



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
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Office of the
Secretary

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CONCILIATION ORDER BY CONSENT

SECRETARY'S ORDER No. 2018-W-0015

Issued Pursuant to 7 Del. C. §6005(b)(2)

Issued to:

Mr. Sam Rascona – Director of Operations
Perdue Foods, LLC
20621 Savannah Road
Georgetown, DE 19947

This Conciliation Order by Consent and Secretary's Order (Order) reflects the mutual effort by Perdue Foods, LLC (Perdue Foods) and the Secretary of the Department of Natural Resources and Environmental Control (Secretary or DNREC) (collectively the Parties) to attain compliance with 7 *Del. C.* Chapter 60 by Conciliation pursuant to 7 *Del. C.* §6005(b)(2).

SECTION I: BACKGROUND

WHEREAS, Perdue Foods, LLC operates a Wastewater Treatment Facility (WWTF) located in Georgetown, Delaware; and

WHEREAS, DNREC is responsible for the administration of the National Pollutant Discharge Elimination System (NPDES) program in accordance with 33 *U.S.C.* §§1251 *et seq.* and 7 *Del. C.* Chapter 60; and

WHEREAS, pursuant to this authority, DNREC issued NPDES Permit DE 0000469 (Permit), effective August 1, 2006, to Perdue Farms, Inc., authorizing the discharge of treated effluent from the Perdue Foods WWTF through its Outfall 002 to the Savannah Ditch; and

WHEREAS, pursuant to Part I.B.1 and Part I.B.2, of the Permit, Perdue Foods is required to monitor its discharge by collecting samples of said discharge and analyzing them for a number of pollutant parameters as more fully specified in the Permit, summarizing this data in a monthly Discharge Monitoring Report (DMR) regularly submitted to DNREC; and

WHEREAS, Perdue Foods submitted DMRs, “5-Day Letters”, and non-compliance letters to DNREC reporting effluent limitation and permit violations, more fully delineated in Exhibit A, attached hereto and incorporated by reference herein; and

WHEREAS, these incidents appear to be the direct result of improper operation, equipment failures, process overloads, and various other circumstances as described in the reports as submitted to DNREC; and

WHEREAS, as a result of these reported incidents, Notice of Violation (NOV) W-15-SWD-04 was delivered to Perdue Foods on September 3, 2015; and

WHEREAS, Perdue investigated the violations of the Permit and immediately made several operational changes at the facility to improve the function of the facility’s wastewater treatment plant; and

WHEREAS, Perdue brought in an outside consultant eight days following the initial sample in violation of a permit limit on June 14, 2015 , to further explore operational and equipment changes that could be taken to bring the facility back into compliance and assure that the facility operates within the Permit limits; and

WHEREAS, the actions taken by Perdue included additional screening and a larger storage tank to reduce loading to the anaerobic lagoon; anaerobic lagoon dredging to increase the retention time; the replacement of the diffusers in the aeration basin to increase oxygen transfer; supplemental liquid oxygen injection into the aeration tank to improve dissolved oxygen levels; and breakpoint chlorination to reduce the ammonia discharge levels back into compliance, all at a total cost of more than \$1.3 million; and

WHEREAS, Perdue has not violated the Permit wastewater discharge limits for nitrogen since July 2015, which confirms that the modifications have corrected the circumstances giving rise to the violations; and

WHEREAS, in view of the incidents delineated supra and pursuant to 7 Del. C. §6005(b)(3), DNREC has drafted a Notice of Administrative Penalty Assessment and Secretary’s Order assessing an administrative penalty of Seventy-Seven Thousand Three Hundred Dollars (\$77,300) for the incidents described herein, and further, pursuant to 7 Del. C. §6005 (c),

assessing an amount of Seven Thousand, Six Hundred and One Dollars (\$7,601) to cover DNREC abatement expenses; and

WHEREAS, both DNREC and Perdue Foods agree that the resolution of these violations without further protracted legal actions is in the best interest of the Parties and can be effectively accomplished via this Order designed to comprehensively address the matters contained in NOV W-15-SWD-04, 5-day and non-compliance letters, and other permitting issues on a facility-wide basis in a systematic manner and additionally providing DNREC with enforceable assurances that the necessary actions will be timely undertaken and completed.

SECTION II: CONCILIATION

NOW THEREFORE, Perdue Foods and DNREC jointly execute this Order to effectuate the purposes and actions delineated herein, and pursuant to 7 *Del. C.* §6005(b)(2), it is Ordered and Agreed as follows:

1. Pursuant to 7 *Del. C.* §6005(b)(3), DNREC assesses and Perdue Foods expressly stipulates and agrees to an administrative penalty of **\$77,300**. Further, pursuant to 7 *Del. C.* §6005(c)(1), Perdue Foods shall reimburse DNREC for its abatement expenses in the amount of **\$7,601**;
2. In lieu of paying the administrative penalty, Perdue Foods has proposed to offset said administrative penalty by undertaking an Environmental Improvement Project (EIP). Perdue Foods and the Nature Conservancy have submitted, and DNREC has approved, the following proposed EIP, a description of which is attached as Exhibit B.
 - a. The EIP will fund the Nature Conservancy's plan, as memorialized in the Supplemental Environmental Project (SEP) proposal titled "Perdue Restoration Proposal for the Nature Conservancy's Edward H. McCabe Preserve, November 20, 2017 (Proposal), submitted by the Nature Conservancy and Perdue, and approved by DNREC, to remove approximately 39 acres of farmland from agricultural production at the Delaware Chapter's Edward H. McCabe Preserve in Sussex County, Delaware. The objective of the EIP is to improve water quality by eliminating agricultural runoff and groundwater transfer of nutrients in the Broadkill River Watershed;
 - b. The EIP will be memorialized by written funding agreement (Agreement) between Perdue Foods and the Nature Conservancy, as accepted and approved by DNREC, which will expressly stipulate the roles, responsibilities and accountabilities of both parties to effectively attain the objectives stated in the SEP. Further, Perdue Foods shall remain in regular contact with DNREC. At a

- minimum and upon commencement of the work described in the Proposal, Perdue Foods shall update DNREC every ninety (90) days with an explanation of the work completed since the previous update and disclosure of any delays or issues reasonably anticipated to affect the timeline. The Agreement must be finalized within forty-five (45) calendar days from the effective date of this Order and must stipulate that the EIP will commence no later than November 1, 2018;
- c. The successful completion of the EIP, subject to DNREC approval thereof, will result in the direct offset not to exceed **75%** of the Administrative Penalty Assessment (an amount not to exceed **\$57,975**), leaving a remaining balance of not less than **\$19,325**, plus DNREC abatement expenses in the amount of **\$7,601**;
 - d. It is anticipated by the Parties that Perdue Foods will utilize the maximum direct offset amount to fund the EIP. Accordingly, Perdue Foods shall remit the minimum \$19,325 administrative penalty, plus DNREC abatement expenses in the amount of \$7,601 within thirty (30) calendar days of the effective date of this order. Payment shall be remitted in two checks payable to the State of Delaware, and mailed to: Kayli Spialter, Esquire, Delaware Department of Justice, 820 North French Street, Wilmington DE 19801; and
 - e. In the event that the EIP does not commence by November 1, 2018, as stipulated in the Agreement, the entire Administrative Penalty assessment of **\$77,300** and abatement expenses of **\$7,601** shall become immediately due and payable;
3. Notwithstanding any express stipulation in this Order to the contrary, if any event occurs that causes or may cause a delay or have a materially adverse effect on Perdue Foods's ability to perform in compliance with this Order, and such event is beyond Perdue Foods's reasonable control and is not the product or result of Perdue Foods's negligence (*Force Majeure* Event), Perdue Foods shall notify DNREC, in writing, within fifteen (15) calendar days of when Perdue Foods first knew of the event or should have known of the event by the exercise of due diligence. In this written notice, Perdue Foods shall provide sufficient evidence to support this claim. Unanticipated or increased costs or expenses associated with the performance of Perdue Foods's obligations as described herein shall **not** constitute a *Force Majeure* Event. DNREC shall respond to Perdue Foods, in writing, regarding its claim of delay or impediment to performance within fifteen (15) calendar days of receipt of notice of claim. Assessment of the effect, if any, of the enumerated factors on Perdue Foods's ability to comply with the terms of this Order shall be in the sole discretion of DNREC, and DNREC retains full discretion to extend or modify the terms of this Order, or not, as it sees fit;

4. In the event Perdue Foods and/or the Nature Conservancy fails to meet any deadlines or fails to fund the EIP as expressly stipulated in the Agreement, DNREC reserves the right to commence any administrative, civil and/or criminal remedies against Perdue Foods pursuant to 7 *Del. C.* §6005;
5. When Perdue Foods believes that the Agreement has been fully satisfied, in compliance with the requirements of this Order, then Perdue Foods shall so certify to DNREC, in writing, including a delineation of the actual expenses incurred in the completion of EIP activities described herein. Within sixty (60) calendar days after the receipt of Perdue Foods's certification, DNREC shall provide a written response to Perdue Foods indicating partial or complete concurrence. If DNREC determines that concurrence is complete, this Order will be deemed satisfied; if concurrence is partial, DNREC will identify the outstanding activities that require satisfaction. Either notice will be in writing;
6. Pursuant to statute, 7 *Del. C.* §6005(b)(2), Perdue Foods has the right to a hearing regarding conciliation, and where no hearing is requested, all of the deadlines set forth herein will be entered as a binding Order. By executing this Order, Perdue Foods formally acknowledges that it has read and understands this Conciliation Order by Consent, accepts all the stipulations contained herein, and voluntarily waives its right to a hearing. Further, Perdue Foods voluntarily waives any right to appeal or contest this Order and further agrees to perform each of the actions listed in this Order pursuant to the schedule set forth herein. Additionally, Perdue Foods acknowledges and does not contest the violations set forth in the attached Exhibit A; and
7. Miscellaneous Provisions:
 - a. Binding on Successors: It is the intention of the parties that this Order shall be binding upon and enforceable against the Parties and their successors, heirs, executors, administrators and assigns;
 - b. Severability: In the event that any provision (section, paragraph, or portions thereof) of this Order shall be held invalid or unenforceable for any reason, it shall not in any way invalidate, affect, or impair the remaining provision(s) (sections, paragraphs, or portions thereof) of this Order, and to this end, the provisions of this Order are hereby declared to be severable;
 - c. Construction: The agreement shall be construed according to the intent of the parties to resolve the pending violations and to prevent future violations and

harm to the environment. No provision(s) or paragraph(s) of this Order shall be construed based on authorship;

- d. Compliance with Law: Nothing in this Order shall relieve Perdue Foods of its obligation to comply with all applicable federal, state or local laws or regulations;
- e. Good Faith: The Parties agree to act in good faith and to cooperate fully with each other in carrying out the intent of this Order, provided that nothing in this Order shall be construed to restrict DNREC's regulatory and permitting judgment and discretion, and nothing in this Order shall be construed to require DNREC to pay or appropriate any monies or expend any funds;
- f. Publicity: The Parties agree that the EIP proposed and undertaken pursuant to this Order is undertaken as the result of an enforcement action. Accordingly, Perdue Foods is prohibited from publicizing or being recognized for the EIP. If the EIP or results thereof are made public by Perdue Foods, it will state in a prominent manner that the project is being undertaken as part of a settlement of an enforcement action;
- g. Notices: Any notices in regard to this Order shall be in writing and sent to: Department of Natural Resources and Environmental Control, Division of Water, Surface Water Discharges Section, Compliance & Enforcement Branch, ATTN: Mr. Bryan Ashby, Environmental Program Manager II, 89 Kings Highway, Dover, Delaware, 19901, with a copy sent to: Delaware Department of Justice, ATTN: Kayli Spialter, Esquire, Delaware Department of Justice, 820 North French Street, Wilmington, DE 19801;
- h. Entire Understanding: This Order constitutes the entire agreement and settlement between the Parties. The Parties acknowledge that this Order may not be amended except in writing executed by both Parties;
- i. No Third Party Rights: The Parties to this Order expressly intend that this Order shall create no right(s) in any person or entity not a party to this Order; and
- j. This Order becomes effective on the date of execution by the Secretary of DNREC.

Date: 2/20/18



Shawn M. Garvin, Secretary
Department of Natural Resources
and Environmental Control

Agreed and Accepted:

Date: 2-7-18



Sam Rascona
Director of Operations
Perdue Foods, LLC

**CONCILIATION ORDER BY CONSENT
SECRETARY'S ORDER NO. _____**

EXHIBIT A

FINDINGS OF FACT

The Department finds that Perdue Foods committed the following violations of its NPDES permit at the Georgetown, Delaware facility:

Outfall 002 Permit Violations

- A. The permit limit of 8.0 mg/l for the daily maximum concentration for Ammonia was exceeded on the following days:
- June 13, 2015 – June 28, 2015 (15 days) – Ammonia maximum daily concentration reported as 15.3 mg/l to 63.6 mg/l (June 14 was in compliance).
- B. The permit limit of 4.0 mg/l for the average daily concentration for Ammonia was exceeded on the following month:
- June, 2015 – Ammonia average daily concentration was reported at 40.21 mg/l
- C. The permit limit of 133.4 lbs/day for the daily maximum loading for Ammonia was exceeded on the following days:
- June 13, 2015 – June 26, 2015 (13 days) – Ammonia maximum daily loading reported as 283.9 lbs/day to 667.46 lbs/day (June 14 was in compliance); and
 - June 28, 2015 (1 day) – Ammonia maximum daily loading reported as 233.9 lbs/day
- D. The permit limit of 66.7 lbs/day for the average daily loading for Ammonia was exceeded on the following month:
- June, 2015 – Ammonia average daily loading was reported at 335.64 lbs/day
- E. The permit limit of 94.4 mg/l for the daily maximum concentration for Total Nitrogen (TN) was exceeded on the following days:
- July 8, 2015 – July 23, 2015 (16 days) – TN maximum daily concentration reported as 99.0 mg/l to 145.0 mg/l

- F. The permit limit of 185 col/100mls for the daily maximum concentration for Enterococcus was exceeded on the following days:
- May 20, 2015 (1 day) – enterococcus maximum daily concentration reported as >200.5 col/100mls

General Permit Violations

Failure to Operate as Efficiently as Possible, all Collection and Treatment Facilities:
Part II, A.3 of the NPDES Permit requires that *the permittee shall at all times maintain in good order and operate as efficiently as possible, all collection and treatment facilities and systems (and related appurtenances) installed or used by the permittee for water pollution control and abatement to achieve compliance with the terms and conditions of this permit.*

- June 4, 2012, the facility reported an overflow of approximately 120 gallons of partially treated process wastewater from their Sequential Batch Reactor (SBR) on to the ground;
- June 4, 2012, the facility reported a discharge via Outfall 002, of approximately 32,000 gallons of non-disinfected treated process wastewater to the Savannah Ditch; and
- August 13, 2014, the facility reported a spill of approximately 100 gallons of partially treated process wastewater into the Savannah Ditch.

NPDES Permit Violations

Respondent's failure to meet the requirements of its NPDES Permit as described above are violations as cited below:

- Discharges of pollutants not allowed by the NPDES Permit constitute violations of 7 Del. C. §6003(a)(2) which prohibits discharging pollutants without a permit;
- NPDES Permit Part I.B1 – Part I.B10 (Effluent Limitations and Monitoring Requirements) list specific Effluent Limitations for the facility outfalls that were not met, which are violation of the NPDES Permit;
- NPDES Permit Part II A.3 (Facilities Operation) list specific requirements for maintaining in good order and operating as efficiently as possible all collection and treatment facilities and systems (and related appurtenances) installed or used by the

permittee to achieve compliance with the terms and conditions of the permit. Violations of these requirements are violations of the NPDES Permit; and

- Violations of the NPDES Permit are punishable according to *7 Del. C. §6005(b)*.