



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**

●FFICE OF THE
SECRETARY

RICHARDSON & ROBBINS BUILDING
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

PHONE
(302) 739-9000

**NOTICE OF ADMINISTRATIVE PENALTY ASSESSMENT
AND SECRETARY'S ORDER**

Pursuant to *7 Del. C. § 6005*

Order No. 2023-A-0007

*PERSONALLY SERVED BY AN ENVIRONMENTAL
PROTECTION OFFICER*

Issued To:

Perdue Foods, LLC
Attn: Edgardo Torres Ortiz
Director of Operations
255 N. Rehoboth Blvd.
Milford, DE, 19963

Registered Agent:

The Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, DE, 19801

This Assessment and Secretary's Order serves to notify Perdue Foods, LLC ("Respondent") that the Secretary of the Department of Natural Resources and Environmental Control ("Department") has found Respondent in violation of state air regulations. Accordingly, the Department is issuing this Notice of Administrative Penalty Assessment and Secretary's Order pursuant to *7 Del. C. §6005(b)(3)*.

BACKGROUND

Respondent owns and operates a chicken processing facility located at 255 N. Rehoboth Blvd. in Milford, Delaware, ("facility"). Because the potential to emit nitrogen oxides ("NOx") would exceed the 25 tons per year ("tpy") major source threshold for Kent County, Respondent's operations would require a permit pursuant to the State of Delaware's Title V Operating Permit

Program. However, Respondent accepted limitations on fuel usage to limit the emissions to below this level to become a Synthetic Minor source. Respondent currently operates under the requirements of **Permit: APC-1982/0395-OPERATION (Amendment 10)(NSPS)(VOC RACT)(SM)**, which was issued on February 3, 2021. The following emission units are currently permitted for operation at the site: one 20.9 MMBTU/hr Cleaver Brooks Boiler capable of combusting natural gas or No. 2 fuel oil; one 14.65 MMBTU/hr Cleaver Brooks Boiler capable of combusting natural gas or No. 2 fuel oil; one 5.67 MMBTU/hr natural gas-fired air dryer burner; several small (<1 MMBTU/hr heat input capacity) space heaters fired on propane or kerosene; one 20,000-gallon No. 2 fuel oil storage tank; one 10,000-gallon diesel fuel storage tank.

Beginning July 1, 2016, Delaware's regulation 7 *Del. Admin. C.* §1108 - Sulfur Dioxide Emissions from Fuel Burning Equipment ("Regulation 1108") requires that distillate fuel used in fuel burning equipment in Delaware have a sulfur content of no more than 15ppm by weight, known as ultra-low sulfur fuel.

The Department conducted a federal fiscal year 2021 full compliance evaluation ("FFY21 FCE") at Respondent's facility that included an on-site inspection on August 4, 2021, as well as several off-site inspections ("records reviews") to review records submitted to the Department by Respondent in response to the FFY21 FCE request for records. The period of time for which records were requested was August 1, 2019, through July 31, 2021. The Department's records review showed that the most recent delivery of No. 2 fuel oil was on October 27, 2017, which included a gross volume of 6,504 gallons of No. 2 fuel oil certified to meet a maximum sulfur content of 500 ppm, which is considered low sulfur fuel. The fuel delivery company's bill of lading indicated that the fuel was stored in a supply terminal in Baltimore, Maryland. It also included a disclaimer at the bottom that indicated the fuel was not suitable for use in areas requiring ultra-low sulfur heating oil (15 ppm maximum). This delivery of fuel stored outside of Delaware, came after the July 1, 2016, effective date for the 15 ppm sulfur content. Because this fuel was non-compliant, the Department specifically advised Respondent during the FFY21 FCE, not to combust the fuel. Respondent notified the Department via telephone on September 20, 2021, that the non-compliant fuel oil had been intentionally combusted to deplete the non-compliant fuel remaining in the tank.

The Department sent an inspection findings letter to Respondent on September 22, 2021, identifying issues such as: non-compliant boiler combustion efficiency determinations; failure to determine the boiler combustion efficiencies as required; failure to conduct visible emissions observations; incomplete burner tune-up records; and requiring certain actions to address these issues. In addition, the letter required Respondent submit information pertaining to the combustion of the non-compliant fuel, including the date(s); what equipment was used; the volume of fuel combusted; an estimate of emissions generated by the combustion of the non-compliant fuel; as well as certification that the remaining non-compliant fuel had been removed from the tank.

Respondent submitted the required information on September 29, 2021, and following email exchanges between the Department and Respondent for clarification, it was determined that between September 7 – 11, 2021, and September 13 – 17, 2021, approximately 6,462 gallons of non-compliant fuel was combusted by the 20.9 MMBTU/hr Cleaver Brooks boiler. On October 13, 2021, Respondent informed the Department that the fuel delivery company had removed the remaining non-compliant fuel, approximately 930 gallons, that morning.

A Notice of Violation dated May 9, 2022, was issued to Respondent on May 16, 2022, for the violations identified during the FFY21 FCE and those resulting from the combustion of non-compliant fuel. This Order addresses only the violations associated with the intentional combustion of non-compliant fuel.

FINDINGS OF FACT

1. Respondent owns and operates a chicken processing facility located at 255 N. Rehoboth Blvd. in Milford, Delaware, (“facility”).
2. The Department conducted a FFY21 FCE, which included an August 4, 2021, on-site visit and records reviews conducted between August 4, 2021 and August 18, 2021.

3. During the FFY21 FCE, the Department learned that on October 27, 2017, Respondent had received a shipment of 6,504 gallons (gross volume) of No. 2 fuel oil that was non-compliant with the 15 ppm sulfur content limit set forth in 7 *Del. Admin. C.* §1108.
4. The Department explicitly advised Respondent during the FFY21 FCE, not to combust the non-compliant fuel.
5. Respondent informed the Department on September 22, 2021, that the non-compliant fuel had been combusted.
6. The Department issued an inspection findings letter dated September 22, 2021, to Respondent which identified issues found during the FFY21 FCE as well as required information pertaining to the combustion of the non-compliant fuel.
7. On September 29, 2021, Respondent provided the information pertaining to the combustion of the non-compliant fuel as well as the other action items set forth in the inspections findings letter. Additional clarification regarding the combustion of non-compliant fuel was obtained via email exchanges between the Department and Respondent.
8. It was determined that 6,462 gallons of non-compliant fuel was combusted in the 20.9 MMBTU/hr Cleaver Brooks boiler from September 7 – 11, 2021 and September 13 - 17, 2021.
9. Respondent notified the Department on October 13, 2021, that the fuel delivery company removed the remaining 930 gallons of non-compliant fuel from the tank that morning.

10. A Notice of Violation dated May 9, 2022, for the violations discovered during the FFY21 FCE and associated with the combustion of the non-compliant fuel, was issued to Respondent on May 16, 2022.

REGULATORY PROVISIONS

1. In Subsection 2.3.1 of 7 *Del. Admin. C.* §1108, it states:

“On and after July 1, 2016, no person shall offer for sale, sell, deliver, or purchase any fuel having a sulfur content greater than the limits specified in 2.3.1 through 2.3.3 of this regulation, when such fuel is intended for use in any fuel burning equipment in Delaware, and no person shall use any fuel having a sulfur content greater than the limits specified in 2.3.1 through 2.3.3 of this regulation in any fuel burning equipment in Delaware.

For a distillate fuel, except as provided for in 2.4 of this regulation, 15 ppm by weight.”

CONCLUSION

Based on the above, the Department has concluded that Respondent committed the following violation:

1. Respondent is found to be in violation of Subsection 2.3.1 of 7 *Del. Admin. C.* §1108 for the purchase of non-compliant fuel delivered on October 27, 2017, and use/combustion of the non-compliant distillate fuel between September 7 – 11, 2021, and September 13 - 17, 2021.

ASSESSMENT OF PENALTY

Pursuant to 7 *Del. C.* §6005(b)(3), the Secretary may impose an administrative penalty of not more than \$10,000 for each day of violation detailed in this Order. In assessing the administrative penalty, 7 *Del. C.* §6005(b)(3) instructs the Secretary to consider the following factors: (1) the nature, circumstances, extent, and gravity of the violation, or violations; (2) the ability of the violator to pay; (3) any prior history of such violations; (4) the degree of culpability; (5) the economic benefit or savings (if any) resulting from each violation; and (6) such other matters as justice may require. A brief discussion of these factors is set out below.

Having considered these factors, the Secretary is assessing an administrative penalty of \$34,000.00 for the violations identified in this Assessment and Order.

1. The Nature, Circumstances, Extent and Gravity of the Violation, or Violations:

The nature, circumstances, extent, and gravity of the violations are significant. Despite explicit verbal warnings not to do so, Respondent combusted non-compliant fuel oil in its 500 HP (20.9 MMBTU/hr) boiler in a reportedly intentional effort to deplete the fuel remaining in the storage tank. This combustion activity was done with the knowledge that doing so violated State of Delaware regulations, and it resulted in the storage tank's fuel levels dropping to a level where fuel could no longer be discharged to the boilers. This combustion activity occurred over a period of ten (10) days from September 7-11, 2021, and September 13-17, 2021.

It should be noted that while the fuel combusted was not compliant with State of Delaware regulations, the sulfur content and volume of the fuel combusted is not believed to have created or contributed to downwind pollutant concentrations which would adversely affect public health or safety. However, the violation is considered grave in that it was intentionally used after the Department instructed that the Facility not use the fuel, and so the penalty must be sufficient to deter Respondent from future violations.

2. Respondent's Ability to Pay:

The record contains no information that the Respondent does not have the ability to pay the administrative penalty assessed.

3. Prior History of Violations:

The Department's records indicate that the first air permit for activities at Respondent's facility was issued in 1985. Prior to the violations discovered as part of the FFY21 FCE inspection, the Respondent had only one (1) violation on record with the Division. This previous violation was related to the unpermitted construction and operation of a boiler in 1998. Due to Respondent's compliance history and nature of the sole previous violation, no additional penalty for a history of violations was assessed.

4. Degree of Culpability:

The degree of culpability is significant as Respondent had received an explicit, verbal warning not to combust the non-compliant fuel oil and did so anyway. Statements provided by representatives of Respondent indicated that the combustion of the non-compliant fuel oil was intentional with the purpose of depleting the fuel remaining in the storage tank. The allegation of intentional combustion was supported by a review of fuel usage records at the Respondent's Facility. These records indicated that the volume of No. 2 fuel oil combusted during the ten (10) days of fuel oil combustion in September of 2021 exceeded the volume of No. 2 fuel oil combusted during any month dating back through January of 2015. Prior to the No. 2 fuel oil combustion in September of 2021, records showed that No. 2 fuel oil had not been combusted in the facility's boilers since March of 2019, when only 196 gallons were combusted. In light of this information, the penalty assessed included a factor for the degree in which willfulness or negligence played a part in the violation. Thus, the Secretary considers the penalty amount assessed appropriate in the view of Respondent's culpability for these violations.

5. Economic Benefit or Savings Resulting from the Violation(s):

The manpower costs and “other” benefits, which included a benefit from the initial purchase of non-compliant fuel oil rather than compliant fuel oil and a benefit from combusting the non-compliant fuel oil rather than an equivalent volume of natural gas, were reviewed during the investigation of the violations. An economic benefit from the violation was quantified and a corresponding factor was included in the penalty assessment.

6. Such Other Matters as Justice May Require:

Lastly, considering such other matters as justice may require, the Secretary has determined that the penalty assessed is proportional to the violations and calculated so as to deter Respondent and those similarly situated from engaging in future violations.

SECRETARY’S ORDER ASSESSING ADMINISTRATIVE PENALTY

Pursuant to 7 *Del. C.* §6005(b)(3), this is written notice to Respondent that on the basis of its findings, the Department is assessing Respondent an administrative penalty of \$34,000.00 for the violations identified in this Secretary’s Order.

Respondent shall submit a check to the payable to the “State of Delaware” in the amount of \$34,000.00 within thirty (30) days of receipt of this Secretary’s Order to: Valerie S. Edge, Deputy Attorney General, c/o Emily Gabriellini, Department of Justice, Environmental Unit, 102 W. Water Street, Dover, Delaware 19904.

PUBLIC HEARING AND APPEAL RIGHTS

This Secretary's Order affects Respondent's legal rights and is effective and final upon receipt by Respondent. Pursuant to *7 Del. C. §6008*, any person whose interest is substantially affected by this action of the Secretary may appeal to the Environmental Appeals Board within 20 days of the receipt of the Secretary's Order. In the alternative, Respondent may, pursuant to *7 Del. C. §6005(b)(3)*, request a public hearing on the Secretary's Order, within 30 days of receipt of the Order. A public hearing pursuant to *7 Del. C. §6005(b)(3)* would be conducted pursuant to *7 Del. C. §6006*, and the Secretary's Order following the hearing would be subject to appeal, pursuant to *7 Del. C. §6008*, by any person substantially affected.

Respondent is further advised that the above assessed administrative penalty shall be due and owing within 30 days of Respondent's receipt of this Assessment and Order. In the event of nonpayment of the administrative penalty assessed above, and after Respondent has exhausted all legal appeals, if any, a civil action may be brought by the Secretary in Superior Court for collection of the administrative penalty, including interest, attorneys' fees and costs, and the validity, amount and appropriateness of such administrative penalty and/or costs shall not be subject to review pursuant to *7 Del. C. §6005(b)(3)*.

To request a public hearing pursuant to *7 Del. C. §6005(b)(3)*, please submit your request, in writing, to:

Department of Natural Resources and Environmental Control
Office of the Secretary
89 Kings Highway
Dover, DE 19901
Phone: (302) 739-9000

To submit an appeal to the Environmental Appeals Board pursuant to *7 Del. C. §6008*, you must file your written statement of appeal and submit a check, made payable to: “Environmental Appeals Board,” for the \$50.00 filing fee, to:

Department of Natural Resources and Environmental Control
Office of the Secretary
Attn: Assistant to the Environmental Appeals Board
89 Kings Highway
Dover, DE 19901
Phone: (302) 739-9000

For additional information on filing an appeal with the Environmental Appeals Board and what information you must include in your written statement of appeal, please refer to the Environmental Appeals Board Regulations, codified at *7 Del. Admin. C. §105*.

The Department, to the extent necessary, reserves the right to take additional enforcement actions regarding these and other violations by Respondent, including but not limited to one or more of the following: an action under *7 Del. C. §6005(b)(1)* seeking penalties for past violations, an action under *7 Del. C. §6005(b)(2)* seeking penalties for continuing violations, an action in the Court of Chancery pursuant to *7 Del. C. §6005(b)(2)* seeking a temporary restraining order or an injunction, and the imposition of civil penalties and recovery of the Department’s costs and attorney’s fees pursuant to *7 Del. C. §§6005(b)(3) & (c)(1)*. Nothing in this document shall be deemed to estop, or in any way preclude, any additional enforcement action for these and any other violations, including administrative and civil penalties for each day of violation, or an action for the recovery of Department costs expended in abating these violations.

COST RECOVERY

Pursuant to 7 *Del. C.* §6005(c), Respondent is liable for all expenses incurred by the Department in abating the violations detailed in this Secretary's Order. "Such expenses shall include, but not be limited to, the costs of investigation, legal fees and assistance, public hearings, materials, equipment, human resources, contractual assistance and appropriate salary and overtime pay for all state employees involved in the effort notwithstanding merit system laws, regulations or rules to the contrary." (7 *Del. C.* §6005(c)(1)).

Respondent is liable for \$3,607.79 in costs, which costs the Department has incurred to date in abating the violations detailed in this Secretary's Order. The Department has attached to this Secretary's Order a detailed billing of expenses detailing these costs. Respondent shall remit a check payable to the "State of Delaware" in the amount of \$3,607.79 within thirty (30) days of receipt of this Secretary's Order, to: Valerie S. Edge, Deputy Attorney General, Department of Justice, Environmental Unit, 102 W. Water Street, Dover, Delaware 19904.

In the event that Respondent appeals this Secretary's Order pursuant to 7 *Del. C.* §6008 or requests a public hearing pursuant to 7 *Del. C.* §6005(b)(3), or in the event Respondent fails to comply with this Secretary's Order, the Department will rescind the detailed billing attached to this Secretary's Order. The Department will issue Respondent a new detailed billing and Cost Recovery Order following exhaustion of Respondent's appeal rights that will include all additional recoverable costs incurred by the Department. Respondent is further advised that Respondent may challenge the Department's final detailed billing in accordance with 7 *Del. C.* §6005(c)(2).

PRE-PAYMENT

Respondent may prepay the administrative penalty of \$34,000 and the Department's costs in the amount of \$3,607.79, in the manner described in the attached "Waiver of Statutory Right to a Hearing." By doing so, Respondent waives its right to a hearing and the opportunity to appeal or contest this Secretary's Order and the Department's Cost Recovery.

If you have any questions, please contact, or have your attorney contact, Valerie S. Edge, Deputy Attorney General, at (302) 257-3219.

Date

4/27/23



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

cc: Valerie S. Edge, Deputy Attorney General
Angela Marconi, P.E., Director

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WAIVER OF STATUTORY RIGHT TO A HEARING

Perdue Foods, LLC hereby waives its right to a hearing and its opportunity to appeal or contest this Assessment and Order and agrees to the following:

1. **Perdue Foods, LLC** will pay the administrative penalty in the amount of \$34,000.00 by sending a check payable to the “State of Delaware” within 30 days of receipt of this Assessment and Order. The check shall be directed to Valerie S. Edge, Deputy Attorney General, c/o Emily Gabriellini, Department of Justice, Environmental Unit, 102 W. Water Street, Dover, DE 19904; and
2. **Perdue Foods, LLC** will pay the Department’s Costs in the amount of \$3,607.79 by sending a check payable to the State of Delaware within 30 days of receipt of this Assessment and Order. The check shall be directed to Valerie S. Edge, Deputy Attorney General, c/o Emily Gabriellini, Department of Justice, Environmental Unit, 102 W. Water Street, Dover, DE 19904;
3. **Perdue Foods, LLC** further agrees to abide by all the terms and conditions of this Assessment and Order.

Perdue Foods, LLC

Date: _____

By: _____

Title: _____

