11(2) of the Regulation, notice is not required for that situation.

An MD 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 MD permit is greater than the AOPA permit threshold. In this case, the MD permit will be recognized as an AOPA permit effectively issued by the NRCB.

If the operator does not dispute the capacity authorized in the MD permit, then a grandfathering determination is not required.

In the following circumstances, however, notice for a CFO with an MD permit may be required:

1. if the MD permit does not state the CFO's capacity, or livestock category and type, and the NRCB must make a deemed capacity determination, or
2. if the CFO owner claims a grandfathered capacity that is greater than the capacity stated in their MD permit.

5.2.2 Notice waived for indoor CFOs (with or without MD permit)

The purpose of the waiver of notice in section 11(3) of the AOPA Administrative Procedures Regulation is to create a shortcut for those operations where it is plain what was permitted or what existed in 2002, and public notice will not elicit any useful information. 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 than for outdoor pens, based on site visits, aerial photos, and other available records. These facts relate essentially to whether CFO facilities existed on January 1, 2002, their dimensions, their physical capacity, and how they were being used. The exception for indoor CFOs is discretionary under section 11(3) of the Regulation.

Many CFOs with indoor barns (e.g. dairy) 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 section 11(3) as referring to the primary CFO facilities for confining and feeding livestock. If those

primary facilities are indoor, the NRCB will treat the entire CFO as indoor for purposes of this subsection.

Section 11(3) states that field services staff may exercise discretion to waive public notice if, at a minimum, the livestock type and capacity of the structures can be reliably determined by viewing historical aerial photographs and owner/operator records.

For example, waiving public notice for a dairy may be appropriate under the following circumstances:

1. There is reason to believe that the facilities and the number of stalls counted today are the same as what existed on January 1, 2002.
2. Information is available about the practices on January 1, 2002. E.g. if it is obvious where a dairy kept their dries and replacements in 2002.
3. The dairy is predominantly indoor.
4. Historical aerial photographs support the claim of both capacity and type.
5. Records from the owner/operator support the claim of both capacity and type. These records may include milking records, testimonials from neighbours or employees, photographs inside the facilities, etc.

A waiver of public notice means neighbours will not have an opportunity to provide evidence or submissions relating to the grandfathering investigation.

Accordingly, if field services staff decide to waive public notice under section 11(3) of the Regulation, the reasons for the waiver should be clearly set out in the grandfathering decision report or the Decision Summary, as applicable.

6.0 Grandfathering investigation

The following subsections apply to both application-related and stand-alone grandfathering investigations.

The investigation focuses on facts as they existed on January 1, 2002. However, the NRCB generally uses a pragmatic and flexible approach toward applying the January 1, 2002 grandfathering date. Field services staff may seek evidence about the operation between 2000 and 2004, acknowledging that the range is not meant to re-define the January 1, 2002 date in section 18.1 of AOPA.

Considering the operational details for two years before and two years past the January 1, 2002 grandfathering date may be useful if witnesses do not remember what occurred on the exact date of January 1, 2002. Also, considering how an operation functioned over a range of dates might provide additional context for typical daily operational functions.

This approach is reasonable because a more rigid or stricter application of the January 1, 2002 grandfathering date could lead to unfair results. For example, if on January 1, 2002 an operation happened to have emptied its enclosures, had temporarily shut down, or were partway through rebuilding or constructing the enclosures on that date, the capacity of the CFO may not be representative of the typical daily operations during that period. The 2000 to 2004 range is meant to generate sufficient evidence to apply this pragmatic and flexible approach.

If the grandfathering determination is being completed in response to a complaint and is not being requested by the landowner or operator, notification regarding the grandfathering determination must be sent to both the landowner and operator. In this way, the landowner or operator will still have an opportunity to provide field services staff with input and evidence.

6.1 Record collection

6.1.1 Operator records

Since the onus is on the operator or owner to establish the likelihood of their claimed capacity, the operator or owner requesting a grandfathering determination should provide records that support their claim in the grandfathering request. These may include, but are not limited to:

1. milking records
2. shipping and handling records (purchase or sale receipts)
3. feeding records or receipts
4. water licences and/or registrations
5. municipal permits
6. certificate of compliance (e.g. Alberta Agriculture)
7. aerial photographs
8. ownership records
9. site plans or drawings
10. livestock nutrition or veterinarian records
11. testimonials from operators and third parties
12. calving and breeding records
13. income tax records (year ending inventories)
14. government program records
15. premise ID records
16. daily journals

Sometimes a record from the past (e.g. inspection report, letter, part of a decision summary) indicates a grandfathering determination was previously done by the NRCB. Even if not in a formal report form, the previous NRCB determination is valid. However, sometimes a partial supplemental determination may be required – for example, to determine the deemed footprint or facilities.

6.1.2 Field services review

The following records, if available, may assist NRCB field services staff in making a grandfathering determination:

1. land title search
2. corporate search
3. historical municipal records (development permit application forms)
4. aerial photographs (Google Earth Imagery, GeoCortex, County/MD, etc.)
5. historical NRCB records (hard copy and database entries), including correspondence relating to CFO status
6. Alberta Environment and Protected Areas records (water well licensing)
7. records from a site inspection (see [Section 6.2 Site inspection](#) for more details)
8. records from an operator interview (if applicable); the interview may be recorded and should have two field services staff present
9. Agriculture and Irrigation records (dairy inspection records, cattle feeders' records)
10. *Public Health Act* licences, permits, or approvals
11. records from livestock industry associations

6.2 Site inspection

NRCB field services will conduct a site inspection with the operator to gather information about the operation as it existed in 2002 such as:

1. grandfathered CFO footprint (based off aerial photos, drawings)
2. facilities in operation (based off aerial photos, drawings, or other evidence)
3. permanent vs. temporary infrastructure, such as feed bunks and watering stations
4. infrastructure inside facilities, and condition of existing infrastructure (does it look as if it was constructed pre-2002?)
5. pit wells, pumphouses
6. location of fences over time
7. alteration (interior or exterior) or abandonment of facilities
8. water wells (e.g. stock vs. domestic use)
9. number of stalls for dairy barns
10. management practices (e.g. free range birds with access to the outside)
11. feeding practices (e.g. CFO vs seasonal feeding and bedding site (SFBS))
12. air photographs to assess whether any unauthorized construction occurred since January 2002
13. handling and processing facilities
14. feeding regime (permanent feed bunks vs portable round bale feeders)

Field services staff will interview the operator in conjunction with the site inspection. The interview can be informal or formal, though it will be more formal when there is little or no documentation, or where there is conflicting evidence.

6.2.1 Outdoor facilities at CFOs

When investigating outdoor facilities at CFOs, field services staff will also consider whether the operation was an SFBS, solely a cow/calf operation, or a CFO on January 1, 2002. See:

- a. Operational Policy 2015-2: Distinguishing Between Confined Feeding Operations and Seasonal Feeding and Bedding Sites (for Cattle Operations);
- b. Operational Guideline 2019-1: Sheep Confined Feeding Operation Determinations; and
- c. Operational Guideline 2016-9: Meat Goat CFO Determinations

In the absence of certainty over whether an operation was an SFBS, cow/calf operation, or CFO in 2002, the NRCB will use current standards to make this determination.

6.2.2 Environmental risk assessment

While at the site, field services staff will take the opportunity to gather information about potential risks posed by existing MSFs and MCAs to groundwater and surface water. Generally, field services staff use the NRCB's Environmental Risk Screening Tool (ERST) to assess site-specific risks. Field services staff will also use their professional judgment, and may wish to access the expertise of the NRCB's Science and Technology division when assessing risks to the environment.

If an existing facility poses a risk to the environment, then:

1. the permit may include conditions to address the risk following NRCB policy if the grandfathering determination is part of an application for an approval, registration, or authorization, or
2. the risk will be identified to NRCB compliance for follow up under NRCB policy if it is a stand-alone or complaint-triggered grandfathering determination.

6.3 Determining capacity

6.3.1 Permitted capacity

An MD 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.

To identify the permitted livestock capacity, field services staff will consider MD permits. The NRCB’s CFO database houses many municipal permitting documents, but may not be exhaustive. For this reason, it may be helpful for field services staff to check hard copy files, and to seek information from the municipality.

Certificates of compliance from government departments are not “development permits” under AOPA and are not themselves a deemed permit. However, the information contained in a certificate of compliance may be helpful in a determination of physical capacity.

6.3.2 Physical capacity

For determining facilities’ capacity under a deemed **approval or registration**, field services staff will determine on a balance of probabilities what the capacity of the enclosures to confine livestock was on January 1, 2002.

Field services staff may also refer to Technical Guideline Agdex 096-81 *Calculator for Determining Livestock Capacity of Operations as They Existed on January 1, 2002*. While this guideline is a tool for determining physical capacity, field services staff have discretion in how they use the tool. For example:

- a. If the operator had a different management practice that doesn’t follow the guideline, discretion can be exercised as long as the rationale is explained.
- b. Field services staff may discount feed alleys, handling facilities, etc. when entering the numbers into the Agdex 096-81 calculator to account for the non-MSF and non-MCA portions of the total area.

The calculator may function as an aid to assessing the reasonableness of a claimed capacity. Operators are encouraged to provide evidence or describe their management practices in 2002 in addition to the results obtained using the Agdex 096-81 calculator and air photos.

For determining the capacity of facilities constructed under a deemed **authorization**, field services staff will consider evidence of the dimensions of MSFs (e.g. historical air photos, liquid levels, operator records), and evidence of manure management practices including the number and type of livestock that produced the manure that was stored at the facility. Field services staff can use Alberta Agriculture and Irrigation’s manure volume storage calculators for verification or supplementary guidance.

For any type of grandfathering determination of physical capacity, another tool is the *Manure Characteristics and Land Base Code* to provide some evidence of manure storage capacity (liquid) by back-calculating land base against claimed capacity. Field services staff may also consider the *2000 Code of Practice for Responsible Livestock Development and Manure Management*.

6.3.3 Determining which capacity method to use

If there is an MD permit that sets out capacity, and if the operator does not claim they are grandfathered at a greater capacity, then the deemed livestock capacity is what is in the permit (“permitted capacity”) under section 18.1(2)(b) of AOPA.

If an MD permit specifies capacity, but the operator claims a grandfathered capacity greater than that specified on the MD permit, then field services staff determine the capacity of the enclosures to confine livestock on January 1, 2002 (“physical capacity”) under section 18.1(2)(a) of AOPA.

If there is no MD permit, then field services staff determine the capacity of the enclosures to confine livestock (“physical capacity”) under section 18.1(2)(a) of AOPA.

See scenarios in [Appendix A](#).

7.0 Grandfathering decision

7.1 When a formal grandfathering report is not needed

It is unnecessary to complete a formal grandfathering report or provide notice for a CFO constructed pursuant to an MD permit issued prior to January 1, 2002, where the MD permit establishes the CFO’s deemed capacity and livestock category and type, and the deemed capacity and animal type match what an operator is claiming. In that situation, field services staff may issue a letter to the operator (with a courtesy letter to the municipality) recognizing the pre-2002 MD permit and the category, type, and capacity set out in that permit as a deemed permit under section 18.1 of AOPA.

7.2 Grandfathering reporting process

Where a written report is required to explain a grandfathering determination, section 11(5) of the AOPA Administrative Procedures Regulation requires that a report state:

1. whether affected parties that made submissions are directly affected
2. whether a deemed permit exists
3. any other terms or conditions included in the deemed permit; this will include terms and conditions deemed to exist under section 18.1(4) and any clarified under section 18.1(5).

Stand-alone grandfathering determinations also may include, but are not limited to, reasoning related to:

1. introduction and background
2. context of the deemed permit determination (legal authority, standard of proof, the process)
3. evidence submitted and considered (operator, municipalities, neighbours, affected persons, and directly affected parties, etc.)
4. findings based on records or inspections – whether the CFO existed; whether above threshold; footprint; capacity; directly affected parties
5. status of the deemed permit today
6. a list of all manure and livestock facilities.

For grandfathering determinations triggered by **approval or registration** applications, the reasoning to support the determination typically appears in an appendix in the decision summary supporting the permit decision. That appendix, in combination with information received from written responses to the application, information in the technical document, measurements from historical aerial photos, and other portions of the decision summary, will provide the basis for the reasons.

For grandfathering determinations triggered by an **authorization** application, the reasoning to support the determination will either appear in an appendix in the decision summary (including reasoning on notice and directly affected parties), or will appear in the form of a stand-alone determination.

Where notice has been waived under section 11(3) of the AOPA Administrative Procedures Regulation, the grandfathering decision report will be sent to the municipality and the applicant, and will be published on the NRCB website.

8.0 Cancelling permits that include grandfathering determinations

On occasion, an approval officer may cancel an NRCB-issued permit, where a grandfathering determination was made as part of the permit application process and explained in the decision summary. In those cases, the CFO's grandfathered status and capacity determination set out in the cancelled permit, or supporting documentation, remain in effect.

9.0 Validity of deemed permit today

A grandfathering determination ascertains factual considerations such as: whether there was a CFO on the site on January 1, 2002, and if so, what categories and types of livestock the operation was feeding on January 1, 2002. A grandfathering determination does not make findings of the status of the operation on the day the grandfathering determination is made. The current status of the operation "today," however, is likely to provide valuable information that an operator or potential lender, seller, or purchaser would like to know.

Determining the current status of a confined feeding operation, including whether a deemed permit in 2002 is still the same deemed permit today, may require decisions related to abandonment, disturbance or alteration of facilities or CFOs occurring between 2002 and "today" (i.e. the date of the grandfathering determination).

9.1 Facilities or CFOs that have been abandoned

This issue is whether, at some point between 2002 and "today" (i.e. the date of grandfathering determination), the CFO or manure storage facility has been abandoned.

In a decision concerning a grandfathered (deemed) permit determination (RFR 2020-04 *Stant Enterprises Ltd.*), the Board implied that where 18 years have passed since the time window used in a grandfathering, it may be appropriate to evaluate a question of abandonment.

Assessing abandonment is not a prescribed process in AOPA. Rather, it is a possible basis for cancelling a permit. Under section 29(1)(b) of AOPA, the Board (or an inspector or approval officer with delegated authority) may cancel a permit if the confined feeding operation, manure storage facility, or manure collection area to which the permit relates "is abandoned." The authority to cancel a permit under section 29(1)(b) applies equally to cancelling a grandfathered permit.

NRCB Operational Policy 2016-3: Permit Cancellations under AOPA Section 29 provides guidance on whether an operation or facility has been abandoned, and if so, whether to cancel a permit for that operation or facility. Some key principles from that policy include:

1. Various factors need to be considered when assessing whether an operation (or facility) has been abandoned.
2. The owner's intent regarding future use is a key factor.
3. An approval officer may amend the permit rather than cancelling it if only part of an operation has been abandoned.

Field services staff bear the burden to establish that an operation (or facility) has been abandoned.

9.2 Deemed facilities that have been disturbed or altered since 2002

Facilities that are deemed to have an AOPA permit retain that deemed status only as long as the essential conditions of those facilities remain as they were on January 1, 2002. The policy objective behind grandfathering is to protect legitimate expectations and reduce unfairness to operators who did not receive adequate notice of AOPA Part 2 from being expected to conform to the “new” standards. When AOPA was being developed, the expectation was that, over time, older facilities would adhere to AOPA’s requirements as they were upgraded or replaced. The idea is that, prior to AOPA, operators made their investment decisions on the basis of the rules as they stood at the time, and that it would be unfair to subject those operators to the new rules.

If an operator substantially changes the liner of a grandfathered manure storage facility or collection area, then the policy objective behind grandfathering that liner is erased. In addition, as a general rule, if a deemed facility is changed in a way that constitutes “construction” under AOPA, including the NRCB’s interpretation, then that facility will lose its deemed status. This rule applies even where the “construction” does not alter the existing liner (e.g. but where capacity of manure storage or collection increases). Further explanation of what constitutes “construction” is provided in NRCB Operational Policy 2012-1: Unauthorized Construction, and Livestock Pen Floor Repair and Maintenance Fact Sheet.

See example: Board decision RFR 2019-04 *Sundown Feeders*.

Appendix A: Scenarios where physical capacity method is appropriate even with a municipal permit

Scenario 1: The municipal permits only cover facilities that were built closer to 2002 (newer facilities)

The CFO was originally constructed without a municipal permit because the municipality did not have a permit requirement at that time. 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 before 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.)

- Use physical capacity method consistent with evidence

Scenario 2: The municipal permits cover only facilities that were built long ago (older facilities)

In this case, the municipality dropped or waived its permitting requirement for CFO expansions or modifications that were made after the CFO was originally permitted.

- Use physical capacity method consistent with evidence

Scenario 3: The CFO owner constructed facilities or added livestock numbers beyond those authorized by the municipal permit.

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.

- Use physical capacity method consistent with evidence

Scenario 4: As of January 1, 2002, a CFO's 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.

- Use physical capacity method consistent with evidence

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

Airdrie Office

Airdrie Agriculture Regional Centre
97 East Lake Ramp NE
Airdrie AB T4A 0C3
T 403-340-5241

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 Reporting 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 King's Printer at www.kings-printer.alberta.ca or through the NRCB website.

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