

March 2, 2022

**DIGESTER DUE DILIGENCE FOR DAIRYMEN**



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1101 W. River Street, Suite 110, Boise, Idaho, 83702 | sawtoothlaw.com

1

**PROCESS**

- Opening Phase
  - Approached by digester company
  - Non-disclosure agreement
  - Letter of intent
- Contracting Phase
  - Feedstock supply agreement
  - Leases (and/or options)
  - SNDAs
- Permitting Phase
  - Site location, design
- Construction Phase
- Operations Phase

**CONFIDENTIAL**



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2

**INTERNAL OWNERSHIP**



- Important to have the right entities for your contracts
- Know your entities and ownership structure
  - Who owns the land
  - Who owns the cows
  - Who operates the dairy
- An LLC with a manager is generally the preferred entity

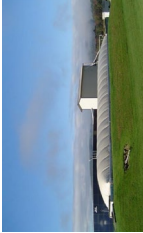

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3

**DIGESTER OWNERSHIP & OPERATIONS**

- Dairyman due diligence requires investigation of the digester developer
- What projects does the developer already have in operation
- What dairy farms has the digester developer already contracted with
- Can the developer arrange for you to talk independently and privately with other dairymen with developed projects
- Does the digester developer have in place long-term contracts for the sale of energy; with who
- A successful digester developer will be able to answer these questions and will not need to hide behind "confidentiality" – they should have pride in what they have done and be willing to share it

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4

## INTERNAL FINANCING

- Your current and future financing is always critically important
- Is the consent to of your current lender needed to grant a leasehold interest
- Involve your lender early
- What lienholder interests are of concern
  - Land (mortgages, deeds of trust)
  - Cows (UCC liens, security agreements)
  - Manure



## COMPENSATION TO THE DAIRYMAN

- Is there a signing payment/bonus
- Are there progress payments, at what stages
- Will there be a lease payment: in what amount
- What will be compensation after commercial operations begin
  - Price by energy unit (mmbTU, mW)
  - Per cow (and then does it vary by cow)
  - Profit share (EBITDA, net income approach)



## DIGESTER FINANCING

- Dairyman due diligence requires investigation of the digester developer
- Does the developer have financing and funding already in place
  - With who, in what amounts, what conditions or contingencies
  - Who will be receiving the carbon credits
  - Who will be receiving the tax credits
- Negotiate toward obtaining access to developer financials and corporate information to assure financial ability to perform and available capital



## EFFECT ON DAIRY ANIMAL OPERATIONS

- Digester company focus will be on CI score, TS, VS and other aspects effecting energy production abilities
- Inquire and understand what changes will and will not be needed to your current animal husbandry practices
  - What control will you have over animal rations going forward
  - What control will you have over animal bedding and housing practices going forward
  - What control will you have over herd size going forward
  - What control will you have over water use going forward (e.g., parlor, stalls, foot baths)
  - What control will you have over health management practices going forward



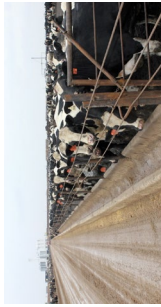
## EFFECT ON DAIRY WASTE MANAGEMENT

- Digester company focus will be on CI score, TS, VS and other aspects effecting energy production abilities
- Inquire and understand what changes will and will not be needed to your current waste management systems
  - Flush water
  - Bypasses
  - Use of honey vacs, solid separation, etc.
  - Other pre-digestion handling and treatment
- How long will manure be in digestion
  - What is nutrient value and composition of digestate
  - Post-digestion separation, handling and treatment
  - Temperature control in digestion and outflow
- Who pays for changes and upgrades
  - Responsibility for manure transportation costs
- Effect on frequency of lagoon cleaning
- What changes will be required to NMP, field application, 3<sup>rd</sup> party export



## OPERATIONAL CONCERNS

- Be involved and ask early re: digester design, location, operation
- Where will interconnection point be to energy transmission system
- Utilities are needed to operate – who supplies, who pays
- What happens, if there is a shortfall in manure delivery – penalties
- Who has liability for releases of manure, indemnities
  - Allocation of insurance obligations
- Negotiate the potential force majeure events
  - Severe or unusual weather, freezes, prolonged low temperatures
  - Upset conditions defined by DECA and declared by ISDA
  - Hard infection or disease outbreak
  - Production curtailment orders



## PERMITTING CONSIDERATIONS

- Each county will have its own unique considerations re: permitting
  - CUP, CAFO amendment, variance, no process
- Potential trigger for site compliance review of your current CAFO permit
  - Do NOT agree in FSA to number of milking cows that exceeds your permit
- Potential opportunity for CAFO expansion or bring permit in to compliance
  - Will variances be needed for building heights, other items
  - What neighborhood meetings, county meetings and other public hearings or comment will be required
  - Will their be a need for ISDA inspection
  - Avoid disclosure of your NMP documents to any public agency other than ISDA
  - Prefer they simply provide an in compliance letter to local authority
- DEQ and other permitting – digester developer



## TERM AND TERMINATION

- What is the fixed contract term
- Are there renewal or extension terms; at whose option
- What exit opportunities are available
- What happens to the facilities upon termination
- Assignability of interests – this goes both ways



## TAXES

- Effect on property taxes; who pays incremental increase
- Allocation of available tax credits for siting infrastructure
- Taxes on the production and sale of manure
- Taxes on the production and sale of energy

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**TAX DAY**  
JOKE

Here's my taxes I've paid every tax, fine, charge, and fee!

I, man...

You forgot to pay the "paying your taxes fee" fee.

© BU

## QUESTIONS ?



**David P. Claiborne, Attorney**

david@sawtoothlaw.com | 208.628.7447

## EMERGING ISSUES AND CONCERNS

- Community digesters
- Sales tax
- Solid waste permitting
- Collateral interest in manure

