

STATE OF COLORADO

Bill Ritter, Jr., Governor
Martha E. Rudolph, Executive Director

WATER QUALITY CONTROL COMMISSION

<http://www.cdphe.state.co.us/op/wqcc/index.html>

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Colorado
Department
of Public Health
and Environment

NOTICE OF PUBLIC RULEMAKING HEARING BEFORE THE COLORADO WATER QUALITY CONTROL COMMISSION

SUBJECT:

For consideration of the adoption of 1) a new Regulation #66 (proposed to be codified at 5 CCR 1002-66), pertaining to financial assurance instrument criteria for Colorado's Housed Commercial Swine Feeding Operations (HCSFOs), and 2) revisions to subsection 13(4)(h) of the Colorado Discharge Permit System Regulations, Regulation #61 (5 CCR 1002-61), regarding financial assurance requirements for HCSFOs. The Environmental Agriculture Program's proposal to establish criteria for six financial assurance instruments in new Regulation #66, along with a proposed Statement of Basis, Specific Statutory Authority, and Purpose is attached to this Notice as Exhibit 1. The Environmental Agriculture Program's proposed revisions to Regulation #61 subsection 13(4)(h), along with a proposed Statement of Basis, Specific Statutory Authority, and Purpose, are attached to this Notice as Exhibit 2. Proposed new language in Regulation #61 is shown with double-underlining and proposed deletions are shown with ~~strikeouts~~. Any alternative proposals related to the rule proposed in Exhibit 1 or the revisions proposed in Exhibit 2, and developed in response to those proposals, will also be considered.

HEARING SCHEDULE:

DATE: Monday, July 12, 2010
TIME: 9:30 a.m.
PLACE: Florence Sabin Conference Room
Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado

PUBLIC PARTICIPATION ENCOURAGED:

The Commission encourages all interested persons to provide their opinions or recommendations regarding the matters to be addressed in this rulemaking hearing, either orally at the hearing or in writing prior to or at the hearing. Although oral testimony from those with party status (see below) and other interested persons will be received at the hearing, the time available for such oral testimony may be limited. Written submissions prior to the hearing are encouraged, so that they can be distributed to the Commission for review prior to the hearing. Oral testimony at the hearing should primarily summarize written material previously submitted. The hearing will emphasize Commission questioning of parties and other interested persons about their written prehearing

submittals. Introduction of written material at the hearing by those with party status or mailing list status (see below) generally will not be permitted.

PARTY STATUS/MAILING LIST STATUS:

Participation as a "party" to this hearing or acquisition of "mailing list status," will require compliance with section 21.4(D) of the Procedural Rules, Regulation #21 (5 CCR 1002-21). Mailing list status will allow receipt of all party documents (except individual exhibits more than five pages in length). It is not necessary to acquire party status or mailing list status in order to testify or comment. **For each request for party status or mailing list status, please provide the organization's name, a contact person, mailing address, phone number, fax number and email address if available.** Written party status or mailing list status requests are due in the Commission Office on or before:

DATE: Tuesday April 27, 2010
TIME: 5:00 p.m.

A single copy of the party status or mailing list status request may be transmitted as an email attachment to cdphe.wgcc@state.co.us, submitted by fax to 303-691-7702, mailed or otherwise conveyed so as to be received in the Commission Office no later than this deadline. PLEASE NOTE that, as indicated below, parties will have the option of distributing materials to other parties electronically, except in instances where a party has requested receiving hard copies of documents. Therefore, **anyone requesting party or mailing list status that wishes to receive hard copies of documents instead of emailed copies should so indicate in the party status/ mailing list status request so that this information can be included on the list distributed by the Commission Office.**

PREHEARING STATEMENTS:

PLEASE NOTE that for this hearing two separate deadlines for prehearing statements are established: (1) An original and 13 copies of **Proponent's Prehearing Statement from the Environmental Agriculture Program (EAP) as proponent of the rule proposed in Exhibit 1 and revisions proposed in Exhibit 2 attached to this notice**, including written testimony and exhibits providing the basis for the proposal, must be received in the Commission Office no later than **May 4, 2010**; and (2) An original and 13 copies of a **Responsive Prehearing Statement**, including any exhibits, written testimony, and alternative proposals of **anyone seeking party status and intending to respond to the EAP proposal** must be received in the Commission Office no later than **May 25, 2010**.

For each deadline, the required number of hard copies of documents must be received in the Commission office by the specified deadline. These requirements are not satisfied by electronic transmission of a facsimile copy or copies. However, **parties are also strongly encouraged to email a copy of their written documents to the Commission Office**, so that materials received can be posted on the Commission's web site. (Please email to cdphe.wgcc@state.co.us.) In addition, copies of these documents must be mailed or hand-delivered by the specified dates to all persons requesting party status or mailing list status, and to the Attorney General's Office representatives for the Commission and Department, in accordance with a list provided by the Commission Office following the party status/ mailing list status deadline. **Alternatively, parties may email documents to those with party status or mailing list status by the specified dates**, except to those that the list distributed by the Commission Office identifies as requesting hard copies.

Also **note** that the Commission has prepared a document entitled **Information for Parties to Water Quality Control Commission Rulemaking Hearings**. A copy of this document will be mailed or emailed to all persons requesting party status or mailing list status. It is also posted on the Commission's web site at <http://www.cdphe.state.co.us/op/wqcc/PublicParticipation/HBappC.pdf>. Following the suggestions set forth in this document will enhance the effectiveness of parties' input for this proceeding. **Please note the new request that all parties submit two-sided copies of all hearing documents on three-hole punch paper.**

MAILING LIST STATUS COMMENTS:

Those requesting mailing list status shall provide written testimony, if any testimony is to be offered for the hearing, by the above deadline for responsive prehearing statements – i.e., **May 25, 2010**. Copies shall be submitted and distributed in the same manner as noted above for prehearing statements.

PREHEARING CONFERENCE:

DATE: Wednesday, June 2, 2010
TIME: 2:30 p.m.
PLACE: Board Room
Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado

Attendance at the prehearing conference is mandatory for all persons requesting party status. An opportunity may be available to participate in this prehearing conference by telephone. Persons wishing to participate by telephone should notify the Commission Office as early as possible.

REBUTTAL STATEMENTS:

Written rebuttal statements responding to the prehearing statements due on May 25, 2010 may be submitted by the EAP or anyone seeking party status or mailing list status. Any such rebuttal statements must be received in the Commission Office by **June 30, 2010**. An original and 13 copies of written rebuttal statements must be received in the Commission Office by this deadline and submission of an emailed copy as noted above is strongly encouraged. In addition, copies of these documents must be mailed or hand-delivered by that date to all those requesting party status or mailing list status, and to the Attorney General's Office representatives for the Commission and Department. **Alternatively, parties may email documents to those with party status or mailing list status by this deadline**, except to those that the list distributed by the Commission Office identifies as requesting hard copies. No other written materials will be accepted following this deadline except for good cause shown.

SPECIFIC STATUTORY AUTHORITY:

The provisions of sections 25-8-202(1), 25-8-401, and 25-8-501.1 C.R.S. provide the specific statutory authority for consideration of the regulatory amendments proposed by this notice. Should the Commission adopt the regulatory language as proposed in this notice or

alternative amendments, it will also adopt, in compliance with section 24-4-103(4) C.R.S., an appropriate Statement of Basis, Specific Statutory Authority, and Purpose.

NOTIFICATION OF POTENTIAL MATERIAL INJURY TO WATER RIGHTS:

In accordance with section 25-8-104(2)(d), C.R.S., any person who believes that the actions proposed in this notice have the potential to cause material injury to his or her water rights is requested to so indicate in the party status request submitted. In order for this potential to be considered fully by the Commission and the other agencies listed in the statute, persons must fully explain the basis for their claim in their prehearing statement which is due in the Commission Office on the date specified above. This explanation should identify and describe the water right(s), and explain how and to what degree the material injury will be incurred.

Dated this 10th day of March, 2010 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Paul D. Frohardt, Administrator

EXHIBIT 1
ENVIRONMENTAL AGRICULTURE PROGRAM'S
PROPOSAL REGARDING REGULATION NO. 66

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Water Quality Control Commission

5 CCR 1002-66

HCSFO FINANCIAL ASSURANCE CRITERIA REGULATIONS
FOR
COLORADO HOUSED COMMERCIAL SWINE FEEDING OPERATIONS

REGULATION NO. 66

66.0 AUTHORITY

These regulations are promulgated pursuant to section 25-8-101 et seq C.R.S. as amended, and in particular 25-8-202(1)(d) and (2), 25-8-501.1, 25-8-504, and 24-4-103.

66.1 APPLICABILITY

The provisions of these regulations are applicable to all housed commercial swine feeding operations, as defined under section 61.2 of the Colorado Discharge Permit System Regulations, Regulation No. 61 (5 CCR 1002-61).

66.2 PURPOSE

- (1) These regulations establish the criteria necessary for a housed commercial swine feeding operation to satisfy when using one or more of the following financial assurance instruments, as identified in subsection 61.13(4)(h)(x) of Regulation No. 61:
- irrevocable standby letter of credit
 - trust fund
 - surety bond (guaranteeing performance or payment)
 - insurance
 - financial test
 - written guarantee
- (2) These regulations supplement the housed commercial swine feeding operation discharge permit regulations in section 61.13 of Regulation No. 61. Housed commercial swine feeding operations

are subject to both the provisions of section 61.13 of Regulation No. 61 and to the provisions of Regulation No. 66.

66.3 DEFINITIONS

- (1) "APPLICANT" means a person that has submitted to the Division an application for an individual discharge permit for a housed commercial swine feeding operation.
- (2) "CLOSURE COSTS" means the total dollar estimate for closure, post-closure, and corrective action costs shown in the current approved financial assurance plan(s) for a permittee, or as otherwise required by the Division pursuant to subsection 61.13(4)(h)(vi)(B)-(C) of Regulation No. 61.
- (3) "COMPANY"- means a voluntary association formed and organized to carry on a business in the legal name of the association and includes, but is not limited to, a sole proprietorship, partnership, corporation, and limited liability entity.
- (4) "DIVISION" means the Water Quality Control Division of the Colorado Department of Public Health and Environment.
- (5) "FACILITY"- means a housed swine feeding operation, as defined under section 61.2 of the Colorado Discharge Permit System Regulations, Regulation No. 61 (5 CCR 1002-61), that is covered by a permit.
- (6) "FINANCIAL ASSURANCE PLAN"- means a plan that addresses the final closure, post-closure, and corrective action activities for a housed commercial swine feeding operation, in accordance with subsection 61.13(3)(h) of Regulation No. 61.
- (7) "FINANCIAL STATEMENTS"- means formal records of the financial activities of a business, person, or other entity that provide an overview of the financial condition in both the short- and long-terms of the business, person, or other entity. For the purpose of this regulation, financial statements include the balance sheet and income statement.
- (8) "OPERATION"- means a housed commercial swine feeding operation, as defined under section 61.2 of the Colorado Discharge Permit System Regulations, Regulation No. 61 (5 CCR 1002-61).
- (9) "PERMIT" means an individual discharge permit issued to a housed commercial swine feeding operation pursuant to Regulation No. 61, including new permits, renewals, and temporary permits.
- (10) "PERMITTEE" means a person that has been issued an individual discharge permit for a housed commercial swine feeding operation.
- (11) "PERSON" means an individual, corporation, partnership, association, state or political subdivision thereof, federal agency, state agency, municipality, Commission, or interstate body.
- (12) "PERSONAL FINANCIAL STATEMENT"- means a document stating an individual's assets, liabilities and other information typically required by a financial institution to underwrite a loan request.
- (13) "PRIVATE COMPANY"- means a company whose ownership is private and is not subject to filing requirements of the U.S. Securities and Exchange Commission.
- (14) "PUBLIC COMPANY"- means a company whose stock is traded on an organized stock exchange and that is subject to filing requirements of the U.S. Securities and Exchange Commission.

- (15) "SUBSIDIARY COMPANY"- means a company in which another, generally larger company, known as the parent company, owns all or at least a majority of the stock. For the purpose of this regulation, a parent company is a public company.
- (16) "TANGIBLE NET WORTH"- means the physical worth of a company or individual minus any value derived from intangible assets such as copyrights, patents, goodwill, and intellectual property, Tangible net worth is calculated by taking the value of a company's total assets and subtracting the value of total liabilities and intangible assets.

66.4 IRREVOCABLE STANDBY LETTER OF CREDIT CRITERIA

A permittee or applicant may satisfy the financial assurance requirements of subsection 61.13(4)(h)(x) of Regulation No. 61 by submitting to the Division an irrevocable standby letter-of-credit that conforms to the requirements of section 66.4. The issuing institution must have the authority to issue a letter of credit and its operations must be regulated by a federal or state agency.

- (1) The letter of credit must be effective as of the date of issuance.
- (2) A letter-of-credit must be in full conformance with Article 5 of the uniform commercial code, C.R.S. 4-5-101 et seq, as amended.
- (3) The wording of the letter-of-credit must be identical to the wording specified for a letter of credit in Appendix A.
- (4) A permittee or applicant who uses a letter-of-credit to satisfy closure costs must also establish a standby trust fund, unless an alternate instrument has been established by the state of Colorado to directly receive monies, or the permittee or applicant has previously established a trust fund under section 66.5. Under the terms of the letter-of-credit, all amounts paid pursuant to a draft by the Division will be deposited by the issuing institution directly into the standby trust fund, or trust fund, in accordance with instructions from the Division. This standby trust fund must meet the requirements of a trust fund (section 66.5), except the following provisions are not required:
 - (a) Updating of Schedule A of the trust agreement to show closure costs; and,
 - (b) Annual valuations as required by the trust agreement; and,
 - (c) Notices of nonpayment as required by the trust agreement.
- (5) Where a standby trust fund is established in accordance with subsection 66.4(4), the wording of the standby trust must be identical to the wording specified in Appendix C and the standby trust must be submitted to the Division concurrently with the letter-of-credit.
- (6) The letter-of-credit must be accompanied by a letter from the permittee or applicant referring to the letter of credit by number, issuing institution, and date, and providing the following information: the name and address of the housed commercial swine feeding operation facilities, and the amount of funds assured for closure costs for the facilities by the letter-of-credit.
- (7) The letter-of-credit must be irrevocable and issued for a period of at least one (1) year.
- (8) The letter-of-credit must provide that the expiration date will be automatically extended for a period of at least one (1) year unless, at least 90 days before the current expiration date, the issuing institution notifies the permittee or applicant and the Division by certified mail of a decision not to extend the expiration date. Under the terms of the letter-of-credit, the 90 days will begin on the date when the permittee or applicant and the Division have received the notice, as evidenced by a certified mail return receipt.

- (9) The letter-of-credit must provide that the issuing institution waives all rights of set off or liens against the letter-of-credit.
- (10) The letter-of-credit must be issued in an amount at least equal to the closure costs, less any amount covered by another financial assurance instrument(s).
- (11) Following a determination that the permittee has failed to perform final closure or post-closure or corrective actions in accordance with the current, approved financial assurance plan and other permit requirements when required to do so, the Division may draw on the letter-of-credit.
- (12) If the permittee does not establish alternate financial assurance that meets the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61, within 60 days after receipt by both the permittee and the Division of a notice from the issuing institution that it has decided not to extend the letter-of-credit beyond the current expiration date, the Division will draw on the letter-of-credit within 30 days prior to the expiration date. The Division may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last thirty (30) days of any such extension the Division will draw on the letter-of-credit if the permittee has failed to provide alternate financial assurance that meets the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61.
- (13) Reimbursements- If the value of the letter-of-credit is greater than the closure costs, the permittee may submit a written request with appropriate documentation justifying the request to the Division for the release of the amount in excess of the closure costs.
 - (a) If the Division concurs with the accuracy of the justification, within 60 days after receiving a request from the permittee for release of letter-of-credit funds, the Division will instruct the trustee to release to the permittee the amount in the letter-of-credit fund in excess of closure costs.
 - (b) If the permittee substitutes other financial assurance that meets the requirements of in subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61 for all or part of the letter-of-credit fund, the permittee may submit a written request to the Division for release of the amount in excess of the closure costs in the letter-of-credit fund covered by another, approved financial assurance instrument(s).
 - (c) After beginning partial or final closure, post-closure, and/or corrective action care of a facility(ies), a permittee may request reimbursements for closure, post-closure, and/or corrective action care expenditures by submitting itemized receipts to the Division.
 - (i) The permittee may request reimbursements for partial or final closure, post-closure, and/or corrective actions only if the remaining value of the letter-of-credit fund is sufficient to cover closure costs for the operation.
 - (ii) Within sixty (60) days after receiving receipts for partial or final closure, post-closure, and/or corrective action care, the Division will instruct the institution that issued the letter-of-credit to make reimbursements in such amounts as the Division specifies in writing if the Division determines that the expenditures are in accordance with the approved financial assurance plan, or otherwise justified.
 - (iii) If the Division has reason to believe that the closure costs over the remaining life of the operation will be significantly greater than the face amount of the letter-of-credit fund, it may withhold reimbursements of such amounts as it deems prudent until it determines that the permittee is no longer required to maintain financial assurance for final closure of the operation. If the Division does not instruct the

institution that issued the letter-of-credit to make such reimbursements, it will provide the permittee with a detailed written statement of reasons.

- (14) The Division shall agree to termination of a letter-of-credit when the provisions of subsection 61.13(4)(h)(xii) or (xiii) of Regulation No. 61 have been satisfied.

66.5 TRUST FUND CRITERIA

A permittee or applicant may satisfy the financial assurance requirements of subsection 61.13(4)(h)(x) of Regulation No. 61 by establishing a trust fund that conforms to the requirements of section 66.5 and submitting the trust agreement to the Division. The trustee must be an entity which has the authority to act as a trustee and its trust operations must be regulated and examined by a federal or state agency.

- (1) The trustee, to be validated by the comptroller or banking commission, shall be the trust division of a federal or state chartered bank with capital and surplus of not less than \$10,000,000, selected by the operator and acceptable to the Division. Said bank must be located and legally chartered to operate in one of the fifty (50) states. The trustee shall direct the investment of funds in the trust, using the standard of care of a fiduciary. No funds shall be released, disbursed, or transferred by the trustee from this trust without the express written authorization of the Division.
- (2) The trust agreement must be effective as of the date of issuance.
- (3) The wording of the trust agreement must be identical to the wording specified for a trust agreement in Appendix B, and no changes are allowed without Division approval. The trust agreement must be accompanied by a formal certification of acknowledgment.
- (4) Reimbursements- If the value of the trust fund is greater than the closure costs, the permittee may submit a written request with appropriate documentation justifying the request to the Division for the release of the amount in excess of the closure costs.
 - (a) If the Division concurs with the accuracy of the justification, within sixty (60) days after receiving a request from the permittee for release of trust funds, the Division will instruct the trustee to release to the permittee the amount in the trust fund in excess of closure costs.
 - (b) If the permittee substitutes other financial assurance that meets the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61 for all or part of the trust fund, the permittee may submit a written request to the Division for release of the amount in excess of the closure costs in the trust fund covered by another, approved financial assurance instrument(s).
 - (c) After beginning partial or final closure, post-closure, and/or corrective action care of a facility(ies), a permittee may request reimbursements for closure, post-closure, and/or corrective action care expenditures by submitting itemized receipts to the Division.
 - (i) The permittee may request reimbursements for partial or final closure, post-closure, and/or corrective actions only if the remaining value of the trust fund is sufficient to cover closure costs for the operation.
 - (ii) Within sixty (60) days after receiving receipts for partial or final closure, post-closure, and/or corrective action care, the Division will instruct the trustee to make reimbursements in such amounts as the Division specifies in writing if the Division determines that the expenditures are in accordance with the approved financial assurance plan, or otherwise justified.

- (iii) If the Division has reason to believe that the closure costs over the remaining life of the operation will be significantly greater than the face amount of the trust fund, it may withhold reimbursements of such amounts as it deems prudent until it determines that the permittee is no longer required to maintain financial assurance for final closure of the operation. If the Division does not instruct the trustee to make such reimbursements, it will provide the permittee with a detailed written statement of reasons.

- (5) The Division shall agree to termination of a trust fund when the provisions of subsection 61.13(4)(h)(xii) or (xiii) of Regulation No. 61 have been satisfied.
- (6) A trust fund must provide that the trustee waives all rights of set off or liens against the trust fund.

66.6 SURETY BOND CRITERIA (for guaranteeing performance or payment)

A permittee or applicant may satisfy the requirements of subsection 61.13(4)(h)(x) of Regulation No. 61 by submitting to the Program a surety bond that conforms to the requirements of section 66.6. A surety bond can be for the purpose of either guaranteeing full closure of a facility(ies) or guaranteeing payment of closure cost funds into a standby trust fund. The surety company issuing the bond and any co-sureties must have the authority to issue a surety bond and must be regulated and examined by a federal or state agency. The surety company must be conducting business in Colorado and issue the bond subject to the applicable laws and jurisdiction of the state of Colorado. If co-sureties are being used, the original bond must reflect that fact.

- (1) If the surety is using reinsurance, a treasury reinsurance form must be submitted with the bond to the Division or within forty-five (45) days thereafter.
- (2) The surety bond must be effective as of the date of issuance.
- (3) The wording of the surety bond must be identical to the wording for either a payment guarantee surety bond in Appendix D or a performance guarantee bond in Appendix E, as applicable.
- (4) A permittee or applicant who uses a surety bond to satisfy the requirements of this section must also establish a standby trust fund, unless there has been an alternate instrument established by the State of Colorado to directly receive monies, or the applicant or permittee has previously established a trust fund under section 66.5. Under the terms of the bond, all payments made there under will be deposited by the surety directly into the standby trust fund, or other trust fund, in accordance with the instructions from the Division. This standby trust fund must meet the requirements of the trust fund, section 66.5, except the following provisions are not required:
 - (a) Updating of Schedule A of the trust agreement to show current closure costs; and,
 - (b) Annual valuations as required by the trust agreement; and
 - (c) Notices of nonpayment as required by the trust agreement.
- (5) Where a standby trust fund is established in accordance with subsection 66.6(4), the wording of the standby trust must be identical to the wording specified in Appendix C and the standby trust must be submitted to the Division concurrently with the surety bond.
- (6) The bond must guarantee that the permittee will, as applicable:
 - (a) For payment guarantee bonds- fund the standby trust fund in an amount equal to the penal sum of the bond before the beginning of final closure of the operation;

- (b) For performance guarantee bonds- faithfully perform closure, post-closure, and corrective actions for each facility for which this bond guarantees closure costs, in accordance with the approved financial assurance plan;
 - (c) For payment guarantee bonds- fund the standby trust fund in an amount equal to the penal sum within fifteen (15) days after an order to begin closure is issued by the Division or state court or other court of competent jurisdiction;
 - (d) For both performance and payment guarantee bonds- provide alternate financial assurance that meets the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61, and obtain the approval of the Division within (90) days after receipt by the permittee and the Division of a notice of cancellation of the bond from the surety.
- (7) Under the terms of the bond, the surety will become liable on the bond obligation when the permittee fails to perform as guaranteed by the bond.
 - (8) The penal sum of the bond must be in an amount at least equal to the closure costs, less amounts covered by alternative financial assurance instruments.
 - (9) The Division shall agree to termination of a bond when the provisions of subsection 61.13(4)(h)(xii) or (xiii) of Regulation No. 61 have been satisfied.
 - (10) A bond must provide that the surety waives all rights of set off or liens against the bond.

66.7 INSURANCE

A permittee or applicant may satisfy the requirements of subsection 61.13(4)(h)(x) of Regulation No. 61 by obtaining insurance for closure, post-closure, and corrective actions that conforms to the requirements of section 66.7, and submitting a certificate for such insurance to the Division.

- (1) At a minimum, the insurer must be licensed to transact the business of insurance or be eligible to provide insurance as an excess or surplus lines insurer, and comply with Title 10 Insurance Code, C.R.S., as amended. The insurance company must be conducting business in Colorado and assure the policy is subject to the laws and jurisdiction of the State of Colorado. The insurance company must be regulated and examined by a federal or state agency.
- (2) The insurance must be effective as of the date of issuance.
- (3) The wording of the certificate of insurance must be identical to the wording specified for a certificate of insurance in Appendix F.
- (4) The insurance policy must be issued for a face amount at least equal to closure costs. The term "face amount" means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer will not change the face amount, although the insurer's future liability will be lowered by the amount of the payments.
- (5) The insurance policy must guarantee that funds will be available to close and provide post-closure and corrective action care of the permitted facility(ies) whenever closure, post-closure, or corrective action occurs. The policy must also guarantee that once closure, post-closure, or corrective action begins, the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the Division.
- (6) If the permittee wishes to pay for closure and post-closure activities directly, without accessing the insurance coverage, this may be done after receiving written approval by the Division. All terms, limits and other applicable information must accompany this approval.

- (7) Reimbursements- After beginning partial or final closure, post-closure, and/or corrective action care of a facility(ies), a permittee may request reimbursements for closure, post-closure, and/or corrective action expenditures by submitting itemized receipts to the Division.
- (a) The permittee may request reimbursements for partial or final closure, post-closure, and/or corrective actions only if the remaining value of the insurance policy is sufficient to cover closure costs for the operation.
 - (b) Within sixty (60) days after receiving receipts for partial or final closure, post-closure, and/or corrective actions, the Division will instruct the insurer to make reimbursements in such amounts as the Division specifies in writing if the Division determines that the expenditures are in accordance with the approved financial assurance plan, or otherwise justified.
 - (c) If the Division has reason to believe that the closure costs over the remaining life of the operation will be significantly greater than the face amount of the insurance policy, it may withhold reimbursements of such amounts as it deems prudent until it determines, that the permittee is no longer required to maintain financial assurance for final closure of the operation. If the Division does not instruct the insurer to make such reimbursements, it will provide the permittee with a detailed written statement of reasons.
- (8) The permittee must maintain the policy in full force and effect until the Division gives written consent to termination of the policy by the permittee. Failure to pay the premium, without substitution of an approved alternate financial assurance mechanism that meets the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61, will constitute a violation of these regulations. Such violation will be deemed to begin upon receipt by the Division of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration of the insurance policy.
- (9) An insurance policy must contain a provision allowing assignment of the policy to a successor permittee. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.
- (10) The insurance policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy must, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel the policy by sending notice of cancellation by certified mail to the permittee and the Division 90 days in advance of cancellation.
- (11) If the insurer provides notice of its intent to cancel the insurance policy in accordance with subsection 66.7(10), the permittee must obtain alternate financial assurance that meets the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61. The permittee must establish alternate financial assurance within 60 days of receiving notice of cancellation. Failure of the permittee to establish alternative financial assurance, as required, shall be a violation of the permit and may be cause for revocation of the permit.
- (12) Cancellation, termination, or failure to renew the policy may not occur and the policy will remain in full force and effect in the event that on or before the date of expiration of the policy one of the following occurs:
- (a) The Division deems a facility(ies) abandoned; or,
 - (b) The permit is terminated or revoked or a new permit is denied by the Division; or,

- (c) Closure is ordered by the Division or a State or other court of competent jurisdiction; or,
 - (d) The permittee is named as debtor in a voluntary or involuntary proceeding under Title 11 (bankruptcy), U.S. Code; or
 - (e) The premium due is paid.
- (13) At a minimum, all premiums shall be paid annually and proof of payment shall be supplied to the Division by no later than 30 days after payment.
- (14) Commencing on the date that liability to make payments pursuant to the insurance policy accrues, the insurer will thereafter annually increase the face amount of the policy. Such increase must be equivalent to the face amount of the policy, less any payments made, multiplied by an amount equivalent to 85 percent of the most recent investment rate or of the equivalent coupon-issue yield announced by the U.S. Treasury for 26-week treasury securities.
- (15) The Division shall agree to termination of an insurance policy when the provisions of subsection 61.13(4)(h)(xii) or (xiii) of Regulation No. 61 have been satisfied.
- (16) An insurance policy must provide that the insurer waives all rights of set off or liens against the insurance policy.

66.10 FINANCIAL TEST CRITERIA

A permittee or applicant may satisfy the requirements of subsection 61.13(4)(h)(x) of Regulation No. 61 by satisfying the requirements of this section. After the Division approves the use of the financial test instrument by a permittee or applicant, the requirements of section 66.10 must be met annually by the permittee or applicant.

(1) Financial requirements

To pass the financial test, the applicant or permittee must satisfy the following conditions:

- (a) For purposes of the financial test, a permittee or applicant must aggregate all of the cost estimates for either:
 - (i) All facilities identified in applications and permits submitted by or issued to the permittee or applicant; or,
 - (ii) A specified subset of the facilities identified in an application or permit submitted by or issued to the permittee or applicant and that is not, and will not be, associated with another financial assurance instrument, in accordance with section 61.13(4)(h)(viii) of Regulation No. 61.
- (b) Satisfy both of the following two financial indicators:
 - (i) A ratio of current assets (which can include the value of breeding swine) to current liabilities at least 1.2; and,
 - (ii) Tangible net worth at least two times the sum of closure costs.
- (c) Have assets located in the United States amounting to at least the sum of closure costs.
- (d) Submit to the Division the permittee's or applicant's financial statements for the latest completed fiscal year, in accordance with the following, as applicable:

- (i) Public company- A permittee or applicant that is a public company must submit a copy of the company's financial statements and a copy of the independent certified public accountant's report on examination of the permittee or applicant's financial statements for the latest completed fiscal year.
 - (ii) Subsidiary company- A permittee or applicant that is a subsidiary and incorporates its financial statements into its parent company, must submit the permittee's or applicant's financial statements for the latest completed fiscal year.
 - (iii) Private company- A permittee or applicant that is a private company must submit a copy of the permittee's or applicant's financial statement for the latest completed fiscal year as submitted to the permittee's or applicant's bank, with an original signature.
- (e) A letter that meets the following requirements:
- (i) The letter must state that the permittee or applicant meets the conditions of subsection 66.10(1)(a)-(c).
 - (ii) The letter must include a statement that the permittee or applicant acknowledges that making a false, fictitious, or fraudulent statement in the letter is punishable under the criminal laws of Colorado as perjury under section 18-8-503, C.R.S.
 - (iii) Public companies
 - (A) The letter must be worded as specified in Appendix G.
 - (B) The letter must have an original signature of an officer of the permittee or applicant who has financial responsibility for the permittee or applicant and is authorized to bind the permittee or applicant.
 - (iv) Subsidiary companies
 - (A) The letter must be worded as specified in Appendix H.
 - (B) The letter must have an original signature of an officer of the permittee or applicant who has financial responsibility for the permittee or applicant and is authorized to bind the permittee or applicant.
 - (C) The letter must state that the subsidiary company's financial statements were appropriately incorporated into the parent company's financial statements.
 - (D) The letter must state that the subsidiary company's financial statements are what were used for the purpose of satisfying the conditions of subsection 66.10(1).
 - (E) The letter must state that the subsidiary company's financial statements were prepared in accordance with accounting principles acceptable to the Division.
 - (v) Private companies
 - (A) The letter must be worded as specified in Appendix I.

- (B) The letter must have an original signature of an officer of the permittee or applicant who has financial responsibility for the permittee or applicant and is authorized to bind the permittee or applicant.

(2) Reporting and other requirements

- (a) Annual submittals- After the initial submission of the items specified in subsection 66.10(1)(d)-(e), the permittee must annually demonstrate that it continues to meet the requirements of subsections 66.10(1)(a)-(c) by submitting the following documents to the Division within 90 days after the fiscal year end for the permittee:
 - (i) A letter that meets the requirements of subsection 66.10(1)(d), as applicable to the permittee.
 - (ii) The financial statements for the latest completed fiscal year, in accordance with subsections 66.10(1)(e), as applicable to the permittee.
- (b) If the permittee no longer meets the requirements of subsections 66.10(1)(a)-(c), the permittee must immediately send notice to the Division by certified mail of this fact and of its intent to establish alternate financial assurance.
 - (i) The permittee must provide the alternate financial assurance within 120 days from the end of the permittee's fiscal year. Such financial assurance must meet the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61.
- (c) The Division may request reports of financial condition from the permittee at any time in addition to those specified in subsection 66.10(1)(d). Such reports must be submitted to the Division within 30 days of the request.
 - (i) If the Division finds, on the basis of such reports or other information, that the permittee no longer meets the requirements of subsections 66.10(1)(a)-(c), the Division will so notify the permittee in writing and request to meet with the permittee to review the Division's finding.
 - (A) If the permittee provides sufficient information to the Division to demonstrate to the Division's satisfaction that the requirements of subsections 66.10(1)(a)-(c) are met, the Division will allow the permittee to maintain financial assurance by using the financial test instrument.
 - (B) If the permittee cannot demonstrate to the Division's satisfaction that the requirements of subsections 66.10(1) (a)-(c) can be met, the permittee must submit to the Division alternate financial assurance within 90 days after notification of such a finding. Such financial assurance must meet the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61.

(3) Confidential business information

- (a) Any person, non-publically traded corporation, division of a corporation that does not file separate financial information, or other non-publically traded entity, may claim that certain information submitted to satisfy the financial test is confidential business information, if the following requirements are met:
 - (i) The person or entity has a reasonable good faith belief that the disclosure of such information would be detrimental to its competitive or business position;

- (ii) Each page or portion of a page that is purported to be confidential business information is clearly marked as such by the person or entity;
 - (iii) The information purported to be confidential business information by the person or entity has not expired by its terms, nor been waived or withdrawn by such person or entity;
 - (iv) The information purported to be confidential business information is not, and has not been, reasonably obtainable without the person's or entity's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial proceedings);
 - (v) No statute or rule specifically requires the disclosure of the information;
 - (vi) The person or entity claiming that certain information is confidential business information states in a letter accompanying the business or financial information that the above requirements (i)-(v) have been and are being met for the information that the person or entity is claiming as confidential business information.
- (b) If the requirements in subsections (3)(a)(i)-(vi) above are met, the Division will not evaluate such information as confidential business information, but will presume such information is confidential business information.
 - (c) The Division will separate from its publically available files information marked confidential business information and keep such information in files marked confidential business information.
 - (d) If the Division receives a request to review information that includes the purported confidential business information files, the Division will respond to such request by stating that the particular information requested that has been marked confidential business information is confidential business information which will not be made available to the requestor.
 - (e) If the requestor challenges the files identified as confidential business information, the Division will promptly notify the person or entity that has claimed confidential business information for such information. The Division will not release such information unless the person or entity claiming it as confidential business information agrees that it, or any portion of it, can be released or a court of competent jurisdiction orders that such information, or any portion of it, be released.
- (4) The Division shall agree to termination of a financial test instrument when the provisions of subsection 61.13(4)(h)(xii) or (xiii) of Regulation No. 61 have been satisfied.

66.11 WRITTEN GUARANTEE CRITERIA

A permittee or applicant may satisfy the requirements of subsection 61.13(4)(h)(x) of Regulation No. 61 by obtaining a written individual or business guarantee that meets the requirements of this section. After the Division approves the use of the written guarantee instrument by a permittee or applicant, the requirements of section 66.11 must be met annually by the permittee or applicant.

- (1) The terms of a written guarantee must provide that:

- (a) For a facility(ies) covered by the guarantee, if the permittee fails to perform closure, post-closure, and corrective actions in accordance with the permittee's approved financial assurance plan and permit requirements, the guarantor will:
 - (i) Either perform or pay a third party to perform closure, post-closure, and corrective actions as required for the facility(ies) (performance guarantee); or
 - (ii) Establish a fully funded trust fund in the name of the permittee in the amount of closure costs (payment guarantee).
 - (b) The guarantee will remain in force while the permittee is required to comply with the closure, post-closure, and corrective actions requirements of the permit, unless the guarantor sends prior notice of cancellation by certified mail to the permittee and Division. Cancellation may not occur, however, during the 90 days beginning on the date of receipt of the notice of cancellation by both the permittee and the Division, as evidenced by the return receipts.
 - (c) If notice of cancellation is given, the permittee must, within 60 days following receipt of the cancellation notice by the permittee and the Division, submit to the Division alternate financial assurance. Such financial assurance must meet the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61.
 - (i) If the permittee fails to provide alternative financial assurance within the 60-day period, the guarantor must submit to the Division that alternate financial assurance within 90 days of the cancellation notice.
- (2) A guarantor must be one of the following persons:
- (a) For a permittee or applicant that is a subsidiary company- The direct or higher-tier parent company of the applicant or permittee, or a company whose parent company is also the parent company of the applicant or permittee.
 - (b) A company with a substantial business relationship with the applicant or permittee.
 - (c) An individual with a substantial business relationship with the applicant or permittee (individual guarantor).
- (3) A guarantor must meet the financial test requirements of subsections 66.10(1)(a)-(c).
- (4) The permittee or applicant must submit to the Division the guarantor's financial statements for the latest completed fiscal year, in accordance with the following, as applicable:
- (a) For a public company guarantor- A copy of the guarantor's financial statements and a copy of the independent certified public accountant's report on examination of the guarantor's financial statements for the latest completed fiscal year.
 - (b) For a private company guarantor- A copy of the guarantor's financial statements.
 - (c) For an individual guarantor- The guarantor's current Personal Financial Statement sent to the guarantor's bank, with an original signature.
- (5) The permittee or applicant must submit to the Division a letter from the guarantor that meets the following requirements:

- (a) The letter must state that the guarantor meets the conditions of subsections 66.11(2) and (3).
 - (b) The letter must include a statement that the permittee or applicant acknowledges that making a false, fictitious, or fraudulent statement in the letter is punishable under the criminal laws of Colorado as perjury under section 18-8-503, C.R.S.
 - (c) The letter must be worded as specified in Appendix J.
 - (d) If the guarantor is a company or an individual with a substantial business relationship with the applicant or permittee, the letter must describe this substantial business relationship.
 - (i) The Division may request additional information from such a company or individual regarding a substantial business relationship.
 - (e) The letter must have an original signature of one of the following persons, as applicable:
 - (i) For a public company guarantor- The signature of the company's chief financial officer.
 - (ii) For a private company guarantor- The signature of an officer of the company who has financial responsibility for the company and is authorized to bind the company.
 - (iii) For an individual guarantor- The signature of the individual.
- (6) Reporting and other requirements
- (a) Annual submittals- After the initial submission of the items specified in subsections 66.11(4)-(5), the permittee must annually demonstrate that the guarantor continues to meet the requirements of subsections 66.11(2)-(3) by submitting the following to the Division within 90 days after the fiscal year end for the guarantor:
 - (i) A letter that meets the following requirements of subsection 66.11(5), as applicable to the guarantor.
 - (ii) The financial statements for the latest completed fiscal year in accordance with subsection 66.11(4), as applicable to the guarantor.
 - (b) If the guarantor no longer meets the requirements of subsection 66.11(2)-(3), the permittee must provide alternate financial assurance within 60 days from the date of receiving notice from the guarantor or Division that the guarantor no longer meets the requirements of subsection 66.11(2)-(3). Such financial assurance must meet the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61.
 - (i) If the permittee fails to provide alternate financial assurance within the 60-day period, the guarantor must provide such alternate financial assurance within the next 30 days.
 - (c) The Division may request reports of the financial condition of a guarantor at any time, in addition to the reports specified in subsection 66.11(4). Such reports must be submitted to the Division within 30 days of the request.
 - (i) If the Division finds, on the basis of such reports or other information, that a guarantor no longer meets the requirements of subsections 66.11(2)-(3), the

Division will so notify the permittee and guarantor in writing and request to meet with the permittee and guarantor to review the Division's finding.

(A) If the guarantor provides sufficient information to the Division to demonstrate to the Division's satisfaction that the requirements of subsections 66.11(2)-(3) are met, the Division will allow the permittee to maintain financial assurance by using the written guarantee instrument.

(B) If the guarantor cannot demonstrate to the Division's satisfaction that the requirements of subsections 66.11(2)-(3) can be met, the permittee must submit to the Division alternate financial assurance within 90 days after notification of such a finding. Such financial assurance must meet the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61.

(7) The permittee is no longer required to meet the requirements of section 66.11 when either of the following occurs:

(a) The permittee substitutes alternate financial assurance that meets the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61; or,

(b) The permittee is released by the Division from the requirements of section 66.11.

(8) Confidential business information

(a) Any person, non-publically traded corporation, division of a corporation that does not file separate financial information, or other non-publically traded entity, may claim that certain information submitted to satisfy the written guarantee is confidential business information, if the following requirements are met:

(i) The person or entity has a reasonable good faith belief that the disclosure of such information would be detrimental to its competitive or business position;

(ii) Each page or portion of a page that is purported to be confidential business information is clearly marked as such by the person or entity;

(iii) The information purported to be confidential business information by the person or entity has not expired by its terms, nor been waived or withdrawn by such person or entity;

(iv) The information purported to be confidential business information is not, and has not been, reasonably obtainable without the person's or entity's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial proceedings);

(v) No statute or rule specifically requires the disclosure of the information;

(vi) The person or entity claiming that certain information is confidential business information states in a letter accompanying the business or financial information that the above requirements (i)-(v) have been and are being met for the information that the person or entity is claiming as confidential business information.

(b) If the requirements in subsections (3)(a)(i)-(vi) above are met, the Division will not evaluate such information as confidential business information, but will presume such information is confidential business information.

- (c) The Division will separate from its publically available files information marked confidential business information and keep such information in files marked confidential business information.
 - (d) If the Division receives a request to review information that includes the purported confidential business information files, the Division will respond to such request by stating that the particular information requested that has been marked confidential business information is confidential business information which will not be made available to the requestor.
 - (e) If the requestor challenges the files identified as confidential business information, the Division will promptly notify the person or entity that has claimed confidential business information for such information. The Division will not release such information unless the person or entity claiming it as confidential business information agrees that it, or any portion of it, can be released or a court of competent jurisdiction orders that such information, or any portion of it, be released.
- (9) The Division shall agree to termination of a written guarantee when the provisions of section 66.11 have been satisfied.

66.12– 66.19 RESERVED

66.20 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY, AND PURPOSE: JULY 12, 2010 RULEMAKING, EFFECTIVE DATE OF SEPTEMBER 30, 2010

The provisions of sections 25-8-202(1)(d) and (2), 25-8-501.1, 25-8-504, and 24-4-103, C.R.S., provide the specific statutory authority for the establishment of this regulation adopted by the Commission. The Commission has also adopted, in compliance with 24-4-103(4), C.R.S., the following statement of basis and purpose.

BASIS AND PURPOSE

A. APPLICABILITY

The provisions in Commission Regulation No. 66 (5 CCR 1002-66), apply to housed commercial swine feeding operations (HCSFOs), as defined under section 61.2(40) of the Colorado Discharge Permit System Regulations, Regulation No. 61 (5 CCR 1002-61). Regulation No. 66 supplements the HCSFO discharge permit regulations in section 61.13 of Regulation No. 61 and, therefore, HCSFOs are subject to the provisions of both Regulations No. 66 and No. 61.13.

B. PURPOSE OF THE REGULATION

The proposal considered by the Commission during this rulemaking hearing is the adoption of Regulation No. 66, which is a new Commission regulation. The proposal is the result of a stakeholder process that was initiated in November 2008 for the purpose of establishing a guidance document for the financial test and guarantee financial assurance mechanism for HCSFOs, in accordance with subsection 61.13(4)(h)(viii) of Regulation No. 61. A proposed guidance document was brought before the Commission at an informational hearing in November 2009. In response to statements from the Division and HCSFO producers at the hearing, the Commission agreed that, in lieu of continuing the hearing on the guidance document, a rulemaking hearing would be set to consider putting into regulation the criteria for all financial assurance instruments. Since the November 2009 hearing, the Division met with stakeholders to develop the proposal for today's rulemaking.

The purpose of Regulation No. 66 is to establish the criteria necessary for a HCSFO to satisfy when using one or more of the financial assurance instruments identified in the current subsection 61.13(4)(h) of

Regulation No. 61. The Commission agrees with the recommendation of staff and parties to this hearing that the financial instrument criteria be established and placed into this new Regulation No. 66 for the following reasons:

- Subsection 61.13(4)(h)(viii) of Regulation No. 61 requires that the Water Quality Control Division (Division) approve submitted financial assurance instruments. Criteria for the instruments are necessary for the purposes of providing the Division and HCSFOs language that an instrument must have in order to be approved.
- The regulatory provisions needed to establish the financial assurance criteria are lengthy and include appendices, making them awkward to add to the permitting requirements of Regulation No. 61.
- Placing the criteria in a new stand-alone regulation allows financial assurance criteria to be readily found and used for financial assurance purposes.

Because Regulation No. 66 supplements section 61.13 of Regulation No. 61, the Commission also adopted in this rulemaking revisions to subsection 61.13(4)(h) that, among other things, makes reference to the provisions of Regulation No. 66.

C. DISCUSSION OF REGULATORY PROVISIONS

Section 66.3 (Definitions): Definitions were included for the purpose of providing clarity of the meaning of certain words used in the regulation. The definitions of "Division", "Permit", and "Person" were taken from Regulation No. 61. Definitions of financial terms were taken from financial dictionary sites on the Internet and revised as appropriate to meet the focus of Regulation No. 66.

Sections 66.6 through 66.9 (Criteria for Four Financial Assurance Instruments): These sections address the criteria for the following financial assurance instruments: irrevocable standby letter of credit, trust fund, surety bond, and insurance. The criteria for these instruments were based on the language in section 1.8 of the Colorado Solid and Hazardous Waste Commission's "Regulations Pertaining to Solid Waste Sites and Facilities" (6 CCR 1007-2). The Commission determined that it was reasonable to use the language from section 1.8 of 6 CCR 1007-2 for the following reasons:

- Section 1.8 is a Colorado environmental regulation that has been in place for several years and addresses the same financial assurance instruments that are the subject of sections 66.6 through 66.9.
- Section 1.8 is based on language that was established by the federal Resource Conservation and Recovery Act (RCRA) regulations pertaining to financial assurance for closure of facilities having waste material.

For Regulation No. 66, the language from section 1.8 of 6 CCR 1007-2 was revised as appropriate to have it pertain to HCSFOs and have it include needed clarifications. In addition, language was added to the instruments so that they would comply with the following requirements of subsection 61.13(4)(h) of Regulation No. 61:

- Standby Trust- With the exception of the trust fund, insurance, and the financial test or guarantee, financial assurance instruments require the establishment of a standby trust.
- The issuing institution of any of the financial assurance instruments, except financial test or guarantee, must have the authority to issue that instrument and its operations shall be regulated and examined by a federal or state agency.

- An issuing institution of a financial assurance instrument is required to waive all rights of set off or liens against the instrument.
- No form of financial assurance shall be approved unless it contains a term that provides that the financial assurance may not be cancelled by the surety or guarantor unless 60 days prior written notice is given the Division and the Division gives written consent, which may be granted only when the requirements of section 61.13 of Regulation No. 61 have been fulfilled.

Section 66.10 (Financial Test Criteria): The financial test and written guarantee instruments (FTG) are the only instruments that do not provide for funds being set aside that the Division can access to hire a third-party to close a facility(ies). As a result, the Commission noted in the Statement of Basis, Specific Statutory Authority and Purpose, Regulation 61.52, (“Statement of Basis and Purpose”) accompanying the January 2003 rulemaking on the HCSFO regulations (section 61.13 of Regulation No. 61) that, where a permittee has been approved to use one of the FTG instruments, the expectation exists that the permittee will use its own funds to properly close the operation before abandoning the operation or going out of business. If this expectation is not met, the only recourse available to the Division to properly close the operation against the permittee or guarantee is to bring a court action to enforce the permittee’s closure obligations. To prevent such potentially drawn out and uncertain court actions, the Commission concluded that the financial standards for a financial test should identify permittees and guarantors having solid financial status. The Commission considered its statements in the 2003 Statement of Basis and Purpose, in its January 2003 rulemaking in adopting financial test criteria in today’s rulemaking.

The hearing record shows that a main focus of stakeholder discussion was determining financial test threshold values, such as for a ratio. To assist in the discussions, Dr. Norm Dalsted (Colorado State University, Department of Agricultural and Resource Economics) served as an agricultural finance expert resource. Some of Dr. Dalsted’s documents written to the stakeholders regarding financial criteria are included in the hearing record. Also included in the hearing record is a letter from the Farm Credit Services of America (FCS) indicating that FCS wants a borrower from the swine industry to maintain a liquidity ratio of at least 1.1 to 1.2, and that the inclusion of breeding swine value on the current assets side of the ledger is very typical among lenders in the swine industry.

While agreement does not exist among all parties to the hearing, the Commission believes it is reasonable based on the hearing record to establish the following three financial thresholds for the financial test instrument:

- Solvency test: tangible net worth of 2.0 more than closing costs identified in the approved Financial Assurance Plan.
- Liquidity ratio test: a ratio of at least 1.2 when comparing current assets (which can include the value of breeding swine) to current liabilities. The Commission understands that the lending industry does not find it necessary to require an adjustment to current liabilities where the value of breeding stock is added to current assets.
- U.S assets test: assets located in the United States must equal or be greater than the sum of closure costs identified in the approved Financial Assurance Plan.

The Commission believes that the above thresholds accomplish the following desirable outcomes:

- Provide a measure of both short-term (via the liquidity ratio test) and long-term (via the solvency test) financial health of a HCSFO.
- Identify a HCSFO with a strong financial status.
- Are not overly burdensome such that a number of HCSFOs would not be able to meet the thresholds. The Commission recognized in its March 1999 rulemaking on HCSFO regulations

that because financial assurance costs could be significant, it did not intend that satisfying financial assurance obligations create an undue financial burden upon producers.

- Provide satisfactory assurance that closure obligations will be met by the permittee because a HCSFO with a financial test instrument must annually meet the thresholds.
- With regard to the solvency test, reasonably ensures that a HCSFO currently has the ability to pay closure costs. Such ability is indicated by a 2.0 multiplier, according to the preamble for the April 7, 1982 federal financial assurance requirements for hazardous waste treatment, storage, and disposal facilities.
- With regard to the U.S. assets test, reasonably ensures Division accessibility to a permittee's funds in the event of the HCSFO's bankruptcy or other default with respect to facility closure.

The Commission is aware that in order for a HCSFO to demonstrate that it meets the financial test thresholds, it must submit to the Division its financial statements, and that a HCSFO may want to protect these statements from being subject to disclosure under the Colorado Open Records Act (sections 214-72-102 to 205, C.R.S.) (CORA); for example, the information could be detrimental to the HCSFO's competitive position. Therefore, the Commission adopted language for Regulation No. 66 that addresses how a HCSFO can claim that certain information, including financial statements, are proprietary, confidential business information and should not be disclosed to the public under CORA.

The Commission adopted language requiring a HCSFO to immediately report to the Division that it no longer meets the financial test threshold requirements, and requiring that such a HCSFO establish alternative financial assurance. The Commission emphasizes that it is imperative that a HCSFO maintain valid financial assurance so that the State of Colorado is protected from the costs of closure of an operation. Language also was adopted providing for the Division to request additional information from a HCSFO for the purpose of determining if the HCSFO continues to meet the financial test threshold requirements. The Commission encourages the Division to use common sense and sound judgment in determining when to request such additional information, and when a HCSFO no longer meets financial test threshold requirements.

The Commission is aware that subsidiary companies typically do not have their financial statements audited by a certified public accountant. In order to ensure that these financial statements reflect accurate information about the companies, the Commission adopted language requiring that financial statements of subsidiary companies be prepared in accordance with accounting principles acceptable to the Division. The Commission understands that a commonly accepted accounting principle tool are the Generally Accepted Accounting Principles ("GAAP") published by the Federal Accounting Standards Board. As a result, the Commission intends that GAAP are the preferred accounting principles, unless the Division accepts an equivalent or better tool.

Section 66.11 (Written Guarantee Criteria): A written guarantee is a financial assurance instrument that a permittee can obtain from an entity guaranteeing that it will properly close the permittee's facility(ies) in the event that the permittee fails to do so. The criteria for this instrument in Regulation No. 66 was based on the Colorado Solid and Hazardous Waste Commission's "Regulations Pertaining to Solid Waste Sites and Facilities" (6 CCR 1007-2). The Commission determined that it was appropriate to use the language from 6 CCR 1007-2 for the same reasons as discussed for sections 66.6 through 66.9, above. For the purpose of Regulation No. 66, the language from section 1.8 of 6 CCR 1007-2 was revised as appropriate to have it pertain to HCSFOs. In addition, the Commission adopted language that provides for an individual with a substantial business relationship with an applicant or permittee to be a guarantor.

Appendices A through F (Five Financial Assurance Instruments): The language for the financial assurance instruments applicable to these appendices was taken from Appendix A of the Colorado Solid and Hazardous Waste Commission's "Regulations Pertaining to Solid Waste Sites and Facilities" (6 CCR 1007-2). The Commission determined that it was appropriate to use the language from the Appendix A in 6 CCR 1007-2 for the same reasons as discussed for sections 66.6 through 66.9, above.

For the purpose of Regulation No. 66, the language from Appendix A in 6 CCR 1007-2 was revised as appropriate to have it pertain to HCSFOs, have it include needed clarifications, and to have it comply with the requirements of subsection 61.13(4)(h) of Regulation No. 61, as discussed for sections 66.6 through 66.9, above.

Appendices G and H (Financial Test and Guarantee Instruments): The Commission adopted these appendices because they are the product of language from the corresponding instruments in Appendix A in 6 CCR 1007-2 and of the Division's discussions with stakeholders.

PARTIES TO THE RULEMAKING HEARING

APPENDIX A

Wording for Irrevocable Standby Letter of Credit

A letter of credit must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Irrevocable Standby Letter of Credit

Director
Colorado Department of Public Health and Environment
Water Quality Control Division
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530

Dear Sir or Madam:

We hereby establish our irrevocable standby letter of credit no. _____ in your favor, at the request and for the account of [permittee's or applicant's name and address] up to the aggregate amount of [in words] U.S. Dollars \$ _____, available upon presentation of:

- (1) Your sight draft bearing reference to this letter of credit no. _____, and
- (2) Your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to regulations issued under authority of the Colorado Water Quality Control Act, as amended."

This letter of credit is effective as of [date] and shall expire on [date at least 1 year later], but such expiration date shall be automatically extended for a period of [at least 1 year] on [date] and on each successive expiration date, unless, at least 90 days before the current expiration date, we notify both you and [permittee's or applicant's name] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event you are so notified, any unused portion of the credit shall be available upon presentation of your sight draft, for 90 days after the date of receipt by both you and [permittee's or applicant's name], as shown on the signed return receipts.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the specified amount of the draft directly into the standby trust fund of [permittee's or applicant's name], in accordance with your instructions, unless an alternate mechanism has been established by the State of Colorado to directly receive monies.

We hereby waive all rights of set off or liens against this letter of credit.

We certify that the wording of this letter of credit is identical to the wording specified in Water Quality Control Commission Regulation No. 66 (5 CCR 1002-66) as constituted on the date shown immediately below.

[Signature(s) and title(s) of official(s) of issuing institution]
[date]

This credit is subject to [insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code"].

APPENDIX B

Wording for a Trust Agreement

A trust agreement for a trust fund must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Trust Agreement

Trust Agreement, the "Agreement", entered into as of [date] by and between [name of the permittee], a [name of state][insert "corporation", "partnership", "association", or "proprietorship"], the "Grantor", and [name of corporate trustee], [insert "incorporated in the State of Colorado" or "a national bank"], the "Trustee."

Whereas, the Colorado Department of Public Health and Environment, Water Quality Control Division, a regulatory agency of the State of Colorado, has established certain regulations applicable to the Grantor, requiring that a permittee or applicant for a housed commercial swine feeding operation shall provide assurance that funds will be available when needed for closure, post-closure, and corrective actions for the operation's facilities; and,

Whereas, the Grantor has elected to establish a trust to provide all or a part of such financial assurance for the facilities identified herein; and,

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this Agreement, and the Trustee is willing to act as trustee.

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions as used in this Agreement

- (a) The term "Grantor" means the permittee or applicant who enters into this Agreement and any successors or assigns of the Grantor.
- (b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of Facilities and Closure costs: This Agreement pertains to the facilities and associated closure, post-closure and corrective action costs identified on attached Schedule A [on Schedule A, for each facility list the name, address, and the closure costs, or portions thereof, for which financial assurance is demonstrated by this Agreement].

Section 3. Establishment of Fund: The grantor and the trustee hereby establish a trust fund, the "Fund", for the benefit of the Colorado Department of Public Health and Environment, Water Quality Control Division. The grantor and the trustee intend that no third party have access to the fund except as herein provided. The fund is established initially as consisting of the property which is acceptable to the trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the trustee is referred to as the fund, together with all earnings and profits thereon, less any payments or distributions made by the trustee pursuant to this Agreement.

The fund shall be held by the trustee, IN TRUST, as hereinafter provided. The trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the grantor, any payments necessary to discharge any liabilities of the grantor established by the Division.

Section 4. Payment for Closure, Post-Closure, and/or Corrective Actions: The trustee shall make payments from the fund as the Division shall direct, in writing, to provide for the payment of the costs of closure, post-closure, and/or corrective actions for the facility(ies) covered by this Agreement. The trustee shall reimburse the grantor or other persons as specified by the Division from the fund for closure, post-closure, and/or corrective action expenditures in such amount as the Division shall direct in writing. In addition, the trustee shall refund to the grantor such amounts as the Division specifies in writing. Upon refund, such funds shall no longer constitute part of the fund as defined herein.

Section 5. Payment Comprising the Fund: Payments made to the trustee for the fund shall consist of cash or securities acceptable to the trustee.

Section 6. Trustee Management: The trustee shall invest and reinvest the principal and income of the fund and keep the fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the grantor may communicate in writing to the trustee from time to time, subject, however, to the provisions of this Section 6. In investing, reinvesting, exchanging, selling, and managing the fund, the trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

- (a) Securities or other obligations of the grantor, or any other permittee of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80A-2.(A), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;
- (b) The trustee is authorized to invest the fund in time or demand deposits of the trustee, to the extent insured by an agency of the Federal or State government; and
- (c) The trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment: The trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the fund to any common, commingled, or collective trust fund created by the trustee in which the fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and
- (b) To purchase shares in any investment company registered under the investment company act of 1940, 15 U.S.C. 80A-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the trustee. The trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee: Without in any way limiting the powers and discretions conferred upon the trustee by the other provision of this Agreement or by law, the trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To register any securities held in the fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the trustee shall at all times show that all such securities are part of the fund;
- (d) To deposit any cash in the fund in interest-bearing accounts maintained or savings certificates issued by the trustee, in its separate corporate capacity, or in any other banking institution affiliated with the trustee, to the extent insured by an agency of the Federal or State government; and,
- (e) To compromise or otherwise adjust all claims in favor of or against the fund.

Section 9. Taxes and Expenses: All taxes of any kind that may be assessed or levied against or in respect of the fund and all brokerage commissions incurred by the fund shall be paid from the fund. All other expenses incurred by the trustee in connection with the administration of this trust, including fees for legal services rendered to the trustee, the compensation of the trustee to the extent not paid directly by the grantor, and all other proper charges and disbursements of the trustee shall be paid from the fund.

Section 10. Annual Valuation: The trustee shall annually, at least 30 days prior to the anniversary date of establishment of the fund, furnish to the grantor and to the Division a statement confirming the value of the trust. Any securities in the fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the fund. The failure of the grantor to object in writing to the trustee within 90 days after the statement has been furnished to the grantor and the Division shall constitute a conclusively binding assent by the grantor, barring the grantor from asserting any claim or liability against the trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel: The trustee may from time to time consult with counsel, who may be counsel to the grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation: The trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the grantor.

Section 13. Successor Trustee: The trustee may resign or the grantor may replace the trustee, but such resignation or replacement shall not be effective until the grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the trustee hereunder. Upon the successor trustee's acceptance of the appointment, the trustee shall assign, transfer and pay over to the successor trustee the funds and properties then constituting the fund. If for any reason the grantor cannot or does not act in the event of the resignation of the trustee, the trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes the administration of the trust in a writing sent to the grantor, the Division, and the present trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the trustee as a result of any of the acts contemplated by this Section 13 shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee: All orders, requests, and instructions by the grantor to the trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the grantor may designate by amendment to Exhibit A. The trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the Division to the trustee shall be in writing, signed by the director or his designees, and the trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the grantor or Division hereunder has occurred. The trustee shall have no duty to act in the absence of such orders, requests, and instructions from the grantor and/or the Division, except as provided for herein.

Section 15. Notice of Nonpayment: The trustee shall notify the grantor and the Division, by certified mail within 10 days following the expiration of the 30-days period after the anniversary of the establishment of the trust, if no payment is received from the grantor during that period. After the pay-in period is completed, the trustee shall not be required to send a notice of nonpayment.

Section 16. Amendment of Agreement: This Agreement may be amended by an instrument in writing executed by the grantor, the trustee, and the Division, or by the trustee and the Division if the grantor ceases to exist.

Section 17. Irrevocability and Termination: Subject to the right of the parties to amend this Agreement as provided in Section 16, this trust shall be irrevocable and shall continue until terminated at the written agreement of the grantor, the trustee and the Division (upon 90 days prior written notice having been given to the Division and the Division has given written consent to terminate the Agreement), or by the trustee and the Division, if the grantor ceases to exist. Upon termination of the trust, all remaining trust property, less final trust administration expenses, shall be delivered to the grantor.

Section 18. Immunity and Indemnification: The trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this trust, or in carrying out any directions by the grantor or the Division issued in accordance with this Agreement. The trustee shall be indemnified and saved harmless by the grantor or from the trust fund, or both, from and against any personal liability to which the trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the grantor fails to provide such defense.

Section 19. Choice of Law: This Agreement shall be administered, construed, and enforced according to the laws of the State of Colorado.

Section 20. Interpretation: As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement. In witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written: The parties below certify that the wording of this Agreement is identical to the wording specified in these regulations were constituted on the date first above written.

Section 21, Waiver of Rights: The trustee waives all rights of set off or liens against this Agreement.

[Signature of grantor]
[Title]
[Seal]

Attest: [Signature of attestor]
 [Title]

[Signature of trustee]
[Name of trustee]
[Title]
[Seal]

Attest: [Signature of attestor]
 [Title]

(B) The following is an example of the certification of acknowledgment which must accompany the trust agreement for a trust fund.

State of _____

County of _____

On this [date], before me personally came [permittee] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of notary public]

APPENDIX C

Wording for Standby Trust Agreement

A trust agreement for a standby trust fund must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Standby Trust Agreement

Standby Trust Agreement, the "Agreement", entered into as of [date] by and between [name of the permittee], a [name of state] [insert "corporation", "partnership", "association", or "proprietorship"], the "Grantor", and [name of corporate Trustee], [insert "incorporated in the State of Colorado" or "a national bank"], the "Trustee."

Whereas, the Colorado Department of Public Health and Environment, Water Quality Control Division, a regulatory agency of the State of Colorado, has established certain regulations applicable to the Grantor, requiring that a permittee or an applicant for a housed commercial swine feeding operation shall provide assurance that funds will be available when needed for closure, post-closure, and corrective actions for the operation; and,

Whereas, the Grantor has elected to establish a standby trust to provide all or a part of such financial assurance for the facility(ies) identified herein; and,

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this Agreement, and the Trustee is willing to act as trustee; and,

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions as used in this Agreement

- (a) The term "Grantor" means the permittee or applicant who enters into this Agreement and any successors or assigns of the Grantor.
- (b) The term "Trustee" means the trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of Facilities and Closure costs: This Agreement pertains to the facility(ies) and associated closure, post-closure, and corrective action costs identified on attached Schedule A [on Schedule A, for each facility list the name, address, and the closure, post-closure, and corrective action costs, or portions thereof, for which financial assurance is demonstrated by this Agreement].

Section 3. Establishment of Fund: The grantor and the trustee hereby establish a trust fund, the "Fund", for the benefit of the Colorado Department of Public Health and Environment, Water Quality Control Division. The grantor and the trustee intend that no third party have access to the fund except as herein provided. The fund is established initially as consisting of the property which is acceptable to the trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the trustee is referred to as the fund, together with all earnings and profits thereon, less any payments or distributions made by the trustee pursuant to this Agreement.

The fund shall be held by the trustee, IN TRUST, as hereinafter provided. The trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the grantor, any payments necessary to discharge any liabilities of the grantor established by the Division.

Section 4. Payment for Closure, Post-Closure, and/or Corrective Actions: The trustee shall make payments from the fund as the Division shall direct, in writing, to provide for the payment of the closure, post-closure, and corrective action costs for the facility(ies) covered by this Agreement. The trustee shall reimburse the grantor or other persons as specified by the Division from the fund for closure, post-closure, and/or corrective action expenditures in such amount as the Division shall direct in writing. In addition, the trustee shall refund to the grantor such amounts as the Division specifies in writing. Upon refund, such funds shall no longer constitute part of the fund as defined herein.

Section 5. Payment Comprising the Fund: Payments made to the trustee for the fund shall consist of cash or securities acceptable to the trustee.

Section 6. Trustee Management: The trustee shall invest and reinvest the principal and income of the fund and keep the fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the grantor may communicate in writing to the trustee from time to time, subject, however, to the provisions of this Section 6. In investing, reinvesting, exchanging, selling, and managing the fund, the trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

- (a) Securities or other obligations of the grantor, or any other permittee of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80A-2.(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;
- (b) The trustee is authorized to invest the fund in time or demand deposits of the trustee, to the extent insured by an agency of the Federal or State government; and
- (c) The trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment: The trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the fund to any common, commingled, or collective trust fund created by the trustee in which the fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and
- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80A-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the trustee. The trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee: Without in any way limiting the powers and discretions conferred upon the trustee by the other provision of this Agreement or by law, the trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;
- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

- (c) To register any securities held in the fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the trustee shall at all times show that all such securities are part of the fund;
- (d) To deposit any cash in the fund in interest-bearing accounts maintained or savings certificates issued by the trustee, in its separate corporate capacity, or in any other banking institution affiliated with the trustee, to the extent insured by an agency of the Federal or State government; and
- (e) To compromise or otherwise adjust all claims in favor of or against the fund.

Section 9. Taxes and Expenses: All taxes of any kind that may be assessed or levied against or in respect of the fund and all brokerage commissions incurred by the fund shall be paid from the fund. All other expenses incurred by the trustee in connection with the administration of this trust, including fees for legal services rendered to the trustee, the compensation of the trustee to the extent not paid directly by the grantor, and all other proper charges and disbursements of the trustee shall be paid from the fund.

Section 10. Advice of Counsel: The trustee may from time to time consult with counsel, who may be counsel to the grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 11. Trustee Compensation: The trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the grantor.

Section 12. Successor Trustee: The trustee may resign or the grantor may replace the trustee, but such resignation or replacement shall not be effective until the grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the trustee hereunder. Upon the successor trustee's acceptance of the appointment, the trustee shall assign, transfer and pay over to the successor trustee the funds and properties then constituting the fund. If for any reason the grantor cannot or does not act in the event of the resignation of the trustee, the trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes the administration of the trust in a writing sent to the grantor, the Division, and the present trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the trustee as a result of any of the acts contemplated by this Section 12 shall be paid as provided in Section 9.

Section 13. Instructions to the Trustee: All orders, requests, and instructions by the grantor to the trustee shall be in writing, signed by such persons as are designated in the attached exhibit A or such other designees as the grantor may designate by amendment to Exhibit A. The trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the Division to the trustee shall be in writing, signed by the director or his designees, and the trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the grantor or Division hereunder has occurred. The trustee shall have no duty to act in the absence of such orders, requests, and instructions from the grantor and/or the Division, except as provided for herein.

Section 14. Amendment of Agreement: This Agreement may be amended by an instrument in writing executed by the grantor, the trustee, and the Division, or by the trustee and the Division if the grantor ceases to exist.

Section 15. Irrevocability and Termination: Subject to the right of the parties to amend this Agreement as provided in Section 14, this trust shall be irrevocable and shall continue until terminated at the written agreement of the grantor, the trustee and the Division (upon 90 days prior written notice having been given to the Division and the Division has given written consent to terminate the Agreement), or by the trustee and the Division, if the grantor ceases to exist. Upon termination of the trust, all remaining trust property, less final trust administration expenses, shall be delivered to the grantor.

Section 16. Immunity and Indemnification: The trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this trust, or in carrying out any directions by the grantor or the Division issued in accordance with this Agreement. The trustee shall be indemnified and saved harmless by the grantor or from the trust fund, or both, from and against any personal liability to which the trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the grantor fails to provide such defense.

Section 17. Choice of Law: This Agreement shall be administered, construed, and enforced according to the laws of the State of Colorado.

Section 18. Interpretation: As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written: The parties below certify that the wording of this Agreement is identical to the wording specified in Water Quality Control Commission Regulation No. 66 (5 CCR 1002-66) as constituted on the date first above written.

Section 19. Waiver of Rights: The trustee waives all rights of set off or liens against this Agreement.

[Signature of grantor]
[Title]
[Seal]

Attest: [Signature of attestor]
[Title]

[Signature of trustee]
[Name of trustee]
[Title]
[Seal]

Attest: [Signature of attestor]
[Title]

(B) The following is an example of the certification of acknowledgment which must accompany the trust agreement for a trust fund.

State of _____

County of _____

On this [date], before me personally came [permittee] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of notary public]

APPENDIX D

Wording for a Payment Guarantee Surety Bond

A surety bond guaranteeing payment into a trust fund must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Payment Guarantee Bond

Date bond executed: _____

Effective date: _____

Principal:[legal name and business address of permittee or applicant]_____

Type of organization: [insert "individual", "joint venture", "partnership", or "corporation"]_____

State of incorporation: _____

Surety(ies):[name(s) and business address(es)]_____

Name, address, and closure costs for each facility guaranteed by this bond: [Indicate closure costs separately for each facility]_____

Total penal sum of bond: \$ _____

Surety's bond number: _____

Know all persons by these presents, that we, the principal and surety(ies) hereto are firmly bound to the Colorado Department of Public Health and Environment, Water Quality Control Division in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the surety(ies) are corporations acting as co-sureties, we, the sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or action against any or all of us, and for all other purposes each surety binds itself, jointly and severally with the principal, for the payment of such sum only as is set forth opposite the name of such surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said principal is required, under the Colorado regulations pertaining to housed commercial swine feeding operations, to have a permit in order to own or operate each housed commercial swine feeding operation facility identified above; and,

Whereas said principal is required to provide financial assurance for closure, post-closure, and corrective actions, as a condition of the permit; and,

Whereas said principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance, unless an alternate mechanism has been established by the State of Colorado to directly receive monies.

Now, therefore, the conditions of the obligation are such that if the principal shall faithfully, before the beginning of final closure of each facility identified above, fund the standby trust fund in the amount(s) identified above for the facility(ies);

Or, if the principal shall fund the standby trust fund in such amount(s) within 15 days after an order to begin closure is issued by the Division or a U.S. District court or other court of competent jurisdiction;

Or, if the principal shall provide alternate financial assurance, as specified in these regulations and obtain the Division's written approval of such assurance, within 60 days after the date notice of cancellation is received by both the principal and the Division from the surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

The surety(ies) shall become liable on this bond obligation only when the principal has failed to fulfill the conditions described above. Upon notification by the Division that the principal has failed to perform as guaranteed by this bond, the surety(ies) shall place funds in the amount guaranteed for the operation(ies) into the standby trust fund as directed by the Division.

The liability of the surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the surety(ies) hereunder exceed the amount of said penal sum.

The surety(ies) may cancel or terminate the bond by sending notice of cancellation by certified mail to the principal and to the Division at least 90 days prior to cancellation, provided, however, that cancellation shall not occur during the 90 days beginning on the date of receipt of the notice of cancellation by both the principal and the Division, as evidenced by the return receipts, and the Division has given written consent to terminate the bond.

The surety(ies) waive all rights of set off or liens against the bond.

In witness whereof, the principal and surety(ies) have executed this financial guarantee bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the principal and surety(ies) and that the wording of this surety bond is, at minimum, identical to the wording specified in Water Quality Control Commission Regulation No. 66 (5 CCR 1002-66) as constituted on the date this bond was executed.

Principal

[Signature(s)]
[Name(s)]
[Title(s)]
[Corporate seal]

Corporate Surety(ies)

[Name and address]
State of incorporation:
Liability limit: \$
[Signature(s)]
[Name(s) and title(s)]
[Corporate seal]

[For every co-surety, provide signature(s), Corporate seal, and other information in the same manner as for surety above.]
Bond premium: \$

APPENDIX E

Wording for a Performance Guarantee Surety Bond

A surety bond guaranteeing performance of closure, post-closure, and corrective actions as specified, must be worded as follows, except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted.

Performance Bond

Date bond executed: _____

Effective date: _____

Principal:[legal name and business address of permittee or applicant]_____

Type of organization: [insert "individual", "joint venture", "partnership", or "corporation"]_____

State of incorporation:_____

Surety(ies):[Name(s) and business address(es)]_____

Name, address, and closure costs for each facility guaranteed by this bond (indicate closure costs separately for each facility): _____

Total penal sum of bond: \$ _____

Surety's bond number: _____

Know all persons by these presents, that we, the principal and surety(ies) hereto are firmly bound to the Colorado Department of Public Health and Environment, Water Quality Control Division in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators successors, and assigns jointly and severally; provide that, where the surety(ies) are corporations acting as co-sureties, we, the sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each surety binds itself, jointly and severally with the principal, for the payment of such sum only as is set forth opposite the name of such surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said principal is required, under the Colorado regulations pertaining to housed commercial swine feeding operations, to have a permit in order to own or operate each facility identified above, and,

Whereas said principal is required to provide financial assurance for closure, post-closure, and corrective actions, as a condition of the permit; and,

Whereas said principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance, unless an alternate mechanism has been established by the State of Colorado to directly receive monies.

Now, therefore, the conditions of this obligation are such that if the principal shall faithfully perform closure, post-closure, and corrective actions whenever required to do so, of each facility for which this bond guarantees such actions, in accordance with the approved financial assurance plan and other requirements of the permit;

Or, if the principal shall provide alternate financial assurance as specified in these regulations, and obtain the Division's written approval of such assurance, within 90 days after the date notice of cancellation is received by both the principal and the Division from the surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

The surety(ies) shall become liable on this bond obligation only when the principal has failed to fulfill the conditions described above.

Upon notification by the Division that the principal has been found in violation of the closure, post-closure, and corrective action requirements of these regulations, for a facility(ies) for which this bond guarantees performances of closure, post-closure, and corrective actions, the surety(ies) shall either perform closure, post-closure, and corrective actions in accordance with the approved financial assurance plan and other permit requirements, or place the closure costs guaranteed for the facility into the standby trust fund as directed by the Division.

Upon notification by the Division that the principal has failed to provide alternate financial assurance that meets the requirements of subsections 61.13(4)(h)(iii)-(iv) of Regulation No. 61, and obtain written approval of such assurance from the Division during the 60 days following receipt by both the principal and the Department of a notice of cancellation of the bond, the surety(ies) shall place funds in the amount guaranteed for the facility(ies) into the standby trust fund as directed by the Division.

The surety(ies) hereby waive(s) notification of amendments to financial assurance plans, permits, applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the surety(ies) hereunder exceed the amount of said penal sum.

The surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Division provided, however, that cancellation shall not occur during the 90 days beginning on the date of receipt of the notice of cancellation by both the principal and the Division, as evidenced by the return receipts.

The principal may terminate this bond by sending written notice to the surety(ies), provided, however, that no such notice shall become effective until the surety(ies) receive(s) written authorization for termination of the bond by the Division.

In witness whereof, the principal and surety(ies) have executed this performance bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the principal and surety(ies) and that the wording of this surety bond is, at minimum, identical to the wording specified in the Water Quality Control Commission Regulation No. 66 (5 CCR 1002-66) as constituted on the date this bond was executed.

Principal

[Signature(s)]
[Name(s)]
[Title(s)]
[Corporate seal]

Corporate Surety(ies)

[Name and address]
State of incorporation:
Liability limit: \$
[Signature(s)]
[Name(s) and title(s)]
[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for surety above.]
Bond premium: \$

APPENDIX F

Wording for Insurance Certificate

The standard insurance industry certificate of insurance form (ACORD form), as prescribed by the Colorado Insurance Commission, shall be used to evidence coverage for closure, post-closure, and corrective action costs for the permittee or applicant. The following information is to be included in the certificate of insurance:

- (1) Name, address, and telephone number of agency; and the underwriter.
- (2) Name of facilities being covered (if list is too long additional pages may be attached).
- (3) Indication of type of coverage (closure, post-closure and corrective actions).
- (4) Amount of coverage (closure costs or closure, post-closure and/or corrective action).
- (5) A statement of certification, in the comment section, worded as follows:

"This certificate certifies that the policy to which this certificate applies, provides coverage for closure, post-closure, and/or closure action in connection with the insured's obligation to demonstrate financial assurance under section 61.13 of 5 CCR 1002-61, as amended (Colorado Discharge Permit System Regulations).
- (6) A statement indicating that the insurer waives all rights of set off or liens against the policy.
- (7) A statement indicating that the policy will not be cancelled by the insurer unless 90 days prior written notice is given to the Division.
- (8) Authorized company representatives' signature.

APPENDIX G

Wording for Financial Test Letter from a Public Company

A financial test letter from a public company must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

Director
Colorado Department of Public Health and Environment
Environmental Agriculture Program
OE-B2
4300 Cherry Creek Drive South
Denver, CO 80246-1530

Re: [Applicant or Permittee Name]
[Permit No.]

Dear Sir or Madam:

I am the chief financial officer of [Applicant or Permittee Name]. This letter is in support of [Applicant or Permittee Name]'s use of the financial test to demonstrate financial assurance for closure costs, in accordance with subsection 61.13(4)(h) of the Colorado Water Quality Control Commission's (Commission's) Colorado Discharge Permit System Regulations (5 CCR 1002-61) and section 66.10 of the Commission's Financial Assurance Criteria Regulations (5 CCR 1002-66).

[Applicant or Permittee Name] is the owner or operator of the following housed commercial swine feeding operation facilities in Colorado under [permit number(s)] for which all or a portion of financial assurance for closure costs is demonstrated through the financial test: [list facilities]

The following information is applicable to the above facilities:

1. The total closure cost for the facilities (per the approved Financial Assurance Plan) is:
\$ _____
2. The closure costs covered by this financial test instrument are: \$ _____

In support hereof, enclosed are [Applicant or Permittee Name]'s recent annual independently audited financial statements and a copy of the independent certified public accountant's report on examination of the permittee or applicant's financial statements for the latest completed fiscal year, as required by subsection 66.10(1)(d). [If applicable, state the following, "As allowed by subsection 66.10(1)(b)(i), [Applicant or Permittee Name] appropriately incorporated the value of breeding swine into the value of the current assets."] Based on the financial statements, the following statement's are true and [Applicant or Permittee Name] meets the requirements of subsection 66.10(1)(b)-(c):

3. The current assets (which can include the value of breeding swine)/current liabilities ratio is at least 1.2.
4. Tangible net worth is greater than or equal to 2.0 times the amount of line 2, above.
5. Assets located in the U.S. are equal to or greater than the amount of line 2, above.

The fiscal year of [Applicant or Permittee Name] ends on [month, day].

I declare that the statements, financial values, and other facts stated herein are true and correct. I acknowledge that making a false, fictitious, or fraudulent statement in the letter is punishable under the criminal laws of Colorado as perjury under section 18-8-503, C.R.S.

[Signature]

[Name]

[Title]

[Date]

Enc: Fiscal year [Year] Financial Statements

APPENDIX H

Wording for Financial Test Letter from a Subsidiary Company

A financial test letter from subsidiary company must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

Director
Colorado Department of Public Health and Environment
Environmental Agriculture Program
OE-B2
4300 Cherry Creek Drive South
Denver, CO 80246-1530

Re: [Applicant or Permittee Name]
[Permit No.]

Dear Sir or Madam:

I am the [Officer's Title] of [Applicant or Permittee Name] who has financial responsibility for [Applicant or Permittee Name] and is authorized to bind [Applicant or Permittee Name]. The [Applicant or Permittee Name] is a subsidiary of [Parent Company's Name]. This letter is in support of [Applicant or Permittee Name]'s use of the financial test to demonstrate financial assurance for closure costs, in accordance with subsection 61.13(4)(h) of the Colorado Water Quality Control Commission's (Commission's) Colorado Discharge Permit System Regulations (5 CCR 1002-61) and section 66.10 of the Commission's Financial Assurance Criteria Regulations (5 CCR 1002-66).

[Applicant or Permittee Name] is the owner or operator of the following housed commercial swine feeding operation facilities in Colorado under [permit number's], for which all or a portion of financial assurance for closure costs is demonstrated through the financial test: [list facilities]

The following information is applicable to the above facilities:

1. The total closure cost for the facilities (per the approved Financial Assurance Plan) is:
\$ _____
2. The closure costs covered by this financial test instrument are: \$ _____

In support hereof, enclosed are [Applicant or Permittee Name]'s annual financial statements for the latest completed fiscal year, as required by subsection 66.10(1)(d). [If applicable, state the following, "As allowed by subsection 66.10(1)(b)(i), [Applicant or Permittee Name] appropriately incorporated the value of breeding swine into the value of the current assets."] These financial statements were appropriately incorporated into [Parent Company's Name]'s financial statements, and were prepared in accordance with accounting principles acceptable to the Division. Based on the financial statements, the following statement's are true and [Applicant or Permittee Name] meets the requirements of subsection 66.10(1)(b)-(c):

3. The current assets (which can include the value of breeding swine)/current liabilities ratio is at least 1.2.
4. Tangible net worth is greater than or equal to 2.0 times the amount of line 2, above.
5. Assets located in the U.S. are equal to or greater than the amount of line 2, above.

The fiscal year of [Applicant or Permittee Name] ends on [month, day].

I declare that the statements, financial values, and other facts stated herein are true and correct. I acknowledge that making a false, fictitious, or fraudulent statement in the letter is punishable under the criminal laws of Colorado as perjury under section 18-8-503, C.R.S.

[Signature]

[Name]

[Title]

[Date]

Enc: Fiscal year [Year] Financial Statements

APPENDIX I

Wording for Financial Test Letter from a Private Company

A financial test letter from a private company must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

Director
Colorado Department of Public Health and Environment
Environmental Agriculture Program
OE-B2
4300 Cherry Creek Drive South
Denver, CO 80246-1530

Re: [Applicant or Permittee Name]
[Permit No.]

Dear Sir or Madam:

I am the [Officer's Title] of [Applicant or Permittee Name] who has financial responsibility for [Applicant or Permittee Name] and is authorized to bind [Applicant or Permittee Name]. This letter is in support of [Applicant or Permittee Name]'s use of the financial test to demonstrate financial assurance for closure costs, in accordance with the Colorado Water Quality Control Commission's (Commission's) Colorado Discharge Permit System Regulations (5 CCR 1002-61) and section 66.10 of the Commission's Financial Assurance Criteria Regulations (5 CCR 1002-66).

[Applicant or Permittee Name] is the owner or operator of the following housed commercial swine feeding operation facilities in Colorado under [permit number's] for which all or a portion of financial assurance for closure costs is demonstrated through the financial test: [list facilities]

The following information is applicable to the above facilities:

1. The total closure cost for the facilities (per the approved Financial Assurance Plan) is:
\$ _____
2. The closure costs covered by this financial test instrument are: \$ _____

In support hereof, enclosed are [Applicant or Permittee Name]'s financial statements for the latest completed fiscal year that have been submitted to the applicant or permittee's bank, with an original signature, as required by subsection 66.10(1)(d). [If applicable, state the following, "As allowed by subsection 66.10(1)(b)(i), [Applicant or Permittee Name] appropriately incorporated the value of breeding swine into the value of the current assets."] Based on the financial statements, the following statement's are true and [Applicant or Permittee Name] meets the requirements of subsection 66.10(1)(b)-(c):

3. The current assets (which can include the value of breeding swine)/current liabilities ratio is at least 1.2.
4. Tangible net worth is greater than or equal to 2.0 times the amount of line 2, above.
5. Assets located in the U.S. are greater than or equal to the amount of line 2, above.

The fiscal year of this company ends on [month, day].

I declare that the statements, financial values, and other facts stated herein are true and correct. I acknowledge that making a false, fictitious, or fraudulent statement in the letter is punishable under the criminal laws of Colorado as perjury under section 18-8-503, C.R.S.

[Signature]

[Name]

[Title]

[Date]

Enc: Fiscal year [Year] Financial Statements

APPENDIX J

Wording for Written Guarantee Letter

A written guarantee letter must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

Director
Colorado Department of Public Health and Environment
Environmental Agriculture Program
OE-B2
4300 Cherry Creek Drive South
Denver, CO 80246-1530

Re: [Applicant or Permittee Name]
[Permit No.]

Dear Sir or Madam:

I am [Select one of the following: 1) the [Officer's Title] of [Company Name] who has financial responsibility for [Company Name] and is authorized to bind [Company Name]; or, 2) an individual with a substantial business relationship with the [Applicant or Permittee] (i.e., an individual guarantor)]. The legal contact address for [Company Name, or Individual Name] is: [Address]. This letter is in support of [Applicant or Permittee]'s use of the written guarantee to demonstrate financial assurance for closure costs, in accordance with subsection 61.13(4)(h) of the Colorado Water Quality Control Commission's (Commission's) Colorado Discharge Permit System Regulations (5 CCR 1002-61) and section 66.11 of the Commission's Financial Assurance Criteria Regulations (5 CCR 1002-66).

This guarantee made this [date] by [Name of Guaranteeing Entity], [an individual guarantor; or, a company organized under the laws of the State of [Name of State]], herein referred to as guarantor, to the Colorado Department of Public Health and Environment's Environmental Agriculture Program (Program), oblige, on behalf of [Applicant or Permittee], which is [Select one of the following: "our subsidiary company"; or, "an entity with which the guarantor has a substantial business relationship"], to meet the requirements of section 66.11. [If applicable, describe the substantial business relationship].

Recitals

Guarantor guarantees to the Program that, in the event that [Applicant or Permittee] fails to perform closure, post-closure activities, and any necessary corrective actions for any of [Applicant or Permittee]'s housed commercial swine feeding operation facility(ies) listed below in accordance with [Applicant or Permittee]'s approved financial assurance plan, permit, and/or as required by the Program, the guarantor shall do so or establish a trust fund in the name of [Applicant or Permittee] in the amount of all or an applicable portion of the closure costs. [Applicant or Permittee] owns or operates the following housed commercial swine feeding operation facilities in Colorado under [Permit Number(s)] for which all or a portion of financial assurance for closure costs is guaranteed: [List Facilities]

1. The total closure cost for the facilities (per the approved Financial Assurance Plan) is:
\$ _____
2. The closure costs covered by this written guarantee are: \$ _____

In support hereof, enclosed are [Guarantor Name]'s [Select one of the following: 1) the financial statements for the latest completed fiscal year and a copy of the independent certified public accountant's report on examination of the [Parent Company Name]'s financial statements for the latest completed

fiscal year; or, 2) the financial statements for the latest completed fiscal year, as sent to the guarantor's bank, with an original signature; 3) the personal financial statement for the latest completed fiscal year, as sent to the guarantor's bank, with an original signature], as required by 66.11(4). [If applicable, state the following, "As allowed by subsection 66.10(1)(b)(i), [Guarantor Name] appropriately incorporated the value of breeding swine into the value of the current assets."] Based on the financial statements, the following statement's are true and [Guarantor Name] meets the requirements of subsection 66.10(1)(b)-(c):

3. The current assets (which can include the value of breeding swine)/current liabilities ratio is at least 1.2.
4. Tangible net worth is greater than or equal to 2.0 times the amount of line 2, above.
5. Assets located in the U.S. are greater than or equal to the amount of line 2, above.

The fiscal year of [Guarantor Name] ends on [month, day].

I declare that the statements, financial values, and other facts stated herein are true and correct. I acknowledge that making a false, fictitious, or fraudulent statement in the letter is punishable under the criminal laws of Colorado as perjury under section 18-8-503, C.R.S.

[Signature]

[Name]

[Title]

[Date]

EXHIBIT 2
ENVIRONMENTAL AGRICULTURE PROGRAM
REGULATION NO. 61.13(4)(H)

DEPARTMENT OF HEALTH AND ENVIRONMENT

Water Quality Control Commission

5 CCR 1002-61

COLORADO DISCHARGE PERMIT SYSTEM

....

61.13(4) REQUIREMENTS FOR HOUSED COMMERCIAL SWINE FEEDING OPERATIONS

....

- (h) Financial Assurance Requirements - Valid financial assurance shall be a condition of conducting a housed commercial swine feeding operation. However, nothing in these regulations shall relieve the permittee of liability for closure, post-closure, and corrective action costs. Violation of any of the financial assurance requirements of these regulations shall be cause for the denial or revocation of the permit.
- (i) The applicant or permittee shall provide financial assurances for the final closure of the housed commercial swine feeding operation and the conduct of any necessary post-closure activities, such that any contamination resulting from actions after the effective date of this regulation is remediated and future contamination is avoided.
- (ii) If required by the Division, based on evidence that conditions create a reasonable potential for the housed commercial swine feeding operation to cause contamination, the applicant or permittee shall provide financial assurances for any corrective action made necessary by such contamination.
- (iii) The financial assurance instruments shall be in the amounts determined in the approved financial assurance plan, or as otherwise required by the Division in accordance with subsection 61.13(4)(h)(vi)(B-C). ~~and shall use wording approved by the Division.~~
- (iv) A financial assurance instrument shall meet the requirements of subsection 61.13(4)(h) and of Regulation No. 66, as applicable to the instrument.
- ~~(ivv) Financial assurance for new housed commercial swine feeding operations must be approved by the Division before the permit will be issued. Financial assurance instruments for new housed commercial swine feeding operations must be approved by the Division before the permit will be issued, and shall meet the requirements of subsections 61.13(4)(h)(iii-iv).~~
- ~~(vvi) Financial assurance for The permittee of an existing housed commercial swine feeding operations shall be provided by the permittee provide a financial assurance instrument(s) within 90 days following the Division's approval of a new or revised financial assurance plan as described in subsection 61.13(3)(h) within 90 days following the Division's~~

61.13(4) REQUIREMENTS FOR HOUSED COMMERCIAL SWINE FEEDING OPERATIONS

approval of a new or revised financial assurance plan as described in subsection 61.13(3)(h). Such a financial assurance instrument(s) shall meet the requirements of subsections 61.13(4)(h)(iii-iv).

- (A) Failure to provide the approved amount of financial assurance shall be a violation of the permit and may be cause for revocation of the permit.
 - (B) Where the Division has found a financial assurance plan to be incomplete, and the permittee is either not working in good faith to submit an approvable plan or does not respond to the Division's comments regarding the plan within a reasonable time, the Division may require that interim financial assurance be provided until such time as the financial assurance plan is approved.
 - (C) Before requiring interim financial assurance, the Division shall provide the permittee written notice of the deficiencies and an opportunity to cure those deficiencies within ninety (90) days of the written notice. If the period to cure expires without the permittee resolving the deficiencies, and an extension of time has not been granted by the Division, the amount of interim financial assurance required shall be established by the Division, based on relevant information related to the permittee.
- (vii) The permittee shall review and update ~~the~~its approved financial assurance instruments each year in accordance with a schedule established in the permit. The amount of the financial assurance for closure and post-closure, and for any applicable corrective action, shall be recalculated annually by the permittee, as required in the permit, and shall account for inflation or deflation by using the most recent Implicit Price Deflator for Gross Domestic Product or its successor as published by the U.S. Department of Commerce. The recalculated amount shall also reflect any changes in the operation pertinent to the cost of closure, post-closure or required corrective action to address contamination. Provided, that for any year in which there have been no changes in the operation pertinent to the cost of closure, post-closure, or required corrective action and cumulative inflation as calculated above does not exceed 5% since the last update of the financial assurance instruments, no further update of the financial assurance instruments is required. ~~The permittee shall have 90 days to adjust the amount of financial assurance provided after receipt of notification that the revised cost estimates have been approved by the Division. Failure to provide any increased amount of financial assurance, as required, shall be a violation of the permit and may be cause for revocation of the permit.~~
- (A) In accordance with the schedule established in the permit, the permittee shall submit to the Division a report that, at minimum, documents that the review and update required above was conducted, explains how the review and update was done, informs who conducted the review and update, informs what the calculated cumulative inflation value is, and informs whether calculated cumulative inflation value exceeded 5% since the last update of the financial assurance instruments.
 - (B) The permittee shall have 90 days to provide a financial assurance instrument(s) for any increased amount of financial assurance, as required, after receipt of notification that the revised cost estimates have been approved by the Division. Such a financial assurance instrument(s) shall meet the requirements of subsections 61.13(4)(h)(iv).
 - (C) Failure to provide any increased amount of financial assurance, as required, shall be a violation of the permit and may be cause for revocation of the permit.
- (viii) If at any time the Division determines that a permittee has insufficient financial assurance it shall notify the permittee ~~and the permittee shall have 90 days to recalculate and adjust~~

61.13(4) REQUIREMENTS FOR HOUSED COMMERCIAL SWINE FEEDING OPERATIONS

~~the amount of financial assurance provided. Failure to provide any increased amount of financial assurance, as required, shall be a violation of the permit and may be cause for revocation of the permit.~~

~~(A) The permittee shall have 90 days, after receipt of the notification by the Division, to recalculate its financial assurance and provide a financial assurance instrument(s) for any increased amount of financial assurance, as required. Such a financial assurance instrument(s) shall meet the requirements of subsections 61.13(4)(h)(iii-iv).~~

~~(B) Failure to provide any increased amount of financial assurance, as required, shall be a violation of the permit and may be cause for revocation of the permit.~~

~~(viiiix) All forms of financial assurance instruments shall be approved by the Division before being accepted. Subject to approval by the Division the applicant or permittee shall use one or more of the following financial mechanisms to assure full payment of all closure, post-closure and estimated costs for any required corrective action: irrevocable standby letter of credit; trust fund; surety bond; insurance; financial test or guarantee and other mechanisms approved by the Division. The financial test or guarantee mechanism shall meet specified criteria identified in a guidance document and subsequent revisions that are cooperatively developed by the Division and stakeholders, and presented at a public hearing before the Water Quality Control Commission. With the exception of the trust fund, insurance, and the financial test and guarantee, all other listed mechanisms also require the establishment of a standby trust. The issuing institution of any form of financial assurance must have the authority to issue that form of financial assurance and its operations shall be regulated and examined by a federal or state agency. The issuing institutions of any form of financial assurance are required to waive all rights of set off or liens against the mechanism.~~

~~(x) Subject to approval by the Division, the applicant or permittee shall use one or more of the following financial instruments to satisfy assurance requirements:~~

~~(A) One or more of the following instruments that meet the provisions of Regulation No. 66: irrevocable standby letter of credit; trust fund; surety bond; insurance; financial test; and/or written guarantee.~~

~~(B) Other instruments approved by the Division that meet the following requirements, except where the Division determines that the requirements of subsections (I) and/or (IV) are not applicable:~~

~~(I) An alternative instrument provides for the establishment of a standby trust that meets the requirements of Regulation No. 66.~~

~~(II) The issuing institution of an alternative instrument must have the authority to issue that instrument, and its operations shall be regulated and examined by a federal or state agency.~~

~~(III) The issuing institution of an alternative instrument must waive all rights and set off or liens against that instrument.~~

~~(IV) An alternative financial assurance instrument must contain a term that provides that the instrument cannot be cancelled by the issuer of the instrument, unless 90 days prior written notice is given to the Division and the Division gives written consent.~~

61.13(4) REQUIREMENTS FOR HOUSED COMMERCIAL SWINE FEEDING OPERATIONS

(V) Uses wording approved by the Division.

~~(ixxi)~~ The permittee shall immediately notify the Division of any notice received or action filed alleging the insolvency or bankruptcy of thean issuing institution that issued to the permittee a financial assurance instrument, or alleging any violations of regulatory requirements that could result in suspension or revocation of the issuing institution's charter or license to do business. ~~In the event the permittee becomes aware that the issuing institution is unable to fulfill its obligations under the financial assurance mechanism for any reason, notice shall immediately be given to the Division. The permittee shall have 90 days from the date of such notice to replace the required amount of financial assurance. Failure to provide any substitute or replacement financial assurance, as required, shall be a violation of the permit and may be cause for revocation of the permit.~~

(A) In the event the permittee becomes aware that an issuing institution is unable to fulfill its obligations under a financial assurance instrument for any reason, notice shall immediately be given to the Division.

(B) The permittee shall have 90 days from the date of providing notice to the Division as required under subsection 61.13(4)(h)(xi) to submit a financial assurance instrument(s) that replaces the required amount of financial assurance.

(C) Failure to provide any substitute or replacement financial assurance, as required, shall be a violation of the permit and may be cause for revocation of the permit.

~~(xii) Release of the Permittee from the Requirements for Financial Assurance.~~

~~(A) No form of financial assurance shall be approved unless it contains a term that provides that the financial assurance may not be canceled by the surety or guarantor unless 60 days prior written notice is given the Division and the Division gives written consent, which may be granted only when the requirements of these regulations have been fulfilled.~~

~~(B) When closure, post-closure, and corrective actions required by a permit are complete, financial assurance shall be released by the Division as follows:~~

~~(I) When the Division determines that initial closure activities have been completed for an operation, financial assurance, less identified retainages, shall be released.~~

~~(II) A sufficient amount of financial assurance shall be retained to pay for estimated costs of post-closure remediation activities. This portion of the financial assurance shall be held for a period of at least three (3) years after initial housed commercial swine feeding operation closure activities are completed, unless the Division determines that a shorter period of time is appropriate.~~

~~(III) The Division may release portions of the corrective action financial assurance for remediation of residual soil contamination, remediation of ground water contamination, or clean-up of any spill or breach when it determines that identified phases of required corrective action have been satisfactorily completed, less any retainages for completion of remaining requirements, such as confirmatory monitoring. Any amount remaining following final satisfactory completion of corrective action shall be released to the permittee.~~

61.13(4) REQUIREMENTS FOR HOUSED COMMERCIAL SWINE FEEDING OPERATIONS

- ~~(IV) — Release of any amounts of financial assurance shall not release the permittee or other responsible person from any responsibility for meeting closure or corrective action requirements.~~

Release of an approved financial assurance instrument - The Division will give written consent that a permittee or an institution that issued an instrument may, prior to closure, post-closure, and corrective action activities beginning at a permitted facility(ies), terminate an approved financial assurance instrument(s) when subsections (A) and (B) below have been satisfied, and/or the applicable provisions of Regulation No. 66 for the instrument(s) have been satisfied:

(A) A permittee or institution that issued an instrument gives to the Division 90 days prior written notice of its request that a financial assurance instrument(s) be released.

(B) The permittee has provided a substitute financial assurance instrument(s) for the same amount of financial assurance that was provided by the instrument(s) requested to be released. Such a substitute instrument(s) must meet the requirements of subsections 61.13(4)(h)(iii)-(iv).

(xiii) Forfeiture of Bond or Other Form of Financial Assurance.

~~(A) — The Division may initiate financial assurance forfeiture after notice to the permittee and any surety that the permit has been violated and that there is a reasonable likelihood that the closure, post-closure, or corrective action obligations of the permittee will not be met.~~

~~(B) — The Division may direct the expenditure of forfeited funds to remedy and abate the circumstances for which any financial assurance was required.~~

~~(C) — Use of all financial assurance shall not relieve the permittee or other responsible parties from responsibility and liability for closure, post-closure, and corrective action costs. The Colorado Attorney General may bring suit to recover any costs incurred by the state for closure, post-closure or corrective actions not covered by collected financial assurance monies.~~

Release of the Permittee from the Requirements for Financial Assurance - When closure, post-closure, and corrective actions required by a permit are complete or partially complete, financial assurance shall be released by the Division as follows:

(A) When the Division determines that initial closure activities have been completed for an operation, financial assurance, less identified retainages, shall be released.

(B) A sufficient amount of financial assurance shall be retained to pay for estimated costs of post-closure remediation activities. This portion of the financial assurance shall be held for a period of at least three (3) years after initial housed commercial swine feeding operation closure activities are completed, unless the Division determines that a shorter period of time is appropriate.

(C) The Division may release portions of the corrective action financial assurance for remediation of residual soil contamination, remediation of ground water contamination, or clean-up of any spill or breach when it determines that

61.13(4) REQUIREMENTS FOR HOUSED COMMERCIAL SWINE FEEDING OPERATIONS

identified phases of required corrective action have been satisfactorily completed, less any retainages for completion of remaining requirements, such as confirmatory monitoring. Any amount remaining following final satisfactory completion of corrective action shall be released to the permittee.

(D) Release of any amounts of financial assurance shall not release the permittee or other responsible person from any responsibility for meeting closure or corrective action requirements.

(E) When the Division determines that the provisions of Regulation No. 66 that address reimbursement of financial assurance have been satisfied, as applicable to the permittee's approved financial assurance instrument(s).

(xiv) Forfeiture of Bond or Other Form of Financial Assurance.

(A) The Division may initiate financial assurance forfeiture after notice to the permittee and any surety that the permit has been violated and that there is a reasonable likelihood that the closure, post-closure, or corrective action obligations of the permittee will not be met.

(B) The Division will direct the expenditure of forfeited funds to remedy and abate the circumstances for which any financial assurance was required.

(C) Use of all financial assurance shall not relieve the permittee or other responsible parties from responsibility and liability for closure, post-closure, and corrective action costs. The Colorado Attorney General may bring suit to recover any costs incurred by the state for closure, post-closure or corrective actions not covered by collected financial assurance monies.

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ENVIRONMENTAL AGRICULTURE PROGRAM PROPOSED

61.64 STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY, AND PURPOSE: JULY 12, 2010 RULEMAKING, EFFECTIVE DATE OF SEPTEMBER 30, 2010- HOUSED COMMERCIAL SWINE FEEDING OPERATION FINANCIAL ASSURANCE REQUIREMENTS

The provisions of section 25-8-202(1)(d) and (i) and (2); and sections 25-8-501 to -504, C.R.S. provide the specific statutory authority for this amendment to the Colorado Discharge Permit System Regulations. The Commission has also adopted, in compliance with section 24-4-103(4), C.R.S., the following Statement of Basis and Purpose.

BASIS AND PURPOSE

A. APPLICABILITY

The provisions in Commission Regulation No. 61, 5 CCR 1002-61, subsection 61.13(4)(h) apply to financial assurance requirements for housed commercial swine feeding operations (HCSFOs). In this rulemaking hearing, the Commission also adopted a new regulation, Regulation No. 66, which specifies the criteria for certain financial assurance instruments that HCSFOs can use to provide financial assurance. Therefore, HCSFOs are subject to the financial assurance provisions of both Regulation No. 66 and subsection 61.13(4)(h) of Regulation No. 61.

B. BACKGROUND AND PURPOSE

The proposal considered by the Commission during this rulemaking hearing is the adoption of revisions to subsection 61.13(4)(h) of Regulation No. 61. The proposal is the result of a stakeholder process that was initiated in November 2008 for the purpose of establishing a guidance document for the financial test and guarantee financial assurance mechanism for HCSFOs, in accordance with subsection 61.13(4)(h)(viii) of Regulation No. 61. A proposed guidance document was brought before the Commission at an informational hearing in November 2009. In response to statements from the Division and HCSFO producers at the hearing, the Commission agreed that, in lieu of continuing the hearing on the guidance document, a rulemaking hearing would be set to consider putting into regulation the criteria for all financial assurance instruments. As a result, the Division met with stakeholders to develop the proposal for today's rulemaking.

As discussed above in the "Applicability" section, the Commission also adopted in today's rulemaking hearing a new regulation, Regulation No. 66, which specifies the criteria for certain financial assurance instruments that HCSFOs can use to provide financial assurance. Because these criteria do not exist in the current subsection 61.13(4)(h) of Regulation No. 61, the Commission adopted revisions to this subsection that accomplish the following outcomes:

- Removes language rendered obsolete by the placement of financial assurance instrument criteria in Regulation No. 66.
- Adds language that makes reference to the provisions of Regulation No. 66.
- For consistency, revises "financial assurance mechanism" to be "financial assurance instrument."
- Adds language and restructures existing language for the purposes of providing clarity, segregating discrete provisions, and making needed connections to other provisions in subsection 61.13(4)(h).

- Adds a new subsection that addresses the release of an approved financial assurance instrument.
- Adds a new subsection that establishes submittal requirements for a permittee's annual update and review of financial assurance instruments.
- Renumbers the subsections as a result of adding three new subsections.

C. DISCUSSION OF REVISED PROVISIONS

Subsection 61.13(4)(h)(iii): This subsection was revised to clarify that the monetary value of financial assurance instruments can also be required to be the amount resulting from the interim financial assurance provisions of section 61.13(4)(h)(vi)(B)-(C). In addition, the phrase, "and shall use wording approved by the Division", was removed because financial assurance instrument criteria is now specified for six specific instruments in the new Regulation No. 66. For the purpose of having the phrase still apply to an alternative financial assurance instrument approved by the Division, the phrase was placed in new subsection 61.13(4)(h)(x)(B)(V).

New subsection 61.13(4)(h)(iv): This new subsection was added to refer to the financial assurance instrument criteria in subsection 61.13(4)(h) and to the six instruments in Regulation No. 66.

Subsection 61.13(4)(h)(v): This is subsection 61.13(4)(h)(iv) in the current regulation. The language was revised to add the word "instruments" after "financial assurance", and to refer to the financial instrument requirements of subsections 61.13(4)(h)(iii)-(iv).

Subsection 61.13(4)(h)(vi): This is subsection 61.13(4)(h)(v) in the current regulation. The language was revised to provide clarity, to add the word "instruments" after "financial assurance", and to refer to the financial instrument requirements of subsections 61.13(4)(h)(iii)-(iv).

Subsection 61.13(4)(h)(vii): This is subsection 61.13(4)(h)(vi) in the current regulation. The language was revised to refer to "approved" financial assurance instruments, and to segregate discrete provisions into new subsections (B) and (C). In addition, subsection (B) was revised to provide clarity and to refer to the financial instrument requirements of subsections 61.13(4)(h)(iii)-(iv).

The existing regulation requires that permittees annually review and update their financial assurance instruments in a specified manner. However, the regulation does not provide for a permittee to verify to the Division that it conducted the review and update. Therefore, the Commission adopted a new subsection (A) that requires a permittee to annually submit to the Division a report documenting the permittee's update and review of financial assurance instruments.

Subsection 61.13(4)(h)(viii): This is subsection 61.13(4)(h)(vii) in the current regulation. The language was revised to segregate discrete provisions into new subsections (A) and (B). In addition, subsection (A) was revised to provide clarity and to refer to the financial instrument requirements of subsections 61.13(4)(h)(iii)-(iv).

Subsection 61.13(4)(h)(ix): This is subsection 61.13(4)(h)(viii) in the current regulation. The language was revised to add the word "instruments" after "financial assurance", and to delete all language after the first sentence. Most of the deleted language pertained to requirements for financial assurance instruments and is now obsolete because of the addition of Regulation No. 66. The deleted language pertaining to the specific financial assurance instruments that a permittee must use was moved to new subsection 61.13(4)(h)(x).

New subsection 61.13(4)(h)(x): This new subsection received the language from the current subsection 61.13(4)(h)(viii) pertaining to the specific financial assurance instruments that must be used by a permittee. Also, because of the new Regulation No. 66, the existing criteria pertaining to all financial

assurance instruments was moved to subsections 61.13(4)(h)(x)(B)(I)-(V), where they now pertain only to an alternative instrument approved by the Division. With regard to subsection (IV), the Commission is aware that the process of acquiring a financial assurance instrument, such as a letter of credit or bond, is rigorous and time-consuming. Therefore, the number of days of written notice that must be given prior to an issuing institution cancelling an instrument was revised from 60 days to 90 days in order to allow more time for a permittee to acquire a substitute instrument.

Subsection 61.13(4)(h)(xi): This is subsection 61.13(4)(h)(ix) in the current regulation. The language was revised to provide clarity and to segregate discrete provisions into new subsections (A), (B), and (C). In addition, subsection (A) was revised to add the word “instrument” after “financial assurance”, and subsection (B) was revised to have language that refers to requirements of subsection 61.13(4)(h)(xi).

New subsection 61.13(4)(h)(xii): The Commission adopted this new subsection to establish provisions that address the release of an approved financial assurance instrument prior to closure activities being initiated. The adopted language includes a provision requiring that an instrument be released when the relevant conditions of Regulation No. 66 for the instrument have been met.

Subsection 61.13(4)(h)(xiii): This is subsection 61.13(4)(h)(x) in the current regulation. Language was added to this subsection to clarify that this subsection pertains to the release of financial assurance requirements when closure actions are complete or “partially complete.” This differentiates the purpose of this subsection from that of subsection 61.13(4)(h)(xii). In addition, the provision in existing subsection (A) was deleted. This provision, which addressed the prior written notice requirement for cancelling a financial assurance instrument, is now included for the six instruments in Regulation No. 66, and, for other instruments approved by the Division, is now required under subsection 61.13(4)(h)(x)(B)(IV).

The language in existing subsection (B) was deleted because it exists earlier in the subsection. As a result, existing subsections (I)-(IV) were revised to be new subsections (A)-(D).

The Commission adopted a new subsection (E) that requires the release of financial assurance when a reimbursement provision(s) in Regulation No. 66 has been satisfied, as applicable to the permittee’s approved financial assurance instrument(s).

Subsection 61.13(4)(h)(xiv): This is subsection 61.13(4)(h)(xi) in the current regulation. Subsection (B) was revised to change the word “may” to “will”, prior to the phrase “direct the expenditure of forfeited funds...”

PARTIES TO THE RULEMAKING HEARING