

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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5 IN THE MATTER OF:

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7 LIVESTOCK WASTE REGULATIONS No. R97-15(B)

8 35 ILL. ADM. CODE 506 (Rulemaking)

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12 Proceedings held on October 21, 1997, at

13 10:15 a.m., at the Municipal Building, Seventh &

14 Monroe Streets, Springfield, Illinois, before the

15 Honorable Charles A. King, Hearing Officer.

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A P P E A R A N C E S

Illinois Pollution Control Board:
Ronald C. Flemal, Ph.D., Board Member
Marili McFawn, Board Member

Anand Rao, Environmental Scientist for the Board
Charles A. King, Hearing Officer

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P R O C E E D I N G S

(October 21, 1997; 10:15 a.m.)

HEARING OFFICER KING: I would like to welcome everyone here this morning. This is the second hearing in Rulemaking R97-15, Docket B, Livestock Waste Regulations, dealing specifically with the financial responsibility rules.

My name is Charles King. I am the Pollution Control Board Hearing Officer in this matter. Also here this morning are Board Members Ronald Flemal and Marili McFawn.

BOARD MEMBER McFAWN: Good morning.

HEARING OFFICER KING: To my immediate right is Anand Rao from the Board's Technical Unit.

We had a hearing last week in Chicago where some initial testimony was presented by the Department of Agriculture and the Pork Producers. Here this morning we have Mr. Boruff from the Department of Agriculture who is going to respond to some of the issues that were raised last week. Then we will take testimony from anyone who wishes to offer more testimony today.

Mr. O'Connor from the Beef Association

1 and Mr. Gebhards from the Pork Producers indicated
2 that they wish to offer testimony this morning.

3 Is there anyone else here today who wants
4 to offer testimony?

5 All right. Before we start, I will just
6 mention that on the table in the back of the room
7 are a number of documents, copies of documents,
8 that have been filed with the Board or provided to
9 us by witnesses and people offering testimony. So
10 if you want to pick up copies of them, they are
11 along the back there.

12 Other than that, we will begin with Mr.
13 Boruff.

14 Will the court reporter please swear the
15 witness.

16 (Whereupon the witness was
17 sworn by the Notary Public.)

18 C H E S T E R S. B O R U F F,
19 having been first duly sworn by the Notary Public,
20 saith as follows:

21 MR. BORUFF: My name is Chet Boruff,
22 Deputy Director of the Illinois Department of
23 Agriculture, and my testimony today will address
24 questions which were brought forth at last week's

1 hearing in Chicago. Throughout the course of my
2 remarks, I will attempt to address some of these
3 questions and will also be offering attachments to
4 the Illinois Pollution Control Board for further
5 documentation.

6 At this point in time, I guess I would
7 like to draw your attention to a document that I
8 gave members before we started which was our report
9 to the Illinois General Assembly, dated February
10 5th, 1997, regarding the availability of financial
11 instruments to the industry to comply with Section
12 17 of the Livestock Management Facilities Act. So
13 I believe that the Board Members that are present
14 have that from our earlier submission to you.

15 BOARD MEMBER McFAWN: Thank you. We do.

16 MR. BORUFF: Okay. At the last hearing,
17 discussion was held regarding when a livestock
18 waste lagoon should be considered as "abandoned."
19 Toward that end, the Illinois Department of
20 Agriculture offers the following suggested
21 definition for the term "abandoned." "A livestock
22 waste lagoon shall be considered abandoned when it
23 is no longer in service, and no responsible party,
24 other than a unit of government, can be identified,

1 that is able to provide adequate maintenance and
2 provide for the proper closure of the lagoon."
3 Within the definition itself, the term "no longer
4 in service" refers to the fact that the lagoon is
5 no longer receiving livestock waste. The
6 definition requires that a responsible party be
7 liable for maintenance and the proper closure of
8 the lagoon. There may be instances where a
9 property has not yet become the responsibility of a
10 unit of local government, but a previous owner or
11 mortgage holder may be identified and be
12 financially capable of providing for maintenance
13 and closure. The Department suggests that the
14 inclusion of such a definition would help clarify a
15 future administration of this portion of the
16 rules.

17 Another area which may require some
18 further clarification regards the effective date of
19 the rules which are being discussed in this docket.
20 I guess I would refer the Board Members to another
21 document which we handed out. It is called,
22 "Effective Date Issue," and in my testimony I will
23 be reading what effectively is on this one sheet.
24 We would like to try to clarify.

1 The Department's proposed amendment to 35
2 IAC 506 under Section 601 does not specifically
3 indicate an effective date for the requirement of
4 an owner to establish and maintain evidence of
5 financial responsibility to provide for the closure
6 of lagoons beyond the current language in the rule
7 and the statute. The Department suggests that at
8 the conclusion of this rulemaking there will have
9 been three different "effective dates" of rules
10 promulgated for the implementation of the Livestock
11 Management Facilities Act. This situation could
12 lead to confusion within the regulated community as
13 to who must provide and maintain evidence of
14 financial responsibility. Therefore, the
15 Department suggests that the final rule within
16 Section 601 should address this issue and provide
17 the following language for consideration by the
18 Board.

19 Would you prefer that I read this, or
20 since I have offered this already, would you just
21 like to have the record reflect that?

22 HEARING OFFICER KING: For the benefit of
23 the people in the room, why don't you read it.

24 MR. BORUFF: Okay. I sure will. This

1 would fall under Section 506.601, Applicability.

2 The current language in the Act and rules
3 are as follows:

4 "Owners of new or modified lagoons
5 registered under the provisions of the Livestock
6 Management Facilities Act shall establish and
7 maintain evidence of financial responsibility to
8 provide for the closure of the lagoons and the
9 proper disposal of their contents within the time
10 provisions outlined in Section 17 of the Livestock
11 Management Facilities Act."

12 Now, this would be the new language which
13 we are suggesting:

14 "This Subpart shall apply only to the
15 owners of new or modified lagoons registered under
16 Subpart B of this Part after the effective date of
17 rules adopted in R97-15(B) at" -- and then we would
18 propose that you would have the actual Illinois
19 Register date and reference in there, effective on
20 the month and day of 1998 that the rules are
21 finally adopted.

22 During our last hearing, there were some
23 discussions held regarding Section 506.604, which
24 is referred to as "Release of Financial

1 Responsibility and Lagoon Owner." The Department
2 suggests that at 506.604(B), the inclusion of a
3 60-day notification period be made so that the
4 Subpart B would now read, "The Department shall
5 notify the lagoon owner in writing within 60 days
6 of the release of the requirement to maintain
7 financial responsibility."

8 The comment was made last week, and it
9 was a good suggestion, that that inclusion of a
10 specific time period might be both for the benefit
11 of the producer and the Department as well. So we
12 would agree with that inclusion.

13 At this point in time, I would like to
14 expand upon discussion held at last week's hearing
15 regarding how the Department of Agriculture
16 determined the level of surety that a lagoon
17 operator would need to provide to comply with the
18 section of this Act. We have developed an example
19 of closure expenses based upon bids we have
20 received and a typical livestock waste lagoon,
21 based upon the registrations we have been receiving
22 from the industry over the past few months. I
23 offer this document as an attachment to my
24 testimony, but I will briefly review some of the

1 major points within it.

2 I would refer you to this worksheet, the
3 few pages. It is called, "Livestock Waste Lagoon
4 Closure Cost Estimates." I won't read the entire
5 document to you, but we will kind of walk you
6 through how we arrived at the numbers that are
7 located within it.

8 We reviewed the lagoon registrations that
9 we have received over the past few months and found
10 that the average sized lagoon was 2,070,000 cubic
11 feet. Of course, they have a range from smaller
12 and larger but that was the average. And so what
13 we did here was we based these calculations on
14 average lagoon size of 2,000,000 cubic feet which
15 would include the freeboard located within the
16 lagoon itself.

17 The document goes on to show some of the
18 typical lagoon parameters in terms of size and
19 depth and that type of thing, and then comes up
20 with calculations as to how we came up with the
21 volume of the lagoon both above and below grade.
22 There are also calculations here showing you
23 approximately how large an area of land mass that
24 lagoon might take. It gives you some conversion

1 factors to aid you with the calculations that we
2 came up with.

3 On the second page, then, we have come up
4 with some of the closure cost estimates. As you
5 read down through there, you will see the different
6 steps that would have to be taken in order to
7 provide for the proper closure of a lagoon. There
8 would be manure sampling and analysis, not only of
9 the manure, the contents, and the sludge, but also
10 the soil would have to be remediated, that is at
11 the bottom in the liner of the lagoon. We have
12 gotten quotes from two private laboratories on what
13 the analysis cost would be, and those are noted in
14 the margin at \$290.00.

15 The next area would be the monitoring
16 well closure. In not all but in some instances, a
17 lagoon might require a monitoring well network
18 based upon the underlying strata below the lagoon.
19 In those cases where those monitoring wells exist,
20 they would have to be properly sealed off. So we
21 have gotten information from the Ag Engineering
22 Department at the University of Illinois and also
23 from the Illinois Department of Public Health about
24 the proper sealing and closure of those wells, and

1 came up with a cost estimate of approximately
2 \$300.00 per well, and a site would have a minimum
3 of three wells so that would be \$900.00 which would
4 contribute toward the closure cost.

5 The next item would be the removal of
6 pads, the cement pads, piping, and that type of
7 thing that would have provided a way for the manure
8 to get into the lagoon itself. We have estimated
9 that since there would be construction equipment on
10 site that might add another \$1,000.00 for the
11 removal of some of those appurtenances to the
12 lagoon.

13 The large expenses, though, would be
14 involved with the next item called lagoon liquid
15 and sludge removal and application. By application
16 we mean the land application of those items.

17 As you turn the page, to page 3 of this
18 handout, you can see that we have gotten estimates
19 from some companies involved in this type of
20 activity. However, none of these are firm quotes
21 because there are many variables that a company
22 might have to take into consideration. But they
23 were good enough to give us some cost figures,
24 based upon ranges of what they might expect from

1 past experience in this type of an operation of
2 closing out a lagoon.

3 So you can see there we have given you
4 the cost expressed in cents per cubic feet of
5 pumping and removal of many of these different
6 items within the lagoon itself. But in this case,
7 in a 2,000,000 cubic foot lagoon, some of what has
8 to be removed will be manure and some will be
9 sludge. And then the combined cost, based upon the
10 estimates that we received, would be \$163,860.00.

11 We have credited back in the fertilizer
12 value of the manure based upon information that we
13 received from the Ag Engineering Department from
14 the University of Illinois, and also estimates
15 taken from the Midwest Plan Service regarding what
16 we might expect as a nutrient value or content of
17 the lagoon contents, and we came up with a net
18 value of \$26,000.00 which would be a credit to the
19 whole project.

20 We have also put in here what we would
21 anticipate it will cost to remove a six-inch layer
22 of soil which are the requirements for lagoon
23 closure, and based upon a company in the northern
24 part of the state that specializes in this type of

1 remediation and land application of soils, we have
2 come up with a cost \$31,800.00.

3 The next thing that we would have to do
4 once the lagoon had effectively been cleaned out
5 and cored out, would be to put the landscape back
6 in its original condition. By doing that, we would
7 be pushing the berm walls back in to fill the hole,
8 essentially left by the lagoon itself. We have
9 four different companies who have talked to us
10 about what it would cost to do such, and we have
11 used kind of the average cost figure to come up
12 with \$1.50 per cubic yard and a total cost of
13 \$34,500.00.

14 Adding all of these comes up with a total
15 estimated cost for closure of this type of lagoon
16 at \$206,350.00, or an average per cubic foot cost
17 of \$.1032 cents per cubic foot.

18 In some cases synthetic liners are used
19 in lagoons, and in those cases, we would have some
20 landfill expenses maybe from the removing and
21 disposing of the synthetic liner. But by the same
22 token, that would be offset by the fact that we
23 don't have the six inches of soil to remediate
24 because there would be no contamination of the

1 soil.

2 So in summary, this would show you how we
3 came up with the 10 cents per cubic feet that we
4 have suggested that producers be required to submit
5 for financial surety. When you look at the range,
6 we had a cost of anywhere from \$0.0908 cents per
7 cubic feet to above that based on different
8 variables. But we felt that 10 cents was a
9 reasonable consideration in coming up with
10 financial surety.

11 Also, when we compared that with a range
12 of values presented by the Illinois Pork Producers,
13 the Beef Association, and the Illinois Farm Bureau,
14 in their public comment, number one, we found that
15 ours compared very closely with theirs. Because
16 when you convert their cost numbers to a per cubic
17 foot basis, their cost was ranging from \$0.0828
18 cents per cubic foot to \$0.1122 cents per cubic
19 feet. So we found that when we had come up with
20 our examination of the cost and then compared it to
21 theirs, we were all very close. We felt that we
22 were in a very reasonable range.

23 During the October 14th hearing held in
24 Chicago, questions were posed to the Department

1 regarding Section 605 and 611 of the proposed
2 rules, both of which dealt with the Department's
3 authority to bring suit and impose penalties under
4 the provision of this Section.

5 In one instance, a question was posed
6 regarding Section 506.C regarding what authority
7 the Department would have to bring suit and what
8 court such actions would be taken within. Section
9 506.605 deals with the application of financial
10 responsibility proceeds.

11 Subpart C in the rules states, "The
12 Department may sue in any court of competent
13 jurisdiction to enforce its rights under financial
14 instruments." For example, if a livestock producer
15 had used a letter of credit from a financial
16 institution as evidence of financial
17 responsibility, and in the event that the bank
18 would not honor the letter of credit as intended,
19 the Department, the Illinois Department of
20 Agriculture, would file suit against the bank in
21 the state circuit court in the county in which the
22 bank is located. In the case of federally
23 chartered banks, the Department would most likely
24 file suit in the appropriate federal court.

1 Section 506.611 deals with penalties and
2 states, "The Department may issue a cease and
3 desist order to the lagoon owner for failure to
4 provide evidence of financial responsibility to the
5 Department or for failure to maintain financial
6 responsibility in an amount required pursuant to
7 Section 506.603 of this subpart." The Livestock
8 Management Facilities Act grants statutory
9 authority to the Department to issue a cease and
10 desist order. After a thorough investigation of
11 the situation, the Department management may
12 determine that it would be appropriate to issue a
13 cease and desist order. Only the Department
14 management at the highest levels will have the
15 authority to issue such orders. If the operator of
16 the livestock management facility ignores a
17 properly issued cease and desist order, the
18 Department has the authority to seek a court
19 injunction in the county of residence of the
20 operation.

21 In both instances outlined above, the
22 Illinois Attorney General's Office will represent
23 the Department as it does in all matters such as
24 these.

1 Following testimony at last week's PCB
2 hearing, a question was raised regarding when the
3 proceeds of financial surety instruments would be
4 used for cleanup and whether or not Section 17 of
5 the LMF Act was intended to protect only units of
6 local government or private owner of lagoons, as
7 well. I responded that during the formulation and
8 discussion regarding the Act, the intent was for
9 financial responsibility to only protect the
10 taxpayers of this State, to prevent local public
11 owners of property from paying for closure and
12 cleanup expenses.

13 In order to support this statement, we
14 reviewed a transcript of the discussions held in
15 both the Illinois House of Representatives and the
16 Illinois Senate regarding this issue. I would
17 refer you to some documents that I handed out
18 earlier of the transcripts of the House and Senate
19 discussions, and I will explain to you what all is
20 located within those.

21 In a copy of the transcript made
22 available to the Pollution Control Board, we refer
23 to a floor debate held on April 18, 1996, the 115th
24 legislative day of the session. Beginning on page

1 125, Representative Larry Woolard, current Chairman
2 of the House Agricultural Committee, asked
3 Representative Rich Myers, one of the cosponsors of
4 the bill, how the bill addressed concerns, "in
5 ensuring that we don't have failures and that
6 nobody responsible in charge to make repairs but
7 the State of Illinois. Is there some kind of a
8 plan in place that would ensure that we would have
9 adequate value of this financial responsibility?"

10 Representative Myers replied to
11 Representative Woolard that, "They will make sure
12 that they are, that the State is adequately
13 protected and that the taxpayer is adequately
14 protected and they will base the value of the bond
15 or any other financial security instrument upon the
16 projected cost of cleanup." Throughout the House
17 debate, this is the only direct reference made to
18 the intent of financial responsibility, and in our
19 opinion, this parallels the intent during informal
20 discussions of the bill outside of the House
21 chamber.

22 In review of the Senate transcripts made
23 available today to the Pollution Control Board,
24 Senator Laura Kent Donahue, one of the cosponsors

1 of the Senate bill, referred to the need for
2 financial responsibility but did not give details
3 regarding the intent of this Section. In order to
4 clarify her position, the Department has asked for
5 a letter from her outlining the intent, and I offer
6 a copy of her letter dated October 20, 1997, in
7 which she clearly expresses the intent that she had
8 as a sponsor of this legislation.

9 I would like to read the letter to you,
10 dated October 20, 1997, directed to Claire Manning,
11 Chair of the Illinois Pollution Control Board, from
12 State Senator Laura Kent Donahue. The letter reads
13 as follows:

14 "I understand that the Illinois
15 Pollution Control Board has opened a docket
16 regarding the adoption of rules for Section 17 of
17 the Illinois Livestock Management Facilities Act
18 dealing with financial responsibility. During a
19 hearing held October 14 in Chicago, Illinois, at
20 which time representatives from the Illinois
21 Department of Agriculture were discussing the LMFA,
22 a question was raised regarding the original intent
23 behind the addition of this financial
24 responsibility section into the LMFA.

1 As one of the original sponsors of the
2 legislation, I thought it might be helpful to give
3 the Illinois Pollution Control Board some insight
4 into the intent behind the addition of this
5 section. During discussions that I held with
6 representatives of the livestock industry and other
7 interested parties, we identified the need to
8 protect the taxpayers from ultimately bearing the
9 cost of closure and cleanup from lagoons which may
10 be abandoned in the future. As a result, we
11 identified five financial instruments which
12 livestock producers might choose to implement in
13 order to provide a level of financial surety to
14 prevent taxpayers from needlessly bearing this
15 burden.

16 I hope that this letter may clarify the
17 intent that I, as a sponsor of the original
18 legislation, had in including this section. Please
19 contact me if you have any further comments or
20 questions regarding this matter. Sincerely, Laura
21 Kent Donahue, State Senator from the 48th
22 District."

23 As I mentioned earlier, we have copies of
24 the transcript and the letter that I have given you

1 earlier.

2 One of the surety instruments available
3 to a livestock producer is a letter of credit from
4 a financial institution to offer as proof of
5 financial responsibility. A question arose
6 regarding the cost and availability of these
7 instruments. Our Department checked with Bank One,
8 a large lender in central Illinois, who has quite
9 an extensive portfolio of agricultural businesses
10 and agricultural credit. According to the bank,
11 their practice is to charge a 1 percent annual fee
12 based upon the face value of the letter of credit.
13 As an example, a \$200,000.00 letter of credit would
14 cost the producer \$2,000.00 per year as a fee. I
15 might note that that \$200,000.00 letter of credit
16 would be the type of instrument necessary to the
17 financial example I just gave you with the
18 2,000,0000 cubic feet lagoon.

19 We recognize that each financial
20 institution may charge different fees and impose
21 different requirements of its borrowers, but in the
22 case of Bank One, they require collateral to be
23 posted with the bank equal to or greater than a
24 letter of credit which they have issued. Also,

1 letters of credit are somewhat short term in nature
2 with the longest terms in the neighborhood of three
3 to five years. As such, letters of credit would
4 need to be renewed frequently based upon the
5 financial strength of the livestock operator.

6 At the last hearing, I mentioned that
7 Illinois grain producers are protected from
8 elevator and grain dealer insolvency by the
9 Illinois Grain Insurance Fund. As discussions are
10 being held regarding the possibility of putting
11 together a producer-funded financial responsibility
12 fund to provide for lagoon cleanup costs, it may be
13 beneficial to understand how the Grain Insurance
14 Fund was developed and how it operates. Prior to
15 the existence of the Fund, Illinois grain dealers
16 and warehousemen were required to carry commercial
17 bonds which protected depositors from grain
18 business failures. When the Grain Insurance Fund
19 was initiated, an assessment schedule was put into
20 place in which participants make payments into the
21 Fund based upon their level of business activity.
22 The Grain Insurance Fund has a trigger level of
23 \$3,000,000.00. Whenever the Fund balance falls
24 below this level, assessments are paid by licensees

1 to bring the Fund back to the \$3,000,000.00 level.
2 In the event of a grain dealer or grain
3 warehouseman failing, producers or individuals
4 holding warehouse receipts or documentation showing
5 the amount of grain in storage at the facility may
6 make claims against the Fund. The Illinois
7 Department of Agriculture liquidates the grain
8 assets of the business and pays these claims from
9 the pool of money developed in the liquidation. If
10 there are shortages, the Grain Insurance Fund makes
11 up the difference. In the event of a catastrophic
12 failure where the entire Grain Insurance Fund was
13 used up, the Illinois General Assembly guarantees
14 any remainder.

15 The Fund has been very successful and has
16 served as a template for other states to implement
17 in developing similar grain funds. It has provided
18 a high level of assurance to producers and has
19 allowed grain dealers and warehousemen to avoid
20 making yearly payments for bonding requirements.
21 In the long run, it has been a cost effective way
22 of providing financial security to the Illinois
23 grain industry. There are many aspects of this
24 program which may be considered as the Illinois

1 Farm Development Authority, and livestock producer
2 groups are putting together a similar fund to
3 provide for financial responsibility associated
4 with lagoons.

5 In my remarks today, I have attempted to
6 further clarify testimony offered at the October 14
7 hearing. As I mentioned at that time, our
8 Department believes that the adopted rule needs to
9 be fair in its approach and economically reasonable
10 in its implementation. The rules which we have
11 proposed to the Illinois Pollution Control Board
12 are sound in their concept and will provide
13 realistic protection to the taxpayers of the State,
14 to ensure that they will not be held responsible
15 for the closure and cleanup of livestock waste
16 lagoons, as intended by the cosponsors of the
17 legislation which ultimately became the Livestock
18 Management facilities Act. Thank you.

19 HEARING OFFICER KING: Thank you. Does
20 anyone have any questions for Mr. Boruff? Yes?

21 MR. WARRINGTON: Rich Warrington, with
22 the Illinois Environmental Protection Agency.

23 Mr. Boruff, I believe you proposed that
24 these regulations would be applicable to new or

1 modified livestock lagoons registered after the
2 effective date, upon the effective date of these
3 amendments. Although they would be applicable, how
4 much time would a producer have to post that
5 financial assurance with the Department?

6 MR. BORUFF: I don't believe that we have
7 set forth a specific time period within the rules
8 to do so.

9 MR. WARRINGTON: Okay. That's all of my
10 questions at this time.

11 HEARING OFFICER KING: All right. Thank
12 you.

13 Yes, Dr. Flemal?

14 BOARD MEMBER FLEMAL: Mr. Boruff, just to
15 make sure that I am clear on this matter, no
16 lagoons that are currently registered would be
17 subject to the financial assurance, according to
18 your proposal; is that correct?

19 MR. BORUFF: I believe that's the way we
20 have worded the proposal at this time, yes, sir.

21 BOARD MEMBER FLEMAL: So that any lagoon
22 that would register prior to the effective date of
23 the regulations you are proposing today, likewise,
24 would not be required to produce financial

1 assurance?

2 MR. BORUFF: I think that's correct, yes.

3 BOARD MEMBER FLEMAL: There are, then, a
4 fair number of lagoons that would have come into
5 existence after the Livestock Facilities Management
6 Act was effective but prior to the effective date
7 of these proposed regulations that would not
8 require financial assurance?

9 MR. BORUFF: I think, by memory, that --
10 I have just checked with staff. Currently, we have
11 39 lagoons which have been registered since the Act
12 has gone into effect to today.

13 BOARD MEMBER McFAWN: Why wouldn't the
14 Department advocate a day, also, to meet the
15 financial responsibility part of the --

16 MR. BORUFF: Our logic in looking at that
17 was that since the rules had not been developed, it
18 was impossible for the producers at that point in
19 time to factor in the cost of that responsibility,
20 not knowing what the requirements would be. Also,
21 the fact that it has been impossible to this point
22 in time for them to come up with an actual surety
23 instrument in cases other than actually putting up
24 cash collateral to do such. But commercially

1 available options, and the option in terms of lack
2 of funds, as was discussed currently, have not
3 existed.

4 BOARD MEMBER McFAWN: The letters of
5 credit would not exist now?

6 MR. BORUFF: The letters of credit would
7 exist, but they become much like a cash instrument
8 in that the operator is required to put up
9 collateral at least equal to but in many cases
10 greater than the letter of credit itself.

11 BOARD MEMBER McFAWN: Doesn't it really
12 put those facilities at a competitive advantage to
13 the later coming facilities?

14 MR. BORUFF: It would be a competitive
15 advantage if livestock producers were able to pass
16 on the cost of regulations in the price of their
17 product, but that is not really the case because if
18 an operation has had additional costs due to
19 regulations, they may be able to produce that
20 product cheaper, but in the marketplace they are
21 treated the same as other folks. So that there
22 would be some -- at the bottom line, there may be
23 some advantage but no competitive advantage.

24 BOARD MEMBER McFAWN: I don't know that I

1 understand that. It seems to me they would have a
2 competitive advantage if they can't pass the cost
3 on. Those that come later then can't pass the cost
4 on to the consumer, and those 39 facilities you
5 mentioned, they won't have that cost to absorb.

6 MR. BORUFF: They will not have the cost
7 as we have recommended it, yes.

8 BOARD MEMBER McFAWN: So future
9 registered facilities will have the cost?

10 MR. BORUFF: That's true, both registered
11 as well as modified or expanded, but all those
12 would be from that point on.

13 BOARD MEMBER McFAWN: This caveat that
14 you are proposing with the suggested language, do
15 you think that the statute requires that, the
16 Livestock Waste Management, the Livestock
17 Management Facilities Act requires that?

18 MR. BORUFF: I am sorry. Are we still
19 speaking about the effective date?

20 BOARD MEMBER McFAWN: Yes, we are.

21 MR. BORUFF: Okay.

22 BOARD MEMBER McFAWN: Yes. We were just
23 looking at the provision of the applicable Act and
24 wondering how you read that, how the Department

1 reads that. Do you think it requires that you
2 create this caveat for the 39 facilities?

3 MR. BORUFF: Our logic behind suggesting
4 the effective date was that as we have been
5 administering the Act over the last year and a
6 half, since it went into effect, is that there are
7 places throughout where effective dates are not
8 made very clear, and as I mentioned earlier, that
9 there are a variety of different effective dates
10 that an operation has to comply with. Our thought
11 was in trying to clarify for everyone's best use,
12 both administrators and the industry, as to what
13 effective dates would actually be applicable.

14 BOARD MEMBER McFAWN: Okay. Thank you.

15 HEARING OFFICER KING: Is it correct,
16 under your proposed definition of abandoned, that
17 this would not cover a situation where you can
18 identify a responsible party but that party fails
19 or refuses to undertake closure?

20 MR. BORUFF: What we have attempted to
21 address in our definition, is a case that -- let me
22 use an example and kind of walk through it to try
23 to explain our logic. Let's assume a livestock
24 operation that had a lagoon but for financial

1 reasons had not continued and was essentially out
2 of business, had stopped paying its taxes and there
3 was no interest in repurchasing, somebody
4 purchasing that operation as a viable ongoing unit,
5 there may be cases, though, where there are still
6 mortgage holders in place that had the financial
7 wherewithal who would be responsible or could be
8 held responsible for cleaning up a lagoon, and it
9 doesn't seem fair to us for the closure fund or
10 whomever to pay for the closure expenses when there
11 are still financially responsible people on the
12 hook for doing so. And so what we try to
13 accomplish in our definition was to make sure that
14 those cases where it had clearly been abandoned but
15 yet where there was someone with some financial
16 responsibility to do so could be held accountable
17 for cleanup.

18 HEARING OFFICER KING: And so there would
19 not be recourse to whatever financial assurance
20 instrument is out there where you can still point
21 the finger to someone notwithstanding whether they
22 actually undertake any of those activities or not?
23 From the experience we have had with landfills,
24 just the fact that you can identify who is

1 responsible does not necessarily mean that closure
2 is going to be undertaken. So I was wondering if
3 you had given any consideration to that situation.

4 MR. BORUFF: We did discuss that, and
5 also we brought into that discussion what would be
6 the nature of the lagoon itself. There may be
7 instances where the lagoon is rather benign in
8 nature, where it is really not posing any threat to
9 the environment, and so that would be one instance.

10 There would be another instance, though,
11 where there is a lagoon that due to construction
12 problems or imminent failure or leaking may be an
13 immediate concern to the environment and the
14 natural resources of the state. So we felt that
15 each case would have to be considered on a
16 case-by-case basis, and that there are going to be
17 some cases where probably if you have a relatively
18 benign lagoon out there the process may go through
19 the steps necessary to where if no taxes are paid
20 and no responsible individual comes forward to
21 either purchase or take responsibility for the
22 lagoon, then we could see in that case the closure
23 financial responsibility instrument, regardless of
24 what had been chosen, would then kick in and pay

1 for the closure costs. There might be cases,
2 though, where you had a lagoon that was of a much
3 more immediate concern, and we would anticipate in
4 those cases there is going to be some type of court
5 actions taken to get that cleaned up more quickly.

6 HEARING OFFICER KING: All right. Thank
7 you. Any other questions for Mr. Boruff?

8 BOARD MEMBER McFAWN: Why don't we do the
9 exhibits and give people a few minutes. Why don't
10 we do that to see if we have anything else.

11 HEARING OFFICER KING: All right. Last
12 time in Chicago, we reserved several exhibit
13 numbers for documents to be provided by the
14 Department of Agriculture, which Mr. Boruff has
15 provided today. So we reserved Exhibit 2 for the
16 legislative history behind the Act, the Livestock
17 Management Facilities Act, and that's been provided
18 to us.

19 Are there any objections to the entry of
20 that legislative history as Exhibit 2?

21 All right. Hearing none, that will be
22 admitted as Exhibit 2.

23 (Whereupon said document was
24 duly marked for purposes of

1 identification and admitted
2 into the record as Hearing
3 Exhibit 2 as of this date.)

4 HEARING OFFICER KING: Exhibit Number 3
5 was reserved for background information regarding
6 the Department's calculation of the cost factor,
7 that 10 cents per cubic foot. That's also been
8 provided by Mr. Boruff.

9 Are there any objections to the admission
10 of the document entitled, "Livestock Waste Lagoon
11 Closure Cost Estimates" as Exhibit 3?

12 All right. Hearing none, that will be
13 admitted as Exhibit Number 3.

14 (Whereupon said document was
15 duly marked for purposes of
16 identification and admitted
17 into the record as Hearing
18 Exhibit 3 as of this date.)

19 HEARING OFFICER KING: Finally, Exhibit
20 Number 4 was reserved for the Department of
21 Agriculture's report to the General Assembly dated
22 February 5, 1997, and it was also provided this
23 morning. Are there any objections to the admission
24 of that document as Exhibit 4?

1 All right. Hearing none, that will be
2 admitted as Exhibit 4.

3 (Whereupon said document was
4 duly marked for purposes of
5 identification and admitted
6 into the record as Hearing
7 Exhibit 4 as of this date.)

8 HEARING OFFICER KING: Mr. Boruff
9 provided several more documents to us this
10 morning. He provided the document entitled,
11 "Effective Date Issue."

12 Are there any objections to the admission
13 of that document? This would be Exhibit 7.
14 Exhibits 5 and 6 were admitted at the last
15 hearing. They were provided by the Pork Producers
16 there. So the next one would be Exhibit 7. Are
17 there any objections to the admission of that
18 document?

19 All right. Hearing none, that will be
20 admitted as Exhibit Number 7.

21 (Whereupon said document was
22 duly marked for purposes of
23 identification and admitted
24 into the record as Hearing

1 Exhibit 7 as of this date.)

2 HEARING OFFICER KING: We have been
3 provided a letter from State Senator Laura Kent
4 Donahue with her interpretation of the -- or some
5 background information about her understanding of
6 what has been in the passage of the Act. Are there
7 any objections to the admission of that letter as
8 Exhibit 8?

9 All right. Hearing none, that will be
10 admitted as Exhibit 8.

11 (Whereupon said document was
12 duly marked for purposes of
13 identification and admitted
14 into the record as Hearing
15 Exhibit 8 as of this date.)

16 HEARING OFFICER KING: Finally, we have
17 Mr. Boruff's written testimony. The document is
18 entitled, "Testimony Regarding the Addition of
19 Rules for Financial Responsibility for the Closure
20 of Livestock Waste Lagoons, testimony offered
21 October 21 in Springfield, Illinois."

22 Are there any objections to the admission
23 of that document as Exhibit Number 9?

24 All right. Hearing none, that will be

1 admitted as Exhibit Number 9.

2 (Whereupon said document was
3 duly marked for purposes of
4 identification as Hearing
5 Exhibit 9 as of this date.)

6 HEARING OFFICER KING: Okay. I believe
7 that's all of the documents that we have this
8 morning.

9 Is there anything else for Mr. Boruff?

10 BOARD MEMBER McFAWN: I have just a
11 couple of questions. On the Illinois Grain
12 Insurance Fund discussion that you gave us, which
13 was most helpful, who administers that fund?

14 MR. BORUFF: The day-to-day
15 administration is provided by the Department of Ag,
16 but there is also a board of directors, so to
17 speak, and it is made up of representatives, if I
18 can recall offhand, it is the Department of Ag, the
19 Department of Insurance, the Attorney General's
20 Office, and the Treasurer's Office. They meet from
21 time to time to approve remittances from the Fund
22 and the financial activity that we administer on a
23 day-to-day basis.

24 BOARD MEMBER McFAWN: What triggers

1 payments from that fund?

2 MR. BORUFF: In the event of a failure of
3 a grain dealer or a grain warehouseman, both of
4 which would be licensed under our Department, at
5 that date then is triggered a failure, and we go in
6 and then we revoke their licenses and begin to
7 liquidate the grain assets of that company.

8 BOARD MEMBER McFAWN: The Department
9 does?

10 MR. BORUFF: The Department does, yes.
11 We actually have staff that come in. I think, to
12 use an example, we would work much as a bank
13 examiner. We work like bank examiners in the
14 day-to-day examination of the banks, but at the
15 date of failure, then we also come in and close the
16 business, much in the case that a bank regulator
17 would close the bank.

18 So we go in, and we liquidate on a timely
19 basis the grain assets of the company and put those
20 in a separate account, and during that same
21 process, the depositors of grain in that elevator
22 would make claims to the Department showing their
23 proof of what their claim should be.

24 We then take the money that we generate

1 from the liquidation, and if we have enough money
2 to make and pay all the claims, we do so. If we
3 are short for some reason, then the Grain Insurance
4 Fund kicks in and makes up the balance.

5 BOARD MEMBER McFAWN: This is all done
6 outside the judicial system? All this is done by
7 the Department? You don't need court orders or
8 anything like that?

9 MR. BORUFF: No. That is correct. The
10 only time the court ever gets involved is if there
11 is the case of a bankruptcy or something and from
12 time to time that does occur. But under normal
13 liquidation procedures, we do not use the court
14 system.

15 BOARD MEMBER McFAWN: Do you find that
16 the funds from the insurance Fund have to be used
17 very often in those scenarios, or is the grain
18 sufficiently valuable that the liquidation covers
19 your costs?

20 MR. BORUFF: The Grain Insurance Fund has
21 been in place for, I think, about 13 years now, and
22 it seems to go in cycles for no apparent reason.
23 But we might go for one or two years and not have
24 any grain closures where we have to tap the Fund,

1 as we refer to it. And then some year you might
2 have two or three closures for some reason that we
3 do have to make a tap against the Fund and sometime
4 reassess the grain industry to get it back up to
5 that \$3,000,000.00 trigger level.

6 BOARD MEMBER McFAWN: Does the Fund -- do
7 proceeds from the Fund pay for your administrative
8 costs that the Department executes?

9 MR. BORUFF: No, the Fund will not allow
10 for any of our administrative overhead costs. As a
11 Department we bear those costs in that event.

12 BOARD MEMBER McFAWN: So this is -- of
13 course, this fund, I assume, was statutorily
14 created since the General Assembly underwrites it?

15 MR. BORUFF: Yes, it was. It was first
16 developed I think, as I mentioned, 13 years ago.
17 But then we had three grain laws in the state that
18 were rewritten into one omnibus Illinois Grain Code
19 about two years ago, so it is a part of that
20 Illinois Grain Code.

21 BOARD MEMBER McFAWN: What is the
22 Department's position on that fund that is being
23 advocated by the associations and the Farm
24 Development Authority? It seems that it is a new

1 type of venture that the Department would be
2 entering into as well as the producers.

3 MR. BORUFF: Our Department is very
4 supportive of the concept of a producer-funded fund
5 such as was outlined at the last hearing, and may
6 be further expanding upon at this hearing. We
7 think that it holds a lot of merit. It also
8 provides a realistic opportunity for livestock
9 producers to meet the requirements of the Livestock
10 Management Facilities Act which may not have been
11 available using preexisting commercial sources. We
12 think that from the discussion we have heard and
13 seen so far that it is cost effective and a
14 realistic way to provide for that kind of coverage.

15 BOARD MEMBER McFAWN: The Department is
16 of the mind, then, to enter into such a memorandum
17 of agreement?

18 MR. BORUFF: From what we have seen so
19 far, admitting that there would be some details to
20 be worked out along the way, but we are supportive
21 of the concept and I would anticipate that we would
22 enter into that agreement to allow that as one of
23 the vehicles that a producer might choose to prove
24 financial responsibility.

1 BOARD MEMBER McFAWN: If the Board were
2 to approve this as a type of way of providing
3 financial assurance and, for example, let's say you
4 proposed it at first notice, could this type of
5 agreement be reached before the rules became
6 final?

7 MR. BORUFF: If it were -- if we were
8 able to do so, we would enter into an agreement as
9 quickly as possible and we would make this a very
10 high priority in getting the agreement between us
11 and the sponsors, between the Department of Ag and
12 the Farm Development Authority to get the funds in
13 place. So we would make this a very high priority
14 and work on it just as quickly as we could.

15 BOARD MEMBER McFAWN: Okay. Thank you,
16 Mr. Boruff.

17 MR. BORUFF: Thank you.

18 HEARING OFFICER KING: Are there no other
19 questions for Mr. Boruff?

20 Okay. Thank you very much.

21 MR. BORUFF: Thank you, Mr. King.

22 HEARING OFFICER KING: All right. Next I
23 think we would like to go with the testimony from
24 the Illinois Pork Producers. I understand Mr.

1 Gebhards is going to testify today.

2 We are going to take the testimony in
3 this order just because the Pork Producers
4 presented testimony at the last hearing, and from
5 the papers we have been provided it appears that
6 this is supplemental or responding to issues that
7 were raised then.

8 Would the court reporter please swear the
9 witness.

10 (Whereupon the witness was
11 sworn by the Notary Public.)

12 M A R K G E B H A R D S,
13 having been first duly sworn by the Notary Public,
14 saith as follows:

15 MR. GEBHARDS: Thank you for the
16 opportunity to follow-up on the testimony that was
17 presented by Richard Davidson at the October 14th
18 hearing in Chicago. He represented the Illinois
19 Pork Producers Association, the Illinois Beef
20 Association, and the Illinois Farm Bureau. As I
21 testify today, I, too, represent these
22 organizations. My name is Mark Gebhards. I
23 currently serve as the Executive Director of the
24 Illinois Pork Producers Association.

1 We respectfully request that these
2 comments be considered as an addition to the
3 previously filed comments of the Illinois Pork
4 Producers, the Illinois Beef, and the Illinois Farm
5 Bureau or the Farm Group, as they have been
6 referred to, which have already been entered as an
7 exhibit.

8 At the Illinois Pollution Control Board's
9 hearing on October 14th, Richard Davidson, our
10 Legislative Consultant, testified on behalf of the
11 Association in support of amending Section 506.602
12 to authorize a "Statement of Participation in a
13 Livestock Lagoon Closure Fund" as another means of
14 demonstrating evidence of financial assurance in
15 the event of a required closure for an abandoned
16 lagoon. A draft dated 10-09-97 of a
17 Government-Industry Cooperative Agreement that
18 would create such a fund was also presented for the
19 Board's review.

20 In accordance with the Board's comments
21 and request for clarification in specific areas,
22 the Farm Group respectfully resubmits a revised
23 Government-Livestock Industry Cooperative Agreement
24 to Provide Financial Surety for Closure of

1 Abandoned Livestock Lagoons, dated 10-21-97. The
2 language that has been revised in that document is
3 underlined, and at a later point here today I
4 believe Mr. David Worth of the Illinois Farm
5 Development Authority would like to testify on
6 behalf of some of those changes.

7 The Farm Group respectfully requests that
8 in addition to the suggested amendments that were
9 requested in the testimony offered on October 14,
10 the Board consider revising Section 506.611 to
11 authorize a fund that would be created pursuant to
12 a Government-Industry Cooperative Agreement and
13 renumber that proposed section as Section 506.612.
14 So it is basically just a renumbering of the
15 original document that we submitted to you last
16 week.

17 The next area I would like to comment on
18 is that of Criteria for Declaration of Abandoned
19 Livestock Lagoons Participating in a Livestock
20 Lagoon Closure Fund.

21 The property tax for the property on
22 which a participating lagoon is located has not
23 been paid for two years and the redemption period
24 has expired, or item B would be a participating

1 lagoon has been declared a nuisance by a court of
2 competent jurisdiction in accordance with the
3 following criteria:

4 Number one, it has been established by
5 the Illinois Environmental Protection Agency or the
6 Department that the lagoon is not being serviced
7 and maintained; and number two, through due
8 diligence no owner or operator can be found to be
9 held legally responsible for the lagoon.

10 When it is determined by a court that a
11 lagoon participating in the Fund is abandoned in
12 accordance with the before-stated criteria, the
13 court may order:

14 A, closure of the lagoon consistent with
15 the closure plan and the provisions governing
16 closure in Section 15 of the Act; or

17 B, the Department service and maintain
18 the lagoon until it is returned to active use; or

19 C, the Department service and maintain
20 the lagoon until an alternate use waiver has been
21 issued.

22 Costs incurred to comply with the
23 court-ordered closure of a lagoon participating in
24 the Fund or court-ordered costs incurred to service

1 and maintain a participating lagoon and associated
2 court costs shall be paid by the Fund and shall
3 constitute a mechanic's lien against the property.
4 However, the liability to the Fund in no case shall
5 exceed the level of surety for that abandoned
6 lagoon participating in the Fund as established in
7 Section 506.603 or the producer's site specific
8 closure plan that was filed with the Department.

9 The Department may request a partial or
10 the total payment of the level of financial surety
11 for that participating lagoon as established in
12 Section 506.603 or by a producer's site specific
13 lagoon closure plan as determined necessary to
14 implement its requirements. Such monies shall be
15 deposited in an interest bearing, non-appropriated
16 account in a federally insured financial
17 institution. If the deposited monies exceed the
18 insured limit, they shall be secured by U.S.
19 government securities. The interest accrued on
20 such monies shall become part of the deposited
21 funds and used for the purposes approved by the
22 Council. Any monies remaining in the account after
23 all expenditures have been paid shall be remitted
24 to the Authority for deposit in the Fund.

1 Under the Livestock Lagoon Closure Fund,
2 we have several points that I would also like to
3 submit.

4 A, the Fund established to meet the
5 requirements of Section 17 of the Act shall be used
6 for the purposes of paying foreclosure or service
7 and maintenance of only those participating lagoons
8 that have been declared abandoned in accordance
9 with the provisions of the cooperative agreement to
10 provide financial surety for closure of abandoned
11 livestock lagoons and these rules. The Fund may
12 also be used to pay associated legal costs and
13 custodial fees in accordance with the provisions in
14 the Agreement.

15 Item B, each participant in the Fund
16 shall be required to make a payment of no less than
17 2 percent nor greater than 5 percent of the level
18 of financial responsibility required to close the
19 lagoon based on an individual site-specific closure
20 plan as authorized in Subpart B of this Part or an
21 average standard closure level as set forth in
22 Section 506.603.

23 C, the Fund amount shall be established
24 according to one of the following methods and the

1 Agreement establishing the Fund shall state which
2 method is to be used:

3 Number one, at a level of no less than 2
4 percent, nor more than 5 percent of the cumulative
5 financial responsibility to meet closure costs of
6 all participants; or

7 Number two, at a level equal to two times
8 the financial responsibility necessary to meet the
9 closure costs for an average size participating
10 lagoon or a level equal to the financial
11 responsibility necessary to meet the closure costs
12 of the largest single participating lagoon,
13 whichever is greater.

14 Item D, the participants in the Fund may
15 make a one-time payment or annual assessments for a
16 period not to exceed five years. Simple interest
17 based on the prime rate on the date the payment is
18 due shall be paid on the unpaid assessment balance
19 if the annual assessment method is chosen.

20 Item E, if the balance in the Fund, plus
21 any expected recovery, drops to a level equal to
22 less than 75 percent of the Fund amount as
23 determined annually by the Council and as set forth
24 above, an additional prorated assessment of the

1 participants shall be made based upon the initial
2 assessment.

3 F, when there is a payout from the Fund,
4 any money recovered as a result of a lien against
5 the associated property or from any other source
6 shall be deposited into the Fund and used for the
7 purposes for which the Fund is authorized.

8 Then item G, the total liability of the
9 Fund is limited to the available Fund balance, plus
10 any expected recovery. The Agreement shall state
11 when liability of the Fund will terminate.

12 One comment in regards to the make-up of
13 the Council that we submitted last week that I
14 would like to submit, is that in addition to the
15 Lagoon Closure Council section which include the
16 following:

17 The Department shall designate one person
18 among the participants in the Fund who are not
19 members of a sponsoring agricultural association to
20 serve on the Council. This is in reference to
21 trying to put someone else on the Council in
22 addition to the associations that were submitted
23 last week.

24 With respect to the instruments of surety

1 available, they prove either unavailable or are not
2 economically feasible for average producers. These
3 would be the instruments that were alluded to in
4 the original Act. Therefore, serious consideration
5 should be given to establishing a
6 Government-Industry Cooperative Agreement to
7 provide financial surety for closure of abandoned
8 livestock lagoons. The requested amendments set
9 forth in this document meet the statutory
10 requirements and the legislative intent of Section
11 17 of the LMFA and provide a means that is
12 "technologically feasible and economically
13 reasonable" for the affected producers as mandated
14 by the Illinois General Assembly in the Livestock
15 Management Facilities Act.

16 That concludes my comments. Again, Mr.
17 Worth is here from the Illinois Farm Development
18 Authority to comment on the changes that we made
19 with that proposed agreement.

20 I also have Mr. Dwight Dunbar who is here
21 in the event that there are technical questions
22 regarding either my comments or David's in order to
23 assist us with those. He serves as legislative
24 consultant for the Illinois Beef Association.

1 HEARING OFFICER KING: Could we go ahead
2 and have Mr. Worth put in his comments and then we
3 will take questions for either of these gentlemen.

4 Would the court reporter please swear Mr.
5 Worth.

6 (Whereupon the witness was
7 sworn by the Notary Public.)

8 D A V I D W O R T H,
9 having been first duly sworn by the Notary Public,
10 saith as follows:

11 MR. WORTH: Thank you. I am David Worth,
12 Executive Director of the Illinois Farm Development
13 Authority. We have been working together with
14 industry representatives and had several
15 conversations with people of the Department of
16 Agriculture regarding this proposal which
17 represents a Government-Industry Cooperative
18 Agreement in an effort to provide the financial
19 surety that has been required in the LMFA.

20 As has been indicated by previous
21 testimony, the financial surety instruments that
22 are typically available are not very attractive in
23 terms of cost effectiveness. As Mr. Boruff
24 mentioned, a letter of credit is a typical method

1 of financial surety and it poses two potential
2 problems. One is the costs associated with the 1
3 percent annual fee, and also the costs associated
4 with tying up collateral. The other problem with
5 that type of financial surety is the short term
6 nature of that instrument. For example, a three to
7 a five year is about the maximum that a bank will
8 commit to. What we are trying to accomplish is a
9 longer term financial surety which would protect
10 the taxpayers and the government from an
11 unnecessary closure cost.

12 Illinois Farm Development Authority is
13 authorized in its enabling legislation to respond
14 to shortages or unavailability of capital to
15 encourage orderly and sustained agricultural
16 production in the state. This is an example of a
17 situation where commercial instruments which are
18 typically available probably are not readily
19 affordable and/or do not meet the need that is set
20 before us.

21 This proposal suggests having a Council
22 of representative organizations to help direct it.
23 In addition to that, a memorandum of understanding
24 with the Department of Agriculture would be drafted

1 between the Department of Ag and the Farm
2 Development Authority to discuss each of the
3 particular details as we implement this particular
4 plan. Data that has been presented suggests that
5 the likelihood of abandonment is a very, very small
6 likelihood, estimated at about one-tenth of one
7 percent. And the proposal that we have submitted
8 suggests that an assessment rate of between 2 and 5
9 percent represents a safety factor of about 20 to
10 50 times the likelihood of an abandonment
11 occurring. So this method provides a very large
12 margin of protection in terms of insurance theory,
13 that is, the likelihood of the event and the amount
14 of premium, if you will, that is being paid into
15 the Fund.

16 The changes from the submittal that was
17 presented at the October 14th hearing are
18 underlined in the document that has been presented
19 and these are, by and large, clarifications and
20 additional documentation or, rather, additional
21 definitions relating to some of the questions that
22 were raised at last week's hearing. Particularly,
23 it defines the removal from service as opposed to
24 abandonment. There is more clarifications to help

1 address some of the questions raised there.

2 It also addresses who can make the
3 claims, what the procedure is and how that is
4 done. Additionally, there is a reference to
5 financial responsibility of the existing owners
6 and/or others who may have responsibility. And,
7 lastly, as has been mentioned, the Fund would have
8 the benefit of a mechanic's lien as proposed which
9 would allow the Fund an opportunity to recover
10 monies when property is ultimately sold. In other
11 words, the mechanic's lien helps to protect the
12 Fund against units of local government or other
13 creditors that may try to benefit from the
14 improvement of the property that the Fund has paid
15 for.

16 BOARD MEMBER McFAWN: Can I interrupt?
17 When you say the "underlined language," that is in
18 the attachment number one, dated 10-21-97, the
19 Government-Livestock Industry Cooperative
20 Agreement?

21 MR. WORTH: That is correct, yes. That
22 is the end of my remarks. I will be glad to answer
23 questions if I can.

24 HEARING OFFICER KING: At this point I

1 will ask if there are any objections to the
2 admission as exhibits of either Mr. Gebhards'
3 written testimony or the attachment number one, the
4 "Government-Livestock Industry Cooperative
5 Agreement to Provide Financial Surety for Closure
6 of Abandoned Livestock Lagoons," draft 10-21-97?

7 All right. Hearing none, the testimony
8 of Mark Gebhards will be admitted as Exhibit Number
9 10, and the draft of the Cooperative Agreement will
10 be admitted as Exhibit 11.

11 (Whereupon said documents were
12 duly marked for purposes of
13 identification and admitted
14 into evidence as Hearing
15 Exhibits 10 and 11 as of this
16 date.)

17 HEARING OFFICER KING: Are there any
18 questions for Mr. Gebhards or Mr. Worth?

19 Yes, Mr. Warrington?

20 MR. WARRINGTON: Thank you. Either Mr.
21 Gebhards or Mr. Worth could answer this.

22 In Mr. Gebhards' testimony on page 4, the
23 proposal for number three, "Criteria for
24 Declaration of Abandoned Livestock Lagoons

1 Participating in a Livestock Lagoon Closure Fund."

2 BOARD MEMBER McFAWN: Excuse me. Mr.
3 Warrington, maybe we are missing something but the
4 document I am looking at has only three pages.
5 That would be Exhibit 10 that you are referring
6 to?

7 MR. WARRINGTON: I am looking at Exhibit
8 10, the comments of Mr. Gebhards.

9 BOARD MEMBER McFAWN: And you said you
10 wanted us to look at page 4?

11 HEARING OFFICER KING: We also received a
12 document "Comments of Illinois Pork Producers
13 Association, Illinois Beef Association, Illinois
14 Farm Bureau." Is this the --

15 MR. WARRINGTON: Yes, that's it.

16 HEARING OFFICER KING: Okay. That's not
17 the exhibit that was -- that is not what was
18 entered as Exhibit Number 10.

19 I will ask Mr. Gebhards, has this
20 document been filed with the Clerk of the Board?

21 MR. GEBHARDS: We would like to submit
22 the "Comments of the Illinois Pork Producers
23 Association, the Illinois Beef Association, and the
24 Illinois Farm Bureau" as an exhibit. This is a

1 more detailed version of my testimony. My
2 testimony was actually a summary of that document.
3 So I would like to submit that as well.

4 HEARING OFFICER KING: Okay. Let's go
5 off the record for just a second.

6 (Discussion off the record.)

7 HEARING OFFICER KING: All right. Back
8 on the record.

9 Are there any objections to having this
10 document entered?

11 All right. I think what we are going to
12 do is enter this as Exhibit 10A as an attachment to
13 Mr. Gebhards' testimony since it seems to be sort
14 of a documentary supplement to that. So we will
15 take this today as Exhibit 10A.

16 (Whereupon said document was
17 duly marked for purposes of
18 identification and admitted
19 into the record as Hearing
20 Exhibit 10A as of this date.)

21 HEARING OFFICER KING: So everyone is
22 clear, I believe Mr. Warrington was discussing page
23 4 of Exhibit 10A.

24 MR. WARRINGTON: Back to page 4 of

1 Exhibit 10A.

2 BOARD MEMBER McFAWN: I am sorry, Mr.
3 Warrington.

4 MR. WARRINGTON: We are talking about the
5 criteria for being declared a nuisance by a court
6 of competent jurisdiction according to the
7 criteria. Basically, the proposal has either the
8 Illinois Environmental Protection Agency or the
9 Department having an active role in establishing
10 that this particular operation is a nuisance. What
11 about other entities? What about, say, state's
12 attorneys acting on behalf of a county, a county
13 health department or, say, municipalities that
14 might be so situated that they might have an
15 interest in declaring a particular facility a
16 nuisance?

17 MR. GEBHARDS: My response to that, I
18 guess, would be that we named the Department and
19 the Illinois Environmental Protection Agency as the
20 two primary agencies that would most likely be
21 involved in this. I don't know that we would have
22 any objection if there were other entities that
23 came forth and were involved in declaring that a
24 nuisance. But we were focusing just primarily on

1 the two agencies.

2 MR. WARRINGTON: Okay. In Subparagraph
3 ii, you do have the requirement that "through due
4 diligence, no owner or operator can be found to be
5 held legally responsible for the lagoon." Whose
6 diligence would that be? Would that be an Illinois
7 EPA obligation or would it be the Department or
8 would it be the cooperative?

9 MR. DUNBAR: It would be the Department
10 because that's what -- I am Dwight Dunbar. I am
11 the legislative consultant of the Illinois Beef
12 Association. I prepared that document or helped
13 prepare that document.

14 HEARING OFFICER KING: Why don't we have
15 the court reporter swear in Mr. Dunbar.

16 (Whereupon the witness was
17 sworn by the Notary Public.)

18 D W I G H T M. D U N B A R,
19 having been first duly sworn by the Notary Public,
20 saith as follows:

21 MR. DUNBAR: The intent was clearly for
22 the Department of Agriculture to be the one to
23 declare that it is closed and abandoned and be the
24 one to start the mechanisms to collect monies from

1 the Fund. And so I think whatever happens in a
2 court, whoever proceeds, local authority or
3 whatever, they still have to come back to the
4 Department for collection on the financial
5 responsibility. If that needs to be clarified, we
6 all need to sit down and do that.

7 MR. WARRINGTON: We are as willing. You
8 did have both of these requirements joined by and,
9 so it seems like both occurrences have to happen.

10 MR. WORTH: Yes.

11 MR. GEBHARDS: Yes.

12 MR. WARRINGTON: I guess my question is,
13 assuming you find someone that is legally
14 responsible but not, say, financially able or able
15 to delay and is unwilling to actually take care of
16 that? What happens to whatever, say, the ability
17 of either the Department or the Agency to abate a
18 nuisance if someone who is legally responsible is
19 not financially able or willing to abate that
20 nuisance?

21 MR. DUNBAR: It should be "or." I mean,
22 that specific case was not discussed, I guess, in
23 drafting this document. So it probably should be
24 "or" or "and/or." I don't know, whatever. But,

1 you know, we want to make sure that -- I think that
2 the intent as drafters of this we want to make sure
3 that we exercise pretty good judgment and pretty
4 good investigative procedures to find out that
5 these resources demonstrate a financial
6 responsibility and, in fact, should pay for some of
7 the costs.

8 MR. WARRINGTON: Then it would not be
9 used prematurely to bail out a particular
10 individual.

11 MR. DUNBAR: Right.

12 MR. WARRINGTON: Thank you. In paragraph
13 four you are providing that the Department service
14 and maintain the lagoon until it is returned to
15 active use. Could you illustrate for us where the
16 Department has the authority to enter on to
17 somebody's property and do this kind of service and
18 maintenance for a private entity?

19 MR. DUNBAR: It would have to be as a
20 result of the order.

21 MR. WARRINGTON: Part of the court
22 order?

23 MR. DUNBAR: Yes, part of the court
24 order.

1 MR. WARRINGTON: All right. Thank you.
2 Then in paragraph five I believe you are stating
3 that even after a participating producer pays the
4 percentage of the closure costs into the Fund and
5 the Fund is called upon to do the closure on behalf
6 of this producer, will the Fund then seek to get
7 reimbursement for the closure costs from the
8 producer?

9 MR. DUNBAR: Right. Recover from the
10 producer or the value of the property.

11 MR. WARRINGTON: That recovery would be
12 limited to the stated amount of closure costs that
13 would be either in the rule or in a site-specific
14 closure plan?

15 MR. DUNBAR: Right, yes.

16 MR. WARRINGTON: If the Fund had to incur
17 greater costs than specified or allowed in the
18 closure plan, who would make up the difference?

19 MR. DUNBAR: I think we have a -- I don't
20 think we thought that was necessarily a logical
21 result. Maybe it is, and --

22 MR. WARRINGTON: I think my last question
23 is, the Livestock Management Facility Act specifies
24 five different financial instruments or

1 combinations thereof. How would you fit the Fund
2 into those particular cubbyholes?

3 MR. GEBHARDS: Well, we would be
4 requesting that this would be a number six and the
5 Fund would be added to that list.

6 MR. WARRINGTON: Have you considered
7 whether the legislature would have to do that or
8 whether the Board would have the power to add
9 another category?

10 MR. DUNBAR: I guess my own personal
11 reaction, and I can't speak for the Department in
12 how they would view it, but the Board probably does
13 have the authority to adopt rules that elaborate on
14 what the law provides. You know, in a technical
15 sense you could probably look at it as another form
16 of guarantee or another form of insurance on a
17 pooled arrangement or whatever. You could look at
18 it as one subcategory under several of --

19 MR. WARRINGTON: Or a combination of some
20 of those.

21 MR. DUNBAR: Or a combination. But I
22 think everybody would be on more secure ground in
23 explaining to our clientele out there, i.e.,
24 producers, if it is created separately and

1 therefore as Mr. Gebhards has proposed, adopt a new
2 Section 611 with some of those provisions on the
3 mechanics of how it is going to work out.

4 HEARING OFFICER KING: Does anyone else
5 have any questions for any of these gentlemen?

6 MR. BORUFF: Mr. King, may I elaborate on
7 that?

8 HEARING OFFICER KING: Yes, certainly.

9 MR. BORUFF: Chet Boruff, Deputy Director
10 of the Department of Ag.

11 In discussing this option of potential
12 funds with members of the industry, we looked at
13 Section 17 of the Act, and the first option
14 available is either commercial or private
15 insurance. It was our feeling that, here again,
16 getting back to my example of the Grain Insurance
17 Fund, this would be a type of an insurance that
18 would be provided by this trust or this fund and
19 administered by if we felt it would fall within
20 that first option.

21 HEARING OFFICER KING: Thank you. All
22 right. Well, then --

23 BOARD MEMBER McFAWN: I had some
24 questions.

1 HEARING OFFICER KING: All right.

2 BOARD MEMBER McFAWN: I was looking at
3 the language that Mr. Warrington had focused on. I
4 was wondering, paragraph three, ii, where it reads,
5 "through due diligence, no owner or operator can
6 be found to be held legally responsible for the
7 lagoon," I had two thoughts. One, would the
8 participants -- what would you think if we deleted
9 the language "or operator" so that you just were
10 looking for the owner, since it is the owner that
11 must provide the financial assurance?

12 MR. GEBHARDS: We would concur with
13 that. We see no reason that -- because in most
14 cases the owner is the primary person that you want
15 to focus on. So that would be fine.

16 BOARD MEMBER McFAWN: What would you --
17 okay. Thank you. What would you think if the
18 Board was to rework or in conjunction with you
19 gentlemen, was to rework the language to say that
20 they were not legally able to provide -- to close
21 or otherwise maintain the lagoon?

22 MR. WORTH: Do you mean financially
23 able?

24 BOARD MEMBER McFAWN: Yes.

1 MR. WORTH: I think that's an appropriate
2 adjustment. That is consistent with what we are
3 trying to accomplish. We are looking for, A, a
4 responsible party who is legally obligated and, B,
5 financially able.

6 BOARD MEMBER McFAWN: Thank you.

7 MR. WORTH: Yes, I would concur.

8 MR. GEBHARDS: Just one comment, if I
9 might, on the operator part. I think, so you know
10 what our thought process was there, many of the
11 operations that might be contracted operations, for
12 example, depending on that financial arrangement on
13 how the -- either the facility or the animals
14 involved with the facility might be owned, I think
15 our thinking was you may have access to an operator
16 in addition to the owner because they were
17 contracted to operate that facility. There would
18 be a primary owner, possibly in state or out of
19 state, somewhere else. I believe that was our
20 thought process in talking about an operator. We
21 would have no problem just focusing on the owner if
22 that were the case.

23 BOARD MEMBER McFAWN: Okay.

24 MR. GEBHARDS: The operator is probably

1 not going to be the one ultimately that would be
2 financially legally responsible for the property.

3 BOARD MEMBER McFAWN: I can see the
4 benefit trying to tap into the operator, but then
5 again, it might dilute your ability to get to the
6 owner who might have deeper pockets.

7 MR. GEBHARDS: Right.

8 BOARD MEMBER McFAWN: Thank you. That
9 does help when you tell us your thought process.

10 In paragraph four, when you say -- there
11 is a discussion there that the court may order the
12 Department to service or maintain the lagoon. If
13 the court does so, do you anticipate the funds will
14 then pay for that service and maintenance? It
15 wouldn't just pay for closure?

16 MR. GEBHARDS: We would anticipate the
17 Fund would pay for that.

18 BOARD MEMBER McFAWN: I also, then, in
19 paragraph five, wonder, where you would by rule be
20 declaring that it would be a mechanic's lien
21 against the property, that would be the Fund -- the
22 money due to the Fund, can we do that by rule? You
23 will have to forgive me. I am not that familiar
24 with mechanic's lien law.

1 MR. WORTH: We think that we can.

2 BOARD MEMBER McFAWN: It would be nice.

3 MR. WORTH: Yes. We have had a couple of
4 attorneys give a preliminary review of this and
5 their preliminary response is, yes, that should
6 work. Whether it is actually a mechanic's lien or
7 if we have to go towards another legal approach to
8 that, the intent is the same, that is, the Fund
9 would have and should have a valid lien against the
10 property for the expenditure that has been made for
11 a closure or even a maintenance item. So the
12 mechanic's lien appears to be the appropriate
13 instrument because you can -- you are improving
14 property whether it is by erecting a structure or
15 in this case removing a lagoon, that is perceived
16 to be an improvement of the property and the
17 mechanic's lien laws do appear to protect that type
18 of activity as well.

19 BOARD MEMBER McFAWN: Okay. As your
20 discussions with these attorneys proceed and you
21 get any further insight or legal authority for
22 that, I would ask that you submit it to the Board
23 at least by way of public comment, because that
24 would seem critical if this is the language that

1 you are proposing to the Board for adoption.

2 HEARING OFFICER KING: All right. That's
3 all we have for you gentlemen right now. Although,
4 we would appreciate it if you could stick around.
5 We are going to get Mr. O'Connor's testimony and
6 then take a short break to go over some of the
7 papers we have been given. In case we come up with
8 some other questions, we would like the opportunity
9 to recall you later.

10 MR. GEBHARDS: Sure. Thank you.

11 MR. WORTH: Thank you.

12 MR. DUNBAR: Thank you.

13 HEARING OFFICER KING: Thank you. We
14 will have the testimony from Tim O'Connor from the
15 Illinois Beef Association.

16 Would the court reporter please swear in
17 Mr. O'Connor.

18 (Whereupon the witness was
19 sworn by the Notary Public.)

20 T I M O T H Y L. O' C O N N O R,
21 having been first duly sworn by the Notary Public,
22 saith as follows:

23 MR. O'CONNOR: Thank you. My name is
24 Timothy L. O'Connor. I am employed as the

1 Executive Vice President of the Illinois Beef
2 Association. The Illinois Beef Association is a
3 trade association and marketing organization
4 representing Illinois' 29,000 beef producers
5 through 60 county, multi-county and breed affiliate
6 organizations and is an affiliate of the National
7 Cattlemen's Beef Association.

8 The Illinois Pork Producers Association,
9 the Illinois Beef Association, and the Illinois
10 Farm Bureau, referred to as Farm Group, proposed
11 creation of a Livestock Lagoon Closure Fund, the
12 Fund, in our prefiled comments to the Illinois
13 Pollution Control Board of July 1, 1997. The
14 Illinois Pork Producers Association, in Richard W.
15 Davidson's testimony at the October 14, 1997,
16 hearing, presented additional details of this
17 proposal to the Board.

18 The Farm Group has thoroughly reviewed
19 the options available to livestock producers to
20 meet the requirements to establish and maintain
21 evidence of financial responsibility for lagoon
22 closure in Section 17 of the Livestock Management
23 Facilities Act. It is the opinion of the Illinois
24 Beef Association that this fund is the only option

1 available to producers that will meet both the
2 requirements of Section 17 for financial
3 responsibility and Section 55(c) of the LMFA for
4 economic reasonability.

5 The cost of guarantees, surety bonds,
6 letters of credit, and dedicated certificates of
7 deposit all require the commitment of large lump
8 sums of cash which will substantially and
9 unnecessarily decrease the net present value of a
10 producer's investment in a facility. In absence of
11 commercially available insurance, the Fund is an
12 industry self-insurance instrument.

13 Utilizing the Illinois Farm Development
14 Authority as the trustee of the Fund provides for
15 qualified professional management of the Fund and
16 efficient use of the State's resources.

17 Within the comments submitted by the Farm
18 Group today we have responded to the observations
19 and questions raised by the Board at the October
20 14th hearing. Our comments provide the detail to
21 the issues of defining Fund participation,
22 declaration of lagoon abandonment, service,
23 maintenance and closure of an abandoned lagoon,
24 Fund management and distributions from the Fund.

1 We believe this proposal addresses the needs of the
2 State and the livestock industry.

3 Thank you for consideration of my
4 comments.

5 HEARING OFFICER KING: Does anyone have
6 any questions for Mr. O'Connor?

7 Mr. O'Connor, was this filed with the
8 Clerk of the Board?

9 MR. O'CONNOR: I just brought it for
10 testimony today.

11 HEARING OFFICER KING: Okay. In that
12 case, does anyone have objections to the admission
13 of Mr. O'Connor's testimony as Exhibit 12?

14 All right. Hearing none, this will be
15 Exhibit 12.

16 (Whereupon said document was
17 duly marked for purposes of
18 identification and admitted
19 into evidence as Hearing
20 Exhibit 12 as of this date.)

21 HEARING OFFICER KING: Thank you, Mr.
22 O'Connor.

23 MR. O'CONNOR: Thank you.

24 HEARING OFFICER KING: At this point, why

1 don't we take a break until a quarter to 12:00. We
2 are going to go over some of the papers that have
3 been handed up, and we will come back at that point
4 and see if there is any further questions for
5 anyone.

6 Thank you very much, and we will be back
7 at 11:45.

8 (Whereupon a short recess was
9 taken.)

10 HEARING OFFICER KING: Board Member
11 McFawn has some questions for Mr. Gebhards. If he
12 could come back here, we would appreciate it.

13 BOARD MEMBER McFAWN: Mr. Gebhards, thank
14 you for coming back.

15 My questions really have to do with some
16 of your testimony that has to do with the
17 disbursement of money from the Fund to the
18 Department. According to your testimony, at least
19 the way I understand it, is that once the court has
20 made its decision that the lagoon has been
21 abandoned, the Department may ask the Authority for
22 the amount of money it needs to either maintain its
23 service or close the lagoon?

24 MR. GEBHARDS: Right.

1 BOARD MEMBER McFAWN: And it is as simple
2 as that? The mere request -- I mean, properly
3 documented, et cetera?

4 MR. GEBHARDS: Right, with the proper
5 documentation. That's how we envision it.

6 BOARD MEMBER McFAWN: Then you also
7 testified that the monies should be deposited in a
8 financial institution. That deposit should be made
9 by the Department, you mean, while -- prior to --
10 while they are waiting to spend the money?

11 MR. GEBHARDS: Well, no, we were
12 referencing it there -- and, Dwight, correct me if
13 I am wrong. My recollection is we were referencing
14 that those monies of the Fund would be deposited in
15 accordance with the financial -- the proper
16 financial instruments. I would see that as the
17 Authority -- the Farm Development Authority's
18 responsibility to do that, since they would be the
19 custodian.

20 BOARD MEMBER McFAWN: Okay. They are the
21 custodian?

22 MR. GEBHARDS: Yes.

23 BOARD MEMBER McFAWN: And then after they
24 give it to the Department, it is up to the

1 Department to make sure that they disburse it
2 correctly?

3 MR. GEBHARDS: Right.

4 MR. WORTH: If I may add to that
5 discussion, there may be a little bit of confusion
6 on how that is intended to work, because I don't
7 have the answers. I guess I see some of the same
8 questions. We may need to further clarify that,
9 exactly how that would work, because Item G on, I
10 believe it is page 8, talks about the Department
11 requesting a pay out from the Fund and then it
12 appears to me that the Department would invest that
13 money. You know, perhaps -- I guess that assumes
14 the Department needs the money to effect whatever
15 work is being done out there.

16 So there has to be a method to get that
17 money in the Department's hands during such time as
18 they are actually incurring the expenses. So I
19 think that's why that is suggested that way. The
20 Department sees that they are going to incur an
21 expense so they could request payment, the money is
22 transferred into their hands such that they have a
23 Fund from which to make payments as the actual
24 expenses are incurred.

1 MR. DUNBAR: Right. When there is a
2 cleanup involved.

3 BOARD MEMBER McFAWN: When there is a
4 closure?

5 MR. DUNBAR: When there is a closure
6 involved or a service and maintenance. Trying to
7 preclude having to take that transfer of funds back
8 through the appropriation process of the General
9 Assembly --

10 BOARD MEMBER McFAWN: Oh, I see.

11 MR. DUNBAR: -- on a cost-by-cost basis.
12 So if you hire a contractor to come in and do work,
13 before you can ever cut a check for that
14 contractor, you have to go back through the
15 appropriations process. We are trying to provide
16 enough protection along the way so that we don't
17 necessarily have to go through on a case-by-case
18 appropriation basis.

19 BOARD MEMBER McFAWN: Oh, I see. So this
20 money would not become the Department's money, it
21 would instead be set aside?

22 MR. WORTH: That is correct. There may
23 be some other ways that we can accomplish the
24 intent here that would be perhaps a little less

1 cumbersome and still accomplish the same thing so
2 the Department would know they have access to "X"
3 amount of dollars for this particular closure that
4 is taking place.

5 I think an additional point of
6 clarification and, Dwight, please correct me if I
7 am mistaken, as this is taking place and the
8 Department would make such a request, they say we
9 have this abandoned facility and all these things
10 have happened, we are now ready to implement the
11 closure, we need access to "X" amount of dollars to
12 do this closure, it is my understanding that the
13 Council that is created in this document would
14 actually have to authorize that expenditure of
15 money. So in other words, they would say, okay, if
16 it is a \$100,000.00 amount --

17 MR. DUNBAR: Approve the plan and
18 authorize the expenditure. That was the intent,
19 anyway. I don't know whether it is clear in the
20 language.

21 MR. WORTH: So there is an additional
22 step. The Department makes the request. The
23 Council has to review and approve the request.
24 Then the Authority would, at that point, transfer

1 funds.

2 BOARD MEMBER McFAWN: What if the Council
3 and the Authority disagreed with the Department?
4 How would the disagreement be resolved? I am just
5 trying to see how this works. In commercial
6 insurance you know the routes, and I am not sure I
7 know the route through this so-called private
8 insurance.

9 MR. GEBHARDS: I guess we didn't really
10 identify a specific procedure for that.

11 BOARD MEMBER McFAWN: Okay.

12 MR. DUNBAR: Yes. I guess our hope was
13 that they wouldn't be at odds. But that is not
14 always guaranteed when you have people involved. I
15 understand that.

16 BOARD MEMBER McFAWN: People and money.

17 MR. DUNBAR: Yes, and money.

18 BOARD MEMBER McFAWN: Well, do give that
19 some thought and see if you can give the Board an
20 answer. I am not trying to create another layer,
21 but I am wondering if that is not a concern and
22 what happens when you have a disagreement, how is
23 it resolved. Maybe the Department wins.

24 MR. DUNBAR: There are some existing

1 entities, advisory councils to the Department of
2 Agricultural for other purposes such as the Board
3 of Livestock Advisors. You know, maybe they can be
4 an arbitration in case there was a difference.

5 BOARD MEMBER McFAWN: How does this work
6 through the grain fund? Although the Department is
7 in full control of that, isn't it?

8 MR. BORUFF: Not really in full control.
9 We have control over the pool of assets that we
10 develop from the liquidation of the grain assets,
11 but if the Fund then has to pay additional, we
12 actually have to go and get the approval of the
13 Grain Insurance Fund Board of Directors that I
14 mentioned earlier in my testimony. So they would
15 approve any disbursements that we make from the
16 Fund.

17 BOARD MEMBER McFAWN: And if you have
18 disagreements what happens?

19 MR. BORUFF: I don't recall an incident
20 where there have been disagreements. All actions
21 by the Board are taken up to a vote, and so they do
22 vote on their actions.

23 BOARD MEMBER McFAWN: Okay.

24 MR. BORUFF: I can't recall an instance

1 where that has been a problem.

2 BOARD MEMBER McFAWN: Okay. So you have
3 successfully accessed the Grain Fund?

4 MR. BORUFF: Oh, yes, quite frequently.
5 I might mention, too, that the process that the
6 gentleman here just described is very consistent in
7 the way we would administer liquidation under the
8 Grain Insurance Fund.

9 BOARD MEMBER McFAWN: All right. Thank
10 you Mr. Gebhards and Mr. Boruff.

11 HEARING OFFICER KING: I believe Board
12 Member Flemal had some questions for Mr. Boruff.

13 BOARD MEMBER FLEMAL: Thanks, Chet. The
14 area I would like to explore just for a little
15 while is the issue of including freeboard in the
16 volume calculation. To begin with, could you just
17 review for us the Department's rationale in
18 including freeboard?

19 MR. BORUFF: Okay. We looked upon the
20 rationale of freeboard as a worse case scenario.
21 Because in an instance where you might trigger
22 financial responsibility, there is a strong
23 likelihood that the operation has not been
24 maintained as well as it should have been prior to

1 that point in time. More than likely, pumping had
2 ceased along the route, and so you have a lagoon
3 now that has essentially gotten full. No one has
4 been pumping it out and that kind of thing.

5 So we looked at the worse case scenario,
6 and that being the case that it is level full to
7 the brim. So that's why we took the entire volume
8 into our consideration. Two things to consider
9 there. It is the worse case scenario. The other
10 thing is that in a situation like that, much of
11 that material in that freeboard and the entire
12 volume of the lagoon is a very liquid, almost
13 essentially water, with a very low analysis.

14 So that we felt very comfortable when we
15 looked at our pumping and sludge removal costs, as
16 were outlined in that document, that they also
17 reflected very worse case scenarios. We felt that
18 we had, I guess you might say, some freeboard of
19 our own built in there in terms of the cost
20 analysis.

21 BOARD MEMBER FLEMAL: I have a general
22 concern that much of what we have done in these
23 proceedings has worked towards making or providing
24 a disincentive to use lagoons, in part because we

1 are regulating those as opposed to other kinds of
2 waste management facilities. My concern here is
3 that are we perhaps adding an additional
4 disincentive to use either lagoons at all or
5 perhaps engineer a lagoon to some level beyond the
6 minimum required by the regulations by including
7 freeboard.

8 For example, our regulations now require
9 for a large lagoon that you maintain two feet of
10 freeboard. If I, as a producer, decide that, for
11 whatever reason, I want three feet around mine, am
12 I being penalized for adding what might be
13 something which is an additional environmental
14 safeguard?

15 MR. BORUFF: I believe you bring up a
16 very good point there. We need to make sure that
17 the regulations don't provide a disincentive in all
18 the regulations we have discussed relative to
19 lagoons, because even though the use of livestock
20 waste lagoons has gotten a rather poor image in the
21 press at times, if they are well constructed and
22 well managed they can be a very, very good
23 alternative and a very environmentally sound
24 alternative for livestock producers to use.

1 So you bring up a good point. We want to
2 make sure that we don't provide a disincentive.
3 That same thought process, I believe, was used as
4 the rules and the Act itself were being developed
5 to make sure that producers were not penalized when
6 they choose to oversize lagoons. Because we do
7 know that as a lagoon size increases, the
8 likelihood for odor and that type of thing
9 diminishes, and that can be good management to
10 oversize a lagoon. So along that same line of
11 thought, you do bring up a good point in terms of
12 voluntarily additional freeboard, it would not be a
13 penalty to provide that, as well.

14 BOARD MEMBER FLEMAL: Indeed so. Perhaps
15 you and other people who might wish to -- might
16 look at how the concern regarding freeboard that
17 you express initially as a Department's
18 justification for including freeboard can be melded
19 with something that wouldn't act as a disincentive
20 for the over-sizing or extra freeboard
21 requirements.

22 MR. BORUFF: You bring up a good --

23 BOARD MEMBER FLEMAL: Perhaps it might
24 relate somehow to not including in the calculations

1 that amount of freeboard that might be voluntarily
2 added in excess of that required by the
3 regulation. I don't know whether that does work.
4 That is just a thought.

5 MR. BORUFF: That's a good point. We
6 will take that under consideration and see how we
7 might handle that.

8 BOARD MEMBER FLEMAL: The use of volume
9 itself is, obviously, as opposed to sizing lagoons
10 based upon avenues, because the Act requires us to
11 consider volume as the determinate, correct?

12 MR. BORUFF: That's correct. It
13 specifically states that the responsibility will be
14 determined by the volumetric capacity of the
15 lagoon.

16 BOARD MEMBER FLEMAL: All right.

17 BOARD MEMBER McFAWN: I thought your
18 comments about the risks were interesting, though.
19 Even though the freeboard might be provided as
20 extra safety it might then, in turn, be abused, so
21 then who should bear that risk, should it be
22 factored into the cost estimate or not. So it is a
23 difficult issue and we look forward to your
24 comments.

1 MR. BORUFF: It is very difficult and you
2 both have brought very good comments regarding
3 them.

4 HEARING OFFICER KING: All right. If
5 that's all of the questions everyone has for the
6 witnesses today, then I believe that we are done
7 with what we need to do.

8 The public comment period in this matter
9 is going to remain open until December 5th. I will
10 issue a Hearing Officer Order that will get served
11 on -- I assume that everyone here today is probably
12 on the notice and/or service list. So that will go
13 out and you will get a written copy of that.

14 In case anyone is here who is not on the
15 service or notice list, there are sign up sheets on
16 the table in back, so feel free to sign up and you
17 can get copies of documents that are filed and
18 orders that are issued in this case.

19 Other than that, I would like to thank
20 everyone who has participated. We are very
21 grateful for all of your comments, and hopefully we
22 will have something for you in the fairly near
23 future.

24 BOARD MEMBER McFAWN: Just for those of

1 you that are not maybe that familiar with the Board
2 rulemaking process, it is part of our rules that we
3 have this public comment period at the close of our
4 public hearings. So we will -- that's why Mr. King
5 has established the public comment period. We will
6 look at your testimony, your exhibits, what public
7 comments we receive until December 5th. At that
8 time the Board would take all of that under
9 consideration and hopefully shortly thereafter,
10 depending on the other demands on the board members
11 and the staff time, go forward with a first notice
12 proposal.

13 As you probably all are aware from maybe
14 your experience with other rulemakings before the
15 Board, we then go through another public comment
16 period. It is then after that that we adopt the
17 second notice version of the proposed rules which
18 we send to the Joint Committee, and after the Joint
19 Committee hopefully issues its notice of no
20 objection, that is when we adopt the rules as
21 final.

22 So, unfortunately, the public comment
23 period does build in delays, but those are very
24 valid -- it is a very valid reason for delays, but

1 we will keep this moving as quickly as we can.

2 I thank you on behalf of the Board as
3 well for coming today and last week in Chicago and
4 giving us such good testimony on this very limited
5 issue but very difficult issue, as the draft
6 agreements demonstrate. Thank you.

7 HEARING OFFICER KING: Thank you very
8 much. That concludes this hearing.

9 (Exhibits 1 through 12 retained
10 by Hearing Officer King.)

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2 COUNTY OF MONTGOMERY)

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I, DARLENE M. NIEMEYER, a Notary Public
in and for the County of Montgomery, State of
Illinois, DO HEREBY CERTIFY that the foregoing 89
pages comprise a true, complete and correct
transcript of the proceedings held on the 21st of
October A.D., 1997, at the Municipal Building,
Springfield, Illinois, in the matter of: Livestock
Waste Regulations, 35 Illinois Administrative Code
506, in proceedings held before the Honorable
Charles A. King, Hearing Officer, and recorded in
machine shorthand by me.

IN WITNESS WHEREOF I have hereunto set my
hand and affixed my Notarial Seal this 30th day of
October A.D., 1997.

Notary Public and
Certified Shorthand Reporter and
Registered Professional Reporter

CSR License No. 084-003677
My Commission Expires: 03-02-99