

## **MEMORANDUM OF UNDERSTANDING CONDITIONAL USE**

This Memorandum of Understanding (this “MOU”) is entered into this \_\_\_\_ day of \_\_\_\_\_, 2020, between the TOWN OF WRIGHTSTOWN, a Wisconsin municipality (the “Town”) and BCO Organics LLC, a Wisconsin limited liability company (“BCO”). The Town and BCO may be individually referred to as a “Party” and collectively as the “Parties.”

### **RECITALS**

A. On May 29, 2019, BCO filed an application for a conditional use permit (the “CUP”) to construct and operate a communal digester (the “Project”) on land identified for tax purposes as Tax Parcel No. W-382 (the “Site”).

B. The Project provides for the construction and operation of a covered anaerobic system, constituting a communal digester system that will process cow manure, as the only input, from neighboring and area farms, treating the waste water and converting the manure into natural gas, a soil amendment product and a liquid fertilizer product, which will involve the conveyance of materials and products to and from the communal digester from offsite.

C. The Site is zoned Agricultural Farmland Preservation. Article XXVIII D (2) (b) 10 of the Town’s zoning code lists as a conditional use ethanol plant, bio-diesel plant, communal digester, pelletizing plant or other facility that processes raw agricultural commodities, agricultural by-product or agricultural wastes (received directly from farms) to produce bulk fuel or other bulk products.

D. The Town followed the procedures of § 60.61(4e), Wis. Stats. and Article XVIII Section K of the Town’s Code of Ordinances, and determined substantial evidence supported the grant of the CUP subject to the conditions listed in the Planning Commission Findings and Recommendations and supporting documents that are attached and incorporated as Exhibit A (the “Recommendations”).

E. The use permitted in the CUP is described in the application and accompanying documents listed in the Documents of Record on file with the Town Clerk, which are described in the attached Exhibit B. The Town relied and will continue to rely on the truth of the representations made in the Documents of Record when the Town granted the CUP.

F. The Parties desire to reiterate the conditions imposed in the Recommendations and outline the operation of those conditions to ensure the Parties’ understanding of the terms of the CUP, the expectations of the Parties and to facilitate the smooth operation of the Project at the Site.

G. The execution and delivery of this MOU is a condition of the Town’s issuance of the CUP.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:

**I. GENERAL OPERATING CONDITIONS OF PROJECT**

- A. Compliance with Documents of Record, Recommendations and Plans. The Project shall be constructed and operated in substantial compliance with the materials presented and listed in the Documents of Record, the conditions imposed by the Recommendations and the final construction and site plans that will be subject to Town review as provided in this MOU.
- B. Compliance with Laws. The construction and operation of the Project shall be in full compliance with all applicable state, federal and local laws.
- C. Cow Manure Only. The Project shall not process any material other than cow manure. No substrates or commercial, organic or non-organic wastes of any kind shall be introduced into the process.
- D. Estimated Limits. When completed, the Project will process approximately 800,000 gallons of manure per day, resulting in approximately 400,000 gallons of effluent. The manure shall be processed into a semi-dry fertilizer that will be returned to the contributors and marketed. The resulting gas (up to 4,000 gallons of methane per day at the Site) and 1,800 MMBtu/day Methane will leave the Site by pipeline to a connection station. From 55 to 70 percent of the manure will be pumped to the Site; the remaining manure will be brought to the Site by truck. Before manure may be delivered to the Site, the trucking company shall provide a document to the Town, disclosing the contributing locations/source of the manure, their approximate load, and the route to be taken to and from the site. The amounts stated in this paragraph are averages estimated over a one-month period. The amounts are estimates and daily amounts are anticipated to fluctuate, however if the average exceeds the estimates for more than three months the Parties shall schedule a public meeting within one month of the exceedance, to review the impact of the increases on the public interest and determine whether additional conditions are required.
- E. Footprint. At the Site there will be 16 stainless steel digesters, a series of screw presses, two storage tanks, and several outbuildings as shown in the Documents of Record. The footprint for all operations required by the Project is approximately 20 acres. If it is necessary to increase the size of that footprint the Town will be notified and if the Town reasonably deems the increase or any change in use accompanying the increase, a significant change in the use permitted by the CUP, the Town may commence the process for amending a CUP.
- F. Noise. The system shall operate at 75 decibels or less as measured at the

operations site line, except in emergency situations where repairs or other exigency may require machinery that is louder. BCO shall promptly report any such emergency or exigency to the Town.

## **II. ADDITIONAL CONDITIONS OF CONSTRUCTION AND OPERATION**

- A. Pre-construction conditions. The following conditions shall be fulfilled to the satisfaction of the Town, before any construction activities related to the Project may begin:
1. State and local permits and approvals. BCO shall gain approval of and provide a copy of each of the following permits, which, when delivered to the Town, shall be retained in a separate file specifically designated for such permits:
    - a. Wisconsin Pollution Discharge Elimination System permit;
    - b. Wisconsin Department of Natural Resources (“WDNR”) air quality permit;
    - c. WDNR storm water permit;
    - d. WDNR erosion control permit;
    - e. WDNR Chapter 30 permit;
    - f. Brown County shore land permit;
    - g. State of Wisconsin building approval and permit; and
    - h. Town Building Permit.
  2. Site Plan. A copy of final construction and site plans (collectively, the “Site Plan”), which shall include a detailed site plan describing landscaping, lighting security measures, signage, pipeline routing and location of structures and substantial conformity with those already provided with the application. The Town shall review the Site Plan to determine consistency with the Documents of Record, Recommendations and the Town’s building code. The Town may condition its approval of the Site Plan upon reasonable conditions. Approval of the Site Plan is a condition of issuance of the Town building permit.
  3. Right to Site. BCO shall provide the Town with proof of BCO’s permission from the Owner to use the Site in the manner described in the CUP application.
  4. Focus on Energy Grant. The Public Service Commission for the State of Wisconsin shall award to BCO a Focus on Energy program grant to finance

a minimum of \$15,000,000 of the estimated \$60,000,000 cost of the Project, as updated, which will be subject to an Incentive Agreement requiring, among other things, that the Project must be complete before 80% of the funds will be released, and that the remaining 20% will be released upon capacity and reliability verification by independent evaluators selected by the Focus on Energy project.

B. Construction Conditions. The following conditions shall be met at all times during construction of the Project:

1. Notice of obstruction of Right of Way. BCO shall provide such notices as required by law as to all rights of way affected by construction of the Project;
2. Right to inspect. During construction the Town's Zoning Administrator and engineers shall be permitted to inspect the Site at any time upon 24 hours-notice and may inspect without such notice in case of emergencies, as determined by the Town in its sole discretion; and
3. Compliance with approved plans and permits. All construction activities shall be conducted in strict compliance with the approved Site Plan and the permits.

C. Public Health Conditions. Before commencement of operations of the Project (commencement of operations of the Project shall be deemed to have commenced when the Project has reached 80% of capacity of the estimated daily manure over a 30-day consecutive period), the Town shall have received satisfactory evidence of the following:

1. Certain Permits and Approvals. Proof of issuance of the following permits and approvals:
  - a. Public Service Commission of Wisconsin pipeline approval and permit;
  - b. WDNR high capacity well permit (if necessary);
  - c. Brown County Private Onsite Wastewater Treatment Systems permit; and
  - d. ATCP Scale Permit.
2. Spill Protection.
  - a. BCO shall comply with the spill prevention and emergency response

plans approved by the State of Wisconsin;

- b. BCO shall construct a passive containment system designed to catch and retain 110% of the largest single tank capacity, unless a higher requirement is made by a reviewing entity;
- c. BCO shall install and maintain in good operating condition alarms to monitor the digester levels and any spills on a 24-hour basis;
- d. BCO shall submit to the Town for its review a protocol addressing the steps to be taken to address any spill at the digester through the pipeline;
- e. BCO shall nominate a person (the “Emergency Contact”), who shall have authority to supervise emergency response on behalf of BCO and who shall be at the Site or on-call 24 hours a day. Such person’s identity and contact information, as the same may change from time to time, shall be provided to the Town Chair and Town Zoning Administrator.

3. Natural Gas Extraction System. In the interests of public safety and welfare to limit the possibility of explosion at the site, pipelines and connection station and to provide for a procedure to address any odor or other concerns, BCO shall fulfill all of the following conditions:

- a. The Natural Gas Extraction System shall be limited to gas extracted from the manure in the digesters and no other source.
- b. Gas pressures at the site shall be monitored on a 24-hour basis and an internal flare system shall be used to lower any gas pressure and minimize the chance of odor escaping from the gas process.
- c. Gas pipelines will be monitored 24 hours a day and will have tracers to facilitate prompt response to any breach or leak from the system.
- d. The connection point shall likewise be monitored and shall be kept and maintained as required by the Public Service Commission of Wisconsin permit.
- e. BCO shall submit to the Town for its review and approval a protocol addressing the steps to be taken to address any leak or other breach of the gas extraction system from the extraction point at the digester through the pipeline and connection point.
- f. BCO shall communicate with the Town through the Emergency Contact as to any leak or other breach of the gas extraction system.

4. Manure Delivery/Return Pipelines. To provide for proper oversight of the delivery system and address any spills or leaks in the system that could

cause or contribute to pollution in the area, BCO shall comply with the following conditions:

- a. All pipelines delivering manure to the Site and transporting brown water or effluent off the Site shall be located within county utility easement right of ways, within Town right of way or in private easements. BCO shall provide the Town with documentation showing the right to use each such right of ways as required under this MOU;
- b. BCO shall have obtained a permit from the Town for the use of those portions of the Mill Road utility easement for the gas and manure pipelines under the terms of this MOU;
- c. The manure pipelines shall be monitored and shall have tracers located on them to assist in discovering any spill location;
- d. Any brown water produced at the Site to be returned to a contributor shall be transported in the same manner as deliveries of the same are required under this MOU; and
- e. BCO shall submit to the Town for its review a protocol addressing the steps to be taken to address any leak or other breach of the manure delivery/return pipelines from the digester to its destination. BCO shall communicate with the Town through the Emergency Contact as to any leak or other breach of the gas extraction system.

5. Water Quality and Volume. In the interest of protecting the East River watershed and hatchery near the Site and to diminish the possibility of pollution at or around the Site and to provide for procedures to address any matters that may relate to those concerns, the following conditions shall be fulfilled:

- a. BCO shall monitor all effluent discharged into the East River Watershed for quality and quantity according to WPDES requirements.
- b. The results of all such monitoring required by WDNR to be sent to a certified laboratory shall be forwarded to the Town on a monthly basis for review by the Town's consultant(s).
- c. BCO shall deliver to the Town for the Town's approval a protocol addressing contingencies if effluent discharge to the watershed exceeds the WPDES limits.

6. High Capacity Well. To protect the water source of adjoining property owners, the following conditions shall be met:

- a. Before BCO drills any high capacity well on the Site, BCO shall provide the Town with a cone of influence study, produced by a licensed engineer acceptable to the Town, to determine the draw effect on adjacent property owners, including the Town.
- b. No high capacity well shall be constructed until the Town is satisfied no remediation is necessary or that any necessary remediation has been adequately addressed.
- c. BCO shall have paid the actual cost of any necessary remediation.

### **III. SITE SECURITY**

- A. Security at Site. To address the Town's interest in protecting property and ensuring an operation dealing with high volumes of waste is secure and any vandalism deterred, the following conditions shall be met to the reasonable satisfaction of the Town:
  - 1. The Site Plan shall depict the location of the following security measures, all of which shall be in place or constructed prior to operation commencing:
    - a. There shall be security fencing completely surrounding the Project.
    - b. There shall be securely locked gates and the Site shall have posted "No Trespassing" signs.
    - c. There shall be one entrance for ingress and egress to the Site.
    - d. The Site shall be monitored by camera surveillance.
    - e. The entrance to and all roadways on the Site shall be of an impervious surface.

### **IV. TRAFFIC AND ROUTING**

- A. Traffic Plan. To control the amount of truck traffic, the transportation of waste production and materials on the roadways and the volume and constituency of the waste at the Site, and to the preserve Town roads and control, the following conditions shall be fulfilled:
  - 1. BCO shall submit to the Town for review and approval a plan showing the routing for manure traffic on Town roads (the "Traffic Plan"). The Traffic Plan shall designate all contributors to the operation and indicate the routes and number of daily trips. Truck traffic shall be in strict compliance with the Traffic Plan and will be limited to the number and origin of trucks referenced in the Traffic Plan (currently 55 to 59 semi-truck round trips per day). Although the Town anticipates and encourages the use of the communal digester by area farms as provided in the Traffic Plan and

recognizes that the number of truck trips may fluctuate, the Traffic Plan may not be amended without the prior review and approval of the Town which approval will not be unreasonably withheld.

**B. Regulation of Trucks.**

1. All truckers delivering and removing materials from the Site shall be on contracts directly with BCO or with BCO's contractors in a manner that allows BCO to direct and control the truck operators.
  - a. All truckers shall refrain from engine braking while hauling manure and while empty or transporting other materials back to the location from which they came.
  - b. All trucks carrying dried fiber from the Site will be covered.
  - c. All other trucks carrying materials to or from the Site will be closed tankers.
2. BCO shall be responsible for the cost of any spill and clean-up of waste or fiber during transport to or from the Site or when transporting fiber to locations outside the Town.
3. BCO shall provide to the Town for its review and approval a protocol for addressing spill clean-up and other complaints regarding the truck traffic.

**C. Road Use Agreement.** Prior to commencement of operations, the Town and BCO shall enter into a Road Use Agreement in the form as attached hereto as Exhibit D.

**V. COMMUNITY RELATIONS AND CITIZEN COMPLAINTS AND CONCERNS**

Citizen Input. To provide for oversight of compliance with the CUP, provide for citizen input and clarify the parameters of the CUP, BCO shall participate in annual public meetings to discuss BCO's operations, the impact of the Project on the community and BCO's record of compliance with the CUP and the terms of this MOU. The Town may also require a meeting upon receipt of allegations of a material breach of the conditions of the CUP.

**VI. ACCESS/INSPECTION BY TOWN**

- A. Inspection of Site and Project.** BCO will permit and shall cause the owner of the Property to permit the Town and the Town's construction consultant or inspector, at all reasonable times to inspect the Site, the Project and all matters relating to the same. The Town assumes no obligation to BCO for the sufficiency or adequacy of such inspections, such inspections being made for the sole and separate benefit of the Town. The fact the Town may make such inspections shall in no way relieve BCO from its duty to independently ascertain that the construction of the Project is being completed in accordance with the approved Site Plan.

- B. Access to Effect Cure. To the extent the Town elects to exercise its remedy to cure any failure by BCO to promptly remedy any emergency situation, BCO shall not interfere with the Town and its designated contractors and consultants from coming upon the Site to accomplish such cure, but shall, instead, fully cooperate in such cure efforts by the Town.
- C. Notice. Town officials, including the fire department, zoning administrator and building inspector shall be permitted to enter the Site for inspection purposes upon 24-hour notice, except in case of an emergency, as may be determined by the Town in its sole discretion, in which case, the Town shall endeavor to give notice to BCO and the owner of the Property, but no notice shall be required. At the request of the Town, the inspectors shall be accompanied by employees of BCO during any non-emergency inspection.

## **VII. PILOT AND ADMINISTRATIVE COSTS AND FEES**

- A. Payment of PILOT. The costs of processing the required permits and overseeing the operation of the Project in the interest of the public health, welfare and safety are attributable solely to the Project and are not intended to be paid by the general tax levy; the Project is intended to be exempt from taxes pursuant to § 70.11(21) and 70.111(18) Wis. Stats. Each year, BCO shall pay the Town a payment in lieu of taxes (PILOT) equal to the amount otherwise attributable to the Town (estimated at \$177,000 for tax year 2019), based on an equalized value of not less than \$60,000,000, as such value may fluctuate during the term of this MOU. The PILOT payments shall commence October 31, 2021 and shall be due on the same date annually thereafter. Payments shall be made in a single installment and the Town shall provide notice to BCO of the projected mil rate for the next year not less than 30 days before the due date.
- B. Initial Administrative Fee Payment. In addition to any PILOT, BCO has paid to the Town the sum of \$43,181.64, in one payment to reimburse the Town or provide funds for the Town to pay all administrative costs incurred by the Town in processing the conditional use application, including actual attorneys' and engineer fees expended, actual costs of publication, and any other costs actually incurred by the Town in processing the CUP.
- C. Annual Administrative Fee Payments. In addition to any PILOT and the initial administrative fee payment, BCO shall pay up to \$24,000 per year toward costs incurred by the Town in administering the CUP, including, specifically, costs of engineering, review and professional advice and services. The obligation to make annual administrative fee payments shall commence at the commencement of operations. Payments shall be made in a single installment within 60 days of notice to BCO from the Town of the administrative fees being requested.

## **VIII. FIRE SAFETY**

BCO shall strictly comply with the conditions of the Greenleaf Fire Department, which are attached hereto as Exhibit C, as such conditions may be amended from time to time and shall maintain in good operating condition all of the equipment listed on Exhibit C and all replacements of such equipment.

## **IX. REPRESENTATIONS AND WARRANTIES**

Representations and Warranties of BCO. BCO represents and warrants to the Town as follows, which representations and warranties shall survive termination of this MOU, that:

- A. Organization and Good Standing. BCO is a limited liability company, duly formed and validly existing under the laws of the State of Wisconsin, has filed all necessary filings with the State of Wisconsin Department of Financial Institutions, has not filed articles of dissolution, and has the power and all necessary licenses, permits and franchises to own its assets and properties and to carry on its business.
- B. Due Authorization. The execution, delivery and performance of this MOU and all other agreements requested to be executed and delivered by BCO hereunder have been duly authorized by all necessary corporate action of BCO and constitute valid and binding obligations of BCO, in accordance with their terms.
- C. No Conflict. The execution, delivery, and performance of BCO's obligations pursuant to this MOU will not violate or conflict with BCO's Articles of Organization or Operating Agreement or any indenture, instrument or material agreement by which BCO is bound, nor will the execution, delivery, or performance of BCO's obligations pursuant to this MOU violate or conflict with any law applicable to BCO.
- D. No Litigation. There is no litigation or proceeding pending or threatened against or affecting BCO or the Project or, to the best of BCO's knowledge, the Site that would adversely affect the Project, BCO or the enforcement of this MOU according to its terms, the ability of BCO to complete the Project or to perform its obligations under this MOU.
- E. Certification of Facts. No statement of fact by BCO contained in this MOU and no statement of fact furnished or to be furnished by BCO to the Town pursuant to this MOU contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact necessary to make any such statement not misleading.
- F. Compliance with Laws and Codes. The Project, when completed, will conform and comply in all respects with all applicable laws, rules, regulations and ordinances, including without limitation, all building codes and ordinances of the Town. BCO will at all times comply with, and will cause the Project to be in compliance with all applicable federal, state, local and other laws, rules, regulations and ordinances, including without limitation, all environmental laws, rules, regulations and ordinances.

- G. No Material Change. All copies of documents, contracts and agreements BCO has furnished to the Town or its agents are complete and accurate as of delivery and remain so as of the date of this MOU.
- H. Correction of Defects. Upon demand of Town, BCO shall correct any material defect, structural or otherwise, in the Project, or any departure from the approved Site Plan.
- I. Right to Occupy. BCO shall provide proof to the reasonable satisfaction of the Town that it has the right to occupy and use the Site in the manner provided in the CUP and this MOU.

## **X. INSURANCE**

- A. Liability Insurance. BCO shall provide and maintain with reputable insurance companies licensed to do business in the State of Wisconsin: (a) a general liability policy for \$3,000,000 in standard insurance industry form; and (b) a pollution insurance policy in the amount of \$3,000,000 and to pay the cost and environmental remediation, bodily injury and property damage and cleanup costs resulting from the operation of the Project, including, without limitation, occurrences involving any of the pipelines referenced in the application. The Town shall be named as an additional insured in all such policies. No such policy shall be terminable, except upon 30 days' notice to the Town.
- B. Casualty Insurance. BCO shall provide and maintain property and casualty insurance with insurance companies meeting the criteria in section A immediately above in amounts sufficient to replace all of the equipment and infrastructure required for the operation of the Project as proposed in the conditional use application.
- C. Workers Compensation Insurance. BCO shall maintain workers' compensation insurance in amounts required by the State of Wisconsin.
- D. Proof of Insurance. BCO shall provide to the Town a certificate or certificates of insurance demonstrating compliance with this section X.

## **XI. INDEMNIFICATION**

A. Indemnification Obligations. BCO, for itself, its owners, directors, officers, members, employees, contractors, agents, insurers and attorneys (each an "Indemnifying Party," and together, the "Indemnifying Parties") shall indemnify, hold harmless and defend the Town, its board members, directors, officers, employees, contractors, agents, insurers and attorneys (each an "Indemnified Party," and, together, the "Indemnified Parties") of and from any and all demands, damages, costs and fees, including, without limitation attorney fees and costs, judgments, awards and all other sums due or claimed to be due and arising out of BCO's breach of any of the terms of

this MOU and any negligence or intentional wrongdoing relating to the ownership or operation of the Project.

B. Indemnification Procedures.

1. In the case of claims made by a third party (a “Third Party Claim”) with respect to which indemnification is sought, the Indemnified Party shall give prompt notice to any Indemnifying Party of any such Third Party Claim made upon it. If the Indemnified Party fails to give such notice, such failure shall not preclude the Indemnified Party from obtaining such indemnification but its right to indemnification may be reduced to the extent such delay materially prejudiced the defense of the Third Party Claim or increased the amount of liability or cost of defense.
2. Assumption of Defense. The Indemnifying Party shall have the right, unless (i) the Indemnifying Party(ies) is also a party to such Third Party Claim and the Indemnified Party determines that joint representation would be inappropriate, or (ii) the Indemnifying Party(ies) fails to provide reasonable assurance to the Indemnified Party of the Indemnifying Party’s financial capacity to defend such Third Party Claim and provide indemnification with respect to such Third Party Claim), by notice to the Indemnified Party given not later than ten (10) days after receipt of the notice to assume the control of the defense, compromise or settlement of the Third Party Claim, provided that such assumption shall, by its terms, be without cost to the Indemnified Party and provided the Indemnifying Party(ies) acknowledges in writing its obligation to (i) not settle any Third Party Claim where such settlement of the Third Party Claim would have a material adverse effect on the Indemnified Party without the prior written consent of the Indemnified Party, which consent shall not be unreasonably withheld and (ii) indemnify the Indemnified Party in accordance with the terms contained in this section in respect of the Third Party Claim.
3. Pursuit of Defense/Cooperation/Legal Fees. Upon the assumption of control of any Third Party Claim by the Indemnifying Party(ies) as set out in subsection 2 above, the Indemnifying Party(ies) shall diligently proceed with the defense, compromise or settlement of the Third Party Claim at its or their sole expense, including if necessary, employment of counsel reasonably satisfactory to the Indemnified Party and, in connection therewith, the Indemnified Party shall cooperate fully, but at the expense of the Indemnifying Party(ies) with respect to any out-of-pocket expenses incurred, to make available to the Indemnifying Party(ies) all pertinent information and witnesses under the Indemnified Party’s control, make such assignments and take such other steps as in the opinion of counsel for the Indemnifying Party(ies) are reasonably necessary to enable the Indemnifying Party(ies) to conduct such defense. The Indemnified Party shall also have the right to participate in the negotiation, settlement or defense of any Third Party Claim at its own expense. The Indemnified Party

shall not settle any Third Party Claim without the prior written consent of the Indemnifying Party(ies), such consent not to be unreasonably withheld.

4. Failure of Indemnifying Party to Assume Defense. If the Indemnifying Party(ies) does not assume control of a Third Party Claim as permitted in subsection 2 above, the Indemnified Party shall be entitled to make such settlement of the Third Party Claim as in its sole discretion may appear advisable, and such settlement or any other final determination of the Third Party Claim shall be binding upon the Indemnifying Party(ies).

## **XII. CLOSURE SECURITY**

Before BCO commences digester operations at the Site, BCO shall provide the landowner with bonds or other security satisfactory to the Town sufficient in type and amount to assure resources will be available to pay for the proper and sanitary closure of the Site and remediation of the Site if digester operations discontinue.

## **XIII. TERM**

This MOU shall commence on \_\_\_\_\_, 2020 and, unless sooner terminated as permitted in this MOU, shall continue for a period of 20 years from such date. The foregoing notwithstanding, the CUP shall be subject to review every 5 years from the anniversary date of first operation of the Project or upon material change of the permitted use as reasonably determined by the Town.

## **XIV. DEFAULT AND REMEDIES**

A. Default by BCO. The following shall constitute defaults on the part of BCO:

1. Failure to Pay. BCO fails to timely and fully pay any sums due and owing to the Town;
2. Failure to Abide by Other Terms. BCO fails to perform any of its other obligations to the Town under this MOU and such failure continues for a period of 30 days from the date of notice from the Town;
3. Insolvency Event. BCO becomes the subject of an involuntary bankruptcy petition, an involuntary assignment for the benefit of creditors, receivership, or other involuntary proceeding designed for the benefit of creditors that is not dismissed within 180 days of the date of filing (each, an “Insolvency Event”);
4. Misrepresentation. Any representation or warranty of BCO in this MOU or otherwise made in writing to the Town is false in any material respect when made;
5. Cessation of Business Operations. Except because of conditions beyond the control of BCO, BCO fails to actively engage in business operations for a

period of 60 consecutive days or for 90 days during any 12-month period;  
or

6. Other Contracts. There exists any material, uncured, default in any other agreement between the Town and BCO or the Town.

B. Cure Rights and Events of Default. BCO shall have the right to cure their defaults as set forth in this section. If BCO fails to cure its default(s), an Event of Default shall occur, in which case, the Town may exercise any or all of the remedies provided below. The Cure rights are:

1. Cure of Payment Default. BCO shall have 10 days from notice from the Town to cure any payment default;
2. Cure of Certain Other Defaults. Except as set forth below, for any default, other than a payment default, BCO shall have 30 days from the date of notice from the Town to cure the default; provided, however, if cure of any such default cannot practicably be achieved within the 30 days allowed, then BCO shall have a reasonable period of time, not to exceed an additional 60 days (a total cure period of 90 days), to cure the default, provided BCO has commenced cure within the initial 30 days and diligently pursues cure thereafter.
3. Cure Period Exceptions. Subparagraph 2 immediately above notwithstanding and irrespective of BCO's obligation to suspend operations as set forth in Subsection 5 below, if the default is:
  - a. a failure to maintain insurance as required, the cure period shall be five business days;
  - b. an attempt to assign or an assignment of this MOU without the Town's consent, the cure shall be rescission of the assignment, with proof of the same being given to the Town no later than seven days after notice from the Town;
  - c. Upon the occurrence of an Insolvency Event, the cure period will be 180 days for BCO to obtain dismissal of the date of filing;
  - d. an intentional, material misrepresentation, in which case, there shall be no cure period;
  - e. a condition that threatens immediate harm to human health or significant property damage, in which case the cure period shall be shortest period of time in which to rectify such condition to the reasonable satisfaction of the Town;

- f. a default under any other agreement between the Town and BCO that provides for a different cure period, in which case the other cure period shall control, whether the same is more or less liberal as to the cure period; or
- g. a default of the same provision of this MOU that occurs more than three times in any six-month period the cure, in which case the cure period shall be one-half of the period of time otherwise allowed to cure such default.

C. Remedies.

1. General Remedies. Upon the occurrence of an Event of Default, the Town may: (a) revoke the CUP and terminate this MOU upon 10 days' notice to BCO; (b) effect cure of the default and charge all costs thereof to the defaulting Party, which shall be due and payable in full within 10 days of demand; (c) seek injunctive relief as to any default for which injunctive relief is an appropriate remedy; (d) obtain specific performance; and/or (e) exercise any and all rights and remedies available under law or equity with respect to the default.
2. Self Help. Subsection 1 immediately above notwithstanding, as to the following defaults:
  - a. Failure to keep roadways free of waste products,
  - b. Failure to repair gas, brown, manure or water lines,
  - c. Failure to clean up a spill or debris on any right of way caused by BCO or its agents, or
  - d. Noise violations.

If there exists, in the determination of the Town, an immediate need to remedy any such default, the Town may cure the default of BCO and charge to BCO all costs incurred by the Town in relation to such default and the cure, which costs shall be paid by BCO no later than 10 days after demand by the Town. If BCO fails to make payment as required, the Town may levy a tax against the Site.

3. Discretionary Exercise of Remedies; Remedies Cumulative. The Town need not exercise any of the foregoing remedies, but all remedies are cumulative, i.e., exercise of any one or more of the foregoing remedies shall not preclude exercise of any other remedies.

4. Due Process. Any of the foregoing sections notwithstanding, the Town shall not revoke the CUP without affording the defaulting party an opportunity to be heard. Except in the case of defaults for which no cure period is afforded, to the extent such opportunity to be heard does not occur before the expiration of the applicable cure period, such cure period, as to such default only, shall be extended by the number of days afforded in the applicable cure period, commencing on the day the Town issues its determination that the default exists.
5. Suspension of CUP. The CUP shall be suspended and BCO shall immediately suspend operations upon failure to cure the following defaults:
  - a. Lapse of any insurance coverage required by this MOU continuing beyond the cure period;
  - b. Lapse of any permit required in Section II of this MOU;
  - c. A condition that threatens immediate harm to human health or significant property damage;
  - d. The occurrence of any catastrophic event caused by the operation of the Project that renders the operation of the Project unsafe or causes damage to adjacent properties in the Town; or
  - e. Operation in violation of any local, state or federal law.

The suspension shall remain in effect until, in the reasonable determination of the Town, the lapse is cured, satisfactory arrangements have been made to pay any damages caused by the breach and BCO has made sufficient modifications to the Project to satisfy the Town the event giving rise to the default will not recur. If the cure has not been performed within a reasonable time as determined by the Town, in its reasonable discretion, the Town may revoke the CUP and exercise any and all remedies available to it. Suspension shall not extend any cure period that may apply to the defaults listed immediately above.

- E. Interest. Interest shall accrue on any amounts that are not paid by BCO to the Town when and as due at the rate of 12% per annum from the due date until paid in full.
- F. Attorney Fees. If either Party elects to hire legal counsel to pursue any remedy afforded to it in this MOU and that Party is determined by a court or arbitrator to be the prevailing Party in such pursuit, the other Party shall be liable to pay to prevailing Party an amount equal to the prevailing Party's reasonable attorney fees and costs relating to such pursuit, whether such fees and costs were incurred before or during any formal legal proceeding or arbitration.

- G. Limitation of Damages. Anything in this MOU notwithstanding, under no circumstances shall any Party to this MOU be liable to any other Party for any consequential or other indirect damages. The Town reserves all rights of immunity and damage limitations afforded to it by statute, including, but not limited to §893.80 of the Wisconsin Statutes.
- H. Waiver. Failure of the Town to enforce any provision contained herein shall not be deemed a waiver of the Town's rights to enforce such provision or any other provision in the event of a subsequent default. All waivers shall be in writing and shall specify the particular requirement being waived. No waiver given shall constitute a waiver of any provision not specifically waived or of any future violation of the provision specifically waived, unless a written waiver so indicates.

#### **XIV. MISCELLANEOUS PROVISIONS**

- A. Assignment. Except for collateral assignments in favor of BCOs lender(s) or assignment to a wholly owned subsidiary of BCO, any assignment of this agreement shall be subject to the review and consent of the Town, which consent will not be unreasonably withheld. In the case of any assignment of the Digester, or any part thereof to another party, the party to whom the interest is being conveyed will be required by written agreement to assume BCOs responsibilities under the terms of this agreement. It shall not be unreasonable for the Town to withhold consent if the proposed assignee lacks financial or industry ability to operate the Project in conformance with the terms of this MOU and the CUP.
- B. Financial Interest Prohibited. No member of the governing body or other official of the Town shall have any financial interest, direct or indirect, in this MOU, the Project, the Site, or any contract, agreement, or other transaction contemplated to occur or be undertaken hereunder or with respect thereto, nor shall any such member of the governing body or other such official participate in any decision relating to this MOU that affects his/her personal interest or the interests of any corporation, partnership, or association in which he/she is directly or indirectly interested. No member, official, or employee of the Town shall be personally liable to the Town in the event of any default or breach by BCO or any successor to BCO on any obligation of BCO under this MOU.
- C. Non-waiver of Approvals. Nothing herein shall be construed or interpreted in any way to waive any requirement of BCO to obtain all necessary approvals, licenses, and permits from the Town in accordance with the Town's usual practices and procedures, nor limit or affect in any way the right and authority of the Town to approve or disapprove any plans and specifications or protocols, or any part thereof, or to impose limitations, restrictions, and requirements on the development, construction, and/or use of the Site as a condition of any such approval, license, or permit, including without limitation, requiring any and all other and further development and similar agreements. The Town will act diligently and in good

faith to review all necessary approvals, licenses, and permits duly requested by BCO.

- D. Limitation on Personal Liability. In carrying out any of the provisions of this MOU or in exercising any power or authority granted to them thereby, there shall be no personal liability of the Town's officers, agents, employees, or representatives, as, in such matters they act as agents and representatives of the Town.
- E. No Partnership. This MOU specifically does not create any partnership or joint venture between the Parties, or render any Party liable for any debts or obligations of the other Party.
- F. Delivery of Notices. Any notice required hereunder shall be given in writing, signed by the Party giving notice, personally delivered or mailed by certified or registered mail, return receipt requested, to the parties' respective addresses as follows:

To the Town:

Town of Wrightstown  
Attn: Town Chair  
1527 Day Street  
P.O. Box 175  
Greenleaf, WI 54126

With a Copy to:

Davis & Kuelthau, s.c.  
Attn: James M. Kalny  
318 S Washington Street, Suite 300  
Green Bay, WI 54301

To BCO:

BC Organics LLC  
Attn: Managing Member  
W175N11117 Stonewood Drive, Suite 209  
Germantown, WI 53022-6506

With a Copy to:

Thiel Law Office  
Attn: John E. Thiel  
P.O. Box 7560  
Appleton, WI 54912-7075

Notice shall be deemed delivered (a) in the case of personal delivery, on the date when personally delivered; or (b) in the case of certified or registered mail, on the date when deposited in the United States mail with sufficient postage to affect such

delivery.

- G. Headings. Descriptive headings are for convenience only and shall not control or affect the meaning or construction of any provision of this MOU.
- H. Entire Agreement. This MOU, including the recitals above, which are integral parts of this MOU, and all other documents and agreements expressly referred to herein contain the entire understanding between BCO and the Town with respect to the matters set forth herein.
- I. Amendments. No amendment or other modification of this MOU shall be enforceable unless it is in a writing signed by appropriate representatives of each Party and with the actual authority of each Party.
- J. Law Applicable. This MOU is entered into under and shall be construed in accordance with the internal laws of the State of Wisconsin.
- K. Construction. The terms and conditions of this MOU shall be read in the light most favorable to the Town. Before they executed this MOU, each Party had sufficient opportunity to have the document reviewed by legal counsel, and legal counsel for each Party participated in the negotiation and drafting of this MOU. Accordingly, nothing in this MOU shall be construed more strictly for or against a Party on the basis that such Party's attorney drafted this MOU or any portion thereof or attachment hereto.
- L. Severance. If a provision of this MOU, or the application of this MOU is deemed invalid or unenforceable to any extent by a court of competent jurisdiction, then, unless sufficient proof is given that deprives the Party adversely affected by the elimination of such provision of the essential benefits of this MOU, the remainder of this MOU or the application of such provision shall be valid and enforceable to the fullest extent permitted by law.
- M. Recording of Agreement. The Town may record this MOU or a memorandum of this MOU as an encumbrance upon the Site. Upon request of the Town, BCO shall execute and deliver any such memorandum or other document in connection with such recording.
- N. Agreement Binding. This MOU shall be binding upon and inure to the benefit of the parties hereto and their respective representatives, successors, and assigns.
- O. Third Parties. This MOU is made for the exclusive benefit of the Parties and is not for the benefit of any other persons, as third party beneficiaries or otherwise, and this MOU shall not be deemed to have conferred any rights, expressed or implied, upon any other person.
- P. Originals and Counterparts. This MOU may be executed in any number of counterparts, each of which shall be deemed to be an original. Facsimile and photocopies of this MOU shall have the same effect as originals.

*[Signature page and exhibits follow.]*

IN WITNESS WHEREOF, the Parties have caused this Memorandum of Understanding to be executed as of the day and year first written above.

**BCO:**  
**BC Organics LLC**

By: \_\_\_\_\_  
Its: \_\_\_\_\_

**TOWN:**  
**TOWN OF WRIGHTSTOWN**

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_

**EXHIBIT A**  
**RECOMMENDATIONS**

## **Planning Commission Findings and Recommendation**

On May 29, 2019, Dynamic Concepts LLC dba BC Organics LLC (the Applicant) filed an application for a conditional use permit (CUP) to operate a communal digester at parcel W-382, on Mill Road (the Site), a property owned by DMW Real Estate LLC (the Owners). The Site is zoned Agricultural Farmland Preservation. Article XXVIII D (2) (b) 10 of the Town or Wrightstown Zoning Code lists as a conditional use:

An ethanol plant, bio-diesel plant, communal digester, pelletizing plant or other facility that processes raw agricultural commodities, agricultural by-product or agricultural wastes (received directly from farms) to produce bulk fuel or other bulk products.

### **Legal Considerations in Granting a CUP.**

Recently amended CUP review procedures that control what the Town Board must comply with are found at § 60.61(4e) Wis. Stats. which reads as follows:

(4e) Conditional use permits.

(a) In this subsection:

1. “Conditional use” means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a town, but does not include a variance.

2. “Substantial evidence” means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion.

(b)

1. If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the town ordinance or those imposed by the town zoning board, the town shall grant the conditional use permit. Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.

2. The requirements and conditions described under subd. 1. must be reasonable and, to the extent practicable, measurable and may include conditions such as the permit's duration, transfer, or renewal. The applicant must demonstrate that the application and all requirements and conditions established by the town relating to the conditional use are or shall be satisfied, both of which must be supported by

substantial evidence. The town's decision to approve or deny the permit must be supported by substantial evidence.

(c) Upon receipt of a conditional use permit application, and following publication in the town of a class 2 notice under ch. 985, the town shall hold a public hearing on the application.

(d) Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed, but the town may impose conditions such as the permit's duration, transfer, or renewal, in addition to any other conditions specified in the zoning ordinance or by the town zoning board.

(e) If a town denies a person's conditional use permit application, the person may appeal the decision to the circuit court under the procedures described in s. 59.694 (10).

To assist in interpretation, the Planning Commission recognizes that the foregoing statute was adopted as part of 2017 Act 67. Act 67 was adopted in response to AllEnergy Corp v. Trempealeau County Environment & Land Use Committee. In that case the majority held, among other things, that public expressions of support or opposition establish a valid basis—that is, substantial evidence—for a decision on a conditional use. That language likely prompted the statutory definition of substantial evidence found in Act 67 that specifically excepts preference and speculation from inclusion as substantial evidence. A review of the legislative history of Act 67 includes the following written legislative testimony from Senator Tiffany, one of the bill's authors:

“We believe that if a local government allows a specific use under a conditional use permit (CUP), and if a property owner satisfies or agrees to satisfy all CUP conditions and requirements, the local government should grant the CUP. Our proposal creates a statutory framework for the CUPs to protect property owners from being subjected from subjective decision making and uncertainty during the CUP process. ...”

Act 67 does not expressly state that a CUP cannot be denied, in fact it implies the opposite by stating at 60.61(4e)(b)2: “... The town's decision to approve or deny the permit must be supported by substantial evidence.” It is expressly provided however, that the decision must be based on substantial evidence that is not merely preference or speculation and that a reasonable person would accept in support of the conclusion.

From a local standpoint, Article XXVIII D (2)(a) provides:

(a) The Town Board may issue a conditional use permit for the uses under par. D.(2)(b) if all of the following apply:

1. The use supports agricultural uses in the farmland preservation zoning district in direct and significant ways, and is more suited to a farmland preservation zoning district than to an industrial or commercial zoning district.
2. The use and its location in the farmland preservation zoning district are consistent with the purposes of the farmland preservation zoning district.
3. The use and its location in the farmland preservation zoning district are reasonable and appropriate, considering alternative locations, or are specifically approved under state or federal law.
4. The use is reasonably designed to minimize conversion of land, at and around the use site, from agricultural use or open space use.
5. The use does not substantially impair or limit the current or future agricultural use of other protected farmland.
6. Construction damage to land remaining in agricultural use is minimized and repaired to the extent feasible.

### **CUP Description**

The proposed use is complex and is described in the application and accompanying documents listed in the Documents of Record for this matter, on file with the Clerk and previously circulated to you. For purposes of this report the proposed use would be for a digester system that will process cow manure, as the only input, from neighboring and area farms, treating the waste water and converting the manure into natural gas, a soil amendment product and a liquid fertilizer product. The manure will be predominantly pumped to the site from the Wiese and Country Aire farms (estimated at 70%) with the remainder trucked to the Site. The system is designed to return the treated waste water or brown water to the contributors.

The operators anticipate approximately 800,000 gallons of manure will be processed per day resulting in approximately 400,000 gallons of effluent. The manure will be processed into a semi dry fertilizer that will be returned to the contributors and marketed. The resulting gas (up to 4,000 gallons of methane per day at the Site) and 1,800 MMBtu/day Methane will leave the Site by pipeline to a connection station

At the Site there will be 16 stainless steel digesters, a series of screw presses, two storage tanks, and several outbuildings as shown in the proposal. The operation's site footprint is approximately 20 acres.

The project is exempt from taxes pursuant to § 70.11(21) and 70.111(18) Wis. Stats. The applicant has offered to pay the Town a payment in lieu of taxes equal to the amount attributable to the Town.

The estimated cost of the system is \$60,000,000.00. The project is in part financed by a 15 million dollar Public Service Commission of Wisconsin, Focus on Energy program grant subject to an Incentive Agreement that requires, among other things, that the project must be complete in order to release 80% of the funds. The remaining 20% is payable upon capacity and reliability verification by independent evaluators selected by the Focus on Energy project. Note this is a reimbursement grant. The grant was awarded after review by an evaluation Team consisting of the following members: one designated staff member each from the Wisconsin Public Service Commission, DATCP, and DNR; a Focus on Energy program staff member from APTIM; and a faculty member from UW-Madison's School of Engineering with expertise in biodigestion.

### **Collection of Evidence regarding the CUP**

Before the public hearing in this matter, the Planning Commission held 6 public meetings including one trip to view digester operations at the Crave Brothers Farm in Waterloo and Majestic Meadow Dairy in Sheboygan Falls. The public was invited to address the Commission at 3 of those meetings. Those meetings are listed in the attached exhibit 1. While the meetings were taking place, staff was directed to respond to questions raised. Staff also, in response to questions from Commission or Board members or on its own initiative, collected information to forward to the Commission for its consideration.

The information collected in the first six meetings and the application file is available at the Town's website, at the Clerk's office, and is incorporated herein (Documents of Record see Ex. 2 which is a list of those documents). Note that much of the information in the record was obtained through a public records request to the Town of Holland who had reviewed a similar request earlier this year. Based on the Documents of Record and information collected at the meetings and to facilitate the collection of evidence and to address the issues that were raised, staff created a Conditional Use Analysis Chart the final version of which is attached as exhibit 3.

On September 4, 2019, the Town Board held a public hearing. At that hearing 70 people were present and 10 people spoke. Ms. Rombeck-Bartels of the Wisconsin Department of Natural Resources (DNR) and Dean LaFleur of Robert E Lee and Associates (REL) were present to assist in responding to the questions. As some questions were not completely answered and at the request of a Board member, some additional documents were collected.

Also at the public hearing the Town Zoning Administrator read the Documents of Record document (exhibit 2) and submitted each document into the record.

To address the public comments and review the conditions, the Planning Commission met again on September 18, 2019. Staff presented a review of the public comments and of documentation

collected as a result of those comments, which is attached as exhibit 4. The commission also received a communication from Ann Shibler. Staff response to that communication is also attached as exhibit 5. The Planning commission also reviewed and discussed the conditions attached as exhibit 6.

On September 23, 2019 the Planning Commission met to take a final review of the matters of record and finalize their findings and recommendations.

Based on the foregoing the Planning Commission makes the following findings and recommendation to the Town Board.

## **FINDINGS**

### **Ordinance Compliance:**

1. The Planning Commission reiterates and incorporates the CUP Description portion of this documents and makes the following findings:

The Site is located in the Exclusive Agriculture zone as provided at Article XXVIII D of the Wrightstown Zoning Code (WZC)

The use described in the CUP is an ethanol plant, bio-diesel plant, communal digester, pelletizing plant or other facility that processes raw agricultural commodities, agricultural by-product or agricultural wastes (received directly from farms) to produce bulk fuel or other bulk products listed as a permitted conditional use in Article XXVIII D (2) (b) 10 WZC

2. The CUP has the “Compatible Infrastructure” required by and is consistent with and each requirement of Article XXVIII D (2)(a) WZC as the CUP:

- a. significantly supports agricultural uses in the farmland preservation zoning district in direct and significant ways, making the CUP more suited to a farmland preservation zoning district than to an industrial or commercial zoning district;
- b. is a digester system and located in the farmland preservation zoning district consistent with the purposes of the farmland preservation zoning district as it processes agricultural commodities obtained from farms in the farmland preservation district;
- c. location in the farmland preservation zoning district is reasonable and appropriate, and superior to alternative locations, in that this location is desirable to achieve the efficiency of pipeline transport from neighboring farms, as specifically approved and supported by state law;

- d. is reasonably designed to minimize conversion of land, as it supports more efficient use of cow manure and encourages more freedom in open space use and otherwise encourages the maintaining of real estate as farmland by providing desirable alternative methods for manure disposal;
- e. does not substantially impair or limit the current or future agricultural use of other protected farmland in fact it encourages both by offering an efficient alternative manner of treating cow manure; and
- f. is planned such that construction damage to land remaining in agricultural use is minimized and repaired to the extent feasible.

### **Substantial Evidence regarding Grant or Denial**

While this CUP is located on private property, the size and logistics of the proposed use merits investigation to assure consideration and protection of the public health, safety and welfare to the extent that substantial evidence is available to address those concerns.

During the evidence collection meetings and public hearing few concerns were raised. Little substantial evidence supporting denial of the CUP was produced.

The principal objection to the CUP has been that the size of the proposed project is untried apparently leading to the conclusion that tried and true technology will not work properly at a larger scale. In response the Wisconsin DNR and Robert E. Lee both testified:

- 1. the technologies to be used in the CUP are tried and true technologies
- 2. the volume of the manure, is a concern that can be addressed by the permitting process
- 3. these conclusions are also consistent with those drawn by Tetra Tech in a commissioned financial feasibility review and the Wisconsin Public Service Commission in its grant review process
- 4. WDNR and REL both stated the operation is technically feasible
- 5. With regard to the technology, the Public Service Commission of Wisconsin found one of the strengths of the B C proposal was its feasibility.

The foregoing opinions constitute substantial evidence that the project is technically feasible. The Planning Commission so finds.

Another objection had to do with possible negative effects of the amount and constituency of the effluent. The planning commission believes the substantial evidence showed this concern was not supported by substantial evidence because:

1. The possible negative effects were not documented but were the opinion of one party.
2. Neither REL or the DNR found support for those conclusions offered by those opinions.
3. The effluent discharge is subject to the WPDES permit who has the authority to stop the discharge.
4. The effluent can, and in fact is designed to be returned to the contributors- no evidence was given that suggests that returning the water would be somehow difficult.
  - a. The system is designed with 4 pipes to facilitate bringing manure to the site and returning the brown water and clean water
  - b. The participating farms have a six month storage capacity for water storage

Concerns regarding odor and noise were raised. Mitigating those concerns are the following:

1. The site is located approximately ¼ mile from the nearest residence.
2. There are 3 residences within a ½ mile of the project.
3. It is in a depression mostly surrounded by trees.
4. The Site is ¼ mile from a mega dairy farm.
5. The Site is immediately across the street from the County land fill site.
6. The secluded location and surrounding uses, support the conclusion that this site is a desirable site for this type of operation with regard to impact on noise and odor issues.

Concern over abandonment of the project were raised. The Planning Commission believes these concerns are consistent with the public interest in avoiding dilapidated and unused properties. The Planning Commission, however, believes that concern can be adequately addressed by a condition providing for remediation upon abandon or discontinues of use.

Several other notice and operational concerns were raised that the Planning Commission believes affects the public health safety and welfare. As explained below, the Commission recommends several conditions that it believes are reasonable, consistent with the public interest and supported by substantial evidence.

In general support of the grant of the CUP is the following:

- The Grant funding for this project is the result of considerable investigation by the Public Service Commission of Wisconsin who concluded the project is feasible and awarded a \$15,000,000 grant to support the project. Their conclusion was based on the report and conclusion of a number of experts as listed in the Public Service Commission of Wisconsin decision to make the grant.
- The purpose of the grant was to find alternative, efficient manners of dealing with cow manure efficiently.

- The Wisconsin DNR issued a report regarding the Holland proposal that expresses their confidence in the technical feasibility of the project. For all relevant issues the Holland project and the CUP are comparable, if anything the Holland proposal was more technically challenging.
- 2 representatives of the DNR stated to the Planning Commission that they have reviewed the CUP and find it technically feasible as has REL and Tetra Tech.
- The construction project will employ people from construction workers to engineers, giving positive support to the community's economics on the short term as provided in the materials accompanying the application.

The Planning Commission therefore finds that substantial evidence supports the granting of the CUP however believes a number of conditions, supported by substantial evidence, are necessary to protect the public interest. The substantial evidence supports that that standards and concerns applicable to the CUP that have been raised and are supported by substantial evidence, can and will be addressed by the Applicant.

## **Required Conditions**

### **I. GENERAL**

Substantial evidence shows that the digester system proposed by the CUP is of unprecedented size and combined technology indicated that if not used for the proscribed purpose there would be little, if any alternative use of the structures needed for the CUP. Those facts raise concern over the uncertainty of the process and the municipal interests in protecting the health and safety of its citizens. The Planning Commission discussed their concerns at length and generally outlined the concerns, public interests' protection and how to address the concerns in exhibit 2.

To secure those public interests the Town believes it is reasonable and necessary to impose the following conditions to insure that the approved of technologies and those reviewed in the CUP process are those implemented and continued by the Applicant and Owner. Based on the information collected, the Planning Commission believes the following conditions are reasonable and consistent with legitimate municipal interests and are supported by substantial evidence.

1. All construction and operations must be in compliance with the representations found in the Application. Of particular concern, without limitation by enumeration, are the following:

- a. The raw material used in the digestion process shall be cow manure only. There shall be no other raw materials brought to the Site, nor shall there be any other system or procedure used at the Site that is not described in the Application.
- b. The digestion system shall be anaerobic. It shall also be covered.

- c. From 55 to 70% of the manure will be pumped to the Site; the remaining manure will be brought to the site by truck in compliance with a plan disclosing the contributing locations, their approximate load, and the route to be taken to and from the site.
  - d. Gas pressure at the site at the gas line connection point and along the gas pipeline shall be monitored.
  - e. The anaerobic system shall be driven by explosion proof motors in classified areas.
  - f. All aspects of the design of the structure, including materials to be used, shall be adhered to, specifically including the passive containment system designed to catch and retain 110% of the largest single tank capacity, unless a higher requirement is made by a reviewing entity.
  - g. The Application estimates average amounts of manure processing, gas production and effluent discharge quantities per day based on the design of the facility. Prior to any expansion of the operation on the property or any change in the operations that results in significant changes in the estimates, the Applicant shall submit to the Town a plan or description which identifies the intended changes for Town review and approval, which approval shall not be unreasonably withheld.
2. The operation shall be in full compliance with all applicable state, federal and local laws.
3. Prior to the commencement of construction, applicant shall obtain all required permits, including without limitation by enumeration, the following:
- a. WPDES permit.
  - b. WDNR air quality permit.
  - c. WDNR storm water permit.
  - d. WDNR erosion control permit.
  - e. WDNR Chapter 30 permit.
  - f. WDNR high capacity well permit (if necessary).
  - g. Brown County POWTS permit.
  - h. Brown County shore land permit.
  - i. Public Service Commission of Wisconsin Pipeline approval and permit.
  - j. State of Wisconsin building approval and permit.
  - k. Department of Agriculture Trade and Consumer Protection Scale permit (this permit shall not be required prior to commencement of construction but shall be required prior to commencement of operations).
  - l. Wrightstown Building permit.

Applicant shall obtain and maintain all permits throughout the time the process is in operation. Applicant shall notify the Town of any violation of any of the permits or outstanding orders with regard thereto within 3 business days of receipt and shall diligently address any orders. Applicant shall annually provide the Town with proof that the continuing permits are in place.

4. Applicant shall provide a detailed site plan describing landscaping, lighting security measures, signage, pipeline routing and location of structures and substantial conformity with those already provided with the application. The town shall have the right to review and approve such site plans and may condition the approval upon reasonable conditions.

## II. PUBLIC HEALTH SAFETY AND WELFARE

### **Environmental issues and operations preparedness**

The size of the propose use, regarding the amount of manure being processed on a daily basis, the extraction of natural gas, the logistics of manure delivery and water/fiber removal all raise legitimate concerns for the public safely with regard to unsanitary material spills and pollution, traffic and road use, explosion and site maintenance, notice to the public and the Town to address these concerns and water pollution. While many of these concerns are addressed in the permitting process, the Planning Commission believes these concerns are legitimate municipal concerns supported by the substantial evidence of the volumes and processes stated in the application. For those reasons, the Planning Commission believes the following conditions are supported by substantial evidence and should be imposed in the public interest.

1. The system shall be constructed with a passive containment system sufficient to catch and retain 110% of the largest single tank capacity.

- a. Applicant shall comply with the spill prevention and emergency response plans approved by the State of Wisconsin.
- b. Alarms shall be installed to monitor the digester 24 hours a day and an individual with authority to supervise emergency response shall be at the premise or on-call 24 hours a day.
- c. Applicant shall compose and submit to the Town for its review and approval of protocol addressing the steps to be taken to address any spill at the digester through the pipeline and connection point.

2. Natural Gas Extraction System. In the interests of public safety and welfare to limit the possibility of explosion at the site, pipelines and connection station and to provide for a procedure to address any odor or other concerns the Planning Commission believes the following conditions are reasonable and supported by substantial evidence

- a. The Natural Gas Extraction System shall be limited to gas extracted from the manure in the digesters and no other source.
- b. Gas pressures at the site shall be monitored on a 24-hour basis and an internal flare system shall be used to lower any gas pressure and minimize the chance of odor escaping from the gas process.
- c. Gas pipelines will be monitored 24 hours a day and will have tracers to facilitate prompt response to any breach or leak from the system.
- d. The connection point shall likewise be monitored and shall be kept and maintained as required by the Public Service Commission of Wisconsin permit.
- e. Applicant shall compose and submit to the Town for its review and approval of protocol addressing the steps to be taken to address any leak or other breach of the gas extraction system from the extraction point at the digester through the pipeline and connection point. Such protocol shall, at a minimum, include the number for 24-hour contact for reporting any leak or breach and the assets available to respond to such situation.

3. Water Quality and Volume. In the interest of protecting the East River watershed and hatchery near the site, and diminish the possibility of pollution at or around the site and to provide for procedures to address any concerns that may intimate those concerns, the Planning Commission believes the following conditions are supported by substantial evidence:

- a. Any effluent discharged into the East River Watershed shall be monitored as to quality and quantity.
- b. All such monitoring, whether required by Wisconsin DNR or not, shall be independently tested and the results thereof shall be forwarded to the Town on a monthly basis for review by the Town's consultant at the discretion of the Town.
- c. The Applicant shall produce a protocol addressing contingencies if water discharge exceeds the WPDES limits and shall present it to the Town for its review and approval.

4. Manure Delivery/Return Pipelines. To provide for proper oversight of the delivery system and address any spills or leaks in the system that could cause or contribute to pollution in the area, the Planning Commission believes the following conditions are reasonable and supported by substantial evidence:

- a. All pipelines shall be located within county utility easement right of ways or in private easements. Prior to any construction, Applicant shall provide the Town with documentation showing the right to use such right of way and any necessary approvals.
- b. The manure pipelines shall be monitored and shall have tracers located on them to assist in discovering any spill location.

- e. Applicant shall compose and submit to the Town for its review and approval of protocol addressing the steps to be taken to address any leak or other breach of the Manure delivery/return pipelines from the digester to its destination. Such protocol shall, at a minimum, include the number for 24-hour contact for reporting any leak or breach and the assets available to respond to such situation.
- f. Any brown water produced at the Site to be returned to a contributor shall be transported in the same manner it was received at the Site.
- g. The Town shall permit the use of those portions of the Mill Road utility easement for the gas and manure pipelines under the terms of this agreement.

5. Applicant shall be responsible for the cost of any spill, leak or breach in the gas extraction system and pipeline including the connection station, any spill or overflow of manure at the Site, any leak or breach of the manure pipeline or any other like spill or contamination caused by and attributable to the operation at the Site and shall take prompt action to remediate any such circumstance.

### III. SECURITY

As the Site is located in a remote area, the Town's interest in protecting property and seeing to it that an operation dealing with high volumes of waste are secure and any vandalism deterred. The Planning Commission believes the following conditions are reasonable, supported by substantial evidence and address the foregoing municipal concerns:

- 1. There shall be fencing surrounding the operation.
- 2. There shall be securely locked gates and the Site shall have posted "No Trespassing" signs.
- 3. There shall be one entrance for ingress and egress to the Site.
- 4. The Site shall be monitored by camera surveillance.
- 5. The entrance and all roadways on the Site shall be of an impervious surface.

### IV. TRAFFIC AND ROUTING

The amount of truck traffic required by this use, the transportation of waste production and materials on the roadways, the preservation of town roads and control over the volume and constituency of the waste at the Site prompt the following conditions which the Town believes are reasonable and supported by the evidence in the record.

- 1. Applicant shall prepare a plan and submit such plan to the Town for review and approval which shall show the routing for manure traffic on Town roads. The plan shall designate

all contributors to the operation and indicate the routes and number of daily trips. Truck traffic shall be consistent with the plan will be limited to the number and origin of trucks referenced in the plan (currently 55 to 59 truck trips per day). The Town anticipates and encourages the use of the communal digester by area farms as provided in the plan and recognizes that the number of truck trips may fluctuate. However the plan shall not be amended without the prior review and approval of the Town which approval will not be unreasonably withheld.

2. All truckers delivering and removing materials from the Site shall be on contract directly with the Applicant or with one of Applicant's contractors in a manner to allow Applicant to direct and control the truck operators.

3. Applicant shall require all of its' truckers to refrain from engine braking while hauling manure and while empty or transporting other materials back to the original site.

4. Any truck carrying dried fiber from the Site will be covered.

5. All other trucks carrying materials to or from the Site, other than those carrying dried fiber, will be closed tankers.

6. The Applicant shall provide to the Town for its review and approval a protocol for addressing spill clean-up and other complaints regarding the truck traffic

7. Applicant shall be responsible for the cost of any spill of waste or fiber during transport to or from the Site or when transporting fiber to locations outside the Town.

8. Prior to commencement of operations, the Town and Applicant shall enter into a road use agreement that shall provide, at a minimum:

a. The Town's consultant shall assess the condition of the Town roads to be used under this agreement and shall furnish a copy to the parties prior to the commencement of operations, the Applicant to pay the cost of the inspection.

b. The Applicant shall be responsible for cost of all road improvements and modifications as recommended by the Town's consultant.

c. The towns consultant shall make annual review of the Town roads used to assess the need for any maintenance or repair. The Applicant shall pay the cost of the inspection

d. The Applicant shall pay for all maintenance and repair of those portions of town roads used for the CUP at its sole cost. Such repairs to be made within a reasonable time of the town's demand for repair.

e. The agreement shall provide for security for payment and manner of performing improvements in a manner satisfactory to the Town.

f. The agreement shall address the issues in the form attached in exhibit 8.

## V. ACCESS/GENERAL COMPLAINTS

To provide for a prompt and efficient manner of addressing citizen concerns of public safety and welfare and to minimize any damage that could be caused by a catastrophic event or public inconvenience, the Planning Commission believes the following conditions are reasonable and supported by substantial evidence.

1. Town officials, including the fire department, zoning administrator and building inspector shall be permitted to enter the premise for inspection purposes with 24-hour notice. The inspectors shall be accompanied by employees of the Applicant during any inspection.

2. Applicant shall acquire all equipment, provide all requested training and otherwise comply with all conditions expressed in the fire department condition demands (see attached exhibit 7) at Applicant's sole cost.

3. The system shall operate at 75 decibels or less as measured at the operations site line, except in emergency situations where repairs or other exigency may require machinery that is louder. Any such emergency or exigency shall be promptly reported to the Town.

4. The applicant shall draft and submit to the Town for its review and approval a protocol for addressing any noise or odor complaints concerning the operation of the facility. The plan shall include a 24- hour contact for such plan and a procedure under which the Town can properly review the situation and expedite a solution.

## VI. COMMUNITY RELATIONS/DURATION

To provide for oversight of compliance with the CUP, provide for citizen input and clarify the parameters of the CUP the public interest requires the following conditions:

1. Applicant and owner shall participate in annual public meetings to discuss the operations of the CUP, its impact on the community, and its record of compliance with the CUP. This condition shall not prohibit the Town from demanding a meeting if there are allegations of a material breach of the conditions of the CUP or continued minor violations of the CUP, as determined at the discretion of the Town.

2. The conditional use permit shall be for a twenty-year duration and shall be subject to review every 5 years from the anniversary date of first operation to determine if there has been material breach of the CUP. Material breach of the permit may result in revocation of the CUP. Material breach may include:

- a. Introduction of raw materials other than cow manure to the digestion process
- b. Discontinuance of operations for a period of greater than 1 year where, as determined at that discretion of the Town, there are no efforts to restore operations
- c. Failure to pay the PILOT
- d. Repeated failure to follow protocols to the extent that the cure provision has been invoked

- e. Failure to construct the facility in substantial compliance with approved plans
- f. Permitting a required permit to lapse without correction within the cure period
- g. Substantial change in operations effecting material output without prior approval

3. The CUP shall include a breach and cure provision requiring compliance with the terms of the CUP and indemnification as provided in the required protocols. Failure to comply with any required clean up or duty provided in the protocols within the time provided by the cure provision shall allow the Town to pursue any remedy allowed by law.

## VII. HIGH CAPACITY WELL

To protect the water source of adjoining property owners, the Planning Commission believes the following conditions are supported by the record and should be imposed:

- 1. If Applicant determines it needs to drill a high capacity well on Site, prior to drilling and placing the well Applicant shall have engineered a cone of influence study to determine draw effect on adjacent property owners, including the Town.
- 2. No high capacity well shall be constructed until The Town is satisfied no remediation is necessary or that any necessary remediation has been adequately addressed.
- 3. Applicant shall be responsible for the actual cost of any remediation if necessary.

## VIII. USE OF SITE/CONTINUED OPERATION AND INSURANCES

Substantial evidence shows that the digester system proposed by the CUP is of unprecedented size and combined technology indicated that if not used for the proscribed purpose there would be little, if any alternative use of the structures needed for the CUP. In the interest of securing productive use of the real estate in the Town and to avoid the possibility of abandoned or blighted conditions of the Site, and to provide for exigencies that may occur during the operations, the Planning Commission would impose the following conditions:

- 1. Owner and Applicant shall provide the Town with proof of the Applicant's permission to use the Site in the manner described in the CUP application.
- 2. Applicant and owner shall provide the Town with a bond or other security approved of by the Town sufficient in type and amount to assure that resources will exist to pay for the property and sanitary closure of the Site, and remediation of the Site if digester operations discontinue.
- 3. Applicant shall provide and maintain a pollution insurance policy for and in the amount of \$3,000,000 and a general liability policy for \$3,000,000 to pay the cost and environmental remediation, bodily injury and property damage, and cleanup costs in the event of

any accident at the digester or pollution created by applicant or third party on behalf of the applicant at the Site or any of the pipelines referenced in the application. The Town of Wrightstown shall be named as an additional insured in any such policy.

4. The Town shall be given notice of any proposed transfer of the Site or the CUP and shall review the CUP to determine if the transferee will have the ability to comply with the CUP prior to any such transfer. Transfer shall not be unreasonably withheld.

## **IX. ADMINISTRATIVE COSTS AND PILOT**

The cost of processing this permit and overseeing the operation in the interest of the public health, welfare and safety are attributable solely to this project and should not be paid by the general tax levy. The Planning commission believes the record of the review of this process supports imposing the following conditions:

1. To the extent that the operation, real property and assets thereon are exempted from real or personal property taxes, the Applicant shall pay the Town a payment in lieu of taxes (PILOT) equal to the amount of the Town's share of taxes on real estate and improvements if they were not exempt from taxation. (estimated at \$177,000 for 2019). The payment shall be made in a single installment within 60 days of notice from the town of the projected mil rate for the next year.

2. In addition to any PILOT, the Applicant shall pay an amount not to exceed \$40,000 in one payment prior to the commencement of construction, any and all administrative costs suffered by the Town in processing this conditional use application, including actual attorneys' and engineer fees expended, actual costs of publication, and any other costs actually incurred by the Town in processing this CUP. The town shall submit invoices showing the costs incurred.

3. In addition to any PILOT, applicant shall pay up to \$24,000 per year toward costs incurred by the Town in administering the CUP, including, specifically, costs of engineering, review and advice.

### **Performance of Conditions:**

The Applicant has been present at all the meetings where the Planning Commission reviewed exhibit 6 and discussed the conditions to be imposed. The Applicant has agreed to meet all of the requirements and conditions specified above.

### **Recommendation:**

Based on the foregoing, the Planning Commission recommends the granting of the CUP to the Applicant and Owner for the Site subject to the foregoing conditions; further that the CUP shall

be reduced to writing and executed between the parties prior to commencement of construction activities. A memorandum of the CUP may be filed with the Brown County Register of Deeds.

**EXHIBIT B**  
**DOCUMENTS OF RECORD**

## Documents of Record

- During the review of this matter, many documents were collected and reviewed by staff for discussion before the board.
  - For example, the entire file of the Town of Holland regarding their review of the B C Organics proposal for property within Holland was received and reviewed by staff.
  - All those records are available on the Town web site or at the Clerk's office for review
  - Many of those documents were forwarded to the Commission.
  - The following is a list of the documents staff forwarded to the Commission
- The CUP application form of BC organics
  - I note for the record that the application is for land within the Agricultural Farmland Preservation Zone (AG-FP)
  - The AG-FP lists as a permitted conditional use at Article XXVIII D (2) (b) 10 of the Town or Wrightstown Zoning Code :
    - An ethanol plant, bio-diesel plant, communal digester, pelletizing plant or other facility that processes raw agricultural commodities, agricultural by-product or agricultural wastes (received directly from farms) to produce bulk fuel or other bulk products.
- The materials accompanying the application
  - Application Notebook
  - BC Organics Project summary documents
  - Community Digester Economic Impact Analysis
- The Town of Wrightstown CUP supplement form
- The Town of Holland January 7, 2019 plan commission packet including among other things
  - BC Organics Application
  - Holland Zoning Ordinances
  - Memo from Town of Holland legal counsel
  - Correspondence between attorneys
  - A terms proposal
  - Correspondence from a 3<sup>rd</sup> attorney
  - Report of an Environmental Engineer
  - The Recommendation of the Town of Holland Plan Commission
- May 20 2019 Report of Town of Holland legal counsel and attachments including, among other things:
  - Proposed conditional use agreement
  - The Draft business plan of the Springfield Digester Project in Dane County
- The packet from the August 5, 2019 meeting of the Wrightstown Planning Commission
  - Questions collected at July 15 meeting, raised by county and raised by a board member
  - Opinion of City Assessor on value impact
  - Initial route proposal
  - DNR summary document on Town of Holland proposal
  - County RFP pertaining to Town of Holland Proposal
- Updated route proposal
- Final Fire Department Conditions and Equipment List
- USDA 9003 Loan Guarantee Feasibility Analysis
- Final Draft of the Conditional Use Analysis Chart
  - The drafts from the August 23 and September 3 meetings are also available

**EXHIBIT C**  
**FIRE DEPARTMENT CONDITION REQUIREMENTS**



## **GREENLEAF VOLUNTEER FIRE DEPARTMENT, INC.**

**1657 Day Street P. O. Box 57 Greenleaf, WI 54126-0057**

**Emergencies Dial: 911**

**Administrative: 920-864-2200 Fax Line: 920-864-2622**

**Email: [greenleaffire@new.rr.com](mailto:greenleaffire@new.rr.com)**

1. BC Organics agrees to:
  - a. Fire inspections per local ordinance and Wisconsin Statute §101.14(2)(c)(1); and,
  - b. Comply with any orders to correct conditions liable to cause a fire.
2. BC Organics agrees to:
  - a. Purchase and install a KnoxBox per Fire Department guidelines; and,
  - b. Provide current keys/cards and or codes to all restricted areas.
3. BC Organics agrees to:
  - a. Provide the Fire Department with numerous contact names including phone numbers; and,
  - b. Update that list on a yearly basis or as needed.
4. BC Organics agrees to provide a current emergency response manual to the Fire Department and have one available on site that would cover all conceivable responses including a list of sub-contractors that would be called in to assist.
5. Per applicable law, BC Organics agrees to:
  - a. Properly store and label all hazardous materials; and,
  - b. Provide Safety Data Sheets to the Fire Department in addition to having them on site.
6. BC Organics agrees to install and maintain a large sign on the front gate with:
  - a. What number to call in the event of an emergency (e.g., EMERGENCY - CALL 911);
  - b. Name of the facility;
  - c. The physical address; and,
  - d. A 24-hour per day emergency contact number.
7. BC Organics agrees to purchase, install and maintain any sign(s) requested by the Fire Department and/or EMS for the safety health and wellbeing of personnel during emergency operations (e.g., "Do not close this valve", "Do not enter", "Do not turn fan off", "Respiratory protection required", "Machinery starts automatically").
8. BC Organics agrees to purchase and maintain a windsock at the facility.
9. BC Organics agrees to:
  - a. Install and maintain a pipe and valve from their 50,000-gallon clear/clean water reservoir to a point just outside of the building for onsite fire protection;
  - b. Work with the Fire Department on the necessary configurations (e.g., pipe/valve size, reservoir venting) to maintain a water flow of 1,500 GPM until such time that the reservoir is empty;
  - c. Provide a large "No Parking – Fire Department Connection" sign at the draft connection; and,
  - d. Keep the connection area fully accessible year-round.
10. BC Organics agrees to:
  - a. Purchase all necessary safety/rescue and related equipment for the facility per Exhibit A;
  - b. Replace it as needed, required or at the end of its service life;
  - c. Keep this equipment on sight, in a locked and properly maintained trailer;
  - d. Park the trailer in an area that remains fully accessible year-round;
  - e. Not use such equipment except for training or emergency purposes;
  - f. Properly store and maintain such equipment per manufacturer and recognized standards;
  - g. Test and certify such equipment as required and provide a copy of those tests/certifications to the Fire Department upon completion;
  - h. Repair/retest or replace any safety/rescue equipment that fails testing/certification as soon as possible;
  - i. Check and inventory such equipment monthly and provide a copy of this report to the Fire Department on a yearly basis;
  - j. Allow the Fire Department to come upon the property to inspect and/or train on such equipment; and,
  - k. Purchase any other safety/rescue equipment now or in the future that may be needed (does not include fire apparatus).
11. BC Organics agrees to provide and/or pay for a qualified instructor to fully train and provide recertification courses to the Fire Department and/or EMS on confine space entry and any other training that would be necessary at the facility in the event of an emergency.
12. BC Organics agrees that upon reasonable notification from the Fire Department and/or EMS, they will provide an employee that is familiar with the facility's operations for training, walkthroughs and/or pre-planning purposes.
13. BC Organics agrees to meet with the Fire Department and/or EMS when asked and to act in good faith on matters not covered by this permit.

## CONFINED SPACE RESCUE EQUIPMENT LIST

PRODUCT NAME / DESCRIPTION	QUANTITY
<b>Rescuer Equipment</b>	
RescueTECH VANGUARD II Med/Lg	6
PRO Leather Rescue Glove	6
Vertex II Vent Helmet Red	6
Helmet Light Dual LED	6
Ear Plugs	10
Equipment Bag	2
Radio Chest Harness (using intercom system instead)	0
<b>Main Line Bag</b>	
1/2 inch Rescue Rope 300' Red	1
Anchor Sling 8', 1300lb working load	1
Webbing 20' Red	1
Standard "D" Steel Carabiner 50kn	7
Rigging Plate	1
Rescue Bar Rack W/hyperbar	1
Prussik Minding Pulley	2
8mm Prussik Matched Set	2
Rope Bag Large Red	1
MPD	1
Anchor Plate	1
<b>Belay Bag</b>	
1/2 inch Rescue Rope 200' Blue	1
Anchor Sling 8', 1300lb working load	1
Webbing 20' Red	1
Standard "D" Steel Carabiner 50kn	6
Prussik Minding Pulley	2
8mm Prussik Matched Set	2
Rope Bag Large Blue	1

Rigging Plate	1
<b>Softgoods</b>	
8mm Prussik Matched Set	1
Webbing 1 inch 12' Yellow	10
Webbing 1 inch 20' Red	10
Webbing 1 inch 30' Blue	2
Webbing 1 inch 50'	1
Equipmet Bag	1
<b>Rescue Equipment</b>	
Sked Litter	1
Stokes Bridal	1
Pick Off Strap	1
Back Board	1
Back Board Straps	1
CMC Aztek	1
SKED EVAC Tripod	1
Con-Space Comm. System for 5	1
Ram Fan 12" w25' hose 120vac	1
LSP Halfback	1
LSP Lift Bridle	1
Light Sticks	10
90' Winch and bracket	1

**EXHIBIT D**  
**ROAD USE AGREEMENT**

## **Road Maintenance and Repair Agreement - Town of Wrightstown and BC Organics LLC**

This Road Maintenance and Repair Agreement (the "Agreement") is entered into this \_\_\_ day of May, 2020, between the Town of Wrightstown, a Wisconsin Town organized and existing under Chapter 60 of the Wisconsin Statutes (the "Town"), with its offices located at 1527 Day Street, Greenleaf, Wisconsin AND BC Organics, LLC, a Wisconsin limited liability company ("BCO"). The Town and BCO may be referred to as "Party" or "Parties" as the context may require.

The Parties represent as follows:

- A. BCO intends to construct a manure digester on an approximately 25 acre site located on Parcel W-382 in the Town (the "Digester") and operate it to generate renewable natural gas, process manure (the Project). BCO will retain a construction contractor to construct the Digester.
- B. On completion of construction of the Digester, BCO and its customers, contractors, subcontractors, and suppliers (collectively "Customers") will need to use roads, bridges, and culverts that are maintained by the Town or over which the Town has jurisdiction and authority, which roads specifically include those identified in the Digester Routing Plan (as defined and illustrated in Exhibit A) as well as any other roads which the Town directs BCO to utilize as an alternative to those specified in the Digester Routing Plan for reason of detour or otherwise (the "Roads").
- C. The Town, in accordance with the Town Code, has adopted Ch. 348, Wis. Stats., and has the authority to regulate the use of Town roads, and authority under sec. 86.07, Wis. Stats., to recover damages for the cost of repairs to Roads which result from operations of an identified party.
- D. BCO will be using the Roads of the Town by certain vehicles operated by BCO or on its behalf, and the Town is willing to authorize the use. This Agreement establishes terms and conditions for use of the Roads by BCO and/or its Customers.
- E. The Parties have determined that it is in the mutual interest to set forth the terms and conditions relating to the issuance of the required permits for the use of the Roads of the Town.

Therefore, the Parties agree as follows:

1. Effective Date; This Agreement shall become effective upon its execution by both of the Parties (the "Effective Date").
2. Routing Plan and Road Use. The parties have agreed to a plan for routing of Digester construction, delivery and other traffic using certain - roads (the "Routing Plan a copy of which is attached as Exhibit A). Some of the roads depicted in the Routing Plan are roads within the Town's jurisdiction and control (Roads). During the term of this Agreement, and subject only to the terms and conditions set forth herein, BCO and its Customers shall enjoy and have the right to use the Roads without restrictions, other than those contained in Wisconsin Statutes, BCO understands and acknowledges that this Agreement applies solely to the Roads, as depicted in the Routing Plan.
3. Road Assessments. Commencing with the start of operations of the Project and annually on each 12 months thereafter the Town's Engineers, Delmore Consulting, or designee (Engineer), will perform an assessment of the condition of the Roads to determine the Roads' condition and repair, determine any severely damaged or unsafe portions of the Road and establish a Pavement Surface Evaluation and Rating (PASER) for each Road. BCO may perform its own assessments. The Engineer and BCO will exchange all records generated in their assessments of the Roads. The reasonable expenses related to activities by the Engineer incurred as a result of the assessments are to be paid by BCO, up to a maximum annual cost of \$10,000.00.
4. Road Reconstruction. If the Engineer determines, in any annual inspection, that the annual inspection results in a PASER of 4 or less for any Road, the Town may, require BCO to reconstruct the road to full compliance with Town standards and/or to make such other repairs as the Town in its discretion deems necessary to preserve the Road to the extent such repairs are recommended by the Engineer (the Work). To the extent required by law and unless the condition is such that the Town Board determines immediate repair is necessary, the Work shall be let by bid as a public project as provided by state law. BCO shall bear the full cost of the Work. The Work shall be completed within one year of notice of the PASER reading to the Parties by the Engineer.
5. Unsafe Conditions. If it is determined by the annual assessment of the Engineer or at other times during the year, in the reasonable discretion of the Town Board that any Road on portion thereof, appears to be unsafe for public use, impassable or otherwise significantly damaged to the point where the condition may deteriorate to an unsafe condition if not promptly repaired, the Town may request its Engineer to assess the Road to determine the condition of the Road. The cost of such assessment and related efforts by the Engineer shall be paid for by BCO, to the extent of the annual \$10,000.00 limitation on Engineer costs referred to in paragraph 3 above. If the Engineer determines that the Road or portion thereof is in a condition described in this paragraph, the Engineer shall recommend actions

to address the condition. The Town through its Chair shall notify BCO who shall immediately inform the Town of its intent with regard to the needed repairs. If the Road requires immediate repair determined at the discretion of the Town Chair, the Chair shall so inform BCO giving BCO the opportunity to immediately repair. If BCO does not timely respond and repair the Town may make the repairs and bill the cost of the repair to BCO.

6. Routine Maintenance. Nothing in this Agreement shall require BCO to perform or bear the cost of routine maintenance (crack filling, plowing, right of way mowing or other scheduled or commonly performed tasks that are intended to extend the life of the Road and appearance of the right of way). This paragraph does not relieve BCO from responsibilities to remedy any spills on the roadway or other damage or condition that was directly caused by BCO's use of the Roads.
7. Weather and Thaw Conditions.
  - (a) By written notice to BCO, the Town may limit or impose conditions on the use of the Roads by BCO for seasonal reasons, or if weather or other conditions beyond the control of the Parties require the same; provided, however, that such conditions apply generally to similarly situated commercial enterprises and that the Town furnish as much advance notice to BCO of such conditions as is reasonably practicable under the circumstances.
  - (b) Except during the Spring Thaw Season identified in subparagraph (c) below, BCO shall have a general permit which authorizes BCO or its Contractors to operate vehicles with a gross weight of 80,000 pounds or less on the Roads.
  - (c) Spring Thaw Season. If the Town posts its roads for lower weight limits during the spring of the year, the Notice shall be in the form attached to this Agreement as Exhibit B. During that season, BCO and its Customers shall comply with the reduced seasonal weight limits on the Roads and use such roads as are designated as appropriate seasonal routes; provided that BCO has received reasonable advance notice of any such seasonal weight limits, and provided further that such seasonal weight limits generally apply to all similarly situated commercial businesses utilizing the Roads.
  - (d) Overweight Vehicle Permits. BCO and its Customers shall apply for special trip permits before operating any vehicle on the Roads with a gross weight in excess of 80,000 pounds. BCO shall comply with the conditions and pay fees associated with such special trip permits.
8. Term. The term of this Agreement shall commence as of the Effective Date and shall continue for a period of twenty (20) years thereafter. This Agreement will be automatically renewed for additional periods of five (5) years, unless either Party furnishes written notice to the other Party of its desire not to renew this Agreement at least ninety (90) days prior to the expiration hereof. This Agreement was negotiated in contemplation of the Digester having sixteen (16) digester units for manure. It was also negotiated in contemplation of dairy farms being serviced by the Digester. If BCO wishes to add additional farms which

will generate additional truck traffic using the Digester, then BCO shall notify the Town and submit an amended Routing Plan to the Town. The Town shall review the amended Routing Plan within one month of its submission and shall approve the amendment so long as the amendment does not significantly alter the terms of the CUP as determined in the reasonable discretion of the Town. If the new route requires use of a Town road or roads, those roads will be added to the Roads in the Routing Plan and subject to the terms of this Agreement. Upon approval the amended Routing Plan shall be affixed to this agreement.

9. Other Rights. Precluded parties acknowledge that under Wisconsin law, the Town has certain rights to assess the cost of repairs and damages to its Roads which are caused by the operation of the Project. This Agreement is intended to act as a complete alternative to the processes set forth in section 86.07, Wis. Stats., or any other provision of law authorizing the Town to impose charges against property owners for Road damages.,

10. Decommissioning. If the Digester shall cease operation, damage to the Roads caused by any activity related to its decommissioning shall be the responsibility of BCO.

11. Hold Harmless.

(a) In accordance with sec. 348.25, Wis. Stats., BCO warrants its work or the work of any other person or entity providing services to BCO shall cause no material damage to any other property of the Town (not including the Roads, damage to which is covered by the other provisions of this Agreement). BCO shall indemnify, protect, defend, and hold harmless the Town from and against any material damages to property of the Town or others (not including the Roads) which may arise out of or be caused by any act of BCO, its Customers or any other person or entity providing services to BCO which may arise out of or be caused by the maintenance, presence, use, or removal of any equipment owned or provided by BCO. Each of the Parties shall indemnify, protect, defend, and hold harmless the other Party from and against any and all losses, claims, lawsuits, judgments, and demands whatsoever, including the cost of investigation and reasonable attorneys' fees, which may arise out of or be caused by any negligence of the indemnifying Party or its agents or any other person or entity providing services to the indemnifying Party.

(b) BCO's obligations for Road damage are limited to those provided for in this Agreement and those provided for in the CUP Agreement.

(c) This Agreement does not apply to claims asserted against the Town or its officers or employees for personal injury or claims other than damages to the Roads.

12. Insurance and Guarantees. BCO represents that, upon acquisition or lease of the Digester site and at all times thereafter during the term of this Agreement, it shall maintain Commercial General Liability Insurance including coverage for bodily injury, death and property damage with a limit of liability of not less than \$3,000,000 each occurrence and in the annual aggregate, containing such other terms and conditions as are commercially reasonable for the industry, and will name the Town as an additional insured on such liability policies in connection with the Digester. BCO acknowledges that pursuant to the

conditional use permit that will be issued in conjunction with the Digester, BCO shall provide additional guarantees or security, which shall secure its performance of this Agreement. The insurance policy shall contain a rider addressing any damage to the Roads caused by BCO or its agents caused during constructing, operating the Project or decommissioning the Project.

13. Relationship to Conditional Use Permit. To the extent applicable to the use of the Roads by BCO, Conditional Use Permit - issued to Owner and BCO by the Town for the construction and operation of the Project and the Conditional Use Agreement required thereby (the "CUP") is incorporated by reference into this Agreement. Compliance with this Agreement shall constitute compliance with road maintenance related conditions of the CUP and CUP Agreement. Breach of this Agreement shall constitute breach of the terms of the CUP and CUP Agreement and shall be subject to the cure and default provisions of the CUP Agreement. The financial obligations imposed on BCO by this Agreement are in addition to and are not to be offset against any or deducted from other financial obligation of BCO provided for in the CUP or CUP Agreement including specifically, and without limitation by enumeration the payment in lieu of taxes (PILOT).
14. Truck Operators as Agents. BCO shall have direction and control of all truck operators providing raw materials to and removing product (effluent, dry matting, brown water or other product produced at the site) from the site and shall be responsible for any damage caused to the Roads by such truck operators.
15. Damage to other Town Roads. Nothing in this Agreement shall suspend the rights of the Town to proceed under section 86.07, Wis. Stats., or any other provision of law authorizing the Town to impose charges against responsible parties for any damage to Town roads not covered by this Agreement.
16. General Provisions.
  - A. Entire Agreement. This Agreement constitutes the entire agreement between the Parties and supersedes all prior written or oral understandings or agreements. Failure of BCO or the Town to insist on performance of any of the terms and conditions of this Agreement, or to exercise any right or privilege contained in this Agreement, shall not be considered as waiving such terms, conditions, rights or privileges. No waiver shall be effective unless reduced to writing and executed by both Parties. This Agreement and its Exhibits may be modified only in a writing signed by the Parties hereto.
  - B. Third-Party Beneficiaries. This Agreement is intended to be solely for the benefit of BCO, and the Town and their successors and permitted assigns. This Agreement is not intended to and shall not confer any rights or benefits on any other third party not a signatory to this Agreement.
  - C. Severability. In the event that any provision of this Agreement is deemed as a matter of law to be unenforceable or null and void, such unenforceable

or void portion of such provision materially alters the rights or obligations of either Party under this Agreement. Even if there is a material alteration in the remainder of the Agreement, the Agreement shall continue in full force and effect as if such provision was not contained in the Agreement, but the Parties shall negotiate in good faith a new provision that will, to the extent practicable, restore the benefit of the bargain contained in such provision.

- D.     Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin. The parties agree that this Agreement does not impose an impact fee and that the charges hereunder are not governed by the impact fee provisions of Wisconsin law.
- E.     Remedies. Except as otherwise expressly set forth in this Agreement, the rights and remedies provided in this Agreement shall be in addition to all other rights and remedies available in law or equity.
- F.     Headings. The headings set forth in this Agreement are inserted for convenience and shall have no effect on the interpretation or construction of this Agreement.
- G.     Counterparts. This Agreement may be executed in any number of counterparts, and each counterpart shall have the same force and effect as the original instrument.
- H.     Authority. The parties hereby warrant and represent that they are acting with full authority of the principals they may represent and/or upon all proper approvals from the entities on behalf of whom they are signing for.
- I.     Assignment. BCO shall not be prohibited from transferring, selling, or gifting all or any part of the Digester to another party; provided however, the party to whom the Digester (or any part thereof) is being transferred assumes the BCO's responsibilities under the terms of this Agreement. BCO shall not be required to obtain approval of the Town for any such transaction, but shall provide the Town notice of transfer of ownership. BCO shall not be prohibited from transferring its rights hereunder to any other owner as they may choose, providing the party to whom the rights are being transferred assumes the BCO's responsibilities under this Agreement. Nothing in this Agreement shall affect the Town's rights with regard to any significant amendment to the conditional use permit issued to BCO.
- J.     Notices. Any and all notices, demands, and communications provided for herein or made hereunder shall be given in writing and shall be deemed given to a party upon actual delivery to such party or upon the second day from

mailing the notice via the US Mail to the party at the address designated below for such party (or such other address as a party may specify in writing to the other party from time to time):

If to BCO:

BC Organics LLC  
W175 N11117 Stonewood Dr.  
Suite 209  
Germantown, WI 53022

If to the Town:

Town of Wrightstown  
Attn: Town Chair  
1527 Day Street  
P.O. Box 175  
Greenleaf, WI 54126

With a Copy to:

Davis & Kuelthau, s.c.  
318 S Washington Street, Suite 300  
Green Bay, WI 54301

*[Signature page to follow.]*

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

BC Organics LLC

By: \_\_\_\_\_

Name: Duane Toenges

Title: CEO

Town of Wrightstown, Brown County

By: \_\_\_\_\_

(NAME & TITLE)

ATTEST:

\_\_\_\_\_

(NAME & TITLE)

Note: BCO or its designee will contact the Town chair prior to the initial use of any aforementioned roads. Potential liability begins on the date of initial use. Town use Permits are required for any vehicle in excess of 80,000 pounds.

## Exhibit A

### Digester Routing Plan

#### Routing Plan for Participating Farms that Require Use of Town Roads:

- 1.) New Horizons Dairy – 0.8 miles south on Rosin Road to County Road D. County Road D south to State Hwy. 96. State Hwy 96 east to State Hwy 32/57. State Hwy 32/57 south to County Road IL. County Road IL west to the project site.

#### Routing Plan for Participating Farms that Do Not Require Use of Town Roads:

- 1.) Wiese Brothers Dairy – Pumped to site.
- 2.) Country Aire Farms – Pumped to site.
- 3.) Rueden Beef – Pumped to site.
- 4.) Thompson's Gold Dust Dairy –State Hwy 32/57 south to County Road IL. County Road IL west to the project site.
- 5.) Plum Pride Holsteins - County Road D north to State Hwy. 96. State Hwy 96 east to State Hwy 32/57. State Hwy 32/57 south to County Road IL. County Road IL west to the project site.
- 6.) Brightside Dairy - County Road D north to State Hwy. 96. State Hwy 96 east to State Hwy 32/57. State Hwy 32/57 south to County Road IL. County Road IL west to the project site.
- 7.) Wall Dairy – County Road Z west to State Hwy. 32/57. State Hwy 32/57 north to County Road IL. County Road IL west to the project site.
- 8.) Brickstead Dairy – Wayside Road west to State Hwy. 32/57. State Hwy 32/57 north to County Road IL. County Road IL west to the project site.
- 9.) Grandview Dairy – Brandt St John Road north to County Road KK. County Road KK east to State Hwy. 32/57. State Hwy. 32/57 north to County Road IL. County Road IL west to the project site.
- 10.) Zirbel Dairy – Morrison Road north to Shirley Road. Shirley Road west to County Road W. County Road W south to State Hwy. 96. State Hwy 96 west to State Hwy 32/57. State Hwy 32/57 south to County Road IL. County Road IL west to the project site.

## Truck Routing Map

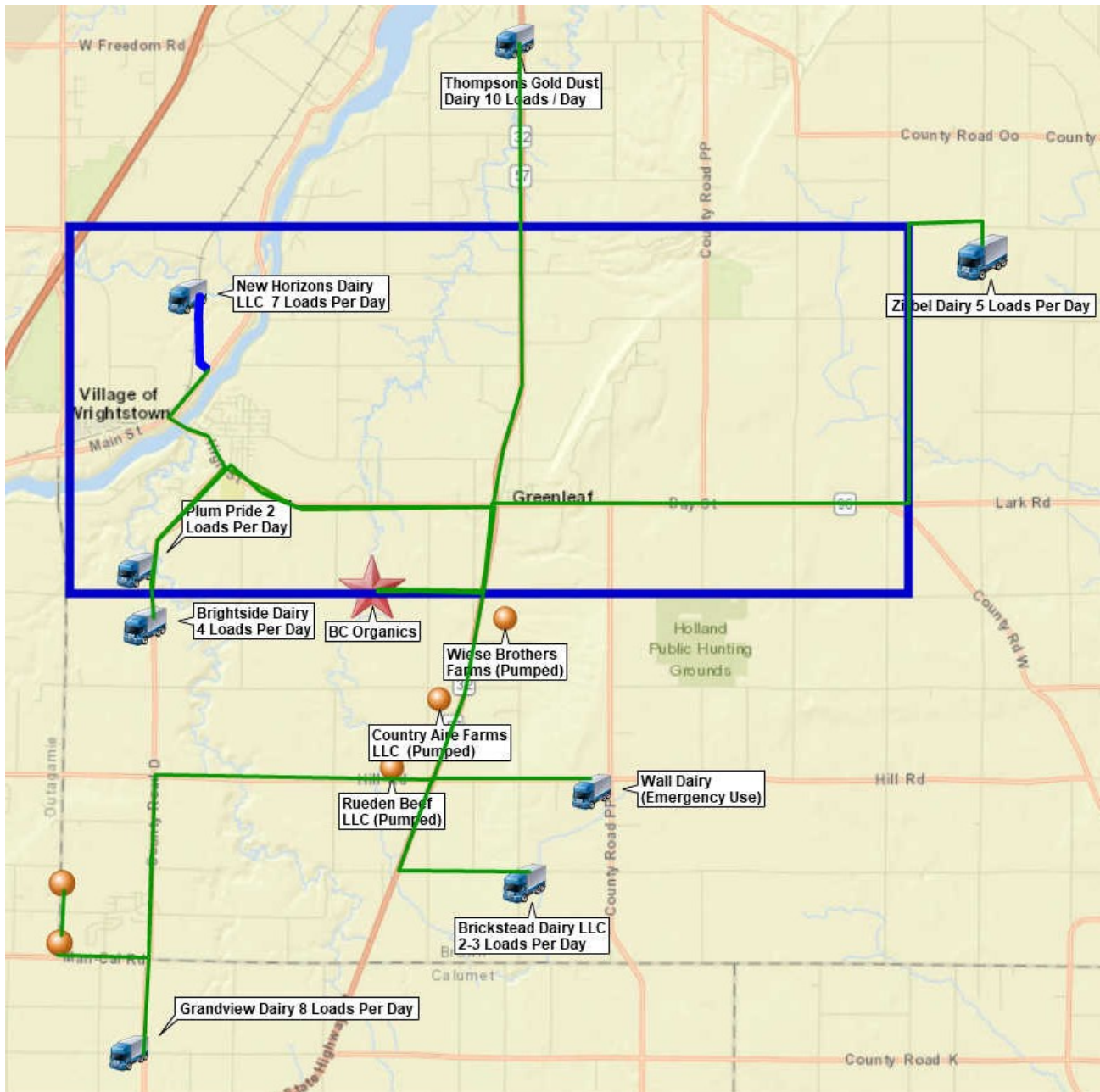


Exhibit B

Spring Thaw Weight Limits Notice Form