

BCBHEC Report on Asian Breeder Producers - Reference documents

APPENDIX 1:	Amending Order draft	Page 1 - 2
APPENDIX 2:	The BC Hatching Egg Asian Breeder Producer Work Action Plan.	Page 3 - 5
APPENDIX 3:	The list of Considerations prepared by Commission staff	Page 6 - 11
APPENDIX 4:	Letter to the Asian Breeder Producers regarding the Schedule 5 of the consolidated orders.	Page 12
APPENDIX 5:	The Asian Breeder Producer April 6, 2016 letter to the BC Hatching Egg Commission	Page 13 - 14

**AMENDING ORDER ?
TO THE
CONSOLIDATED ORDER OF MAY 1, 2016**

**MADE BY
THE BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION
ON _____, 2016**

The British Columbia Broiler Hatching Egg Commission orders as follows:

1. *Section 1 of the Consolidated Order of May 1, 2016 is replaced with the following:*

Purpose and Application of Order

1. (a) The British Columbia Broiler Hatching Egg Commission (the "Commission") has approved this Consolidated Order for the purpose of promoting, regulating and controlling the production, transportation, packing, storage and marketing of Broiler Hatching Eggs, Chicks and broiler breeders.
 - (b) Except as might otherwise have been determined by the British Columbia Farm Industry Review Board in its March 29, 2016 decision in the matter of *Skye Hi Farms Inc. et al. v British Columbia Broiler Hatching Egg Commission et al.*, persons:
 - (i) who are engaged exclusively in the marketing of Silkie or Taiwanese broiler breeders, Silkie or Taiwanese Broiler Hatching Eggs, or Silkie or Taiwanese Chicks; and
 - (ii) who have applied for, obtained, and are in good standing with a partial exemption permit issued by the Commission in accordance with this paragraph;
- are not bound by the provisions of this Consolidated Order, save for:
- (iii) Section 1 of the Consolidated Order;
 - (iv) Schedule 5 to the Consolidated Order and the definitions related thereto; and

(v) the requirement to pay fees or charges imposed by the Commission from time to time in order to recover costs associated with the administration and enforcement of Schedule 5 to the Consolidated Order with respect to persons engaged in the marketing of Silkie or Taiwanese broiler breeders, Silkie or Taiwanese Broiler Hatching Eggs, or Silkie or Taiwanese Chicks.

2. *This Order comes into effect on _____, 2016.*

DATED at Abbotsford, British Columbia, on _____, 2016

BRITISH COLUMBIA BROILER HATCHING EGG COMMISSION

Casey Langbroek, Chair

Asian Breeder Hatching Egg Producers: Work Action Plan

Stakeholders:

- BC Asian Breeder Hatching Egg Producers
- BC Broiler Hatching Egg Producers Association (BCBHEPA)
- BC Chicken Growers Association (BCCGA)
- BC Chicken Marketing Board (BCCMB)
- BC Processors
- Canadian Hatching Egg Producers (CHEP)
- BC Farm Industry Review Board

Purpose:

- To undertake the requisite due diligence incumbent on the Commission to ensure fair and orderly marketing in the hatching egg sector.

Outcomes:

- To determine the extent to which, if at all, the Asian Breeder Hatching Egg Producers ought to be subject to the existing regulations or to alternative regulations (other than Biosecurity, Food Safety and Premise ID).

Scope:

- This undertaking will identify and assess the BC FIRB's decision in the Skyhi/V3 appeal in regards to regularization of Asian Breeder Hatching Egg Producers.
- This undertaking will identify and assess the considerations material to the determination of the extent to which, if at all, the Asian Breeder Hatching Egg Producers ought to be subject to the existing regulations or to alternative regulations (other than Biosecurity, Food Safety and Premise ID).
- This undertaking will identify and access the risk to the Industry in terms of Biosecurity, Food Safety and Biosecurity.

Background:

In September 2015 the BC Hatching Egg Commission was the respondent in an appeal process regarding Amending Order 11. In March 2016 a decision was made by BC FIRB and the BC Hatching Egg Commission was given a list of orders and a timeline for completion. This work action plan was developed to ensure that both of those directives were completed.

Phase 1:

Food Safety, Biosecurity and Premise ID

Approach:

- To update the consolidated orders to reflect the appeal decision to remove Amending Order 11.

Asian Breeder Hatching Egg Producers Work Action Plan

- To review the Orders, in particular Schedule 5 which speaks to Biosecurity, Food Safety and Premise ID program audits.
- To instruct Commission staff to schedule, conduct and follow up on all Asian Breeder facilities that are engaged in hatching egg production by the BC FIRB's ordered deadline of April 29, 2016

Expected Outcome:

- Asian Breeder Hatching Egg Producers are to be Biosecurity and Food Safety audited by May 30, 2016
- To Ensure that all Asian Breeder Hatching Egg Producers have premise identification on all associated premises.

Deliverables:

- Asian Breeder Hatching Egg Producers are yearly audited and compliant under the consolidated orders in terms of Biosecurity, Food Safety and Premise Identification Programs.

Phase 2:

Review of Decision to determine course of action on regulating the Asian Breeder Hatching Egg sector or on developing an exemption permit program.

Approach:

- Review the BC FIRB's Sky-Hi/V3 decision and create a list of considerations.
- Review the list of considerations with through the SAFETI lens of good governance, with all stakeholders considered.

Expected Outcome:

- A SAFETI rationale regarding the Commission's decision
- The ordered report to all Stakeholders.
- A consultative review of both the SAFETI review and the report.

Deliverables:

- A sound decision delivered to the stakeholders in the form of a report, based on the SAFETI model of good governance delivered by the BC FIRB's deadline of June 29, 2016

Phase 3:

The development of the decision reached by the Commission by BC FIRB's deadline of September 29, 2016

Approach:

- Administrative involvement and execution of the Commission's decision.

Expected Outcome:

- Asian Breeder Hatching Egg Producers that are in a system and/or program to ensure that Biosecurity, Food Safety and Premise ID are prioritized.

Asian Breeder Hatching Egg Producers Work Action Plan

Deliverables:

- Definition by way of a decision.

QUESTIONS AND CONSIDERATIONS

At paragraphs 134 – 137 of its decision, the BCFIRB wrote:

134. Before enacting any other regulation in regards to persons engaged in the production of Silkie or TC broiler hatching breeders, eggs, or chicks, the Commission is to consider the full scope of potential regulation, develop options and determine which best meet its objectives for the industry. At a minimum, the Commission must determine if production controls are necessary and whether or not the Commission should be setting chick price. As part of its consideration, we would expect the Commission to consider the role the Chicken Board currently plays in regulating the production of specialty chicken and the impact of its pricing orders which include a pricing component for Asian specialty chicks. To put it another way, should the Commission directly regulate the amount of production of Asian breeders, eggs or chicks and their price or should the Chicken Board indirectly regulate these components of Asian production through its regulation of specialty chicken?
135. The Commission must decide if further regulation is needed to achieve sound marketing objectives including industry stability, innovation and diversification based on the application of the outcome based principles of a SAFETI analysis.
136. No later than 90 calendar days from the date of this decision, the Commission is to provide a report to its stakeholders and BCFIRB with its recommendation(s) with respect to paragraphs 134 and 135 above, fully supported by a process consistent with SAFETI principles. This report will determine whether or not the Commission intends to exempt persons engaged in the production of Silkie or TC broiler hatching breeders, eggs or chicks, from regulation except with respect to any provisions regarding biosecurity, including identification and registration of premises, and food safety referred to in paragraph 133 above. If the Commission's choice is for exemption, the report must include draft changes to the existing regulatory scheme to support the exemption.
137. In the event that the Commission decides not to exempt persons engaged in the production of Silkie or TC broiler hatching eggs from regulation and instead decides to pursue some form of regulation of production levels and /or pricing, the Commission has a further 90 days to complete an appropriate consultation process and enact a regulation(s) supported by a SAFETI analysis. If regulations are enacted to deal with production and pricing, they must include an appropriate mechanism (such as an advisory committee) through which the Commission will seek and obtain advice from those affected, each time it changes any aspect of production or sets a price for the Asian sector.

The following questions and considerations may be useful as the Commission discharges the responsibilities imposed on it as described above.

- **Why did the Commission originally decide that Silkie and Taiwanese producers should be “regularized” and regulated in all respects?**
 - It was the Commission’s view that its Consolidated Order applies to these producers:
 - In its Reasons for Decision with Appendices dated April 9, 2015, the Commission expressed its view that it has “actively regulated Silkie and Asian broiler breeder flocks”, and that the Appellants are properly regarded as being non-compliant with the Consolidated Order (and in particular, section 37). See paragraphs 5 - 15.
 - In its Closing Argument before the BCFIRB, the Commission noted that:
 - Past unlawful production cannot give rise to a right to quota that is enforceable against a commodity board [as per *British Columbia (Milk Marketing Board) v. Aquilini*, [1998] B.C.J. No. 2061].
 - A failure to enforce against non-compliant activity does not have the effect of creating a "right" to continued non-compliance [as per *Materi v. BCEMB* (August 14, 2007)]
 - The Commission concluded that an effective regulatory response could not be premised on the idea that Silkie and Taiwanese Broiler breeders can or should be regarded as a specialty strain:
 - The Commission noted that production of broiler hatching eggs from Silkie and Taiwanese broiler breeder flocks does not satisfy the BCFIRB’s requirements for “specialty” differentiation. In its September 1, 2005 report, the BCFIRB clearly indicated that “[c]ertification is to be required as a condition of licensing for all designated specialty product classes.” See paragraph 28.
 - Having regard to the BCFIRB’s requirement that “[d]esignation of specialty product/market classes is to be based on clearly defined criteria”, the Commission concluded that it could not define “specialty” production with sufficient precision to avoid undermining the orderly marketing system:
 - “the Commission came to the view that it would not be sound marketing policy to afford special regulatory accommodation to producers of Silkie and Taiwanese broiler hatching eggs on the basis of the strain of broiler breeder. If the Commission did so, on what rational basis could any person be denied a special regulatory accommodation? Unless, as the BCFIRB stated, the designation of a special class was based “on clearly defined criteria”, would any producer be free from the obligation to produce under quota if they started producing under a strain of broiler breeder that, in the final analysis, is not fundamentally distinguishable from any other strain of broiler breeder? Could the hatcheries themselves effectively dismantle the supply management system by

directing producers to produce under some strain of broiler breeder? All these questions caused the Commission to think its failure to enforce against producers of Silkie and Taiwanese broiler hatching eggs had the effect of creating a vulnerability to the continued integrity of the system. After all, if these producers were officially recognized as being able to produce without license and quota, why should any producer be obliged to produce under license and quota? That question could only be answered if it was possible to distinguish producers of Silkie and Taiwanese broiler hatching eggs “on clearly defined criteria”. See paragraph 29.

- **In its decision, how did the BCFIRB rule with respect to the Commission’s analysis above?**
 - The BCFIRB appears to have ruled that the Commission’s Consolidated Order either does not apply to Silkie and Taiwanese producers, or if it does apply, the Commission’s failure to enforce the Consolidated Order against them has resulted in a circumstance in which it may now be said that they are no longer “actively regulated” (if they ever were):
 - The BCFIRB ruled that the Commission failed to articulate a meaningful rational for its position that the Appellant producers are bound by the Consolidated Order and that its failure to enforce cannot be regarded as creating a de facto exemption. See paragraph 70.
 - The BCFIRB states: “[w]hile the Commission argues that it has ‘always’ regulated specialty breeder and broiler hatching egg production, we do not agree.” See paragraph 109.
 - The BCFIRB essentially ruled that Silkie and Taiwanese breeders and broiler hatching eggs can and should be regarded as a special class:
 - “The panel finds that the production this program authorizes is a type of niche production that formed the basis for the 2005 Specialty Review, and the directions of that report apply to this historically non-regulated production, irrespective of the changes in name the Commission used to describe it or the direction the Commission took to regulate it.” See paragraph 113
 - The BCFIRB seems to indicate that the Commission should not adopt an approach that might have a negative impact on the businesses of the present Silkie and Taiwanese producers, or that might impair other persons from entering “into an unregulated (or not actively regulated) hatching egg industry” thereby “enhancing diversity amongst producers in the further development of this sector”:
 - “Moving on to the Regularization Program itself, we find that the Commission failed to take into account the impact that the level of quota allotments issued under the Program would have on the appellants’ hatching egg production operations. While the Commission would not be bound by this factor alone, some serious consideration must be given to the reality that Skye Hi and V3’s hatching egg businesses would be destroyed as a consequence of the amending order, as the quota allotted is not enough to supply their own farms let alone their third

party customers. As well, W. Friesen will not receive enough quota to meet its current market needs. The Commission points to flexibility in its allotment process but we observe that it rejected out of hand the appellants' applications for further allotments as a result of exceptional circumstances, finding that their circumstances were related to acquiring more base as opposed to specific and unique production needs." See paragraph 112

- "...there is no recognition in the Reasons for Decision, the meeting minutes, or the Commission members' testimony that suggests that the Commission gave any meaningful consideration to the negative impact its decision would have on the appellants. The Commission's justification for its choice of historical production period was its desire to avoid "a race for base" and the associated market disruption and instability. While this was expressed as a concern, neither the Commission nor Bradner and Coastline brought any evidence to show that the entry of two new producers in the sector had in fact caused disruption or instability." See paragraph 115
 - "...the entry of Skye Hi and V3 into an unregulated (or not actively regulated) hatching egg industry in 2010. In the view of the panel, this is part of the industry's overall success story and is an indication of the growing strength of this small but important sector. It is not, as depicted by the Commission, Bradner and Coastline, a story of self-interest, market chaos and something to be condemned." See paragraph 116
 - "The panel finds that regulating a return to fewer producers of Asian chicks than now exist is not consistent with sound marketing policy. In the current market, chicken growers have more choice of chick producers and there is increased opportunity for the development of variety within hatching egg breeds. We heard compelling arguments that diversity of producers in the Asian hatching egg sector provides for a more resilient marketplace, increased production efficiencies within the sector overall and protection in the event of outbreaks of disease or other disasters. In our view, the Commission's orders fail to give sufficient weight to the importance of diversity amongst producers in the further development of this sector." See paragraph 117
- **Is there any aspect of the Commission's original analysis favouring "regularization" that has survived the BCFIRB decision?**
 - The Commission's approach was entirely premised on the idea that Silkie and Taiwanese producers are bound by the Consolidated Order and that a failure to enforce cannot be regarded as creating a de facto exemption. The BCFIRB ruled that the Commission failed to articulate a meaningful rational for that position and stated: "[w]hile the Commission argues that it has 'always' regulated specialty breeder and broiler hatching egg production, we do not agree."
 - The Commission concluded that there are no clearly defined criteria that exist to distinguish Silkie and Taiwanese breeders from any other strain of breeder. The Commission was of the view that if it could not define "specialty" production with

sufficient precision to rationally distinguish among various strains of broiler breeders, the orderly marketing system would be undermined. Though the BCFIRB did not attempt to articulate any such clearly defined criteria, it did rule that “the production this program authorizes is a type of niche production that formed the basis for the 2005 Specialty Review, and the directions of that report apply to this historically non-regulated production, irrespective of the changes in name the Commission used to describe it or the direction the Commission took to regulate it.”

- **Are there other considerations that weigh for or against regularization?**

- The BCFIRB chastised the Commission for taking an approach that could have the effect of negatively impacting the businesses of the present Silkie and Taiwanese producers, or that might impair other persons from entering “into an unregulated (or not actively regulated) hatching egg industry” (the latter being something that has the effect of “enhancing diversity amongst producers in the further development of this sector”).
- Any system of orderly marketing that is dependent on the requirement to hold quota has the potential to negatively affect the businesses of persons who either presently produce without quota, or who might in future wish to enter the industry without quota.
- If the Commission exempts persons who wish to produce from Silkie or Taiwanese breeders from the requirement to hold quota, the Province might not be able to meet its responsibilities under the federal-provincial agreement. Contra this, the BCFIRB ruled that the Commission’s effort to regularize these producers within the quota system was in fact “inconsistent with federal regulatory rules”. See paragraph 111. Further, in its decision, the BCFIRB seems to telegraph that production volume (in aggregate) may be indirectly controlled by the volume of chicken quota set aside for Silkie and Taiwanese chicken by the BCCMB. Though any excess broiler hatching eggs produced might displace other “quota” production, the BCFIRB has effectively negated any basis for this concern by holding that this production is “niche production” that is distinguishable from all other various strains of broiler breeder.
- After the BCFIRB issued its decision, 5 of the 6 existing Silkie and Taiwanese producers wrote to the Commission expressing support for regularization as proposed by the Commission, but subject to a few, modest suggestions. However, the question remains as to whether the BCFIRB’s ruling leaves any scope to implement a program that was found to be fundamentally contrary to “sound marketing policy.”

- **What changes to the existing regulatory scheme might be required to support exemption?**

- Arguably, no changes are required. Though the Commission vigorously advanced the view that Silkie and Taiwanese producers are subject to the Consolidated Order, the BCFIRB ruled that the Commission had failed to articulate a meaningful rational for its position that the Appellant producers are bound by the Consolidated Order and that its failure to enforce cannot be regarded as creating a de facto exemption. See paragraph 70.
- In this respect, the BCFIRB’s decision has created uncertainty with respect to the extent to which the existing producers may be subject to the Commission’s “provisions regarding

biosecurity, including identification and registration of premises, and food safety". The Commission has informed these producers as follows:

Schedule 5 contains the provisions which, among other things, oblige Producers to comply with the Commission's biosecurity standards, premise ID registration requirements, and food safety standards. Except to the extent that the BCFIRB's decision in Skye Hi might indicate otherwise, the Consolidated Order (including Schedule 5) applies to persons engaged in the production of Silkie or TC broiler hatching breeders, eggs or chicks.

- Notwithstanding the questionable applicability of the Consolidated Order to persons engaged in the marketing of Silkie or Taiwanese broiler breeders, broiler hatching eggs or chicks, it would be prudent to clarify the nature and scope of any "exemption" that might be necessary in the following terms:

Except as otherwise determined by the BCFIRB in its March 29, 2016 decision in *Skye Hi Farms Inc. et al. v BCBHEC et al.*, persons engaged in the marketing of Silkie or Taiwanese broiler breeders, broiler hatching eggs or chicks are not bound by the provisions of the Consolidated Order, save for Schedule 5 and the definitions related thereto.



MEMO

TO: All Hatching Egg Industry Stakeholders

STATUS: Important

FROM: Casey Langbroek

DATE: April 22, 2016

SUBJECT: Biosecurity, Food Safety and Premise ID

By a decision dated March 29, 2016 in the matter of *Skye Hi Farms Inc. et al. v. BC Broiler Hatching Egg Commission*, the BCFIRB set aside *Amending Order 11 to the Consolidated Order of September 30, 2012*, which *Amending Order* was subsequently incorporated into the *Consolidated Order of August 21, 2014*.

On April 14, 2016, the Commission passed its *Consolidated Order of May 1, 2016*, which reflects the reversal of Amending Order 11. Most notably, the new *Consolidated Order of May 1, 2016* no longer includes the *Regularization of Historically Non-Compliant Silkie and Taiwanese Producers Program* which was the focus of the appeal before the BCFIRB.

Despite the passage of the new *Consolidated Order of May 1, 2016*, it is important to note that *Schedule 5 – Biosecurity, Food Safety and Code of Practice* remains unchanged. *Schedule 5* contains the provisions which, among other things, oblige Producers to comply with the Commission's biosecurity standards, premise ID registration requirements, and food safety standards. Except to the extent that the BCFIRB's decision in *Skye Hi* might indicate otherwise, the *Consolidated Order* (including *Schedule 5*) applies to persons engaged in the production of Silkie or TC broiler hatching breeders, eggs or chicks.

If you have any questions or concerns, please contact the office.

Regards,

A handwritten signature in black ink, appearing to read "Casey Langbroek".

Chair, Casey Langbroek, FCPA, FCGA

British Columbia Hatching Egg Commission
#108 – 32160 South Fraser Way
Abbotsford, BC V2T 1Ws

April 6, 2016

RE: TC and Silkie Production

Attn: British Columbia Hatching Egg Commission,

We the under signed have come to a general agreement in regards to British Columbia Specialty Hatching Egg and Chick production.

We are in agreement that 2015 production as determined by the British Columbia Chicken Marketing Board Chick Broker or Hatchery Reports will be the basis for the initial base quota allocation. This information will be verified with corresponding BCCMB BC101-S contracts as the initial quota allotment (export production will be accommodated by permit).

We ask the BCBHEC to complete a third party cost of production analysis for TC/Silkie hatching eggs/chicks. This information will be used to determine a minimum Board ordered chick price, and subsequently used to determine a “minimum economically viable farm size”. Any quota allotment at or below the “economically viable farm size” will be utilized at 100% allocation. Any industry growth would then be allocated to the uneconomical farms first until they reach the determined size, then pro rata to the entire industry forthwith.

We ask the BCBHEC to recognize the right for specialty hatching egg producers to operate as “virtual hatcheries” as already determined acceptable in a previous decision.

2009 will be used as the earliest “start date” for 10/10/10 calculations. Production documents have already been submitted and recognized by the BCBHEC for this time period.

British Columbia Hatching Egg Commission

April 6, 2016

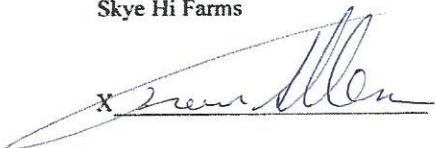
Page 2

We ask the BCBHEC to form a Specialty Marketing Advisory Committee comprised of the six producers recognized as currently producing specialty hatching eggs. This committee would be tasked with making recommendations to the BCBHEC regarding Pricing and Production.

The participants in this letter feel that these agreed upon principles will provide a strong and stable foundation for this specialty niche sector to build on, thus benefiting all participants in the value chain.

Respectively submitted,

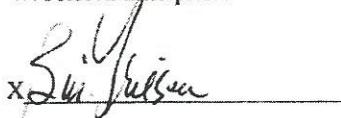
Trevor Allen
Skye Hi Farms



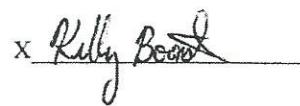
Casey Van Ginkel
V3 Farms



William Friesen
W. Friesen Enterprises



Kelly Boonstra
Coastline Hatchery



Rob Donaldson
Bradner Farms

