This document has been prepared as part of the implementation project of *Legal Pathways to Deep Decarbonization* (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see https://lpdd.org.

MODEL STATE LEGISLATION DESIGNATING LEAD STATE AGENCY FOR THE PERMITTNG OF BIOGAS FACILITIES AND GATHERING LINES

Introductory Memorandum.

Recent increases in natural gas use in electricity generation and other applications have been widely heralded as a vital step in the transition to a clean energy economy. Natural gas is often described as a "clean" fossil fuel because its combustion emits significantly less mercury and other air toxins than coal or oil. Natural gas combustion also emits fewer greenhouse gases than other fossil fuels. Savings at the point of combustion may, however, be offset by greenhouse gas emissions during natural gas production. Most of those emissions take the form of methane, a highly potent greenhouse gas, released through gas leaks, venting, and flaring (where there is incomplete combustion). *See* Romany M. Webb and Melinda E. Taylor, *Production and Delivery of Low-Carbon Gaseous Fuels*, in *Legal Pathways to Deep Decarbonization in the United States* 670 (Michael B. Gerrard and John C. Dernbach eds., 2019) ("LPDD").

To reduce emissions, the LPDD recommends replacing natural gas with lower emissions alternatives including, biogas, hydrogen, and synthetic methane. Biogas is typically produced through anaerobic digestion of organic materials such as agricultural waste, energy crops, forest residue, sewage sludge, and municipal wastes. During anaerobic digestion, the biomass is broken down by microorganisms in an environment deprived of oxygen, releasing a gaseous mixture, usually composed primarily of methane and carbon dioxide. *Id*. at 671.

To support the increased production of biogas and the delivery to end users, the LPDD identifies the need for changes in the regulatory framework over biogas production and delivery facilities. Authority for the regulation of biogas production and delivery infrastructure is shared among federal, state, and local government bodies. *Id*. at 671. To streamline permitting of biogas production and delivery facilities, the LPPD recommends the following:

1. State legislatures should designate a lead agency with responsibility for coordinating the various permitting processes for biogas facilities. *Id*. at 682.[1]

2. State legislatures should designate a lead agency with responsibility for coordinating the various permitting processes for gathering pipelines needed for renewable gas. *Id*. at 686.

[1] The LPDD's original recommendation was to designate a single agency with responsibility for issuing all necessary permits for biogas facilities. For purposes of this model legislation document, the authors revised the recommendation to designate a lead, not single, agency with coordinating responsibilities.

The accompanying annotated model state legislation provides a template for state legislatures to designate a lead agency with responsibility for coordinating the various permitting processes for biogas facilities, including gathering lines and injection lines. The model legislation addresses only biogas and not other forms of renewable gas.

Annotated Legislation.

A bill for an act

relating to energy and the environment; establishing the Commercial Biogas Production Facility Permitting Act; streamlining the permitting of commercial biogas facilities in the State of [ ] eliminating any State site permit requirement for accessory biogas production facilities; encouraging cooperation and coordination between state and local regulatory authorities for the permitting of commercial biogas production facilities; and proposing coding for new law in [state statutes] and amending and reenacting [state statutes].

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF [ ]:

Note: This model document focuses on new legislation designating a lead state agency with responsibility for coordinating state-level permitting of biogas facilities. It is anticipated that the existing state code will need to be reviewed to identify any sections that will require amendment or repeal. In those states that have a state-level environmental review similar to the National Environmental Policy Act (e.g., the Minnesota Environmental Policy Act), the scope and timeframes of this model document will likely need to be revised to account for the state-level environmental review. For example, a state-level environmental review document (e.g., environmental assessment or environmental impact statement) would likely not be able to be completed within the abbreviated review time contemplated by this model document intended to streamline permitting of biogas facilities. Accordingly, adoption of this model document would likely require amendment to the state environmental review process to allow for an alternate form of environmental review for biogas facilities and/or provide that the applicant is required to produce the environmental review document at the time the application is filed. Alternatively, the state level environmental review process could be amended to consolidate the environmental review and permitting processes (e.g., New York's Accelerated Renewable Energy Growth and Community Benefit).

I. TITLE.

This bill may be referred to as the "Commercial Biogas Production Facility Permitting Act."

II. PURPOSE AND INTENT.

To designate a lead state agency with responsibility for coordinating the various permitting processes for biogas facilities to streamline the permitting process, encourage cooperation and coordination between state and local regulatory authorities, and reduce unnecessary duplication in the permitting review of commercial biogas production facilities.

Note: This model document assumes the state public utilities commission or similar state agency ("PUC") will be the lead state agency. If there is a state agency (likely the state PUC) that has current authority to issue a site permit, certificate of site compatibility, or other similar state-level siting approval for biogas production facilities, the authors suggest such agency would be a logical choice to be designated as the lead agency. However, to the authors' knowledge, in most states, a state-level siting permit from the state PUC is not currently required for a biogas production facility. Accordingly, this model document includes language first requiring that a site permit be obtained from the PUC for a biogas production facility, including options for preemption of local regulation and without preemption of local regulation.

If the policymaker using this model document elects not to establish a state-level site permit from the PUC, the policymaker must decide whether to designate the PUC as the lead agency or another state agency, such as the state department of natural resources, as the lead agency with coordinating responsibilities.

Lastly, the authors of this document strongly recommend consultation with the biogas industry, developers, and other stakeholders in the state to ensure that the legislation effectively accomplishes the goal of streamlining and supporting the increased production of biogas and delivery to end users.

III. DEFINITIONS.

(a) "Accessory biogas production facility" means a biogas production facility where the biogas generated offsets the energy demands of the onsite property, provides no more than the estimated total energy demand for the onsite property, and is not used to supply offsite energy needs.

(b) "Act" means the Commercial Biogas Production Facility Permitting Act.

(c) "Biogas" means gas that is generated from organic waste, through anaerobic digestion, gasification, pyrolysis, or other technology that converts organic waste to gas. Biogas may be produced from, but not limited to, any of the following sources:

(i) Agricultural waste remaining after all reasonably usable food content is extracted;
(ii) Forest waste produced from sustainable forest management practices;
(iii) Landfill gas;
(iv) Wastewater treatment gas and biosolids; or
(v) Diverted organic waste, if the waste is separated and processed to (A) enhance the recovery of recyclable materials and (B) minimize air emissions and residual wastes in accordance with applicable standards.

(d) "Commercial biogas production facility" or "CBPF" means a facility that produces, processes, and/or stores biogas, including those associated gathering lines or injection lines, where the biogas generated is used to primarily supply offsite energy needs, including both facilities where biogas produced onsite is supplied offsite. CBPF shall not include accessory biogas production facilities.

(e) "Gathering line" means a pipeline that transports biogas from a production site to a centralized location for processing and/or storage.

(f) "Governmental approval" means any approval, authorization, determination, license, consent, consultation, exemption, waiver, registration, filing, notification, revocation, modification, or other form of governmental permission or notice required to be, or voluntarily, obtained from or submitted to the State of [state] or any agency or local government unit thereof.

(g) "Injection line" means a pipeline that transports biogas from a biogas processing and/or storage facility to injection into a transmission line.

(h) "Lead state agency" means the [state PUC], which shall be responsible for navigating a CBPF project through the state environmental review and permitting process.

(i) "Local government unit" means governmental entities or political subdivisions of the state that provide functions and services at the local level, including, without limitation, counties, townships, towns, and cities.

(j) "Offsite" means any property that is not part of the onsite property.

(k) "Onsite" means the property where a biogas production facility is located and any contiguous properties under common ownership as the property where a biogas production facility is located.

(l) "Non-lead State agency" means any [state] agency with authority over the siting, development, construction, or operation of a CBPF in the State of [state] including, without limitation, [list of state agencies with potential jurisdiction over the siting, permitting, or environmental review of a biogas facility other than the lead state agency, such as the state public utilities commission, department of natural resources, pollution control agency, state historic preservation office, department of agriculture, department of commerce, soil/water conservation districts, or other similar state agencies with permitting jurisdiction over a CBPF].

(m) "Person" means an individual, partnership, joint venture, private or public corporation, association, firm, public service company, cooperative, political subdivision, municipal corporation, government agency, public utility district, or any other entity, public or private, however organized.

(n) "Site permit" means the site permit issued by the [state PUC] for a CBPF under [this chapter; chapter establishing site permit procedures].

(o) "Transmission line" means a pipeline, other than a gathering line or injection line, that transports gas from a gathering system, the outlet of a gas processing plant, or a storage field to a distribution center, distribution system, storage facility, large-volume customer, or another storage field.

Note: The definitions should be modified as necessary.

IV. SITE PERMIT.

(a) No person may construct a CBPF without first obtaining a site permit from the [state PUC]. No site permit from the [state PUC] shall be required for an accessory biogas production facility.

(b) Any person seeking to construct a CBPF shall submit an application to the [state PUC] for a site permit in accordance with [this chapter; chapter establishing site permit procedures] and any rules adopted by the [state PUC].

(c) The [state PUC] shall make a final decision on an application for a site permit for a CBPF within [sixty (60)] days after acceptance of a complete application by the [state PUC]. The [state PUC] may extend by up to [sixty (60) days] this deadline for cause.

(d) The [state PUC] may place conditions in a site permit and may deny, modify, suspend, or revoke a site permit.

Note: This model document does not establish the specific procedures and standards for the application, PUC review, and issuance of the site permit. The author anticipates the user of model document would likely amend the state's current state-level energy facility permitting statute and rules to include CBPFs. In the interest of streamlining the permitting of biogas facilities, the authors suggest that the state-level review process for CBPFs should be truncated as compared to the process for larger or more controversial energy facilities such as natural gas plants, commercial wind farms, pipelines, or electric transmission lines. Alternatively, a voluntary or mandatory pre-filing process could be established to streamline the permitting process and allow permit issuance within the contemplated short timeframe from application acceptance.

V. EFFECT OF ISSUANCE OF SITE PERMIT – LOCAL REGULATION.

(a) A site permit issued for a CBPF from the [state PUC] does not, subject to paragraph (b) below, supersede or preempt any zoning, building, or land use rules, regulations, or ordinances adopted by a local government unit and a site may not be designated by the [state PUC] which violates local land use, zoning, or building rules, regulations, or ordinances.[2]

(b) A site permit issued for a CBPF from the [state PUC] supersedes and preempts any zoning, building, or land use rules, regulations, or ordinances adopted by a local government unit, upon a finding by the [state PUC] that the rule, regulation, or ordinance of the local government unit is unreasonably restrictive in view of existing technology, factors of cost or economics, needs of consumers, or any environmental or other benefits of the CBPF and the ability of the CBPF to contribute to the achievement of State climate goals. Without such a finding, a site may not be designated which violates local land use, zoning, or building rules, regulations, or ordinances.

[2] Model zoning regulations to make biogas production facilities a contemplated and accepted use, which would make development of such facilities quicker and less costly, can be found at https://lpdd.org/resources/lpdd-model-law-biogas-zoning-ordinance.

VI. COORDINATION OF STATE AGENCY REVIEW.

(a) The [state PUC] shall act as the lead agency for the purposes of coordinating all applicable governmental approvals under State law necessary or desirable for the siting, development, construction, or operation of a CBPF in the State of [state].

(b) Each non-lead State agency or local government unit considering an aspect of an application for a State governmental approval for a CBPF shall be a party to the CBPF site permit proceedings before the [state PUC].

(c) In the CBPF site permit proceedings, the [state PUC] shall establish a schedule for all governmental approvals to be issued by each non-lead State agency or local government unit considering an aspect of an application for a State governmental approval for a CBPF. In establishing the schedule, the [state PUC] shall (i) ensure expeditious completion of all such proceedings, and (ii) comply with applicable schedules established by State law. Prior to setting such schedule, the [state PUC] shall provide a proposed schedule to each non-lead State agency or local government unit. The [state PUC] shall allow [ten (10)] days for the non-lead State agencies or local government units to provide comments on the [state PUC's] proposed schedule. The [state PUC] shall take into account all such comments from a non-lead State agency or local government unit before the [state PUC] reaches a final decision on the schedule and shall specify the reasons for granting or denying any requests for schedule modifications.

(d) Each non-lead State agency or local government unit considering an aspect of an application for a State governmental approval for a CBPF shall cooperate with the [state PUC] and comply with the deadlines established by the [state PUC].

(e) Each non-lead State agency or local government unit considering an aspect of an application for a State governmental approval for a CBPF shall be bound to the decisions of the [state PUC], with respect to the site designation, and with respect to other matters for which authority has been granted to the [state PUC] by this chapter.

(f) Each non-lead State agency or local government unit considering an aspect of an application for a State governmental approval for a CBPF shall participate during siting at public hearings and shall clearly state whether the site being considered for designation or permit and other design matters under consideration for approval will be in compliance with the standards, rules, or policies of such non-lead State agency or local governmental unit.

Note: The reference to a local government unit paragraphs (d)-(f) is intended to refer to state laws implemented at the local level. For example, in Minnesota, local government units implement the state wetland law.

(g) [remedy if cooperating agency fails to meet established schedule]

Note: This model document includes a placeholder for the remedy and rights of the applicant if a non-lead State agency or local government unit does not adhere to the schedule established

by the state PUC. Options may include: (i) judicial review and/or that such permits are deemed issued unless cause for the delay is shown by the cooperating agency. If the state has a permitting efficiency law and/or a law that provides that if an agency does not approve or deny an application within a certain amount of time of a complete application, such permit is deemed approved, it may be appropriate to include here a cross-reference to such state law.