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Dear Department of Natural Resources and Environmental Control,

On behalf of Delawareans concerned about Bioenergy Development Group's ("Bioenergy") proposed anaerobic digester project on Enviro Way near Seaford, Food & Water Watch, Sussex Health & Environmental Network, and the Socially Responsible Agricultural Project (collectively "FWW") submit this letter to notify DNREC of several concerns regarding the absence of local approval for the project and the many environmental and public safety threats posed if Bioenergy were allowed to proceed. Bioenergy proposes to develop a large gas production facility with several anaerobic digesters, associated control technologies such as gas flares and an oxidizer, a wastewater treatment facility, and other infrastructure on an existing composting site. According to Bioenergy, these digesters will extract gas from up to 200,000 tons of waste annually from the region's poultry concentrated animal feeding operations ("CAFOs"), with much

of the remaining waste likely to be disposed of on local fields.

We understand that construction and operation of this new facility will require a variety of permits from at least three DNREC Divisions: Division of Air Quality, Division of Water, and Division of Waste and Hazardous Substances. We also understand that this will be the first anaerobic digester facility of its kind to be sited in Delaware, and therefore DNREC must assess technologies and potential environmental impacts not presented by any previous permitting process. Under these circumstances, ensuring that local approvals are properly obtained and the public's input has been considered are particularly important. FWW respectfully presents the following concerns:

- 1) Bioenergy has not obtained valid local approval for the project, and local communities may be cut out of that decision-making process;
- 2) The project would import and concentrate massive quantities of pollutants, far more than the local environment can handle;
- 3) The project would threaten local and regional water quality, which is already overburdened with pollutants;
- 4) The project would threaten local air quality; and
- 5) The project would threaten public safety.

In light of these concerns, FWW requests that DNREC decline to move forward with any permitting of this project, which could seriously threaten the health and wellbeing of Delaware's environment and communities.

**1. *Zoning for This Project Has Not Been Approved, and the County's Process Thus Far Has Illegally Excluded Public Participation***

DNREC's rules require that a project proponent obtain local zoning approval *before* applying for permits<sup>1</sup>—that has not happened here. Therefore, DNREC lacks authority to permit many aspects of Bioenergy's proposed digester facility at this time. Additionally, given the project's scale, its unique potential to pollute, and the very

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<sup>1</sup> *E.g.*, CDR 7-1000-1301 § 4.4.1.10 (applicant must submit “[p]roof that all applicable zoning approvals have been obtained”).

significant risks associated with a project of this sort, it is imperative that Bioenergy go through the proper process for obtaining local zoning approvals before DNREC begins evaluating permit applications. It has not yet done so for at least three reasons.

First, any assertions to DNREC employees by Bioenergy claiming it has already received a conditional zoning and land use approval from the Sussex County Planning & Zoning Commission (the “Commission”) are misleading. Bioenergy presented preliminary site plans and a project summary to the Commission in April, which the Commission took notice of and briefly discussed at its April 23, 2020 meeting.<sup>2</sup> In that meeting, the Commission appears to have considered Bioenergy’s submission but withheld actual approval, instead tabling the proposal until further details were available to the Commission.<sup>3</sup> Thus, Bioenergy does not currently have the Commission’s approval.

Second, the Commission clearly misapplied Sussex County code in even considering Bioenergy’s proposal to the limited extent that it did, rendering any implied approvals unlawful. The Commission improperly discussed this project as already covered by a previous, inapplicable zoning decision related to the site’s existing composting operations. The site that Bioenergy acquired from Perdue AgriBusiness, LLC hosts a preexisting composting operation that has received at least two previous Conditional Use (“CU”) approvals, but neither are applicable to this anaerobic digester project. In 1999, Sussex County approved a CU for the composting operation (CU 1314). In 2013, after a public hearing, the County approved a new CU for the site (CU 1962), also related to composting.<sup>4</sup> Both of these CUs state in plain terms that the use authorized is “strictly limited to the improvements shown on the” relevant site plans submitted during those proceedings. They go on to state that “[a]ny future additions, alterations or improvements to the Site Plan shall be subject to an application and public hearing to

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<sup>2</sup> [https://sussexcountyde.gov/sites/default/files/packets/04-23-2020%20Electronic%20Planning%20and%20Zoning%20Packet\\_0.pdf](https://sussexcountyde.gov/sites/default/files/packets/04-23-2020%20Electronic%20Planning%20and%20Zoning%20Packet_0.pdf).

<sup>3</sup> <https://sussexcountyde.gov/sites/default/files/audio/Planning%20Commission%20Meeting%20Audio%2004-23-20.mp3> (discussion starting at 3:10).

<sup>4</sup> Ordinance No. 2311, <https://sussexcountyde.gov/sites/default/files/LandUse/o2311.pdf>.

amend this Conditional Use.”<sup>5</sup>

Despite this clear and unambiguous condition, at its April 23 meeting, the Commission seriously entertained the idea that no new CU is required, with Commission staff opining that “a public hearing is not required” because the construction and operation of an entirely new gas production facility and associated infrastructure changes “do[es] not represent an expansion of the Conditional Use.”<sup>6</sup> This position is unsupportable under the clear terms of the preexisting CU as codified. If the Commission moves to actually approve the project under the composting facility’s CU, denying the public and the Sussex County Council the right to participate in this critical decision that will seriously impact local residents, the decision will be subject to legal challenge. Further, the Commission has not determined or apparently even considered whether the Sussex County zoning code provides any authority to approve a CU for the proposed gas production facility on this site.<sup>7</sup>

It appears to FWW that Bioenergy is attempting to push through local approval of this project by bypassing two critical elements in the process: public participation and final approval by the County Council. By pretending that construction of several anaerobic digesters, gas flares, an oxidizer, an emergency generator, a wastewater treatment facility, and other infrastructure is not a change to the preexisting site use—a *composting* facility—Bioenergy is attempting to gain local approval through a simple vote by the Commission, without any public involvement or the final approval by the County Council that is required when the Commission considers a new CU.

Third, because it is undeniably controversial, the Commission acted improperly in even considering the project in its April meeting. On April 28, just five days after the Zoning Commission meeting, the County Council recognized that consideration of

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<sup>5</sup> *Id.*; [https://sussexcountyde.gov/sites/default/files/packets/04-23-2020%20Electronic%20Planning%20and%20Zoning%20Packet\\_0.pdf](https://sussexcountyde.gov/sites/default/files/packets/04-23-2020%20Electronic%20Planning%20and%20Zoning%20Packet_0.pdf) (at page 6).

<sup>6</sup> [https://sussexcountyde.gov/sites/default/files/packets/04-23-2020%20Electronic%20Planning%20and%20Zoning%20Packet\\_0.pdf](https://sussexcountyde.gov/sites/default/files/packets/04-23-2020%20Electronic%20Planning%20and%20Zoning%20Packet_0.pdf) (at page 6).

<sup>7</sup> Sussex Cnty. Code §§ 115-19 (stating the purpose of the AR-1 zone to provide for “agricultural activities,” and to protect “watersheds, water resources, forest areas and scenic values and, at the same time, to provide for low-density single-family residential development, together with churches, recreational facilities and accessory uses”), 115-22 (listing the permissible conditional uses in an AR-1 zone, with very limited provisions for industrial CUs).

“controversial” land use decisions was, and had been, on hold due to COVID-19.<sup>8</sup> In June, the County Administrator further reported that “no land use applications that appear to be controversial or have the potential of drawing large crowds in the chambers are being scheduled at this time” because “[i]t would be impractical, irresponsible, and frankly nearly impossible to attempt to host a public hearing that could result in ‘standing room only.’”<sup>9</sup> The Commission included the Bioenergy project on its April agenda despite this County policy and the fact that it could not hold a public hearing or otherwise engage the public as is necessary for such a proposal. This action further demonstrates that the Commission has not followed an appropriate process or issued any sort of legally significant approval of the project.

Despite all of these irregularities, FWW understands that DNREC intends to accept Bioenergy’s permit applications despite a lack of local zoning approval, review them, and prepare letters for the Commission stating that DNREC intends to issue permits for the various aspects of the project. This plan is not only an inappropriate scheme to influence the Commission’s final decision, but also puts the cart before the horse and violates DNREC’s own rules. In short, because Bioenergy has not received proper zoning approval from Sussex County, a process which requires far greater evaluation and public engagement than has taken place to date, DNREC may not proceed with considering permit applications for the construction or operation of the proposed anaerobic digester operation.

## ***2. Bioenergy’s Project Would Concentrate Large Amounts of Waste, Burdening Local Communities and the Environment***

This project would involve importing vast amounts of waste not only from throughout Delaware but the entire region, threatening the environment and local communities with concentrated and inequitable pollution. Sussex County is already burdened with an extreme concentration of poultry CAFOs<sup>10</sup> and the associated pollution

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<sup>8</sup> <https://sussexcountyde.gov/sites/default/files/minutes/042820.pdf> (at page 3).

<sup>9</sup> <https://sussexcountyde.gov/sites/default/files/packets/Public.Packet.062320.pdf> (at page 37).

<sup>10</sup> <https://www.foodandwaterwatch.org/news/brand-new-see-americas-factory-farms-mapped-out>.

from these operations.<sup>11</sup> Bioenergy’s proposed project would dramatically exacerbate this problem by bringing even more waste to the area, much of which likely will be disposed of on local agricultural fields.

While anaerobic digesters process waste to extract methane gas, they do not “treat” poultry waste in a way that eliminates or even reduces many other environmental pollutants. Shifting the environmental harms caused by the poultry industry across the region to the water, air, and soil resources surrounding the proposed project is patently unjust, and not in the best interests of the Delawareans who will ultimately bear the burden of this pollution.

### ***3. Bioenergy’s Project Would Threaten Local and Regional Water Quality***

The proposed project would be a significant new source of pollution in a watershed already overburdened with pollutants. Bioenergy indicates that this site will discharge to Gum Branch and the Nanticoke River.<sup>12</sup> Gum Branch is under Total Maximum Daily Loads (“TMDLs”) for phosphorus, nitrogen, and bacteria.<sup>13</sup> These waterways are also part of the Chesapeake Bay watershed, and the State of Delaware has legal responsibilities to reduce pollutants entering the Bay under the TMDLs established by the U.S. Environmental Protection Agency.<sup>14</sup>

Bioenergy’s proposed project would import massive quantities of the very pollutants already plaguing local waterways and the regional watershed. In fact, according to the Natural Resources Conservation Service, digestate—the leftover material after gas extraction—may pose an even greater risk to water quality than raw

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<sup>11</sup> National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7180 (Feb. 12, 2003) (“poultry manure, if not properly handled and managed by the CAFO, can contribute pollutants to the environment and pose a risk to human and ecological health”); Pew Environment Group, Big Chicken: Pollution and Industrial Poultry Production in America 9 (2011), <https://www.pewtrusts.org/-/media/legacy/uploadedfiles/peg/publications/report/pegbigchickenjuly2011pdf.pdf> (recognizing that the poultry industry in Delaware poses a serious pollution problem).

<sup>12</sup> Bioenergy Devco, LLC’s Notice of Intent for coverage for stormwater discharges associated with industrial activities, dated June 9, 2020.

<sup>13</sup> <http://delawarewatersheds.org/chesapeake-bay/gum-branch/>.

<sup>14</sup> See <https://www.epa.gov/chesapeake-bay-tmdl>.

factory farm waste.<sup>15</sup> In a watershed already in need of pollution reductions, introducing a new source that will generate especially dangerous effluent is likely to slow TMDL progress and result in violations of the State's water quality standards.

#### ***4. Bioenergy's Project Would Threaten Local and Regional Air Quality***

The proposed project would also be a significant new source of air pollution. While Bioenergy's has yet to disclose its full intent to emit air pollutants, the known components of the project make clear that air pollution will be a major concern for the health of local residents. It appears that the site will require no fewer than three separate air pollution permits: one for the composting operation, one for an emergency generator to serve the digester operation, and one for the digesters and associated control technologies, such as gas flares.

To ensure transparency regarding the project's full air pollution impacts, DNREC must consider the site's potential air emissions together in assessing the impacts and ultimate permitting requirements for this pollution. We understand that DNREC has already issued an amended air permit to Bioenergy for its composting operations, and that Bioenergy has applied for a permit to construct and operate an emergency generator. FWW requests that, if and when DNREC considers an air emissions permit application for the digesters and related control technologies, it simultaneously consider the impact of the other air permits and associated emissions together so that the Delawareans whose air will be impacted can evaluate the total air emissions Bioenergy is proposing, as opposed to allowing Bioenergy to disaggregate these emissions and downplay the overall burden on local communities.

#### ***5. Bioenergy's Project Would Threaten Public Safety***

Digester projects like the one Bioenergy proposes are fundamentally designed to collect large quantities of pollution-laden waste with the intent to generate, collect, and

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<sup>15</sup> Natural Resources Conservation Service, 366-CPS-1, Conservation Practice Standard No. 366: Anaerobic Digester, at 6 ("Land application of digester effluent, compared with fresh manure, may have a higher risk for both ground and surface water quality problems. Compounds such as nitrogen, phosphorus, and other elements become more soluble due to anaerobic digestion and therefore have higher potential to move with water.").

transport hazardous and explosive gases. This poses unique threats in an area otherwise designated as residential and agricultural. FWW understands that Bioenergy’s proposal would require a Resource Recovery Facility Permit. Such a permit would, among other things, require that the facility be “operated in a manner that will preclude degradation of land, air, surface water, or ground water”; prohibit storage of waste “in such a manner that [it] becomes a nuisance or endangers human health or the environment”; and ensure that “[e]quipment shall be available on site to control fires, and arrangements shall be made with the local fire protection agency to provide immediate services when needed.”<sup>16</sup>

However, DNREC cannot simply assume that a Resource Recovery Facility Permit will sufficiently address all public safety concerns. Anaerobic digesters are not agricultural operations, they are industrial gas production facilities that are known to pose the risk of explosions, high-pressure gas leaks, fires, and other dangers unique to such industrial processes.<sup>17</sup> The area surrounding Bioenergy’s site, which is zoned residential-agricultural, should not be exposed to such hazards.

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DNREC’s mission to protect public health and the environment and improve Delawareans’ quality of life is critical in this process. The agency must not circumvent local approval requirements, put its thumb on the scale of the Commission’s decision by prematurely considering permit applications, or otherwise overlook critical environmental and safety threats in an effort to expedite Bioenergy’s project proposal.

FWW requests a written response to the above concerns at your earliest convenience, including whether DNREC intends to accept and assess any additional permit applications submitted by Bioenergy prior to the necessary zoning approvals being secured. Due to remote work related to COVID-19, please deliver said response via email

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<sup>16</sup> CDR 7-1000-1301 §§ 9.4.1.1, 9.4.2.2.1, 9.4.2.3.4.

<sup>17</sup> E.g., Marjolaine, *Risks and Safety Measures for Anaerobic Digestion*, Biogas World (Apr. 4, 2018), <https://www.biogasworld.com/news/safety-precautions-anaerobic-digestion-systems/>; *Manure Digester Explosion in Wisconsin Sparks Fire* (Aug. 7, 2014), <https://www.manuremanager.com/manure-digester-explosion-in-wisconsin-sparks-fire-15850/>.



to the contact information below. Given the serious concerns about this project, transparency and robust public engagement are critical to ensuring that DNREC abides by its mission and duties to the people of Delaware. Food & Water Watch, Sussex Health & Environmental Network, and the Socially Responsible Agricultural Project are available to engage with DNREC in this matter; please let us know if further clarification of the issues raised herein would assist DNREC at this time, and we look forward to hearing from you.

Respectfully,

A handwritten signature in black ink, appearing to read "Tyler Lobdell", is centered on a white rectangular background.

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Cc:

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Michael H. Vincent, President of the Sussex County Council  
Todd F. Lawson, Sussex County Administrator  
Robert C. Wheatley, Chairman of the Sussex County Planning & Zoning Commission