

1 APPEARANCES:

2 ILLINOIS POLLUTION CONTROL BOARD MEMBERS PRESENT:

3 MR. ANAND RAO
4 MS. MARILI MC FAWN

5

6 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY MEMBERS
7 PRESENT:

7

8 MR. RICHARD C. WARRINGTON, JR.
9 MR. A.G. TAYLOR
10 MR. BRUCE J. YURDIN

9

11 OTHER AUDIENCE MEMBERS WERE PRESENT AT THE HEARING
12 BUT NOT LISTED ON THIS APPEARANCE PAGE.

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1 HEARING OFFICER KING: This is the first
2 public hearing in rulemaking proceeding R97-15,
3 docket B, Livestock Waste Regulations, and docket
4 B deals with financial assurance requirements.
5 This hearing concerns only the financial assurance
6 requirements so other aspects of the livestock
7 facilities rules are not the subject of this
8 hearing.

9 There are some other proceedings
10 pending dealing with certain other aspects of
11 that. If you'd like some information about that,
12 see one of us during the break or after the
13 hearing, but all we are going to be taking
14 testimony on and discussing this morning is going
15 to be the financial responsibility requirements.

16 I'm Charles King. I'm the Hearing
17 Officer in this matter. Also here this morning
18 are board member Marili McFawn.

19 MS. MC FAWN: Good morning.

20 HEARING OFFICER KING: And Anand Rao
21 from the Pollution Control Board's technical unit.

22 MS. MC FAWN: I would just interject
23 here before we get any further, Dr. Flemal would
24 have joined us today but some other business of

1 the Board kept him from joining us.

2 HEARING OFFICER KING: Also here this
3 morning are Board attorneys Audrey Lozuk-Lawless,
4 Amy Moran Felton and John Kinttle, K-I-N-T-T-L-E.
5 This is the first hearing in this proceeding.
6 This is based on a proposal that was filed July
7 22nd by the Illinois Department of Agriculture.
8 On August 21st, the Board accepted the proposal,
9 and there will be one other hearing on this matter
10 next week on the 21st in Springfield.

11 At the back of the room on the table
12 are signup sheets for the notice and service
13 lists. If you sign up to be on the notice list,
14 you receive all the Board orders that are issued
15 in this rulemaking proceeding. If you are on the
16 service list, you receive all the pleadings and
17 prefiled testimony. In addition you must serve
18 everything you file to everyone on the service
19 list.

20 If you have any questions about which
21 list you might want to be on, you can see one of
22 us at break. There are also copies of some of the
23 documents that have already been filed in this
24 case on the table back there if you don't have

1 them already.

2 The Board received prefiled testimony
3 from the Department of Agriculture for this
4 hearing. We're going to begin with the Department
5 of Agriculture's testimony, and then we'll allow
6 for questioning of their witnesses, and after
7 that, we'll allow other persons who wish to
8 testify who did not prefile testimony for the
9 hearing to the extent that we have time.

10 We've heard this morning from Richard
11 Davidson and David Wirth from the Pork Producers
12 and the Illinois Farm Development Authority who
13 indicated they wish to testify. Is there anyone
14 else here today who wishes to testify at this
15 hearing or would like to?

16 (No response.)

17 MS. MC FAWN: Before we begin, I would
18 just welcome you all. As Mr. King described, this
19 is a pretty limited rulemaking having to do with
20 just financial assurance of closure of livestock
21 waste lagoons. We look forward to your testimony.
22 With that, let us begin.

23 HEARING OFFICER KING: All right. So
24 we'll start with the Department of Agriculture.

1 MR. BORUFF: I'll be offering the
2 testimony.

3 HEARING OFFICER KING: State your name
4 for the court reporter.

5 MR. BORUFF: My name is Chet Boruff.
6 I'm deputy director of the Illinois Department of
7 Agriculture.

8 MS. MC FAWN: And with you today?

9 MR. BORUFF: I have Scott Frank and
10 Warren Goetsch, both employed by the Department of
11 Agriculture. We've worked quite extensively with
12 the program managed by the livestock facilities --

13 HEARING OFFICER KING: I would ask the
14 court reporter to swear the witnesses.

15 (Witnesses sworn.)

16 MR. BORUFF: Good morning. As I
17 mentioned, my name is Chet Boruff, and we have
18 prefiled testimony with the Board, and rather than
19 read that into the record, I just thought I'd give
20 some brief remarks on it.

21 In my position as deputy director, I'm
22 responsible for the administration of the natural
23 resource and ag regulatory programs and such that
24 we have become responsible for the provisions of

1 the Livestock Management Facilities Act. Illinois
2 has long been recognized as one of the leading
3 livestock feed suppliers. With a strong market
4 and well developed infrastructure, the Illinois
5 livestock industry has been a major contributor to
6 the state's overall economy.

7 The livestock industry is continuing to
8 undergo major changes in structure due to economic
9 and marketing forces which are not unique to our
10 state here in Illinois. As a result, it has been
11 common for many operations to expand, specialize
12 and invest in capital intensive production units
13 in recent years. The livestock industry has been
14 faced with challenges regarding market structure,
15 access to capital, a limited supply of trained
16 employees and increased regulations.

17 In many cases, in Illinois as well as
18 other states, traditional and long established
19 producers have chosen to exit the livestock
20 business rather than to address the challenges as
21 I've mentioned above. During the discussions
22 regarding the Livestock Management Facilities Act,
23 many citizens expressed concerns over the possible
24 negative impacts large volumes of manure might

1 have on soil, water and air resources. As a
2 result, the Livestock Management Facilities Act
3 was developed and signed into law on May 21st of
4 1996.

5 Section 17 of the Act requires the
6 owners of new or modified lagoons registered under
7 the provisions of the act to establish and
8 maintain financial responsibility to provide for
9 the closure of lagoons and the proper disposal of
10 their contents when a lagoon is removed from
11 service.

12 Also, the Act went on to require the --
13 and then stated that the level of surety based
14 upon the volumetric capacity of the lagoon is to
15 be determined by rule, which is the purpose of
16 this docket and rulemaking. The proposal which we
17 have set forth lays out a simple procedure
18 determining the level of surety required to
19 establish the financial responsibility.

20 The volumetric capacity of the lagoon
21 in cubic feet is to be multiplied by a cost factor
22 to determine the level of surety. This capacity
23 is to include the free board volume since in a
24 worst case scenario, the entire capacity of the

1 lagoon would be filled. The cost factor is a rate
2 per cubic foot of lagoon volume. This rate is to
3 include the cost of the removal and application or
4 disposal of lagoon contents, sludge, minimum
5 six-inch soil liner, monitoring wells and other
6 appurtenances as outlined in the lagoon closure
7 regulations.

8 No two facilities will be identical.
9 Thus, extreme variation may exist in the amount of
10 the lagoon contents and other items that must be
11 properly disposed of. The initial cost factor of
12 10 cents per cubic foot of lagoon volume has been
13 included in this proposal and is based on
14 estimates from firms engaged in contract manure
15 pumping and application and earth moving.

16 It is possible that the total cost of
17 manure removal and lagoon closure may be higher
18 than the cost factor which we have proposed.
19 However, the manure in the lagoon does have
20 nutrient value for crop production, and some
21 closure costs could be recovered by the sale of
22 manure. Furthermore, the land on which the lagoon
23 and livestock facility is situated would have
24 value on the market, and proceeds can be applied

1 to closure costs.

2 The development and implementation of
3 financial responsibility rules could have major
4 effects on livestock production in Illinois. The
5 use of lagoons for waste storage is a cost
6 effective method of handling livestock manure.
7 Dramatically increasing the costs for new lagoon
8 construction in addition to the new regulations
9 may further alter the waste storage preferences of
10 producers and could result in the use of less
11 efficient and environmentally responsible system
12 adoption.

13 As was mentioned in previous hearings,
14 farmers are price takers and not price makers due
15 to the market conditions and the nature of
16 livestock and crop production. The American
17 consumer demands a quality food product at an
18 affordable price. Generally farmers do not have
19 the ability to pass along their increased costs of
20 production to the consumer.

21 As such, the adopted rules need to be
22 fair in its approach and economically reasonable
23 in its implementation. That concludes my remarks
24 that I would like for today. If you have any

1 questions, we would be pleased to try to answer
2 them.

3 MS. MC FAWN: Thank you, Mr. Boruff.

4 HEARING OFFICER KING: Are either of the
5 other gentlemen here going to offer any testimony?

6 MR. BORUFF: No testimony, but they're
7 available for questions that might come up.

8 HEARING OFFICER KING: Mr. Rao, you have
9 some questions. Does anyone in the audience have
10 any questions for the Department of Agriculture?

11 MR. WARRINGTON: Thank you. My name is
12 Richard Warrington. I'm associate counsel with
13 the Illinois Environmental Protection Agency, and
14 we do have two questions for Mr. Boruff to flesh
15 out the record of their proposal before the Board.

16 I guess the first one is that when
17 you're talking about the cost factor in order to
18 calculate the required amount of financial
19 assurance, you're saying that it's based on
20 estimates from firms engaged in contract manure
21 pumping and application. Could you expand a
22 little bit on what firms were contacted, what kind
23 of questions it asked and how many. We're trying
24 to get an idea of the depth and the range of

1 various cost estimates that might -- you might
2 have found out there.

3 MR. BORUFF: Sure. Well, as I mentioned
4 in the testimony, no two sites are going to be
5 identical, and also those costs can vary from one
6 end of the state to the other, but we did try to
7 contract firms that were in the business of
8 several different aspects. We talked to firms
9 that specialize in earth moving, moving the actual
10 soil that would be involved in the berms and that
11 kind of thing.

12 We had companies -- there is one by the
13 name of Metro Ag. We talked to an engineering
14 firm called CM & T. We also talked to the
15 Illinois Department of Transportation. Even
16 though they wouldn't be involved with the actual
17 closing of a lagoon like this, they would have
18 information regarding cost connected with
19 construction or moving of soil and that type of
20 thing.

21 We talked to a firm Agriwaste
22 (phonetic), which was involved in removal and
23 pumping of the liquid contents and the sludge. So
24 we tried to cover the different portions of a

1 closure activity that we could foresee.

2 MR. WARRINGTON: Thank you. One of the
3 scenarios I think you raised is that the cost to
4 remediate one of these lagoons might be 10 cents
5 or possibly more per cubic feet, and we're
6 wondering how would you see the scenario
7 developing that if it actually did cost more to
8 remediate a lagoon than was available in the
9 various financial assurance documents posted by
10 the landowner, who would wind up paying the
11 difference and how?

12 MR. BORUFF: Well, as I mentioned in my
13 testimony, there would be some value from the
14 contents of the lagoon. There also may be some
15 value of the land itself, and when the General
16 Assembly was debating this aspect of the Act,
17 their concern was in order to protect local as in
18 this case county municipalities or county
19 government that may ultimately end up with the
20 ownership of these sites through a series of
21 processes, I guess, were through a tax sale of the
22 county or lack of a tax sale that the county came
23 up with the ownership.

24 So if there were additional costs

1 involved, then it would be the responsibility of
2 the owner, but the hope is and the intent is that
3 the cost of the property and the contents might
4 offset some of those expenses. Plus it's hard to
5 estimate at this point in time exactly what would
6 be the closure costs.

7 MR. WARRINGTON: Perhaps do you have any
8 like data as to how much this accumulated manure
9 or sludge might be worth or how much it might cost
10 to apply it?

11 MR. BORUFF: At this point in time, I
12 wouldn't have a value based on some type of
13 volumetric analysis. I wouldn't have that right
14 now.

15 MR. WARRINGTON: Do you see any
16 authority problems about being able to take what
17 would be somebody else's manure and selling it to
18 recoup costs?

19 MR. BORUFF: Well, I would assume that
20 because the property itself has gone back to the
21 ownership of local government, then the contents
22 of the lagoon as well would belong to the
23 authority or local landowner to liquidate.

24 MS. MC FAWN: Can I just ask a question.

1 What if the land didn't go to the local
2 government? Then Mr. Warrington's question would
3 be then who would be authorized to go forward and
4 sell the manure or sell the land? Would that be
5 accurate, Mr. Warrington?

6 MR. WARRINGTON: That's another
7 scenario, if the Board adopted rules that didn't
8 rely upon a unit of government on taking title.

9 MR. BORUFF: Well, at that point in
10 time, it would still be like the --like in one
11 case, it would be the original owner of the
12 property would be liable for the cleanup costs and
13 take responsibility.

14 If in fact they had turned over title
15 to a lender, maybe through a bankruptcy or
16 something like that, it would become then the
17 responsibility of the title holder of the land,
18 but it seems as though when General Assembly was
19 discussing this, the intent of the Act was to make
20 sure that when that title passed ultimately, if it
21 did to a local unit of government, that the
22 financial responsibility would relieve them of the
23 cost of cleanup and closure.

24 MR. RAO: Which section of the Livestock

1 Management Facilities Act are you referring to?

2 MR. BORUFF: It's Section 17 of the Act
3 called financial responsibility.

4 MS. MC FAWN: This is the section of the
5 Act -- this is where the legislature has the
6 intention of the land going to the local unit of
7 government.

8 MR. BORUFF: During the discussion of
9 the legislative process, this is where it was
10 discussed at this point in time. This discussion
11 reflected that concern when it came to the General
12 Assembly.

13 MR. RAO: Would it be possible for you
14 to provide us the legislative history you're
15 referring to?

16 MR. BORUFF: We could attempt to do
17 that, yes.

18 MR. RAO: One of my questions to you was
19 what was the rationale for including insurer
20 liability to transfer of property to unit of local
21 government so it would be helpful.

22 MR. BORUFF: Okay.

23 MR. WARRINGTON: Just a few more. Going
24 to the question of how this financial assurance

1 would increase the cost of lagoon construction for
2 the operator, I believe on page 4, second
3 paragraph, you estimated that it might cost
4 another \$200,000 on top of the otherwise lagoon
5 construction cost.

6 Is that estimate based on having the
7 producer like deposit an additional \$200,000 in a
8 savings deposit or letter of credit type account,
9 or is that just like the cost of an insurance
10 policy or cost of a letter of credit?

11 MR. BORUFF: It was based on the tie-up
12 of funds at that amount.

13 MR. WARRINGTON: So I would actually
14 physically have to put that much in cash?

15 MR. BORUFF: If in fact they chose to
16 use a CD or letter of credit, they would be tying
17 up either funds and the associated costs with
18 that.

19 MR. WARRINGTON: And lastly, I guess the
20 question that we're talking about that these
21 increased costs on the producers would potentially
22 force them into using less efficient and
23 environmentally responsible systems.

24 Could you sort of like tell us what

1 those less responsive or less environmentally safe
2 systems might be?

3 MR. BORUFF: There may be instances when
4 the use of a lagoon would be the proper choice for
5 a producer to make in terms of length of storage
6 and storage capacity and that type of thing where
7 they might be forced into going to a pit or some
8 type of above-ground structure. They might be
9 faced with having less storage capacity, and so
10 there may be certain climatic conditions which
11 would cause them to have difficulty in disposing
12 of those wastes.

13 I guess the important thing to note
14 here is that if in fact the cost of this
15 regulation would make lagoons unacceptable, we
16 just lost one of several good options that the
17 producer might want to consider.

18 MR. WARRINGTON: And maybe just to
19 follow up on a question from Ms. McFawn, have you
20 considered options rather than having a unit of
21 local government take over the property and
22 perform the remediation?

23 MR. BORUFF: Could you clarify. I
24 thought in my response, it might be a lender or an

1 owner or maybe a subsequent buyer of the property,
2 that they would be liable for the contents and the
3 lagoon itself and the property.

4 MR. WARRINGTON: But under your
5 proposal, doesn't the liability remain ineffective
6 until an actual unit of local government took over
7 the property? My question is that if, say, a
8 lender or, say, a subsequent purchaser wanted to
9 purchase the property or maybe change the use and
10 do some short term remediation, those funds
11 wouldn't be accessible to him because they would
12 still be waiting for the participation of a unit
13 of government.

14 Would you see that might be like an
15 impediment in, say, the transfer of the property
16 or the satisfaction of the lender or the return of
17 that facility to production?

18 MR. BORUFF: As I mentioned earlier, the
19 rules reflect what we felt was following the
20 legislative intent of the Act as we worked through
21 the process and knew what the intent to be.

22 MR. WARRINGTON: Thank you.

23 HEARING OFFICER KING: Mr. Rao, you have
24 some questions. No one else in the audience has

1 any questions?

2 MR. O'CONNOR: My name is Tim O'Connor.
3 I'm executive vice president of the Illinois Beef
4 Association. I'd like to ask Mr. Boruff did the
5 Department investigate the availability of
6 commercial insurance for producers to post
7 financial responsibility?

8 MR. BORUFF: Yes, we did. The Act lays
9 out five options that a producer might look at.
10 One would be commercial or private insurance. A
11 second would be a guarantee. A third would be a
12 surety bond. The fourth might be a letter of
13 credit, or a fifth would be a certificate of
14 deposit or designated savings account.

15 In terms of the private insurance,
16 either commercial or private insurance and also
17 the surety bonds, we had found that there really
18 is not that type of instrument available to
19 producers in the marketplace. There is some
20 companies that have considered -- some
21 organizations are looking into those types of
22 bonds or guarantees, but at this point in time, to
23 our knowledge, none are available. So the
24 realistic option for a producer to use at this

1 point in time would be the use of some type of a
2 letter of credit or a certificate of deposit, a
3 cash instrument like that.

4 MR. O'CONNOR: Thank you.

5 HEARING OFFICER KING: Does anyone else
6 have any questions? Mr Rao.

7 MR. RAO: Following up on Mr. O'Connor's
8 question, are you aware of any other instruments
9 or mechanisms that may be used other than those
10 listed in the Act for providing financial
11 assurance?

12 MR. BORUFF: I'm not aware of any. I
13 know that maybe in subsequent testimony, it may
14 come up that the Illinois Farm Development
15 Authority is considering offering some type of an
16 instrument along the line of a guarantee, I
17 believe, that might be available to producers, but
18 to my knowledge at this point in time, there would
19 be no other instruments other than what's outlined
20 within the Act.

21 MR. RAO: And do the rules as proposed,
22 do they allow a lagoon owner to utilize any other
23 instruments other than those listed?

24 MR. BORUFF: I believe that they would

1 allow flexibility as long as the producer could
2 prove that there was a long term protection, a
3 long term financial responsibility.

4 MR. RAO: Does the proposed regulations
5 allow the level of surety upon closure -- let's
6 see, and I'm talking about the multiple stage
7 lagoons where they have more than one lagoon in
8 the system.

9 MR. BORUFF: Uh-huh.

10 MR. RAO: And in such a case, would the
11 proposed rules require the level of surety would
12 be calculated on the basis of the entire volume of
13 the system or each individual lagoon?

14 MR. BORUFF: Yes, the entire system
15 would be used as one single livestock waste
16 handling facility, and as such, the coverage would
17 be based on the volume of the entire facility. If
18 it's a two or three-cell lagoon system, it would
19 apply to all in total.

20 MR. RAO: In case one of the lagoons in
21 the system is closed, will the rules allow the
22 level of surety to be revised as less volume? If
23 they decide to close one of the stages in the
24 lagoon for whatever reasons, will the rule allow

1 them to revise their level of surety?

2 MR. BORUFF: I can't honestly say at
3 this point in time whether they would or not.

4 MS. MC FAWN: Before you move on,
5 Mr. Rao, does the Department have any thoughts on
6 that, whether that should be part of the rules or
7 should not be?

8 MR. BORUFF: Let me refer back to our
9 proposal, Section 506.603, talking about the level
10 of surety, and there's a volumetric factor in
11 there, and so it would appear that we should be
12 able to have some flexibility there as the volume
13 would change plus or minus depending on
14 modifications to the structure, that we should be
15 able to change that based on that factor because
16 we do talk about in there both constructed and
17 modified lagoons.

18 MS. MC FAWN: That means you believe
19 that the rule should take into account if a system
20 is downsized?

21 MR. BORUFF: Yes, I think the rule
22 should take that into account, both downsized or
23 expanded, but to be reflective of the new volume.

24 MR. RAO: Regarding the proposed cost

1 factor under Section 506.603(c), the cost factor
2 effective up to December 31st, 2002, this 10 cents
3 per cubic foot of lagoon volume --

4 MR. BORUFF: Correct.

5 MR. RAO: -- this figure is
6 significantly different than the cost estimate
7 presented by the Illinois Pork Producers.

8 Could you explain how you determined
9 this cost factor by breaking down the costs in
10 terms of the factors in the closure for the
11 lagoon?

12 MR. BORUFF: Well, as I mentioned
13 earlier, we looked at a variety of different firms
14 that deal with the different aspects of this, and
15 what we found in some cases, one firm couldn't
16 take all the different aspects of a closure
17 activity.

18 Some would work with the actual moving
19 of the earth. Others would work with the sludge
20 removal. Others might work with the pumping costs
21 associated with it and that type of thing. But it
22 was our feeling based on the estimates we received
23 that 10 cents per cubic foot of volume was a
24 reasonable and realistic cost factor to use.

1 MR. RAO: When you were getting this
2 information about the cost estimates from
3 different firms that you contacted, did you get
4 cost in terms of each of the five or six factors
5 that you listed in your testimony that affected
6 closure of the lagoon?

7 Did you get cost data for each one of
8 those factors like how much it would take to pump
9 and apply the waste from the lagoon and how much
10 it would take to cost a closed and monitored well?
11 Such information did you get from those firms, and
12 if so, would it be possible for you to provide the
13 Board with the cost estimates?

14 MR. BORUFF: Yes, we did. In answer to
15 your question, we did ask for those specific
16 points along the route. In some cases firms would
17 give us a range because of the fact that, as I
18 mentioned earlier, every situation is different in
19 terms of location in the state, proximity to maybe
20 the company's base of operations, whatever, but we
21 were given ranges based on wherever it might be.
22 So yes, I will try to provide you with that
23 information.

24 MR. RAO: That can be helpful.

1 MS. MC FAWN: Has the Department ever
2 thought of using like a consultant or even
3 internal resources to combine an example? Maybe
4 take the information you received on earth moving
5 and couple it with the information you might --
6 you might receive on the cost of applying the
7 waste at the bottom of the lagoon and making an
8 example package? You said that they supplied you
9 with individual information.

10 MR. BORUFF: And we put that together.
11 Internally we came up with that in order to come
12 up with the 10 cents.

13 MS. MC FAWN: It would be very helpful
14 to the Board to see that analysis, maybe have
15 someone testify about how you arrived at the 10
16 cents with the dollars and figures and that type
17 of thing. Maybe you could consider that for next
18 week's.

19 MR. BORUFF: Okay, thank you.

20 MR. RAO: Given that you just stated
21 that there's a large variation in the closure
22 costs between each facility because they're
23 different in the way they're operated or
24 constructed, would it be reasonable to get a cost

1 system like a site specific cost system in from
2 each facility, what would be their closure costs,
3 rather than having a cost factor which is not
4 truly reflective of each site?

5 MR. BORUFF: Uh-huh. Our approach in
6 doing this was to come up with something -- first
7 of all, it's important, I think, to realize that
8 the situation that's outlined within this section
9 to try to cover, to our knowledge, has not
10 exhibited or presented itself in the state of
11 Illinois.

12 Now, there may be some facilities that
13 are not currently in use, but to go to this extent
14 to where one would be closed at the expense of a
15 local unit of government has never been -- to our
16 knowledge in this state has not occurred. So our
17 approach was to come up with something that was
18 reasonable that the industry could in advance, as
19 they were determining whether or not to use a
20 lagoon on site, the producer or potential builder
21 would have an idea of the capacity of the lagoon,
22 and they could factor that in up front.

23 So that's why we tried to come up with
24 something that was somewhat easier to use in terms

1 of being able to plug that factor in up front. So
2 we chose to take this approach instead of a site
3 specific approach.

4 MR. RAO: Would it be acceptable to the
5 Department if the owner of a lagoon wants to do it
6 on a site specific basis and provide a cost
7 estimate based on site specific factors as an
8 alternative to what's being proposed?

9 MR. BORUFF: That may be possible, but
10 also, we have to look back at the legislation
11 itself which says that the level of surety will be
12 determined by rule and based upon the volumetric
13 capacity of the lagoon. So that the Act itself
14 doesn't specify any site specific determination of
15 the rate. It just simply refers to volumetric
16 capacity.

17 MR. RAO: How about if that site
18 specific estimate is still based on volumetric
19 capacity, do they come up with an alternative
20 estimate based on your lagoon volume?

21 MR. BORUFF: Are you suggesting then
22 that some type of a factor be used for different
23 types of sites that would be plugged in to the --

24 MR. RAO: If an owner or operator feels

1 that certain site specific factors will change
2 their cost estimate, not the one that's been
3 proposed here. I'm just asking.

4 MR. BORUFF: It may be something to be
5 considered. It might be.

6 MS. MC FAWN: Has the Department
7 considered whether that might be the preferred
8 route? While it can be based on volumetric
9 capacity as required by statute, do you think that
10 it might be preferable to the hog producing
11 community and others involved in this type of
12 lagoon to do it on a case-by-case basis and
13 provide you the numbers to provide you an up-front
14 estimate that they've obtained from a contracted
15 firm?

16 MR. BORUFF: It may be, but we also, of
17 course, have to weigh what the producer or builder
18 may want and weigh that with the environmental
19 impact of the local resources, too. So it may be
20 possible to do that.

21 MS. MC FAWN: Have you considered that
22 at all, you know, having -- that was somewhat
23 suggested by the Illinois EPA in its pre-hearing
24 comments. I wondered if that was discussed at all

1 by the Department in its alternative route.

2 MR. BORUFF: In developing our proposal
3 for the Board, that's something we took into
4 consideration.

5 MS. MC FAWN: But you didn't include it?

6 MR. BORUFF: No, ma'am.

7 MS. MC FAWN: Why was that?

8 MR. BORUFF: We felt that this was the
9 approach that we would like to propose to the
10 Board for your adoption.

11 MR. RAO: I have a clarification
12 question on Section 506.604, subsection (a)(1).

13 MR. BORUFF: (a)(1)?

14 MR. RAO: Yeah, it sites a lagoon owner
15 offers an authorized alternative. Could you
16 clarify who makes this authorization or what it
17 means.

18 MR. BORUFF: This would be giving the
19 Department of Agriculture would have to look at an
20 alternative that someone might offer to make sure
21 the level of surety was at least equal to and
22 provide the long term stability of other
23 instruments.

24 MR. RAO: So it's the Department that

1 makes the determination here?

2 MR. BORUFF: Yes.

3 MR. RAO: There's one more of these
4 clarifying questions, 506.606, subsection (a).
5 You have used the term duplicate original. Could
6 you explain what that means.

7 MR. BORUFF: What this refers to would
8 be to give us proper documentation that a policy
9 does exist, and this language was taken from
10 existing IEPA programs where they use similar
11 security like this on a facility. I believe it's
12 like a landfill, something like this. So this
13 language was taken from their existing regulations
14 for consistency.

15 MR. RAO: So it is like a duplicate
16 that's been signed.

17 MR. BORUFF: Uh-huh.

18 MR. RAO: Where it is not a copy of the
19 original, is that it?

20 MR. BORUFF: I would assume that's what
21 it says.

22 MR. RAO: In Section 506.606, subsection
23 (c), it sets forth that the insurer will become
24 liable when the owner abandons the site and the

1 property title transfers to a unit of government.
2 Could you explain what "abandon" means in the
3 proposed context, and also, is the Department
4 required to affirmatively declare that the site
5 has been abandoned?

6 MR. BORUFF: The abandonment would mean
7 there that the owner no longer uses it for
8 livestock production, and through the process of
9 failure to pay taxes and those types of processes,
10 the title would go now to the unit of local
11 government that ultimately holds the title.

12 Abandonment, I guess, would have to be
13 determined by our Department when a unit of
14 government then approaches us that they now have
15 the property and that they would like to invoke
16 the privileges they might have under the financial
17 security.

18 MR. RAO: Do you believe that term
19 should be defining the rules what abandonment
20 means?

21 MR. BORUFF: I think from past
22 experience in working with this program whenever
23 we can clarify a definition of a term, it would be
24 very helpful to us.

1 MR. RAO: Do you have a definition that
2 you could offer or does the proposal include a
3 definition?

4 MR. BORUFF: Right now, how about if we
5 offered that next week, I think might be will the
6 easier way to do it to give you a definition.

7 MR. RAO: Section 506.606, subsection
8 (d) requires an owner to maintain an insurance
9 policy until the Department consents to
10 termination of the policy. Can you clarify
11 whether the termination of the policy would be in
12 accordance with Section 506.604.

13 MR. BORUFF: Our intent there was if
14 owner A owned the property, they would be
15 responsible for paying that insurance until such
16 time as they may decide to sell the property to
17 owner B. And then when owner B then could provide
18 proof, their security was greater to our equal to
19 what A had been provided earlier, then A would be
20 released from further responsibility in keeping up
21 that insurance policy.

22 MR. RAO: So more in context of covering
23 transfer of property.

24 MR. BORUFF: It covers transfer so

1 there's no possibility for that coverage to lapse.

2 MR. RAO: Thank you. That's all I have.

3 MS. MC FAWN: I just had a couple of
4 questions. You talk about the Department's Board
5 of Agriculture Advisors under 506.605. I'm not
6 that conversant with the Department of Ag. I know
7 a little bit more about the EPA. Who and what is
8 the Board of Agriculture Advisors?

9 MR. BORUFF: The Board of Ag Advisors is
10 a board made up of many different representatives
11 of Illinois agriculture. They are appointed by
12 the governor, and they provide advice and counsel
13 to the Department of Agriculture director from
14 time to time as they're called upon.

15 It was our intent that the advisors
16 have a broad coverage of Illinois interests. They
17 understand agriculture, and they would be a good
18 board that could oversee or offer suggestions to
19 the Department in this regard. Like I say, they
20 are appointed by the governor. They meet
21 periodically throughout the year to review the
22 Department's programs and to make suggestions how
23 those programs might be improved or benefit the
24 state.

1 MS. MC FAWN: Under Section 605, they're
2 supposed to review the closure plans and discuss
3 the plans and site uses. Would they have to give
4 you their written opinion about how this should be
5 done when you're applying the financial
6 responsibility proceeds, or how would they fit
7 into this process? I read here that they're
8 supposed to review it, but then what is done and
9 when is it done with the product of their review?

10 MR. BORUFF: Their review would be taken
11 into consideration by the Department.

12 MS. MC FAWN: How would they communicate
13 that to the Department?

14 MR. BORUFF: Either verbally or written.
15 The proposal would be the site -- the specific
16 site and the closure activities would be reviewed
17 at one of their meetings, and their input would be
18 sought.

19 MS. MC FAWN: How often do they meet?

20 MR. BORUFF: They meet it's usually
21 semiannually, if not more frequently, but whenever
22 the need arises, they can be called upon to meet.

23 MS. MC FAWN: What if their review and
24 the Department of Agriculture's decision coincide?

1 They are in agreement. Does the unit of
2 government have any say so in this since according
3 to the rules now drafted, the unit of government
4 seems to be the someone that's going to be
5 responsible for the closure? How do they then
6 talk with the Department of Agriculture and the
7 Board of Advisors if they disagree with the result
8 of the review? How does that happen?

9 MR. BORUFF: Well, the Department would
10 be working with that local -- the local unit of
11 government had made application at this time to
12 the Department for their funds that are available
13 to them under the plan, and then it's a discussion
14 and consensus kind of a program, I guess, where
15 the unit of government lays out what their vision
16 for the property would be to the Department and to
17 see if that coincides with the money that's
18 available.

19 The intent was that the property would
20 be closed and put back to its original use or its
21 original -- if it was just level land, it could be
22 put back to the same as it was before. However,
23 one of the things that was discussed what if a
24 local unit of government saw the lagoon once it

1 had been properly cleaned as maybe a lake or a
2 pond or something like that.

3 It's not inconceivable that one of
4 these bodies could be used for that. So we want
5 to take into consideration what the needs and the
6 wants were of local government. Maybe they don't
7 want it cleared off to a level building site like
8 it was prior to construction so we shouldn't
9 automatically assume that every property would be
10 closed to that level.

11 MR. RAO: Can I ask a follow-up
12 question. How is this review of closure plan tied
13 up with Section 506.209 which deals with lagoon
14 closure and ownership transfer where the
15 Department is authorized to approve all closure
16 plans in accordance with the requirements of their
17 Section?

18 MR. BORUFF: I'm looking at two
19 different documents. I'll go back to 209.

20 MR. RAO: It's 506.209.

21 MR. BORUFF: I'm sorry, would you mind
22 repeating your question for me.

23 MR. RAO: I want to know how does the
24 proposed review of closure plans tie up with the

1 requirements of 506.209?

2 MR. BORUFF: Well, 209 outlines the
3 sampling, the analysis and that type of thing, the
4 steps that we would go through to determine what
5 level of closure would be necessary on the site,
6 and I think that this -- I think it ties in with
7 that in that it's dealing with the local unit of
8 government and with the advice and counsel of the
9 Board of Ag Advisors coming up with a suitable
10 final disposition of the property. So I think the
11 provision of 209 will lead up to making a good,
12 sound decision about how the property should be
13 used.

14 MR. RAO: So the requirements of 506.209
15 still applies to this abandoned facility?

16 MR. BORUFF: Uh-huh.

17 MR. RAO: And they have to comply with
18 all the requirements?

19 MR. BORUFF: Yes.

20 MS. MC FAWN: A couple of questions.
21 506.604 concerning the release of financial
22 responsibility, it says that the Department will
23 agree to release the surety insurer and other
24 financial institution when the title of property

1 has been transferred to a new owner. I'm
2 wondering if that agreement should not be
3 qualified that you will agree that the Department
4 would only agree at some point in time where you
5 are made -- where you are assured that the new
6 owner has provided the financial assurance. Is
7 that somewhere else in the rules? I've missed it.

8 MR. BORUFF: Certainly, you're
9 absolutely right that there has to be assurance,
10 as I mentioned before, before owner A is off the
11 hook, owner B needs to be on the hook.

12 MS. MC FAWN: I recall you mentioning
13 it. I was thinking, okay, how does that happen.

14 MR. BORUFF: Ms. McFawn, I don't know if
15 I answered your question, but just to make a
16 reference back to 506.602, point B, we talked
17 there about that same one you just mentioned, that
18 custody where the title passes from one to another
19 to making sure that the same or better level of
20 surety is maintained.

21 MS. MC FAWN: So we just have to make
22 sure that that requirement precedes your agreement
23 or your obligation under 506.604 to release the
24 old owner?

1 MR. BORUFF: Uh-huh.

2 MS. MC FAWN: You would agree that has
3 to take place?

4 MR. BORUFF: Yes, that's correct, I
5 agree with that.

6 MS. MC FAWN: Do you believe that maybe
7 there should -- 506.604(b), it says that you will
8 notify presumably the former lagoon owner in
9 writing of the release of the requirement to
10 maintain financial responsibility.

11 Do you think there should be any time
12 frame on your obligation to so notify in writing?

13 MR. BORUFF: I don't think that
14 unreasonable, maybe like a 90-day period or
15 something like that to give -- that we would have
16 to give that notice.

17 MS. MC FAWN: Why don't you give that
18 some thought and let the Board know if you like
19 that idea and what you think would be a reasonable
20 time frame for your internal workings.

21 MR. BORUFF: Okay.

22 MS. MC FAWN: At 506.605, the
23 application of financial responsibility proceeds,
24 there's a subsection (c), and it says the

1 Department may use competent jurisdiction to
2 enforce its right under financial instruments.
3 How does the Department see that working? What
4 courts would it be in? Under what legal
5 authority, that type of thing? Explain it.

6 MR. BORUFF: This language, I believe,
7 came from what I mentioned earlier as far as the
8 preexisting rules as it pertains to what IEPA
9 administers on landfills and that type of thing.

10 MS. MC FAWN: This is from the 807
11 series?

12 MR. BORUFF: Whatever series that is,
13 right. That's what we used for this. I honestly
14 can't say at this point in time which courts we
15 would be working in.

16 MS. MC FAWN: And your authority would
17 be the financial instrument? Where do you think
18 your authority to enforce that financial
19 instrument comes from?

20 MR. BORUFF: I believe that would come
21 from the Livestock Management Facilities Act.

22 MS. MC FAWN: From the Act. Perhaps you
23 could have your legal counsel --

24 MR. BORUFF: Clarify.

1 MS. MC FAWN: -- clarify that point,
2 sure.

3 On a similar legal question -- and
4 perhaps you want to defer to your counsel -- has
5 to do with the last Section, 506.611, penalties.
6 It says that the Department may issue a cease and
7 desist order. How would this happen? How would
8 the Department go forward to obtain such a cease
9 and desist order, or would you obtain it from a
10 court? How would this happen?

11 MR. BORUFF: That penalty of issuing a
12 cease and desist order also exists within other
13 portions of the Act itself.

14 MS. MC FAWN: This is the financial --
15 the livestock --

16 MR. BORUFF: Livestock Management
17 Facilities Act. There are other places where our
18 authority would give us a cease and desist as an
19 option. If I could suggest, next week before that
20 time, I'll outline that with counsel and in
21 testimony to the Board then outline what your
22 question has covered in terms of our authority and
23 how we would proceed with that.

24 MS. MC FAWN: Along those lines, maybe

1 you can consider between now and next week the
2 effect of such a cease and desist order. Is it to
3 compel that the lagoon owner post the necessary
4 funds, or is it to close the lagoon or cease
5 operations? What do you mean by that cease and
6 desist order?

7 MR. BORUFF: Yeah, and certainly the
8 reason that is in the Act would be to compel in
9 order to comply with the provisions in the Act.
10 Since this is an ongoing business operation, when
11 you look at a series of penalties we might impose,
12 certainly monetary penalties would be
13 important -- would be an important enforcement
14 tool, but taking away the operation's ability to
15 actually produce would be ultimately a stringent
16 penalty. So that's why we would consider that.

17 MS. MC FAWN: You had earlier stated
18 that you would provide us with the information
19 substantiating the 10-cent per cubic foot cost
20 factor.

21 In your testimony, you testified about
22 \$200,000 cost that would be at page 4 of your
23 prepared testimony.

24 MR. BORUFF: Uh-huh.

1 MS. MC FAWN: Can you explain to me why
2 that could add approximately \$200,000 to the cost
3 of the lagoon.

4 MR. BORUFF: At this point in time and
5 until such times there may be commercial insurance
6 or surety bonds available to a producer, the only
7 way they could comply with this is to actually put
8 up \$200,000 in a CD or maybe get a \$200,000 letter
9 of credit from a bank, but in either event, it's
10 tying up \$200,000 in capital in advance, and so
11 that's why at this point in time based on the
12 options the producer has, we've chosen that.

13 Later on if there are surety bonds
14 available or if there are insurance policies
15 available, there will be a cost. It would still
16 be associated, though, in covering in this example
17 \$200,000 of closure expense.

18 MS. MC FAWN: But it would be a lesser
19 cost --

20 MR. BORUFF: Presumably a lesser cost.

21 MS. MC FAWN: -- than a letter of
22 credit. Do you have to post the entire amount
23 for a letter of credit or just the percentage?

24 MR. BORUFF: It depends on the

1 institution you're working with. Each individual
2 bank or however they might issue that letter of
3 credit might handle it differently.

4 MS. MC FAWN: It could be as much as the
5 entire amount?

6 MR. BORUFF: It could be. You would be
7 posting collateral of some other type, but paying
8 an interest charge or some type of fee for that,
9 but that's just dependent upon the institution as
10 to what they charge.

11 MS. MC FAWN: Have you gotten the range
12 of the approaches that various institutions used?

13 MR. BORUFF: No. At this point in time,
14 I couldn't tell you specifically what those
15 expenses might be per institution or whatever.

16 MS. MC FAWN: That would be very helpful
17 to the Board to understand what the charges
18 associated with the letter of credit could be.

19 MR. BORUFF: Okay.

20 MS. MC FAWN: Perhaps some examples,
21 that type of thing.

22 One other question I had, and that is
23 the report the Department made to the General
24 Assembly under the Livestock Management Facilities

1 Act. My reading of comments that had been
2 presented to the Board indicates it was dated
3 February 5th, 1997. I wonder could we have a copy
4 of that report.

5 MR. BORUFF: Sure.

6 MS. MC FAWN: Perhaps if you could
7 provide that to the Board and we could reserve a
8 number for it.

9 MR. BORUFF: Okay.

10 HEARING OFFICER KING: Does anyone else
11 have any questions for the Department of
12 Agriculture?

13 (No response.)

14 HEARING OFFICER KING: In that case
15 we're going to take a break now for approximately
16 15 minutes.

17 MS. MC FAWN: Would you gentlemen leave
18 your things there. When we come back, we'd like
19 to enter some things into the record as exhibits
20 so we're not letting you go.

21 HEARING OFFICER KING: I've got
22 approximately 11:00 o'clock so we'll start again
23 at 11:15. Mr. Davidson is here for the Pork
24 Producers and provided us this morning with some

1 comments that are going to be the subject of his
2 testimony.

3 I believe he's also left copies of them
4 on the table back there. So we would invite
5 everyone to review those during this break so that
6 we would be able to address that so we'll be back
7 at 11:15.

8 (Recess taken.)

9 HEARING OFFICER KING: Before we finish
10 with the Department of Agriculture's witnesses
11 here, are there any other questions regarding the
12 testimony that the Department of Agriculture has
13 submitted?

14 (No response.)

15 HEARING OFFICER KING: Well, in that
16 case, we'll move on to admission of exhibits. Are
17 there any objections to admission as Exhibit 1 of
18 the prefiled testimony of Mr. Boruff in this
19 matter? Okay, hearing no objections, that will be
20 admitted as Exhibit 1.

21 (Exhibit 1 received
22 in evidence.)

23 HEARING OFFICER KING: We're going to
24 reserve Exhibits 2, 3 and 4 for some of the other

1 documents we discussed this morning.

2 MS. MC FAWN: Exhibit 2, we'll reserve
3 for legislative history. Exhibit 3 will be
4 reserved for the background information regarding
5 the calculation of the 10 cents a cubic foot
6 figure, and Exhibit 4 will be reserved for the
7 February 5th report to the General Assembly, and
8 so we're not going to move for admission of those
9 at this time.

10 Presumably we'll do that at the next
11 hearing. This is just sort of an itemization for
12 the Department of Agriculture as to what we're
13 still expecting from them. Then we may well have
14 further questions at the next hearing, so
15 hopefully, you gentlemen will be available there
16 as well. That's all we have for you then.

17 MR. BORUFF: Thank you.

18 MS. MC FAWN: Thank you very much.

19 HEARING OFFICER KING: We'll go off the
20 record for just a minute.

21 (Discussion off the record.)

22 HEARING OFFICER KING: Next we'll hear
23 from Richard Davidson. Please swear the witness.

24 (Witnesses sworn.)

1 HEARING OFFICER KING: Proceed.

2 MR. DAVIDSON: Thank you. I'd like to
3 say that at this time, the first part of the
4 presentation pertaining to the Illinois Pork
5 Producers, I will be making.

6 The second part which is indicated as
7 being Government - Livestock Industry Cooperative
8 Agreement To Provide Financial Surety For Closure
9 of Abandoned Livestock Lagoons attached as No. 1
10 dated 10-9-97 will be by Mr. Wirth.

11 MS. MC FAWN: Thank you, Mr. Davidson.

12 MR. DAVIDSON: My name is Richard
13 Davidson, and I am employed by the Illinois Pork
14 Producers Association as a legislative consultant.
15 My brief personal history is as follows: I was
16 employed by the Illinois Department of Agriculture
17 for 27 years as the executive assistant to the
18 director for administrative services and as the
19 legislative liaison. I retired in December 1991.
20 Also, I operate a grain and livestock farm in
21 Sangamon County.

22 Since I was involved in the drafting of
23 the LMFA, I wish to make observations and comments
24 on prefiled comments and testimony of the

1 Department of Agriculture and the Illinois
2 Environmental Protection Agency. In addition, I
3 will present the recommendations of the Illinois
4 Pork Producers Association concerning the
5 establishment of a custodial trust account with
6 IFDA as custodial trustee as a method for meeting
7 the financial requirements for registered lagoons
8 as required by Section 17 of the LMFA. David
9 Wirth is with me today as the executive director
10 of IFDA. This is David.

11 First, let's review IEPA's two filings
12 dated June 30th, 1977 (sic), and October 3rd,
13 1997. Beginning on page 3 of the June 30th
14 comments, the IEPA suggested that the owner
15 provide a written cost estimate for the closure of
16 a lagoon in accordance with Title 35, Section
17 506.209, and on page 4, they designate five items
18 that will be included in the closure costs. The
19 swine industry supports this concept as one
20 alternative method for determining closure costs.

21 The October 3rd filing raised some
22 questions beginning on page 2 suggesting that
23 abandonment is the same as cessation of operations
24 and therefore equal to removal of livestock from

1 the facility. This is not the case, nor was this
2 the intent of the legislation. IEPA in its Table
3 1 of October 3rd testifies -- October 3rd
4 testimony would have us believe there are 26
5 abandoned swine facilities based upon their
6 estimate that the facilities do not have
7 livestock.

8 This table is not consistent with the
9 LMFA or Title 35, and the Board should disregard
10 this information as it is not pertinent to this
11 docket, i.e. financial assurance on new or
12 modified lagoons required to be registered.
13 Section 15(e) of the LMFA states: Quote, "When
14 any earthen livestock waste lagoon is removed from
15 service, it shall be completely emptied.
16 Appropriate closure procedures shall be followed
17 as determined by rule. The remaining hole must be
18 filled. The closure requirements shall be
19 completed within two years from the date of
20 cessation of operation unless the lagoon is
21 maintained or serviced." That's an option.

22 "The Department may grant a waiver to
23 the before-stated requirements that will permit
24 the lagoon to be used for an alternative purpose."

1 The LMFA allows a livestock lagoon to remain
2 dormant for an indefinite period as long as the
3 lagoon is being maintained and serviced. The
4 reason for permitting lagoons to remain dormant is
5 that it is normal practices within the industry to
6 expand or sell off based on market fluctuations
7 and personal finances.

8 IEPA recognizes this practice in that
9 35 Ill. Adm. Code 501.402(c)(2) and (2)(a) state,
10 quote, "The following shall not be considered
11 location of a new or expanded livestock management
12 or waste handling facility: Commencement of
13 operations at an idle facility which has livestock
14 shelters left intact and which has been operated
15 as a livestock management facility or livestock
16 waste handling facility for four consecutive
17 months at any time within the 10 previous year
18 period."

19 The legislative intent was to provide
20 financial surety so that public funds would not be
21 required to clean up new, larger sized lagoons.
22 Abandoned lagoon means a lagoon for which no owner
23 can be found and is not being maintained or
24 serviced. Therefore, we request a definition be

1 added to the proposed rules to set the criteria
2 for determining when a livestock lagoon is
3 abandoned as follows: Criteria for declaration
4 of abandoned livestock lagoons: (A) a lagoon for
5 which no owner or operator can be found who is
6 responsible for maintaining or servicing it; (b),
7 a lagoon at an idle livestock management facility
8 which has not received livestock waste for four
9 consecutive months at any time within 10 previous
10 years; a lagoon which has been declared a nuisance
11 by a court of competent jurisdiction and ordered
12 to be closed; or (d), the property tax on the
13 property on which a lagoon is located has not been
14 paid for two years and the redemption period has
15 expired.

16 Further, the livestock industry
17 provides a definition of closure in its comments
18 on July 1 which the Board should consider, and
19 those are in our filing with the Board on July 1
20 by the livestock industry.

21 The Illinois Pork Producers Association
22 generally agrees with the concepts set forth in
23 the Department's proposed rules concerning the
24 method and amount of surety required to meet the

1 financial requirements of Section 17. As
2 previously stated, the IEPA's alternative proposal
3 as set forth in their June 30th comments shall be
4 included in the final rules in addition to the
5 method proposed by IODA for determining the level
6 of financial surety required for the closure of a
7 registered lagoon. That's a registered lagoon.

8 I strongly recommend that the Board
9 give careful consideration to the provisions
10 outlined by the Farm Group in its proposal of July
11 1 relative to declaration of removal of service,
12 page 6; when a lagoon is required to be closed,
13 page 7; and when the Department may request
14 payment of surety, pages 7 and 8.

15 In the Farm Group's proposal of July 1
16 beginning on page 1, item 2, we indicate we would
17 be proposing an alternative financial surety
18 mechanism be developed in cooperation with the
19 Illinois Farm Development Authority for the
20 reasons stated in that document.

21 Jim Niewald, a pork producer from Loda,
22 Illinois, chaired a producer task force to
23 research methods of meeting financial requirements
24 of Section 17 of the LMFA. Section 17 of the LMFA

1 states that: "Financial responsibility may be
2 evidenced by any combination of the following:
3 (1) commercial or private insurance, (2)
4 guarantee, (3) surety bond, (4) letter of credit,
5 (5) certificate of deposit or designated savings
6 account."

7 The Producer Group visited with two
8 insurance vendors regarding the possibility of
9 them making available a policy to deal with lagoon
10 closure. The insurance market expressed no
11 interest in offering such policies because there
12 is no basis on which to compute an actuary cost.
13 However, they may be interested in providing
14 excess liability for a producer pool if it were to
15 be established.

16 With respect to guarantee, CD, savings
17 account and commercial surety bonds, there is no
18 history of measuring risk. Therefore, these
19 financial surety instruments require the producer
20 to maintain a 100 percent of the cash required for
21 whatever level of risk is determined which is not
22 economically feasible and could serve a severe
23 hardship on independent producers. The Producer
24 Group found that commercial lender letters of

1 credit are available based upon the net worth,
2 i.e. debt to asset ratio of the producer and
3 subject to withdrawal in an instance where net
4 worth position deteriorates.

5 The Producer Group looked into history
6 of livestock lagoon abandonment. They found among
7 the three "I" states, Illinois, Indiana and Iowa,
8 two lagoons may have been abandoned and public
9 funds may have been used to close these lagoons.
10 We have no documentation that this is a fact. We
11 were unable to find any documentation in our
12 research. If this is the case, we estimate there
13 are -- that these two lagoons would represent less
14 than one tenth of one percent of the livestock
15 lagoons currently in use in the three "I" states.

16 In discussions with persons in the
17 livestock industry and personnel of the Illinois
18 Environmental Protection Agency, we did not find
19 an instance where a livestock lagoon had been
20 abandoned in accordance with our criteria in
21 Illinois and where government had to incur costs
22 of closure. To date, all lagoons in Illinois
23 involved in bankruptcies have been recycled and
24 used in agricultural pursuits.

1 The Farm Development Group -- the Farm
2 Group discussed with Illinois Farm Development
3 Authority, IFDA, to determine if IFDA can assist
4 by providing a means to fulfill the statutory
5 requirement. According to David Wirth, IFDA has
6 the legal authority to participate in a Livestock
7 Lagoon Closure Fund with IFDA as trustee. David
8 Wirth indicated that based on experience, the
9 amount in the Fund for producers could be kept
10 low. It was his opinion that any interest
11 generated from the investment of money in the Fund
12 should remain in the Fund and be used for the same
13 purposes and for administrative expenses.

14 The Producer Group recommended to their
15 respective organizations that a custodial fund be
16 established in the Illinois Farm Development
17 Authority to receive, hold and invest funds
18 deposited by the persons subject to the surety
19 requirements subject to Section 17 of the LMFA.
20 Although Section 17 of the LMFA identifies several
21 of the instruments that may be accepted as
22 evidence of surety, it does not prohibit other
23 forms of financial evidence from being accepted.

24 Therefore, the Illinois Pork Producers

1 Association requests an additional item be added
2 to the list as to what constitutes evidence of
3 financial surety in Section 506.602 such as
4 paragraph 6, statement of participation in the
5 Livestock Lagoon Closure Fund.

6 The Illinois Pork Producers Association
7 and the Illinois Farm Development Authority are
8 submitting with this testimony the proposed
9 Government-Industry Cooperative Agreement to
10 Provide Financial Surety For Closure of Abandoned
11 Livestock Lagoons. After review and consideration
12 of the policy in this Cooperative Agreement, we
13 respectfully request the Board to give adequate
14 assurance that this method is acceptable for
15 meeting the financial surety provisions of Section
16 17 of the LMFA. In the industry's view, this
17 approach to providing financial surety is
18 technically feasible and financially reasonable as
19 mandated by the LMFA. Thank you for allowing me
20 to make these comments, and I'll be available for
21 questions. David would like to make the
22 presentation of the second part.

23 MS. MC FAWN: Thank you, Mr. Davidson.

24 MR. WIRTH: Thank you. I am David

1 Wirth. I serve as the executive director of
2 Illinois Farm Development Authority in a capacity
3 I've served since about 1992. Today I'd like to
4 present a Government-Livestock Industry
5 Cooperative Agreement. It's attachment No. 1 that
6 you have before you. This agreement is to provide
7 financial surety for closure of abandoned
8 livestock lagoons, and with your consent, I will
9 read it into the record.

10 Preamble. In accordance with the
11 Livestock Management Facilities Act, specifically
12 Section 17 requires that: "Owners of new or
13 modified lagoons registered under the provisions
14 of this Act shall establish and maintain evidence
15 of financial responsibility to provide for the
16 closure of the lagoons and the proper disposal of
17 their contents within the time provisions outlined
18 in this Act," end quote.

19 A person may demonstrate financial
20 responsibility by any one or combination of the
21 methods outlined in Section 17 of the Act or may
22 participate in financial surety trust agreement.

23 The Illinois Farm Development Act
24 authorizes the Illinois Farm Development Authority

1 to respond to the shortage or unavailability of
2 capital for agricultural business from private
3 market sources at reasonable costs and to provide
4 a stable supply of adequate funds for agriculture
5 financing to encourage orderly and sustained
6 agriculture production. The livestock industry
7 associations have investigated and determined that
8 commercial financial instruments are generally
9 unavailable or are not reasonably affordable.

10 As there is no knowledge of a livestock
11 lagoon abandonment in Illinois where government
12 had to incur the costs of closure, the risk
13 appears to be very negligible. To date, all
14 lagoons in Illinois involved in bankruptcies have
15 been recycled and used in agricultural pursuits as
16 the lagoons and its contents have value.
17 Undocumented evidence among the states of
18 Illinois, Indiana and Iowa indicates that two
19 lagoons have the potential for being declared
20 abandoned which is estimated to represent less
21 than one tenth of one percent of the livestock
22 lagoons or a potential of one lagoon in one
23 thousand to be declared abandoned.

24 Based upon costs associated with

1 closure acquired from currently operating
2 businesses involved in livestock waste lagoon
3 closure practices, it costs 1.5 cents per gallon
4 of volumetric capacity to close a lagoon which
5 includes the costs of manure removal, removal of
6 appurtenances, laboratory testing, land
7 application, well closure and contingency costs.
8 If we used a five percent assessment rate of the
9 surety required to close a lagoon, that results in
10 a safety factor of 50 times the estimated
11 abandonment rate. A five percent assessment rate
12 yields sufficient funds capable of closing one out
13 of every twenty registered lagoons. Note: A two
14 percent assessment rate has been suggested which
15 results in a safety factor of 20 times the
16 estimated abandonment rate or one out of every
17 sixty registered lagoons, and I will state for the
18 record that this document will refer to the five
19 percent factor, but as no final determination has
20 been made, you can assume that the range that's
21 proposed would range from that two percent to that
22 50 percent or rather that two percent to five
23 percent, which reflects a coverage of 20 to 50
24 times the estimated rate of the event.

1 Therefore, we hereby establish a
2 Government-Livestock Industry Cooperative
3 Agreement which will govern the implementation and
4 operation of a Livestock Lagoon Closure Fund. The
5 Authority will serve as the fiduciary custodian
6 for funds deposited by participants. Third-party
7 costs associated with closing abandoned
8 participating livestock lagoons shall be approved
9 by the Council and shall be reimbursed from the
10 deposited funds.

11 Persons subject to Section 17 of the
12 Act may demonstrate financial responsibility by
13 depositing funds with the Authority. Participants
14 will deposit funds with the Authority based upon
15 cost of closure as determined by an individual
16 site-specific livestock lagoon closure plan or by
17 using a standard livestock lagoon closure cost as
18 established in the Livestock Waste Regulations.

19 A Livestock Lagoon Closure Council
20 consisting of one representative designated by
21 each participating sponsor and one person
22 representing individual participants who are not
23 represented by a sponsor is hereby established for
24 the purpose of advising the Authority on matters

1 and approving lagoon closure plans and
2 expenditures as agreed to herein.

3 Definitions. For the purposes of this
4 agreement, the following definitions shall pertain
5 unless context clearly indicates otherwise or is
6 defined in individual Section: The Act means
7 Livestock Management Facilities Act. Authority
8 means Illinois Farm Development Authority.
9 Council means the Livestock Lagoon Closure
10 Council. Department means Illinois Department of
11 Agriculture. The Fund means Livestock Lagoon
12 Closure Fund. Participant means the person who
13 provides financial surety in accordance with
14 Section 17 of the Act and who makes a contribution
15 to the Fund. Person means a natural person,
16 corporation, association, trust, partnership,
17 cooperative or other legal entity. Sponsor means
18 an association representing production agriculture
19 and who pays the required sponsor's fee. Trustee
20 means Illinois Farm Development Authority.

21 IFDA responsibilities. The Authority
22 shall establish a custodial fiduciary trust fund
23 in accordance with its authority to receive,
24 invest and disburse funds. The Authority shall

1 invest funds received in accordance with its
2 investment policy or in accordance with a policy
3 determined by the Council to be appropriate to
4 meet the needs of this Agreement and the Act. Any
5 interest accrued from investment of funds shall be
6 deposited in the Fund and may be used for the
7 purposes as set forth in this Agreement. The
8 Authority may make expenditures from the Fund and
9 may receive custodial fees in accordance with this
10 agreement.

11 The Authority and the Department may
12 enter into a Memorandum of Understanding setting
13 forth the procedures governing lagoon closure cost
14 payments, payment of lagoon closure claims,
15 validation of participation in the Fund and costs
16 for participation. The Authority shall notify the
17 Department when participants have entered into an
18 agreement to participate in this program and
19 submitted funds required in accordance with this
20 Agreement or when a participant fails to make a
21 required assessment.

22 The Authority shall file a lien when
23 approved by the Council against the associated
24 property for the recovery of actual closure

1 expenditures in cases where payout was made by the
2 Fund to close the participating abandoned
3 livestock lagoon. Costs associated with filing
4 and litigating any liens shall be approved by the
5 Council and paid from the Fund.

6 Department of agriculture. The
7 Department shall notify the owner or operator of
8 the lagoon and the Authority of the level of
9 surety and the assessment required for any person
10 desiring to participate in the Fund, when there's
11 a change in participating lagoon ownership or when
12 a participating lagoon is modified.

13 The Department shall recommend and
14 submit a closure plan including itemized costs
15 associated therewith to the Council and to the
16 Authority when a participating lagoon is to be
17 removed from service, abandoned, and closure is
18 required in accordance with this
19 Government-Livestock Industry Cooperative
20 Agreement to Provide Financial Surety for the
21 Closure of Abandoned Livestock Lagoons.

22 In addition, this notification shall
23 indicate that all alternative uses have been
24 explored and no other options exist.

1 Notwithstanding the foregoing, the Department and
2 Council may agree to a plan to service and
3 maintain an abandoned lagoon when it is reasonably
4 expected that the lagoon may be sold or there is a
5 potential for alternative use.

6 Participants. Any person who is
7 required to demonstrate financial responsibility
8 for the abandonment of an earthen livestock lagoon
9 may at any time demonstrate financial
10 responsibility by depositing funds with the
11 Authority. Participants shall notify the
12 Department and the Authority that they elect to
13 participate in the Fund. The Department shall
14 then notify the person electing to participate in
15 the Fund of the assessment for such participation
16 based upon the Department's determination of the
17 level of surety required.

18 The participant will deposit funds with
19 the Authority. The failure to pay any assessment
20 shall be deemed as a cancellation of the agreement
21 between the participant and the Authority for
22 participation in the Fund. Any assessments made
23 by the participant prior to cancellation of the
24 agreement shall remain in the Fund. The

1 participant may at any time cancel the agreement
2 with the Authority for participation in the Fund
3 by notifying the Authority and the Department in
4 writing and by providing other financial surety to
5 the Department in accordance with Section 17 of
6 the Act.

7 The participant shall enter into an
8 agreement with the Authority that they are
9 responsible for closing the lagoon and will assume
10 the costs associated with such closure unless the
11 lagoon has been declared abandoned as set forth in
12 this Government-Livestock Industry Cooperative
13 Agreement to Provide Financial Surety for Closure
14 of Abandoned Livestock Lagoons.

15 Sponsors. Each agricultural
16 association electing to be a sponsor shall qualify
17 by making a request to the Authority to be
18 designated as a sponsor and by payment of a
19 one-time sponsor assessment fee of \$2,500 which
20 shall be deposited into the Fund. Sponsors shall
21 not be subject to additional assessments. Each
22 participating sponsor shall designate one
23 representative to serve on the Livestock Lagoon
24 Closure Council. The sponsors, in whole or their

1 respective officers and members, shall not be held
2 liable for any action or failure to act of the
3 Department and the Authority or in the performance
4 of the Council's duties and responsibilities or
5 for their failure to act.

6 Livestock Lagoon Closure Council. The
7 Council shall consist of a representative of each
8 sponsoring agricultural association and one person
9 among the participants in the Fund that are not
10 members of a sponsoring agricultural association.
11 Each sponsoring agricultural association shall
12 designate their Council representative, and the
13 Department shall appoint a person from among the
14 participants in the Fund who are not members of a
15 sponsoring agricultural association.

16 The Council shall approve all lagoon
17 closure plans and requests by the Department for
18 expenditures from the Fund and recommend to the
19 Authority the payment of such expenditures. The
20 Council shall recommend to the Authority when a
21 lien shall be filed and shall authorize and
22 approve payment of filing fees and costs
23 associated with litigation.

24 The Council shall meet as necessary and

1 shall serve without compensation or reimbursement
2 of expenses. The Council shall consult with the
3 Authority on future assessment needs and lagoon
4 closure matters as mutually agreed. Should the
5 deposited funds exceed 125 percent of the required
6 Fund level, the Authority and the Council may
7 agree to other uses of the excess balance for
8 purposes of interest to the livestock industry.

9 The Council, in whole or individually,
10 shall not be held liable for any action or failure
11 to act in the performance of its duties and
12 responsibilities or for the actions of the
13 Department and the Authority in the implementation
14 of the Act or this program.

15 Assessment policy. Each participant in
16 the Fund shall be required to make a payment of
17 five percent of the level of surety required to
18 close the lagoon based upon an individual
19 site-specific closure plan or an averaged standard
20 closure level adopted in the Livestock Waste
21 Regulations. The participant may elect to make a
22 one-time payment of the assessment required or may
23 make equal annual payments not to exceed five
24 years. If a participant elects to make annual

1 payments of the assessment over a period of years,
2 simple interest on the unpaid assessment balance
3 shall be added to the total assessment obligation.
4 The interest rate shall be the prime rate on the
5 day the payment is due. A participant may be
6 required to pay additional assessments as
7 determined necessary to keep the Fund at its
8 established level.

9 Policy for determination of when a
10 lagoon is to be removed from service, abandoned
11 and closed. Per Section 15 of the LMFA, quote,
12 "When a livestock waste lagoon is removed from
13 service, it shall be completely emptied. The
14 remaining hole must be filled. The closure
15 requirements shall be completed within two years
16 from the date of cessation of operation unless it
17 is maintained and serviced or the Department
18 grants a waiver for an alternative purpose."

19 (A) A registered lagoon shall be
20 considered removed from service when one of the
21 following occurs: (1) such lagoon no longer
22 receives livestock waste and the lagoon is not
23 being maintained or serviced; (2) the Department
24 has issued its final administrative decision

1 denying a waiver for an alternative use; (3) in
2 the case of a bankruptcy proceeding, the court has
3 issued the final order; (4) a court of competent
4 jurisdiction determines such lagoon should be
5 removed from service.

6 (B) The Department shall notify the
7 Council and the Authority when a registered lagoon
8 is removed from service.

9 (C) A registered lagoon shall be
10 required to be closed when one of the following
11 occurs: (1) the owner or operator of the lagoon
12 determines that such lagoon is to be closed; (2)
13 the lagoon has been declared abandoned and no
14 legal owner or responsible person has been
15 determined to exist or no person will purchase or
16 assume legal responsibility for servicing and
17 maintaining the lagoon; (3) the lagoon is ordered
18 closed by a court of competent jurisdiction.

19 (D) The Department shall notify the
20 Council and the Authority when a registered lagoon
21 is required to be closed.

22 (E) The Department assumes
23 responsibility for a closure when it has been
24 determined that the lagoon meets the requirements

1 set forth in subparagraph C above. (1) The
2 Department shall implement a plan to maintain and
3 service a lagoon to assure that its integrity is
4 maintained until closure is effected. (2) The
5 Department shall prepare a plan of closure
6 consistent with the closure requirements of this
7 Agreement which shall include estimated itemized
8 costs for closure and for maintenance required in
9 subsection 1 of this subparagraph (e)(1) for the
10 Council's consideration.

11 (3) Upon the Council's approval of the
12 closure plan with associated costs, the Department
13 shall proceed with closure. (4) Notwithstanding
14 the foregoing, the Council and the Department may
15 negotiate a plan of service and maintenance when
16 there is a potential for transfer of legal
17 responsibility.

18 (F) The Department may request a
19 partial or the total payment of the face amount of
20 the financial surety as determined necessary to
21 implement its requirements.

22 Fund. The required Fund level shall be
23 established at the level of five percent of the
24 cumulative closure surety obligation of all

1 participants. If the balance in the Fund plus any
2 expected recovery drops to a level equal to or
3 less than 75 percent of the five percent of the
4 cumulative surety obligation exposure, an
5 additional assessment of the participants shall be
6 made.

7 The additional assessment shall be
8 prorated based on the initial assessment fee. The
9 required Fund level shall be determined annually
10 based on records of the participants at the end of
11 the fiscal year. And note instead of the five
12 percent of cumulative of all participants, it has
13 been suggested that the required Fund level be
14 established at two times the surety necessary for
15 the closure cost for an average participating
16 lagoon or the surety required to close the largest
17 single participating lagoon, whichever is greater
18 and see addendum No. 1 concerning the assessment.

19 When there is a payout from the Fund to
20 close a participating livestock lagoon that has
21 been abandoned, any money recovered as a result of
22 a lien against the associated property or any
23 other source shall be deposited into the Fund and
24 used for the purposes set forth in this Agreement.

1 Monies in the Fund shall be invested
2 and interest accrued shall be deposited in the
3 Fund and used for the purposes set forth in this
4 Agreement. The liability of the Fund is limited
5 to the available Fund balance plus any expected
6 recovery. The Fund shall pay one half of one
7 percent annually to the Authority for custodial
8 fees. Should the Authority incur extraordinary
9 costs associated with this program, the Council
10 may authorize additional payments from the Fund to
11 the Authority.

12 Except for the custodial fee, the Fund
13 may be used only for service, maintenance and
14 closure costs of abandoned livestock lagoons that
15 are participating in the Fund and legal costs.
16 Notwithstanding the above provision, if the Fund
17 balance minus any expected payouts equals or
18 exceeds 125 percent of the required Fund level for
19 one year, the Council may agree to other uses of
20 the excess balance for purposes of interest to the
21 livestock industry which may include a prorated
22 refund to participants and sponsors.

23 Dissolution of Fund. The Council, when
24 it determines that the Fund is to be dissolved,

1 shall establish the policy for the disposition of
2 remaining balance in the Fund for purposes of
3 interest to the livestock industry which may
4 include a prorated refund to participants and
5 sponsors.

6 And there are some attachments on page
7 9, addendum No. 1, the first thing I will point
8 out is that there's a factor which can be used for
9 calculating between cubic feet and gallons, and
10 note that a cubic foot contains 7.48 gallons.
11 I'll mention that this document talks about
12 closure costs per gallon. The Department of Ag
13 testimony talked about closure costs per cubic
14 foot so the conversion is 7.48 gallons per cubic
15 foot. I will stop there and gladly answer any
16 questions.

17 HEARING OFFICER KING: Are there any
18 questions for Mr. Davidson or Mr. Wirth?

19 MR. WARRINGTON: Rich Warrington,
20 Illinois EPA. This is a question for Mr. Wirth.
21 Do you have any criteria to decide whether or not
22 a lagoon would be maintained or serviced?

23 MR. WIRTH: How do you mean?

24 MR. WARRINGTON: On page 6, you're

1 talking about the considerations to decide whether
2 or not a lagoon would be removed from service, one
3 which no longer receives livestock waste which
4 would be fairly simple to understand.

5 The other part of the criteria is not
6 being maintained or serviced. How would you or
7 the Department decide it's not being maintained or
8 serviced?

9 MR. WIRTH: We would be working with the
10 Department of Agriculture on these issues, and
11 that would be subject to a visual inspection, I
12 presume. An actual memorandum has not been
13 drafted between the Department and the Authority,
14 but my opinion as to the answer to that situation
15 would be a visual inspection to see if in fact,
16 you know, proper maintenance is being done to
17 preserve the integrity of the structure.

18 MR. WARRINGTON: And the other question
19 is you're proposing that this fund would be
20 triggered when the lagoon has been declared
21 abandoned and no legal owner or responsible person
22 has been identified or determined to exist even.
23 How long and how hard would you look to determine
24 a financially responsible person?

1 MR. WIRTH: Well, certainly it's
2 advantageous to find someone other than us to pay
3 the money so we're going to look pretty long and
4 hard, and part of that definition, that
5 abandonment may dictate that there is in fact no
6 responsible party, which is part of the definition
7 of abandonment.

8 That is, the person or entity is gone,
9 unavailable, can't be found or financially has no
10 wherewithal, and it's most likely that before a
11 payment is made from this Fund, there's going to
12 be local ownership of that property, truly
13 abandoned property.

14 MR. WARRINGTON: If there isn't any
15 financial wherewithal and the property winds up
16 going through bankruptcy proceedings, do you
17 foresee your agency or the Department
18 participating in those bankruptcy proceedings to
19 effectuate closure of the lagoon?

20 MR. WIRTH: I doubt that we would step
21 in during the time any bankruptcy is taking place.

22 MR. WARRINGTON: I think we have one
23 more question.

24 MR. TAYLOR: I'm A.G. Taylor,

1 agricultural advisor with the Illinois EPA. One
2 thing that's just come to mind here -- and I'm not
3 sure how you might address it. You're talking
4 about bankruptcy proceedings or other time factors
5 in trying to pursue a responsible party you may
6 not be able to find, and in the meantime, you may
7 have a lagoon here that may be full to the brim.

8 Is there any way through your procedure
9 in providing some assurance that the lagoon which
10 is not being maintained will be maintained during
11 that period?

12 MR. WIRTH: At this time I don't think
13 this document specifically addresses that
14 situation. Again referring back to a memorandum
15 that would be drafted between my agency and the
16 Department of Agriculture, it would be likely in
17 my opinion that some type of maintenance or
18 supervision occur in that situation where you've
19 got property which perhaps is not being
20 maintained.

21 It's important that the integrity of
22 the structure is taken care of. I don't know what
23 the powers are that the Department of Ag, for
24 example, might be able to exercise to force, let's

1 say, proper care of a structure, whether it's from
2 rodents or otherwise during the course of a
3 bankruptcy and have that become a lien in the
4 bankruptcy. I really do not know if there's any
5 legal authority for that, but one way or another,
6 we want that addressed so that that's not just
7 ignored.

8 MR. TAYLOR: Thank you.

9 MR. DAVIDSON: Can I further expand?

10 MS. MC FAWN: Please do.

11 MR. DAVIDSON: In answer to
12 Mr. Warrington's question, we have been working on
13 some details concerning the very question that you
14 asked, and that is what would be construed as
15 servicing and maintaining and inspection and so
16 forth. It would be that the lagoon would have to
17 be inspected by someone, and in this particular
18 case, it would probably be the Department of
19 Agriculture, that they assume the responsibility.

20 They would inspect it on a regular
21 basis. They would contract with someone to assure
22 that the grass and weeds were mowed, that no trees
23 were going, that the free board was maintained,
24 that there was no rodent holes and no seepage and

1 no leakage, and they come forward with a plan to
2 the Council and David, and they in turn what it
3 says in here, that they would either assure that
4 the payments would be made or advance the money to
5 the Department.

6 That would be maintain and servicing.
7 Now, when you get down to the question here
8 concerning -- and this has been discussed on
9 several occasions. You have to have a reason
10 other than maintaining and servicing. You have to
11 have a reason to go on private property because
12 you have private property rights, and even under
13 the Environmental Protection Act in its rules and
14 regulations, you have to be able to demonstrate
15 that there is pollution or a potential for
16 pollution before you can take an action, and then
17 the action -- I'll put the shoe back on your foot,
18 the action then taken by you is squat.

19 I just came through the south side of
20 Chicago. What action do you take there concerning
21 abandoned property when there's a problem? So
22 that procedure, in other words, it had to be
23 coordinated between Agriculture and EPA and a
24 pollution potential would have to be there. The

1 servicing and maintaining, no question, but when
2 you start getting into property rights -- and in
3 the case of bankruptcy, it's up to the Bankruptcy
4 Court. You got to preserve the property rights of
5 the owner of that property.

6 HEARING OFFICER KING: Any other
7 questions? Mr. Rao.

8 MR. RAO: Mr. Wirth, on page 6 of the
9 draft, you have this criteria for a lagoon to be
10 considered removed from service. Under the first
11 one, you say a lagoon no longer receives livestock
12 waste and the lagoon is not being maintained or
13 serviced.

14 The criteria for declaration of
15 abandoned livestock waste lagoon which is proposed
16 by Mr. Davidson, the criteria are slightly
17 different from what you have in your draft. I
18 will read the criteria here. It says a lagoon for
19 which no owner or operator can be found who is
20 responsible for maintaining or servicing the
21 lagoon is considered abandoned, and the second one
22 says a lagoon at an idle livestock management
23 facility that has not received waste for four
24 consecutive months is also considered abandoned.

1 Are there any conflicts between the one
2 that's in your draft and the one that is proposed
3 by Mr. Davidson here?

4 MR. WIRTH: I think --

5 MR. RAO: Because he doesn't link the
6 servicing and maintaining the lagoons.

7 MR. WIRTH: Part of the answer to your
8 question may be that on page 6, this references
9 when a lagoon is considered removed from service,
10 and that would not be considered the same as
11 abandonment necessarily.

12 MR. RAO: So under your proposal, if a
13 lagoon is removed from service, then will any
14 closure requirements trigger at that point?

15 MR. WIRTH: No.

16 MR. RAO: It still has to be abandoned
17 before anything happens?

18 MR. WIRTH: Correct.

19 MR. RAO: I have another question for
20 Mr. Davidson concerning the same criteria for
21 declaration of abandoned lagoon. The criteria
22 under (b) where you say a lagoon at an idle
23 livestock management facility which has not
24 received livestock waste for a period of four

1 consecutive months is considered abandoned, could
2 the lagoon be considered abandoned even if it's
3 being maintained and serviced?

4 MR. DAVIDSON: You have to get into the
5 situation of these are different provisions in
6 several laws, and then you get into the situation
7 of coming down to a point after meeting all this
8 criteria, do you -- does the lagoon now need to
9 be closed, or does it need to be used for an
10 alternative purpose?

11 Closure is the last alternative in our
12 opinion that should happen to a lagoon. It's a
13 structure. It has value. It has use. First it
14 should be recycled for the use for which it was
15 really intended. Second, it should be used for
16 any other purposes. Now, there are methods of
17 cleaning lagoons so that they can be used for
18 aquaculture or water retention or recreational
19 purposes without closing them.

20 Now, there's a company called Bart
21 Specialties headed by Don Sarles (phonetic) from
22 Mattoon, Illinois, and his specialty is going into
23 a lagoon that has liquid in it, and he can remove
24 the sediment, sludge and so forth in the bottom of

1 that lagoon, as required by law, and then use that
2 lagoon for other purposes.

3 In some cases you may want to remove
4 all of the liquid. You may want to remove all of
5 the sludge. You may want to remove the liner.

6 MR. RAO: I realize that, but what I'm
7 asking you is in that particular criteria where
8 you say a lagoon at an idle livestock management
9 facility which does not receive any waste.

10 MR. DAVIDSON: Because it's only
11 abandoned when there's no one maintaining and
12 servicing it and there's no owner that can be
13 found and the taxes have not been paid for two
14 years, and the redemption period has passed.

15 This is the only way that somebody does
16 not own or have that unless it's in bankruptcy or
17 it's in some type of litigation.

18 MR. RAO: The reason I ask is the way
19 you propose the language here, each one of the
20 criteria here can -- you know, it says a lagoon
21 which meets any one of these criteria is abandoned
22 lagoon, and I just needed a clarification from you
23 if that's what you're intending here.

24 MS. MC FAWN: I think that Mr. Rao is

1 looking at is the word "or."

2 MR. DAVIDSON: Any one of these items is
3 an item that could declare the lagoon abandoned.

4 MS. MC FAWN: That's your intent, not a
5 combination, but any one of these that a lagoon
6 should be declared abandoned?

7 MR. DAVIDSON: One could be construed
8 with two. In some cases it would take all of
9 them. In other cases it would take only one. It
10 would depend upon the financial situation.

11 MS. MC FAWN: If it's been abandoned or
12 you can't find a person or owner or operator for
13 maintaining and servicing it, that pretty much
14 presumes that it's not being maintained or
15 serviced, but otherwise, you're going to be
16 looking at it. So that alone, wouldn't that
17 qualify for abandonment?

18 MR. DAVIDSON: I would say that, yes,
19 the correct interpretation of this -- and we'll go
20 back to the Council -- would be that if it meets
21 any one of these criteria.

22 MS. MC FAWN: And then going to when I
23 was listening to your dialogue, Mr. Rao was
24 looking at letter (b), and he's wondering if that

1 one needs to be qualified like that. Maybe it's
2 livestock management facility, but if in fact the
3 lagoon is being maintained and serviced, then it
4 probably should not be deemed abandoned.

5 MR. RAO: That's what I was trying to --

6 MR. DAVIDSON: That's a good question on
7 (b). We need to probably go back to legal
8 counsel.

9 MR. RAO: You have a lagoon that is not
10 receiving waste for four months.

11 MR. DAVIDSON: It should be further
12 qualified if it hasn't received waste but it is
13 serviced and maintained, that it is not construed
14 as being abandoned. We'll clarify that for you.

15 MS. MC FAWN: I think that's what we
16 were questioning.

17 MR. DAVIDSON: Do you want us to get
18 that back to you in Springfield?

19 MS. MC FAWN: That would be fine.

20 HEARING OFFICER KING: Since we're just
21 reviewing this now for the first time, we hope
22 that you gentlemen will be available again in
23 Springfield.

24 MR. DAVIDSON: I may not be available,

1 but my partner is also a legislative consultant or
2 there may be other persons from the producers
3 association.

4 MS. MC FAWN: I would hope that your
5 partner and you and Mr. Wirth could come on
6 Tuesday because as Mr. Rao said, we just haven't
7 reviewed this. Over the course of next week,
8 we're apt to have questions, not only from this
9 panel but from other board members.

10 HEARING OFFICER KING: Are there any
11 other?

12 MS. LAWLESS: Audrey Lawless from the
13 Pollution Control Board. Mr. Davidson, you seemed
14 to indicate earlier that when you contacted
15 commercial insurance carriers that their only
16 interest was really excess coverage, maybe
17 secondary coverage, and I was wondering in light
18 of the fact that it seems like this fund was
19 created because there is a gap in the commercial
20 market for the producers to actually obtain any of
21 the possible financial sureties, have you looked
22 into at all getting excess coverage or secondary
23 coverage for the Fund because I would imagine that
24 if indeed there is this gap in the commercial

1 market, that the producers aren't able to acquire
2 the possibly allowable financial methods under the
3 Livestock Management Facilities Act, that
4 certainly a lot of them will want to participate
5 in the Fund.

6 In light of any catastrophic event,
7 certainly it is feasible that the Fund could go
8 bankrupt. Have you looked at all into getting
9 secondary coverage or excess coverage?

10 MR. DAVIDSON: We'd like to answer it
11 two ways. One, in talking to the insurance
12 carriers and because of the low volume and the low
13 incident and there's no actuarial history, they
14 are totally 100 percent reluctant to enter into
15 the surety.

16 When you get into the second liability
17 question when there's a high deductible, then
18 there is the potential, as indicated by one
19 company, that they would provide, say, 100,000 or
20 200,000 deductible and take the excess liability,
21 say, 400,000 to a million at a reasonable price.
22 David, I think you were involved in that
23 particular situation concerning the excess
24 liability.

1 MR. WIRTH: Yeah, I guess I was involved
2 in some of the discussions when we were trying to
3 find some primary insurance, and that was
4 basically there was none, none offered nor likely
5 to be, and I guess I did not get involved in any
6 of the reinsurance issues so I can't speak to
7 that.

8 MR. DAVIDSON: But there is the
9 potential, but as far as 100 percent policy, most
10 any company will write you a surety policy if you
11 put up the face amount and pay the annual
12 maintenance fee, which can run anywhere from five,
13 seven, fifteen percent because it costs a lot of
14 money for an underwriter to go through the
15 paperwork. So if you put up the face amount, you
16 might as well go to the bank and get a CD.

17 MR. WIRTH: I guess a couple of things
18 to mention on this. This proposed Fund is really
19 to address abandonment situations. In the event
20 of, you know, mismanagement, shall we say, or an
21 event like that, farm operators in Illinois, as
22 best as I understand, are required by law to carry
23 liability insurance policies.

24 So certainly there is insurance out

1 there that covers a broad range of things that can
2 take place on a farm including a potential
3 accident or a problem with the lagoon. The Fund
4 itself is for those cases where there is no entity
5 available. We've got, you know, truly abandoned
6 property, and the whole objective is that the
7 industry, through this mechanism, supports itself
8 in that unlikely event rather than having the unit
9 of local government or the state have to incur
10 that cost for properly closing an abandoned
11 lagoon.

12 HEARING OFFICER KING: Are there any
13 other questions?

14 MS. MC FAWN: I have a few.
15 Mr. Davidson, I was reviewing your testimony, and
16 I had a couple of other questions. You talked
17 about you have looked into the history of
18 livestock abandonment in Illinois, Iowa and
19 Indiana, and you only found two lagoons that have
20 been abandoned and that public funds were used to
21 close the lagoons. Did you find any lagoons that
22 were abandoned?

23 MR. DAVIDSON: We found no official
24 government documentation.

1 MS. MC FAWN: The two that you found,
2 did you determine that public funds were used.

3 MR. DAVIDSON: That's what I said. We
4 were not able to document from a governmental
5 entity that they actually used their funds to
6 close the lagoon.

7 MS. MC FAWN: So it's not that --

8 MR. DAVIDSON: But it was alleged.

9 MS. MC FAWN: It's alleged.

10 MR. DAVIDSON: It was alleged.

11 MS. MC FAWN: Mr. Wirth, you talked
12 about two abandoned lagoons, but you didn't couple
13 it with government funds, and I just wondered that
14 more lagoons were found that didn't then trigger
15 this government funding or --

16 MR. WIRTH: The same incidents, the same
17 information was used in both those statements.

18 MS. MC FAWN: So then you found two
19 abandoned lagoons. Did you find any more that
20 didn't involve government funding?

21 MR. DAVIDSON: Well, there are lagoons
22 that the private individuals close from time to
23 time on their own volition because they no longer
24 use them, and that's one of the areas that one of

1 the companies we contacted is in that business,
2 and when a farmer no longer needs the lagoon and
3 he doesn't want to use it for another purpose,
4 then they close the lagoons and they have a
5 history on that.

6 MS. MC FAWN: Would that be the company
7 you mentioned?

8 MR. DAVIDSON: There's actually two that
9 I contacted. One was Bart Specialties. That one
10 has more multiple facet because they do sanitary
11 waste lagoons, and the other one is Metro Ag,
12 Brian Kramer, and as you see in our testimony and
13 that of the Department of Agriculture, our
14 comments, I should say, on July 1 that our cost
15 estimates are pretty close concerning the cost per
16 gallon or cubic foot, and we did -- in our July
17 1st filing, we did break down by different areas
18 the specific costs.

19 MS. MC FAWN: Thank you. In your
20 testimony you also talked about bankruptcies and
21 the lagoons being recycled and used in
22 agricultural pursuits. How many bankruptcies did
23 you find that involved facilities with lagoons?

24 MR. DAVIDSON: That is a difficult

1 situation because to go through, you'd have to do
2 total research in every county or every federal
3 district to find out exactly how many bankruptcies
4 have been filed. If you're a large law firm and
5 have the database, yes, you can do that, but to go
6 through that database would cost a fortune.

7 MS. MC FAWN: I wondered what you said
8 when all Illinois involved bankruptcies.

9 MR. DAVIDSON: The latest bankruptcy
10 that was recycled was Euroswine, and that was
11 immediately sold.

12 MS. MC FAWN: So this statement was
13 based on how many facilities, Euroswine plus how
14 many more?

15 MR. DAVIDSON: That was the only one at
16 this time. That was the most current, and that
17 was just this summer.

18 MS. MC FAWN: In your conclusion you
19 suggested language to the Board for a financial
20 instrument or financial assurance item, and you
21 said the statement of participation in Livestock
22 Lagoon Closure Fund would be the proposed
23 language.

24 Do you think that should be qualified

1 in any way, for example, should we qualify it to
2 be funded by the Illinois Farm Development
3 Authority, or could it be any other kind of
4 Livestock Lagoon Closure Fund?

5 MR. DAVIDSON: I would say that it
6 shouldn't be restricted to one. In this
7 particular presentation, we're talking about one
8 specific recommendation.

9 MS. MC FAWN: We've seen the specifics
10 or the anticipated specifics of that through the
11 IFDA. How would we go about making sure that
12 other funds are adequately funded?

13 MR. DAVIDSON: That would be the
14 responsibility of the Department of Agriculture
15 and the responsibility of the entity approved in
16 the regulations.

17 MS. MC FAWN: But we wouldn't have --
18 that entity, I think, is the Board approving the
19 regulations at least, and we wouldn't have the
20 Fund before us at the time.

21 MR. DAVIDSON: What we're saying at this
22 particular time, we are presenting to you a
23 definite type of fund setting forth certain
24 criteria. If some other entity wants to come

1 forth with a fund, then that should be proposed to
2 the Board for approval. We're asking you
3 specifically to approve this fund and only this
4 fund at this time.

5 MS. MC FAWN: Okay, that's a good
6 clarifying point. Thank you. I just have a
7 couple more questions. I see that it is pretty
8 much the lunch hour.

9 Mr. Wirth, I know that this is probably
10 a preliminary draft, but I was wondering I don't
11 know that much about your Authority. Do you work
12 continually with the Department of Agriculture,
13 that is, the Farm Development Board?

14 MR. WIRTH: We have kind of an open
15 relationship. We do not have any joint projects
16 as such today. Just as a point of clarification,
17 we're a separate entity from the Department of
18 Agriculture, but certainly Mr. Boruff and I
19 communicate on issues such as this from time to
20 time. This would be kind of new territory where
21 we would actually have a Memorandum of
22 Understanding.

23 MS. MC FAWN: You've never had a
24 Memorandum of Understanding with the DOA before?

1 MR. WIRTH: No, we have not.

2 MS. MC FAWN: Have you discussed this
3 memorandum with the DOA?

4 MR. WIRTH: No, only in broad terms.

5 MS. MC FAWN: This is a rather specific
6 question, but I'm going to pose it, and you can
7 answer today or at a future time. It says on page
8 4 about the participants. That is, if they fail
9 to pay an assessment, it shall be deemed a
10 cancellation of the agreement between the
11 participant and the Authority.

12 So that means if they don't pay one
13 assessment, they're out, is that right?

14 MR. WIRTH: Well, just to walk through,
15 there's two situations that I envision an
16 assessment taking place, the initial assessment.
17 That is, the closure costs for your lagoon are
18 estimated at X, you shall pay in such a percent of
19 X into the Fund and you have your agreement.
20 Obviously if they don't pay into the Fund at that
21 initial point, no agreement.

22 The other case where I can envision an
23 assessment, actually possibly two. One, the
24 agreement -- this addresses one case where because

1 of unforeseen payouts of the Fund, the Fund
2 becomes undervalued, shall we say. So those
3 participants are reassessed at a level to bring
4 that back up. Failure to make that future
5 assessment would result in their becoming
6 ineligible for coverage under the Fund which by
7 definition forces them to provide other surety.

8 MS. MC FAWN: But if they don't, then
9 the state has no recourse?

10 MR. DAVIDSON: The Department of
11 Agriculture would have recourse because they no
12 longer meet the requirements of financial
13 responsibility under Section 17. So when David
14 tells them you have failed to meet the
15 requirements of a participant, then they'll have
16 to get surety elsewhere. That's something that
17 needs to be worked out in the agreement as to the
18 period of time that you have there in the
19 transition.

20 MS. MC FAWN: It does seem to be a gap.

21 MR. DAVIDSON: You have to get it one
22 way or the other. That's what the law says.

23 MS. MC FAWN: The gap concerns me.

24 MR. DAVIDSON: That would need to be

1 worked out in the agreement.

2 MS. MC FAWN: Do you see my point?

3 MR. WIRTH: Yes, a good point.

4 MS. MC FAWN: Especially if they were
5 making annual payments as opposed to an entire
6 payment up front. If they miss one annual payment
7 and periodic payment and they're out, then the
8 state has no fund to seek.

9 MR. WIRTH: There's something we may be
10 able to address, especially in the case where they
11 failed to make an annual payment. That's a good
12 thought I hadn't considered.

13 MS. MC FAWN: What would happen, for
14 instance, if the Authority doesn't agree with the
15 Department of Agriculture about the need for
16 expenditures?

17 MR. WIRTH: Well, part of that there
18 will be some protection in that there will be a
19 Council that's actually -- we'll have a seat on
20 the Council, and the Department of Ag and the
21 sponsoring organizations and the representatives
22 of the participants will serve on that Council.
23 So I would suggest that the Authority is bound by
24 the Council's recommendation rather than -- I

1 wouldn't want this suggesting the Authority
2 unilaterally says. We have to be bound by the
3 recommendation of the Council.

4 MS. MC FAWN: So the Authority would be
5 bound by the Council's recommendation so it
6 wouldn't be just a recommendation?

7 MR. WIRTH: I think that's -- as I
8 envision it, correct.

9 MS. MC FAWN: Who else would be on the
10 Council? You mentioned the Department of
11 Agriculture. What kind of other participants
12 would there be on that?

13 MR. WIRTH: For example, producers who
14 have livestock lagoons who are members of Illinois
15 Farm Bureau could be represented by a designee by
16 the Illinois Farm Bureau. Similarly, Illinois
17 Pork Producers Association could have a
18 representative of Illinois Pork Producers on the
19 Council.

20 This specifies that in the case I'm a
21 producer and I don't fall under the Farm Bureau or
22 Pork Producers or any other association that
23 represents membership, in that case let's say
24 there's three of us that fall into that category,

1 we can have a seat on the Council. One of the
2 three of us can be a member of that Council, and I
3 believe the Department of Ag would help us select
4 one of us three.

5 MS. MC FAWN: Page 6 of the draft
6 agreement, memorandum, paragraph (c), it says, "A
7 registered lagoon shall be required to be closed
8 when one of the following occurs," and one of
9 those is number one, the owner or operator of the
10 lagoon determines that such lagoon is to be
11 closed.

12 Then if you drop down to paragraph (e),
13 it says, "The Department assumes responsibility
14 for closure when it has been determined that a
15 lagoon meets the requirements set forth in
16 paragraph (c) above." Maybe I'm not reading this
17 correctly, but it almost appears that the owner or
18 operator could trigger the need for closure and
19 thereby trigger the need for the Authority to
20 expand the funds and the Department of Agriculture
21 to spend them.

22 MR. WIRTH: That is the way it appears
23 to read, but I don't think that is the intent so
24 we will need to clarify that.

1 MR. DAVIDSON: That's a good question if
2 someone decides they want a free closure job.

3 MS. MC FAWN: Exactly.

4 MR. WIRTH: That's certainly not what we
5 intend to use the Fund for.

6 MS. MC FAWN: I don't think so. It
7 reminds me of some open-ended disability insurance
8 policies written many years ago. Well, you know,
9 I do have some other questions, but I think I want
10 to ponder them for the coming week about the
11 financing of the Fund two times versus the five
12 percent so I do hope you'll join us again on
13 Tuesday. Mr. Davidson, the Pork Producers did
14 submit a comment. Fortunately, my copy is dated
15 July 1.

16 MR. DAVIDSON: Right, in July.

17 MS. MC FAWN: And some of these -- some
18 of the comments were addressed in your testimony
19 today. For instance, the definition of when it
20 should be removed from service does not seem to
21 coincide any longer with your testimony exactly.
22 It doesn't parallel exactly.

23 I'm wondering does your testimony take
24 precedence over what you put in your comments?

1 MR. DAVIDSON: We better clarify that at
2 the 21st meeting.

3 MS. MC FAWN: That would be helpful.
4 The comments are accepted as a public comment. So
5 on the 14th, you might want to enter them as an
6 exhibit or amend them and enter an amended copy or
7 something to that effect.

8 HEARING OFFICER KING: For the purposes
9 of the record and for reference in the course of
10 future Board opinions, although Mr. Davidson and
11 Mr. Wirth essentially recited their filings into
12 the record here today, I'm going to ask if there
13 are any objections to entering Mr. Davidson's
14 comments and Mr. Wirth's proposal that was
15 attached here as exhibits.

16 Hearing none, those will be entered as
17 exhibits, I believe, 5 and 6 since we reserved
18 some numbers for some other documents from the
19 Department of Agriculture. Mr. Davidson's
20 comments by Richard W. Davidson in the matter of
21 livestock waste regulations 35 Ill. Adm. Code 606,
22 97-15(b) dated October 14th, 1997, will be entered
23 as Exhibit 5 and the attachment No. 1,
24 Government-Livestock Industry Cooperative

1 Agreement to Provide Financial Surety For Closure
2 of Abandoned Livestock Lagoons will be entered as
3 Exhibit 6, and we'd note that has addendum
4 Department of Agriculture Information Regarding
5 New Lagoons Required to be Registered 10/9/97, and
6 that's a part of Exhibit 6.

7 (Exhibits 5 and 6 were received
8 in evidence.)

9 HEARING OFFICER KING: In the course of
10 the testimony, there are also references made to
11 the IEPA comments. Those are already made part of
12 the record with public comment numbers. Those
13 were public comments 2 and 3.

14 MS. MC FAWN: Mr. Davidson in his
15 testimony referred to the Agency's comments June
16 30th, 1997. That's already been entered into the
17 Board's record as a public comment, and then he
18 also referred to the Agency's comments which are
19 the pre-hearing comments submitted by
20 Mr. Warrington of October 3, 1997. That is public
21 comment No. 3 in the Board's records.

22 HEARING OFFICER KING: Mr. Warrington,
23 do you know if the Agency's intending to present
24 any witnesses or testimony?

1 MR. WARRINGTON: We don't have any
2 witnesses anticipated for next week at this time.

3 MS. MC FAWN: In light of Mr. Davidson's
4 comments, are you interested in perhaps presenting
5 a witness concerning your table?

6 MR. WARRINGTON: That's why I qualified
7 it. We will review it and we'll let the Hearing
8 Officer know as soon as possible.

9 HEARING OFFICER KING: All right. Is
10 there anyone else who wishes to offer any
11 testimony? I believe that finishes up what we're
12 doing here today.

13 As we mentioned several times, there is
14 another hearing on September 21st in Springfield.
15 I believe the Hearing Officer order should be on
16 the table back there, if you don't already have
17 one, that has the locations and times. So I'd
18 like to thank everyone today. I will mention to
19 the court reporter that we got approval for an
20 expedited transcript.

21 MS. MC FAWN: So the audience knows as
22 well, we asked for an expedited transcript because
23 we asked for a lot of things from the Department
24 of Agriculture. We're hoping that transcript is

1 available on Thursday at the very earliest, but
2 you might want to -- do they have to get that
3 from you, the court reporting service?

4 THE REPORTER: We'd like them to order
5 from us, but we know it is also posted on the
6 Internet and made available.

7 MS. MC FAWN: As the court reporter has
8 informed you, we also do put our transcripts on
9 the Internet on our Worldwide Web site. That is
10 not done as quickly as we receive the hard copy,
11 but for those of you that are critically
12 interested in reviewing that transcript prior to
13 the next hearing in this matter, please know that
14 we are trying our best to make it available.

15 As Mr. King said, our hearing is next
16 week in Springfield, it is at the Municipal
17 Building on October 21 at 10:00 a.m. It will be
18 continued as necessary to the next day at a
19 different location. Given the brevity of today's
20 hearing, there's, I would say, an unlikely chance
21 that we will need to go on to October 22, but do
22 keep in mind we do have those two dates set aside.

23 We look forward to additional testimony
24 from the Agency, from the Department of

1 Agriculture and do hope that someone from the
2 Illinois Pork Producers is there, also, to answer
3 further questions.

4 HEARING OFFICER KING: Thank you,
5 everyone. That concludes today's hearing.

6 (Which were all the proceedings
7 had in the above-entitled
8 hearing.)

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1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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5 LISA H. BREITER, CSR, RPR, CRR, being
6 first duly sworn, on oath says that she is a court
7 reporter doing business in the City of Chicago;
8 that she reported in shorthand the proceedings at
9 the taking of said hearing and that the foregoing
10 is a true and correct transcript of her shorthand
11 notes so taken as aforesaid, and contains all of
12 the proceedings had at said hearing.

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