**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF DELAWARE**

| | | |
|---|---|---|
| STATE OF DELAWARE DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL, | ) | Case No. 18-00838-MN-CJB |
| Plaintiff, | ) | |
| v. | ) | |
| MOUNTAIRE FARMS OF DELAWARE, INC., a Delaware Corporation, | ) | |
| Defendant. | ) | |

# FIRST AMENDED AGREEMENT AND [PROPOSED] CONSENT DECREE

This First Amended Agreement and Proposed Consent Decree ("Agreement") is made and entered into as of this 29th day of May, 2020, by and between Mountaire Farms of Delaware, Inc. ("Mountaire") and Plaintiff, Delaware Department of Natural Resources and Environmental Control ("DNREC") (collectively, the "Parties"), as more fully set forth herein:

## I. Recitals.

1. WHEREAS, Mountaire operates a poultry processing facility located on and nearby Route 24 east of Millsboro, Delaware (the "Facility"); and

2. WHEREAS, DNREC issued the following permits to Mountaire related to the operation of its wastewater treatment facility ("WWTF") at the Facility: (1) Spray Irrigation Permit No. 359191-04 issued July 31, 2017 (the "Spray Permit"); and (2) Agricultural Utilization Permits Nos. AGU 1402-S- 03 and AGU 1403-S-03, both issued June 1, 2014 (the "Land Application Permits"); and

3. WHEREAS, the Spray Permit allows Mountaire to operate a WWTF at the Facility that spray irrigates reclaimed wastewater onto agricultural farmland divided into thirteen (13) spray zones located north and south of State Route 24, Millsboro, Delaware. The facility is permitted to dispose of a monthly average quantity of 2.6 million gallons per day at a rate not to exceed 2.5 inches per acre averaged over a seven-day period. The facility has been designed for monthly effluent Total Nitrogen concentration of 15.6 mg/L according Mountaire's 2010 Design Development Report, prepared by Cabe Associates, Inc. The total amount of nitrogen that may be applied annually to each spray field acre is 320 pounds. (Spray Permit attached as Exhibit A); and

4. WHEREAS, the Land Application Permits allows Mountaire to operate a land treatment system for the agriculture utilization of sludge generated by the WWTF. The permit is limited to the application of stabilized sludge from the WWTF at agronomic rates specified in the Land Application Permits. (Land Application Permits attached as Exhibit B); and



ED_006227_00000070-00002

5. WHEREAS, at the end of August 2017, Mountaire discovered that the WWTF was in failure due to a buildup of solids throughout the WWTF, as well as a depletion of oxygen in the aerobic portions of the WWTF (the "System Failure"); and

6. WHEREAS, the System Failure caused Mountaire's wastewater to exceed effluent limitations contained in the Spray Permit; and

7. WHEREAS, on September 5, 2017, DNREC's Groundwater Discharge Section ("GWDS") received a notice via cover letter attached to Mountaire's July Discharge Monitoring Report indicating that operations staff discovered that effluent composite samples were being collected at an invalid sampling point that was not representative of the total combined effluent at the Facility; and

8. WHEREAS, on September 7, 2017, the GWDS received verbal notice from the Facility's operational staff regarding the discovery of additional non-compliance items, which caused the WWTF to apply constituents that exceeded permit levels; and

9. WHEREAS, Mountaire undertook timely interim action to reduce the solids from the spray effluent and disinfect the effluent prior to application on the spray fields; and



ED_006227_00000070-00003

10. WHEREAS, in November 2017 Mountaire submitted a Corrective Action Work Plan ("CAWP") to DNREC setting forth interim measures it would implement to reduce the monthly concentration of spray effluent contaminants; and

11. WHEREAS, the CAWP proposes construction of a long-term Wastewater Treatment Facility System Upgrade (hereinafter referred to as "Long-Term WWTF Upgrade"). The Long-Term WWTF Upgrade will be designed to meet permit limits and a maximum effluent concentration of 10 mg/L Total Nitrogen, which align with State and Federal Drinking Water Standards; and

12. WHEREAS, Construction of the Long-Term WWTF Upgrade will consist of two phases, as further discussed in Section VI (Compliance Requirements). In the first phase, Mountaire will construct the Primary WWTF Upgrades, which consist of the WWTF components necessary to achieve a Total Nitrogen effluent concentration of 10 mg/L or less. ("Primary WWTF Upgrades"). In the second phase, Mountaire will construct additional facility upgrades to further enhance and improve wastewater management and solids handling at the facility, including but not limited to replacing anaerobic lagoons with flow equalization tanks. ("Secondary WWTF Upgrades").



ED_006227_00000070-00004

13. WHEREAS, the CAWP has been periodically updated to show Mountaire's progress on the interim measures. Mountaire also provides weekly process control numbers and bi-weekly reports to DNREC and participates in monthly meeting with the DNREC staff regarding the interim measures, and such actions having commenced in September 2017 and continuing to date; and

14. WHEREAS, on November 2, 2017, DNREC issued Notice of Violation No. W- 17-GWD-13 (the "NOV") identifying a total of seventeen (17) categories of permit violations, including thirteen (13) categories of Spray Permit violations, and four (4) categories of Land Application Permit violations. (DNREC's November 2, 2017 Notice of Violation is attached as Exhibit C); and

15. WHEREAS, on December 22, 2017, DNREC supplemented its NOV with a letter to Mountaire requiring additional corrective actions for violations of the Spray Permit and the Land Application Permit, AGU 1402-S-03. (DNREC's December 22, 2017 letter attached as Exhibit D); and

16. WHEREAS, as a result of the System Failure, Mountaire will be unable to maintain full compliance with the Spray Permit until such time that the Primary WWTF Upgrades are completed; and



ED_006227_00000070-00005

17. WHEREAS, Mountaire has already implemented, and is in the process of further implementing interim measures designed to improve functionality of the WWTF, and Mountaire has committed to fully implementing those interim measures as set forth herein; and

18. WHEREAS, the interim measures implemented by Mountaire after the occurrence of the System Failure have resulted in improvements in the quality of the effluent from the WWTF, but such efforts have not and cannot consistently achieve full compliance with the Spray Permit until the Primary WWTF Upgrades are completed; and

19. WHEREAS, Mountaire has retained a design engineer to design the Long-Term WWTF Upgrade to ensure that the WWTF will be able to meet Spray Permit effluent limitations well into the future; and

20. WHEREAS, Mountaire's design engineer has prepared a Final Design Summary (the "Final Design Summary") for the Long-Term WWTF Upgrade, and has submitted this Final Design Summary to DNREC in connection with a construction permit application for the Long-Term WWTF Upgrade intended to implement Paragraph 45 hereof; and

21. WHEREAS, it is in the best interests of the Parties and the environment that the remaining interim measures and long-term measures be implemented as soon as possible in accordance with the requirements hereof; and



ED_006227_00000070-00006

22. WHEREAS, some but not all of the residential drinking water wells located some distance from the Facility have tested positive for nitrate as nitrogen above the maximum safe drinking water standard of 10 mg/L; and

23. WHEREAS, Mountaire does not agree or concede that elevated levels of nitrates in the drinking water wells are related to the System Failure, the WWTF or Mountaire's past and present operations; and

24. WHEREAS, while Mountaire maintains that it has not caused the nearby drinking wells to have elevated levels of nitrates, many recognize that there have historically been high levels of nitrates in the soils and groundwater in the area prior to the time that Mountaire commenced operations at the Facility. However, as a part of this Agreement, and as an environmentally beneficial offset, Mountaire shall provide the residents in the area as shown on the attached Exhibit F (Residential Area) the availability of a central water supply system or in the alternative, deep water supply wells or water filtration systems in accordance with Section VII (Environmentally Beneficial Offset) of this Agreement; and

25. WHEREAS, DNREC has brought lawsuits against Mountaire in respect of: (i) its violations of the Spray Permit and the Land Application Permits; (ii) its improper handling, treatment, storage, transportation and disposal of solid waste, which present an imminent and substantial endangerment to health and the environment, (iii) its handling, treatment, storage, transportation and disposal of



ED_006227_00000070-00007

solid waste that constitutes open dumping of solid waste, and (iv) its unpermitted discharge of pollutants into waters of the State and United States through surface water and hydrogeologic connection of Mountaire-contaminated groundwater with Swan Creek, Indian River and Indian River Bay; and

26. WHEREAS, to mitigate the environmental impacts from Mountaire's discharges of excess nitrogen caused by Mountaire's System Failure, alleged permit violations and any disposal of solid waste at the Facility, as well as by Mountaire's continued non-compliance with permit conditions until such time as the Primary WWTF Upgrades are completed and compliance achieved, Mountaire will: (1) determine, by a method approved by DNREC, the quantity of excess nitrogen discharged to the spray fields above permit limits, with Mountaire's quantity determination subject to final approval by DNREC; and (2) as part of the construction and operation of Mountaire's Primary WWTF Upgrades, Mountaire will install a system of wells to withdraw and treat groundwater through its WWTF in an effort to remove the excess nitrogen Mountaire discharged from the groundwater. The mitigation wells will be relocated and operational within 24 months of the issuance of the construction permit for the Long-Term WWTF Upgrade; and



ED_006227_00000070-00008

27. WHEREAS, Mountaire agrees to undertake the actions set forth herein in addition to the interim and long-term corrective measures at the WWTF in order to resolve and satisfy the allegations set forth in the NOV and in the Complaints filed by DNREC in this Court and in the Superior Court of Delaware,[1] (hereinafter referred to as the "Federal Complaint" and "State Complaint," respectively) and to return the WWTF to full compliance with the current or future Spray Permit and Land Application Permits; and

28. WHEREAS, the Parties commit to work cooperatively and communicate regularly to effectuate the purposes of this Agreement and allow the Facility to continue operations as long as the requirements of this Agreement are being satisfied, and provided further that the Parties are committed to pursue timely and efficient performance of the actions identified in this Agreement; and

29. WHEREAS, the Parties have agreed that the resolution of any violations of permit conditions or of applicable law addressed by this Agreement is in the best interest of the Parties and in the public interest, and that execution of this Agreement without further litigation is the most appropriate means of resolving violations of the Spray Permit and the Land Application Permits, as alleged in the Federal Complaint and State Complaint; and

---

[1] *Delaware Department of Natural Resources & Environmental Control v. Mountaire Farms of Delaware, Inc.,* C.A. No. S18M-06-002-RFS.



ED_006227_00000070-00009

30. WHEREAS, the initial Agreement and [Proposed] Consent Decree was lodged with the Court on December 16, 2019, [D.I. 65], and published in the Delaware Register of Regulations on February 1, 2020; and

31. WHEREAS, as a result of public comments received and the meet and confer process with Intervenors, the Parties have agreed to further enhance and improve the WWTF and to take additional mitigation measures beyond the initial Agreement and [Proposed] Consent Decree.

NOW THEREFORE, without any admission of fact or law, including without limitation any admission of potential violations of Delaware or federal law or regulations, the Parties hereby stipulate and agree as follows:

## II. Objectives.

32. It is the express purpose of the Parties in entering into this Agreement to undertake actions to protect the public health and welfare, as well as the environment, and to resolve the claims of DNREC against Mountaire, as provided in this Agreement.

## III. Jurisdiction.

33. The United States District Court for the District of Delaware (the "Court") has jurisdiction over the subject matter of DNREC's claims pursuant to the Resource Conservation and Recovery Act ("RCRA"), codified in 42 U.S.C. § 6901 *et seq.*, and the Clean Water Act, codified at 33 U.S.C. § 1251 *et seq.* ("CWA"),



ED_006227_00000070-00010

## IV. Enforcement.

34. This Agreement shall be governed by, and interpreted under, the laws of the State of Delaware.

35. Upon execution of this Agreement by the Parties, this Agreement shall be a legally binding contract enforceable by DNREC or Mountaire through a breach of contract action filed in a Delaware state court of competent jurisdiction.

36. On December 16, 2019, the initial Agreement and [Proposed] Consent Decree was lodged with the Court for public comment and thereafter for entry as a "Consent Decree" with the Court. Pursuant to Orders of the Court dated December 17, 2020 [D.I. 67], and by further agreement of the Parties on March 6, 2020 [D.I. 79], the matter has been stayed until May 1, 2020. During the period of the stay, the initial Consent Decree was published by DNREC in the Delaware Register of Regulations on February 1, 2020, and DNREC received four separate comment letters.

37. On May 7, 2020, the Court granted DNREC's motion to stay the case until May 29, 2020, to allow DNREC and Mountaire additional time to consider and finalize changes to the original Agreement and [Proposed] Consent Decree based on the written public comments and Mountaire's meet and confer process with Intervenors Gary and Anna-Marie Cuppels. D.I. 89.



ED_006227_00000070-00011

38. After the comment period closed and following review of the public comments received, the Parties engaged in further negotiations, resulting in this First Amended Agreement and [Proposed] Consent Decree. Mountaire consents to entry of this Agreement as a Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Consent Decree, unless DNREC has notified Mountaire in writing that it no longer supports entry of the Consent Decree. Upon the Court's entry of this Agreement as a Consent Decree, the Parties shall submit to the jurisdiction of this Court for purposes of enforcement or implementation of any provision of the Consent Decree. The Court retains jurisdiction over both the subject matter of this Consent Decree for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes.

39. In the event the Court refuses to enter this Agreement as a Consent Decree, this Agreement shall remain enforceable as a legally binding contract between the Parties, enforceable as provided in Paragraph 35.



ED_006227_00000070-00012

## V. Application and Scope.

40. The provisions of this Agreement shall apply to and be binding upon DNREC, Mountaire and their respective successors and assigns for the term of this Agreement. Execution of this Agreement by Mountaire is properly authorized, and Mountaire commits the resources reasonably necessary to satisfy this Agreement. Notwithstanding any other provision of this Agreement to the contrary, the State of Delaware Department of Justice is not a party to this Agreement, and no aspect of its legal authority is disturbed by the content herein.

41. In the event Mountaire proposes to sell or transfer the Facility prior to termination of this Agreement, it shall advise any prospective purchaser or successor-in-interest about the existence of this Agreement in writing and provide therewith a copy of this Agreement. Mountaire shall simultaneously provide written notice to DNREC by certified mail, in accordance with Section XIX (Notices) of this Agreement that it is proposing to sell or transfer the Facility, which notice must include a copy of Mountaire's written notice provided to the prospective purchaser or successor-in-interest required by this Paragraph. In addition, if Mountaire chooses to sell the Facility before this Agreement has been terminated, and the prospective purchaser chooses to continue to operate the Facility as a poultry processing facility, then such sale shall be contingent upon the purchaser or successor-in-interest



ED_006227_00000070-00013

agreeing to be bound by any remaining obligations applicable to the Facility under this Agreement.

42. No transfer of ownership or operation of the Facility, whether in compliance with the procedures of Paragraphs 41 and 42, or otherwise, shall relieve Mountaire of its obligation to ensure that the terms of this Agreement are implemented. At least 30 days prior to such transfer, Mountaire shall provide a copy of this Agreement to the proposed transferee or successor-in-interest and shall simultaneously provide written notice of the prospective transfer, together with a copy of the portion of the proposed written agreement addressing this Agreement, to DNREC in accordance with Section XIX of this Agreement (Notices). Any attempt to transfer ownership or operation of the Facility without complying with the requirements of Paragraphs 41 and 42 constitutes a violation of this Agreement.

43. Nothing contained herein shall prevent Mountaire for any reason from discontinuing its poultry processing operations at the Facility and relinquishing its Spray Permit and Land Application Permit, in which case all of Mountaire's requirements to achieve Permit compliance under this Agreement shall be eliminated, provided, however, that the remaining requirements of this Agreement shall remain in effect. If Mountaire discontinues operations and relinquishes its Spray Permit and Land Application Permits, Mountaire will develop a mitigation



ED_006227_00000070-00014

plan for Department approval to resolve any outstanding mitigation commitments established via this Agreement.

## VI. Compliance Requirements.

44. **Interim Corrective Measures**. Mountaire agrees to make all reasonable efforts to implement or to complete, in a timely manner, interim measures, which are designed to improve functionality to the WWTF in anticipation of the Long-Term WWTF system upgrades. As noted in Section I, several such measures have already been implemented and/or discontinued. If Mountaire discontinues or modifies any existing interim corrective measures, or implements any new interim corrective measures, Mountaire agrees to notify DNREC verbally and in writing as soon as practicable, but no later than five (5) days prior to discontinuing any existing or implementing any new interim corrective measures. Failure to provide the notice required by this Paragraph constitutes a violation of this Agreement.

Interim Corrective Measures that have been taken prior to the execution of this Agreement and that are ongoing as of the execution date of this Agreement are:

a. Increased WWTF staffing

b. Installation and operation of Liquid Oxygen System – SDOX, including the upgraded SDOX system and the additional unit

c. 4Q Project (CROM tank recycle)



ED_006227_00000070-00015

d. Continued ongoing efforts to improve CROM performance

e. Review of alternatives to SDOX units due to performance and support concerns.

Interim Corrective Measures that have been taken prior to the execution of this Agreement and that have been completed or discontinued are:

f. Removal of solids stored in the Temporary Sludge Storage Lagoon

g. Offal Room Screening Upgrade

h. Sludge removal from Final Pond

i. Activated Sludge System Improvements

j. Pivot Maintenance

k. Trial implementation of Zee Breakpoint Chlorination System

l. Sludge Removal from Anaerobic Lagoon 2

m. Solids Removal from Oxidation Ditch

n. Installation of a new post-anaerobic DAF Unit

o. Bench-testing of ion exchange, R3renew Electro-Kinetic Transfer System, and 3D Probe Technology

p. Retrofit of Clarifier B to allow increased Return Activated Sludge.



ED_006227_00000070-00016

q. Removal of solids materials from existing Anaerobic Lagoon No. 1.

45. **Wastewater Treatment Facility System Upgrade.** The Parties acknowledge that at the time of the execution of this Agreement, Mountaire has submitted to DNREC applications for a construction permit for the Long-Term WWTF Upgrade and a request to modify the existing Spray Irrigation Operations Permit in contemplation of the completion of these upgrades. Mountaire represents that, to the best of its knowledge and belief, its applications for a construction permit for the Long-Term WWTF Upgrade and request to modify the existing Spray Irrigation Operations Permit address all applicable requirements of the Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems, 7 Del. Admin. C. § 7101. Mountaire also represents that its applications for a construction permit for the Long-Term WWTF Upgrade and request to modify the existing Spray Irrigation Operations Permit address: (1) an emergency contingency plan (6.3.2.3.13.7); (2) elimination of wet weather irrigation fields (6.3.2.3.13.11); (3) synthetic lining of the new finish pond (6.3.2.3.5.6); (4) adequate storage capacity (6.3.2.3.12.2); (5) automatic diversion of off-spec water (6.3.2.3.2.4, 6.3.2.3.12.3); and (6) soils assessment/infiltration testing (6.3.2.3.6.5). The Department reserves the right to request additional information as needed to complete its technical review of the revised application.



ED_006227_00000070-00017

46. Draft permits have been prepared and a public hearing on the permits was noticed for and occurred on May 21, 2020.

47. Construction of the Long-Term WWTF Upgrade consists of two phases. In the first phase, Mountaire will construct the Primary WWTF Upgrades, which consist of the WWTF components necessary to achieve a total nitrogen effluent concentration of 10 mg/L or less. ("Primary WWTF Upgrades"). The Parties contemplate that construction of the Primary WWTF Upgrades, including but not limited to the treatment and disposal components of the WWTF, will be completed within 24 months of the issuance of the construction permit.

48. In the second phase, Mountaire will construct additional facility upgrades to further enhance and improve wastewater management and solids handling at the facility, including but not limited to replacing anaerobic lagoons with flow equalization tanks. ("Secondary WWTF Upgrades")

49. the Parties contemplate that construction of the Secondary WWTF Upgrades will be completed within 36 months of the issuance of the construction permit.

50. The Parties recognize the importance of timely completion of the Long-Term WWTF Upgrade in order to reduce the amount of total nitrogen that will be applied to Mountaire's spray fields pending the completion and operation of the system upgrade. The Parties further acknowledge that DNREC has expedited its



ED_006227_00000070-00018

review of Mountaire's permit applications, and further agree to act expeditiously to the extent practicable and permissible under applicable statutes and regulations to ensure timely completion of the Long-Term WWTF Upgrade.

51. Mountaire and DNREC have agreed to include a compliance schedule in the proposed Spray Irrigation Construction Permit to address the timing of the Secondary WWTF Upgrades as well as installation of treated effluent storage that increases Mountaire's storage capacity from 22 million gallons to at least 44 million gallons. Mountaire also agrees that the design and operation of the Long-Term WWTF Upgrade will include the following: (i) installation of equipment allowing for the seasonal injection of supplemental carbon (glycerin or other suitable source) into the proposed tertiary filter to allow for additional denitrification as appropriate during the winter season; and (ii) certain design changes allowing for more consistent biologic treatment in periods of cold weather. In addition, Mountaire intends to pursue all permits required for the conversion of the Al Rust and Thorogood land application fields to dual-use spray irrigation or land application fields, thereby adding additional spray field acreage.



ED_006227_00000070-00019

## VII. Environmentally Beneficial Offset & Alternative Water Supply.

52. The groundwater in the residential area shown as Exhibit F ("Residential Area") has historically, before Mountaire commenced operations at the Facility, contained high levels of nitrates. The residences in the area, like many others in Sussex County, rely on shallow drinking water wells for a water supply, and on-site septic systems for domestic sewage disposal. Some, but not all residential drinking water wells in the Residential Area, have tested positive for nitrates as nitrogen above the safe drinking water standard.

53. Mountaire shall, as an environmentally beneficial offset, seek to make available to the residential property owners in the Residential Area through Tidewater Utilities ("Tidewater"), a regulated public water supply company, the availability of a central water supply that meets safe drinking water standards within the time frame set forth in Exhibit G. It is recognized by the Parties that the Delaware Public Service Commission ("PSC") has jurisdiction over the supply of drinking water to the Residential Area and imposes certain requirements, such as obtaining a Certificate of Public Convenience and Necessity ("CPCN") before a central water supply system can be installed. DNREC shall cooperate and provide assistance in obtaining PSC approvals necessary to provide the availability of a central water supply system to the Residential Area.



ED_006227_00000070-00020

54. In the event that it is not possible to satisfy the PSC requirements for the installation of a central water supply system within the time frame set forth in Exhibit G, then as an alternative, and subject to receipt of all necessary permits and approvals, Mountaire shall offer to provide deep drinking water wells to the residential property owners in the Residential Area, in accordance with Exhibit G.

55. Regardless of Mountaire or Tidewater's ability to obtain the necessary PSC approval, as discussed in Paragraph 53, Mountaire shall, as an alternative to connection to a central water supply or a deep well, offer within the timeframe described in Exhibit G, the prompt installation of a whole-house filtration system acceptable to DNREC.

56. Mountaire shall provide written reports on a monthly basis to DNREC detailing its efforts to provide an alternative water supply to the residential property owners in the Residential Area.

**VIII. Mitigation Measures.**

57. **Mitigation.** As a result of the System Failure, Mountaire has sprayed and continues to spray effluent onto the spray fields which exceeds the Spray Permit concentration limit for Total Nitrogen. To mitigate for the quantity of Total Nitrogen sprayed above the permit limit, and to abate conditions that may have been caused thereby, Mountaire shall, at the time that the Primary WWTF Upgrades are operational, withdraw groundwater from the spray fields by relocating its shallow



ED_006227_00000070-00021

plant process production wells to spray field locations containing elevated levels of nitrates, and then after using such withdrawn groundwater for plant processing purposes, direct the resulting wastewater to the WWTF to achieve a reduction of nitrates in the groundwater concentrations, and to effectuate the highest level of hydraulic control practicable based on Mountaire's process water needs.

58. Mountaire has submitted a work plan for process well relocation that provides hydraulic control under the facility. This mitigation measure shall be a permanent part of the Long-Term WWTF Upgrade, and not a temporary measure. The manner in which the shallow plant processing wells are to be located and the methodology for determining the amount of Total Nitrogen to be reduced from the groundwater treatment is set forth in Exhibit H.

59. Mountaire shall install at least 1,000 feet of "TreeWell" or equivalent phytoremediation barrier between its lower spray fields and wetlands bordering Swan Creek south of State Route 24. Within thirty (30) days of the date of execution of this Agreement, Mountaire shall submit to DNREC a work plan for the phytoremediation barrier required under this paragraph 59.

60. Mountaire shall provide written reports on a monthly basis to DNREC detailing its efforts to implement the mitigation measures set forth in Exhibit H and in Paragraph 59 above.



ED_006227_00000070-00022

## IX. Monitoring Compliance Certification.

61. The Spray Permit as issued on July 31, 2017, and the Land Application Permits as issued on May 30, 2014, each contain monitoring requirements imposed on Mountaire for purposes of determining permit compliance. To assure that the monitoring requirements are being satisfied, that interim corrective actions are being properly performed and continued, and the Facility is being operated in accordance with this Agreement, Mountaire shall, within sixty (60) days of the date of execution of this Agreement, submit to DNREC for approval, the names of a qualified licensed professionals or licensed consulting firms with operational sampling and monitoring experience in the spray irrigation of wastewater and agricultural land application of solids to certify that the monitoring requirements contained in the referenced Permits are being satisfied. The Certifications shall be provided to DNREC at the time monitoring results are submitted by Mountaire to DNREC, and such Certifications shall contain a description of any deficiencies and any corrective action taken by Mountaire. If Mountaire is not sooner relieved of this requirement by DNREC, then this requirement shall terminate at the time of termination of the Agreement.



ED_006227_00000070-00023

## X. Civil Penalties and Costs.

62. The parties acknowledge that Mountaire has, in connection with this Agreement, paid a civil penalty to DNREC in the amount of $600,000.00, such civil penalty having been reduced by thirty (30) percent as a result of the obligation to provide the Environmentally Beneficial Offset as set forth in Section VII (Environmentally Beneficial Offset) hereof.

63. The parties further acknowledge that Mountaire has, in connection with this Agreement, paid costs incurred by DNREC in the investigation of the violations alleged in the Complaint in the amount of $25,000.00.

64. [Reserved].

65. The Parties further agree that any violations of the provisions of this Agreement may result in the immediate issuance of a cease and desist order pursuant to 7 *Del. C.* § 6018 to Mountaire and may result in further enforcement action that may include, but is not limited to, additional civil penalties, administrative penalties, criminal penalties, or injunctive relief.

66. DNREC is not required to seek penalties under this Section (Civil Penalties and Costs) for any specific violation, and the failure of DNREC to seek a penalty for any specific violation shall not waive or affect DNREC's rights to seek penalties for any future violation of the Agreement.



ED_006227_00000070-00024

## XI. Stipulated Penalties.

67. Mountaire shall be liable for stipulated penalties for violations of this Agreement as specified below, unless excused under Section XII (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Agreement, including any work plan or schedule approved under this Agreement, according to all applicable requirements of this Agreement and within the specified time schedules established by or approved under this Agreement.

68. Late Payment of Civil Penalties and Costs. If Mountaire fails to pay the civil penalties or costs required under Section X (Civil Penalties and Costs) of this Agreement when due, Mountaire shall pay a stipulated penalty of $1,000.00 per day for each day that the payment is late.

69. Compliance Requirements. Stipulated penalties shall accrue for each violation of the obligation to implement interim or long-term measures by the final date required under Section VI (Compliance Requirements) of this Agreement:

| Penalty Per Violation Per Day | Period of Noncompliance |
|---|---|
| $1,000 | Each Day |

70. Stipulated penalties under this Section (Stipulated Penalties) shall begin to accrue on the day after performance is due or on the day that a violation occurs, whichever is applicable, and shall continue to accrue until performance is



ED_006227_00000070-00025

satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Agreement.

71. Within 20 Business Days of a written demand by DNREC, Mountaire shall either pay stipulated penalties or invoke the Dispute Resolution provisions of Section XV (Dispute Resolution) of this Agreement.

72. DNREC may in the unreviewable exercise of their discretion, reduce or waive stipulated penalties otherwise due it under this Agreement.

73. Stipulated penalties shall continue to accrue as provided in this Section (Stipulated Penalties), during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of DNREC, which is not appealed to a court of competent jurisdiction, Mountaire may be required to pay accrued penalties determined to be owing to DNREC within 30 days of the effective date of the agreement or the receipt of DNREC's decision or order if the dispute resolution process is invoked in bad faith.

b. If the dispute is appealed and DNREC prevails, Mountaire shall pay all accrued penalties determined by a court of competent jurisdiction to be owing within 60 days of receiving said court's decision or order, except as provided in Subparagraph c, below.



ED_006227_00000070-00026

c. If any Party further appeals said court's decision respecting accrued penalties, Mountaire shall pay all accrued penalties determined to be owing, together with interest, within 15 days of receiving the final appellate court decision.

74. Mountaire shall pay stipulated penalties owing to DNREC in the manner set forth and with the confirmation notices required by this Section (Stipulated Penalties), respectively, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

75. If Mountaire fails to pay stipulated penalties according to the terms of this Agreement, Mountaire shall be liable for interest on such penalties, as provided for in 7 *Del. C.* § 6005, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit DNREC from seeking any remedy otherwise provided by law for Mountaire's failure to pay any stipulated penalties. Mountaire does not waive and specifically reserves all of its defenses to any such action by DNREC.

76. The stipulated penalties provided for in this Agreement shall be in addition to any other rights, remedies, or sanctions available to DNREC for Mountaire's violation of this Agreement or applicable law. Where a violation of this Agreement is also a violation of relevant statutory or regulatory requirements,



ED_006227_00000070-00027

Mountaire shall receive full credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

## XII. Force Majeure.

77. A "force majeure" for purposes of this Agreement is defined as any event arising from causes beyond the control of Mountaire that delays or prevents the performance of any obligation under this Agreement despite Mountaire's best efforts to fulfill the obligation, taking into account DNREC's commitment to act in a timely manner regarding any matter under consideration or review. A "force majeure" does not include the failure of performance by Mountaire due to the failure of any of Mountaire's officers, directors, employees, agents, or contractors to employ best efforts in taking actions necessary for Mountaire to comply with the provisions of this Agreement, nor does it include the failure of performance by Mountaire due to the failure of any of Mountaire's officers, directors, or employees to perform their duties. The requirement that Mountaire exercise its best efforts to fulfill the obligations, includes without limitation an obligation to use best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. A force majeure does not include Mountaire's financial inability to perform any obligation under this Agreement.



ED_006227_00000070-00028

78. In the event of a force majeure Mountaire shall notify DNREC verbally or in writing as soon as practicable, but in any event within forty-eight hours from the time when Mountaire first knew of the event, or should have known of the event by exercise of due diligence. In this notification or subsequent communication, Mountaire shall specifically reference this Paragraph of this Agreement and describe the anticipated length of time the delay may persist, the cause or causes of the delay, and the measures taken or to be taken by Mountaire to prevent or minimize the delay and the schedule by which those measures will be implemented. Mountaire shall adopt all reasonable measures to avoid or minimize such delays.

79. Failure by Mountaire to comply with the notice requirements of Paragraph 78 as specified above shall render this Section (Force Majeure) voidable by DNREC.

80. DNREC shall acknowledge receipt of Mountaire's claims of a delay or impediment to performance within five (5) business days of DNREC's receipt of the Force Majeure notice required under Paragraph 78.

81. If DNREC agrees that the delay or impediment to performance has been or will be caused by circumstances beyond the control of Mountaire, and that Mountaire could not have prevented the delay by the exercise of due diligence, then DNREC shall extend the required deadline(s) or all requirement(s) affected by the delay by a period equivalent to the delay caused by such circumstances, or such other



ED_006227_00000070-00029

period as may be appropriate in light of the circumstances. Such an extension by DNREC shall modify this Agreement and does not require Court approval.

82. Unanticipated or increased costs or expense associated with the performance of Mountaire's obligations under this Agreement shall not constitute circumstances beyond Mountaire's control, or serve as a basis for an extension of time under this Section (Force Majeure).

83. Notwithstanding any other provision of this Agreement, no inference shall be drawn nor presumption adverse to any Party be established as a result of Mountaire's transmitting a notice of Force Majeure.

**XIII. Release of Liability.**

84. Mountaire's satisfaction of its obligations under this Agreement shall resolve and release Mountaire of any and all liability of Mountaire to DNREC for: [1] the System Failure; [2] Mountaire's past failure to meet the effluent limitations and other conditions in the Spray Permit; [3] Mountaire's past failures to satisfy the compliance requirements in the Land Application Permits, including but not limited to, any such liability that might be imposed for violations alleged in the NOV; [4] Mountaire's present failure to comply with the effluent limitations in the Spray Permit for the period from the System Failure until the Primary WWTF Upgrades are completed; [5] Mountaire's alleged other contribution to the past or present handling, storage, treatment, transportation or disposal of a solid waste that may



ED_006227_00000070-00030

present an imminent and substantial endangerment to health or the environment; [6] Mountaire's alleged other disposal into an "open dump" as defined under 7 *Del. C.* § 6002(35) and 42 U.S.C. 6403(14); and [7] Mountaire's alleged other discharge of pollutants into waters of the State and United States through surface water hydrogeologic connection of Mountaire contaminated groundwater with Swan Creek, Indian River, and Indian River Bay.

85. During the time from the execution of this Agreement until Mountaire applies for an amended Spray Permit as required under Paragraph 45 of this Agreement, Mountaire shall, during such period, undertake all practical and reasonable measures to operate the WWTF in a manner that achieves results that approach full compliance with the Spray Permit. Mountaire shall further attempt to minimize the impact that the construction of the WWTF system upgrade has on interim operations of the WWTF. Provided Mountaire undertakes the practical and reasonable measures required under this Paragraph and Paragraph 44, Mountaire shall not have any liability for failing to meet the conditions of the Spray Permit prior to the effective date of the amendment to the Spray Permit as required under Paragraph 45.

86. To the extent Mountaire takes required actions identified in this Agreement, the release of liability set forth in Paragraph 85 above shall extend through the time this Agreement is terminated pursuant to Section XXI (Termination



ED_006227_00000070-00031

and Satisfaction). This Paragraph is not intended nor shall it be construed to limit the provisions of Paragraph 85 above.

87. Nothing in this Release of Liability shall affect the legal rights of any individual not a party to this Agreement. In addition, nothing in this Release of Liability shall affect DNREC's ability to enforce any violations of federal or state law that are not expressly set forth in Paragraph 84 of this Agreement.

## XIV. General Provisions

88. Modification. This Agreement may only be modified by written consent of the undersigned Parties or their successors. Except as otherwise provided herein, any changes or amendments to the Agreement shall be submitted to the Court for purposes of the entry of a Court Order to reflect the revised Agreement. Nothing in this Agreement shall be deemed to alter the Court's power to modify, enforce, supervise, or approve modifications to this Agreement.

89. Admissibility. This Agreement shall not be deemed an admission of liability or wrongdoing by any Party, and its admissibility shall be limited in accordance with Rule 408 of the Federal and Delaware Rules of Evidence in any court proceeding, except in an action to enforce this Agreement.

90. Other Laws. Except as specifically provided by this Agreement, nothing in this Agreement shall relieve Mountaire of its obligation to comply with all applicable federal, state, and local laws and regulations.



ED_006227_00000070-00032

## XV. Dispute Resolution.

91. All disputes arising under the terms of the Agreement shall be resolved in accordance with the following procedure.

92. Any party wishing to initiate dispute resolution shall provide the other with a written statement outlining the nature of the dispute (the "Notice of Dispute"). The Parties, within ten (10) days of the receipt of the Notice of Dispute, shall meet and confer to attempt to resolve their differences informally.

93. If the Parties are unable to resolve the dispute within fourteen (14) days of receipt of the Notice of Dispute, or such longer time to which the Parties may agree to pursue informal dispute resolution, either: (i) the dispute shall be submitted to the Court, via motion, for a hearing if this Agreement has previously been entered by the Court as a Consent Decree or if the Court has not yet acted on the request to enter the Agreement as a Consent Decree; or (ii) if the Court has rejected entry of this Agreement as a Consent Decree, the dispute shall be submitted to a Delaware state court of competent jurisdiction on a cause of action arising under state law.



ED_006227_00000070-00033

## XVI. Information Collection, Retention, and Sharing.

94. Right of Entry. DNREC and their representatives, including attorneys, contractors, and consultants, shall have a right of entry upon the premises of the Facility at any time for any lawful purpose, including, but not limited to:

a. Monitor the progress of activities required under this Agreement;

b. Verify any data or information submitted to DNREC;

c. Obtain samples and, upon request, splits of any samples taken by Mountaire or its representatives, contractors, or consultants;

d. Inspect equipment at the Facility;

e. Inspect and copy all records maintained by Mountaire related in any way to this Agreement;

f. Obtain documentary evidence, including photographs and similar data; and

g. Assess Mountaire's compliance with this Agreement.

95. Nothing in this Agreement shall limit the authority of DNREC to conduct tests and inspections under applicable statutory and regulatory provisions.

96. Information Sharing. Mountaire and DNREC shall cooperate with the signatories to the Agreement by providing statistics, analysis, audits, and other information regarding compliance with the Agreement. At reasonable times and upon reasonable notice, which need not be more than 30 days, Mountaire shall

provide to DNREC copies of documents or things requested by DNREC for the purpose of determining whether Mountaire is complying with this agreement and order. Upon reasonable request and within 30 days, DNREC shall provide to Mountaire documents or things requested upon which DNREC relies in claiming Mountaire is not complying with this Agreement. Upon request, Mountaire shall provide DNREC or its authorized representatives with splits of any samples taken by Mountaire. Upon request, DNREC shall provide Mountaire with splits of any samples taken by DNREC or its authorized representatives. Mountaire shall provide DNREC copies of all analytical results, regardless of whether the results are specifically requested by DNREC.

97. Recordkeeping, Record Retention, and Reporting. Until five (5) years after the termination of this Agreement, Mountaire shall make all reasonable efforts to retain, and shall instruct its contractors and agents to make all reasonable efforts to preserve, all non-identical copies of all final documents (including such documents in electronic form) in its or its contractors' or agents' possession that relate to Mountaire's performance of its obligations under this Agreement. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. The information-retention requirement shall be in addition to any similar information-retention requirement included in any permits, and shall not affect or invalidate any such permit requirements. At any time



ED_006227_00000070-00035

during this information-retention period, upon request by DNREC, Mountaire shall provide copies of any documents required to be maintained under this Paragraph, subject to Mountaire's right to claim any such documents as privileged under the attorney-client privilege or any other privilege recognized by federal law. If Mountaire asserts such a privilege, it shall provide the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of each author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Mountaire. However, no final documents or records created or generated pursuant to the requirements of this Agreement shall be withheld on grounds of privilege.

98. This Agreement in no way limits or affects any right of entry and inspection, or any right to obtain information, held by DNREC pursuant to applicable federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of Mountaire to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.



ED_006227_00000070-00036

## XVII. Effect of Settlement/Reservation of Rights.

99. This Agreement resolves the claims of DNREC for the violations alleged in the Complaint filed in this action and includes the Notice of Violation issued to Mountaire by DNREC on November 2, 2017.

100. DNREC reserves all legal and equitable remedies available to enforce the provisions of this Agreement, and DNREC does not waive and specifically reserves all defenses to any such claims. Except as provided in Paragraphs 84 and 85 hereof this Agreement shall not be construed to limit the rights of DNREC to obtain penalties or injunctive relief under any applicable law, regulation, or permit. DNREC further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or environment that arise at, or posed by, the Facility, whether related to the violations addressed in this Agreement or otherwise. DNREC does not waive and specifically reserves all defenses to any such claims.

101. This Agreement is not a permit, or a modification of any permit, under any federal, state, or local laws or regulations. Unless addressed otherwise herein, Mountaire is responsible for achieving and maintaining compliance with all applicable federal, state, and local laws, regulations, and permits. Unless specifically set forth herein, Mountaire's compliance with this Agreement does not guarantee compliance with any applicable federal, state, or local laws or regulations.



ED_006227_00000070-00037

Mountaire's compliance with this Agreement shall be no defense to any action commenced by DNREC pursuant to any such laws, regulations, or permits. Unless specifically set forth herein, nothing in this Agreement shall be construed to be a ruling on, or determination of, any issues related to any federal, state, or local permits. Except as expressly set forth herein, it is understood that the interim actions undertaken by Mountaire under this Agreement to achieve compliance shall not require individual permits from DNREC and shall be subject to the provisions of Paragraphs 44, 84, 85, and 99 of this Agreement.

102. Nothing in this Agreement shall alter DNREC's independent statutory, regulatory, and permitting discretion, and nothing in this Agreement shall be construed to require DNREC to pay or appropriate any monies or expend any funds.

103. This Agreement does not limit or affect the rights of Mountaire or of DNREC against any third Parties, not party to this Agreement.

104. This Agreement shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Agreement. This Agreement affects the rights, obligations, and duties of the Parties only. Notwithstanding any other provision of this Agreement to the contrary, nothing in this Agreement is intended to, nor shall it be interpreted or construed in a manner which shall: (a) grant any third party the right to enforce any of the terms, rights, or obligations set forth



ED_006227_00000070-00038

in this Agreement; (b) confer any substantive or procedural rights or privileges to any third party in relation to or arising out of any collateral civil or criminal legal proceeding; (c) impair the legal rights of any third party; or (d) waive or otherwise affect the sovereignty of the State of Delaware or the application of 10 *Del. C.* § 4001, *et seq.* to any civil proceeding involving any officer, employee, or agent of the State of Delaware.

**XVIII. Costs.**

105. Except as to DNREC's costs, as provided in Paragraph 63, the Parties shall bear their own costs of this action, including attorney's fees.

**XIX. Notices**.

106. Unless otherwise provided herein, notifications to or communications with DNREC or Mountaire shall be deemed submitted on the date they are postmarked and sent either by overnight receipt mail service or by certified or registered mail, return receipt requested, or on the date that they are hand delivered. Except as otherwise provided herein, when written notification or communication is required by this Agreement, it shall be addressed as follows:



ED_006227_00000070-00039

As to Mountaire:

Phillip Plylar
President
Mountaire Farms of Delaware, Inc.
P.O. Box 1320
29106 John J. Williams Hwy.
Millsboro, DE 19966
pplylar@mountaire.com

with a copy to:

F. Michael Parkowski, Esq.
Michael W. Teichman, Esq.
Elio Battista, Jr., Esq.
Parkowski, Guerke & Swayze, P.A.
1105 N. Market Street, 19th Floor
Wilmington, DE 19801
mparkowski@pgslegal.com
mteichman@pgslegal.com
ebattista@pgslegal.com

As to DNREC:

The Honorable Shawn M. Garvin
Secretary
State of Delaware
Department of Natural Resources and Environmental Control
89 Kings Highway
Dover, DE 19904

with a copy to:

Devera Scott, Esq.
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, DE 19904
Devera.Scott@Delaware.gov



ED_006227_00000070-00040

107. Either party may change either the notice recipient or the address for providing notices to it by serving the other party with a notice setting forth such new notice recipient or address.

## XX. Effective Date.

108. As among the Parties, the effective date of this Agreement shall be the date upon which this Agreement is executed by the Parties. This Agreement shall not become effective as a Consent Decree until the date upon which it is entered by the Court.

## XXI. Termination and Satisfaction.

109. This Paragraph establishes the procedures and standards for termination of this Agreement.

a. The standard for termination of this Agreement is Mountaire's satisfaction of the requirements of this Agreement. Specifically, the requirements for termination include payment of any civil penalties and stipulated penalties that may be due to DNREC under this Agreement and implementation of the compliance requirements under Sections VI (Compliance Requirements), VII (Environmentally Beneficial Offset), VIII (Mitigation Measures), and IX (Monitoring Compliance Certification) of this Agreement.



ED_006227_00000070-00041

b. The procedure for termination is as follows: if Mountaire believes that it is in compliance with the requirements of this Agreement, and has paid the civil penalties and any stipulated penalties required by this Agreement, then Mountaire shall so certify to DNREC. Within sixty days after receipt of Mountaire's certification, DNREC shall provide a written response to Mountaire indicating whether DNREC concurs that Mountaire is in compliance with the requirements of this Agreement through the date of the certification and has paid the civil and any stipulated penalties required by this Agreement. To the extent that DNREC states in such response that it concurs with Mountaire's certification, then this Agreement shall be terminated, effective on the date of Mountaire's certification and subject to the filing of a Notice of Termination with the Court. To the extent that DNREC states in its response that it does not concur with Mountaire's certification, then DNREC shall identify within its response those requirements of the Agreement with which DNREC asserts that Mountaire is not in compliance, and/or any civil penalties that DNREC asserts are due and owing from Mountaire under this Agreement. Any disagreement between the Parties with respect to termination under this Paragraph shall be submitted to this Honorable Court for resolution.



ED_006227_00000070-00042

Termination of this Agreement under this Paragraph 109 shall conclusively and finally establish that Mountaire has satisfied all the requirements of this Agreement for purposes of Section XVII (Effect of Settlement/Reservation of Rights).

**XXII. Miscellaneous Provisions.**

110. Each party declares and represents that no promise, inducement, or agreement not herein expressed has been made to it. Each party acknowledges that it and its counsel have received this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement.

111. Each party acknowledges and agrees that this Agreement supersedes all previous oral or written agreements, memoranda, correspondence, or other communications between the Parties hereto relating to the subject matter hereof, and that this Agreement contains the entire agreement between the Parties hereto. Simultaneously with the lodging of this Agreement, DNREC shall seek, and Mountaire will consent to, the voluntary dismissal of *State of Delaware Department of Natural Resources & Environmental Control v. Mountaire Farms of Delaware, Inc.*, C.A. No. S18M-06-02 RFS, and, upon dismissal, the Parties agree that the consent decree filed in that matter shall be deemed moot.

112. Time will be of the essence in the performance of this Agreement.



ED_006227_00000070-00043

113. All submissions shall be considered effective upon receipt, unless otherwise provided in this Agreement.

114. The Parties consent to the execution of this Agreement without further notice.

115. Each undersigned representative of a Party to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement, and to execute and legally bind such party to this Agreement.

116. This Agreement may be signed and dated in any number of counterparts, each of which shall be an original, and such counterparts shall together be one and the same Agreement.

[*Signature Page Follows*]



ED_006227_00000070-00044

FOR THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

By: _____ Date: 5/29/20

Shawn M. Garvin, Secretary
State of Delaware
Department of Natural Resources and
Environmental Control
89 Kings Highway
Dover, DE 19901

Approved as to form:

Devera Scott, I.D. No. 4756
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, DE 19904

FOR MOUNTAIRE FARMS OF DELAWARE, INC.

By: _____ Date: _____

Phillip Plylar
President
Mountaire Farms of Delaware, Inc.
P.O. Box 1320
29106 John J. Williams Hwy.
Millsboro, DE 19966

By: _____ Date: May 29, 2020

F. Michael Parkowski, Esquire, I.D. No. 7
Michael W. Teichman, Esquire, I.D. No. 3323
Elio Battista, Jr., Esquire, I.D. No. 3814
Parkowski, Guerke & Swayze, P.A.
1105 N. Market Street 19th Floor
Wilmington, DE 19801



ED_006227_00000070-00045

FOR THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

By: _____ Date: _____
Shawn M. Garvin, Secretary
State of Delaware
Department of Natural
Resources and
Environmental Control
89 Kings Highway
Dover, DE 19901

Approved as to form:

Devera Scott, I.D. No. 4756
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, DE 19904

FOR MOUNTAIRE FARMS OF DELAWARE, INC.

By: _____ Date: 5/29/20
Phillip Plylar
President
Mountaire Farms of Delaware, Inc.
P.O. Box 1320
29106 John J. Williams Hwy.
Millsboro, DE 19966

By: _____ Date: May 29, 2020
F. Michael Parkowski, Esquire, I.D. No. 7
Michael W. Teichman, Esquire, I.D. No. 3323
Elio Battista, Jr., Esquire, I.D. No. 3814
Parkowski, Guerke & Swayze, P.A.
1105 N. Market Street 19th Floor
Wilmington, DE 19801



ED_006227_00000070-00046

FOR THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

By: _____ Date: _____
Shawn M. Garvin, Secretary
State of Delaware
Department of Natural
Resources and
Environmental Control
89 Kings Highway
Dover, DE 19901

Approved as to form:

Devera Scott, I.D. No. 4756
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, DE 19904

FOR MOUNTAIRE FARMS OF DELAWARE, INC.

By: _____ Date: _____
Phillip Plylar
President
Mou
P.O.
291(
Mill

By: _____ Date: May 29, 2020
F. Michael Parkowski, Esquire, I.D. No. 7
Michael W. Teichman, Esquire, I.D. No. 3323
Elio Battista, Jr., Esquire, I.D. No. 3814
Parkowski, Guerke & Swayze, P.A.
1105 N. Market Street 19th Floor
Wilmington, DE 19801



ED_006227_00000070-00047

SO ORDERED, this _____day of _____, 20_____.

_____
United States District Judge



ED_006227_00000070-00048

# EXHIBIT A

# SPRAY PERMIT



ED_006227_00000070-00049

# EXHIBIT B

# LAND APPLICATION PERMIT



ED_006227_00000070-00050

# EXHIBIT C

# NOTICE OF VIOLATION



ED_006227_00000070-00051

# EXHIBIT D

# DNREC LETTER – DECEMBER 22, 2017

# EXHIBIT E

# RESERVED



ED_006227_00000070-00053

# EXHIBIT F

# RESIDENTIAL AREA



ED_006227_00000070-00054

## EXHIBIT G

## ENVIRONMENTALLY BENEFICIAL OFFSET

In accordance with the provisions of Section VII (Environmentally Beneficial Offset), Paragraphs 52 to 53 of the Agreement Mountaire shall arrange for the availability of a central water supply system to the residential property owners in the area designed on Exhibit F hereof and marked Residential Area. If reasonable efforts to provide the availability of a central water supply system are unsuccessful, Mountaire shall offer to provide to the owners of residences in the Residential Area deep wells with necessary treatment systems to provide potable water which meets the applicable drinking water standards. In the alternative, owners of residences may elect whole-house filtration systems offered by Mountaire as more fully described below.

Central Water Supply System

A. Mountaire shall arrange for Tidewater to commence the process of obtaining the approval of the Delaware Public Service Commission ("PSC") for issuance of a certificate of public convenience and necessity ("CPCN") to provide a central water supply system to the Residential Area in accordance with the provisions of 26 *Del. C.* § 203C. DNREC will provide assistance to Tidewater in producing evidence to be used by Tidewater to establish that some of the drinking water in the Residential Area does not meet the governing drinking water standards



ED_006227_00000070-00055

of the Delaware Department of Health and Social Services for human consumption. Within thirty (30) days of obtaining the necessary evidence that some drinking water in the Residential Area does not meet the drinking water standard, Mountaire shall cause Tidewater to file the necessary application with the PSC to supply drinking water to the Residential Area and continue to timely and diligently pursue final PSC approval for issuance of a CPCN.

B. Upon obtaining final PSC approval and issuance of a CPCN, Mountaire shall cause Tidewater to proceed to timely take the necessary actions to design, construct and make available the central water supply system to the Residential Area, subject to obtaining necessary local, county and State approvals. Within fifteen (15) months of obtaining the necessary approvals, the central water supply system will be in place and available for use.

C. For any owner of a residence in the Residential Area wishing to connect to the central water supply system Mountaire shall arrange for and provide the physical connection of the residence to the central water supply system such physical connection to be at no cost to the owner of the residence.

Alternative Water Supply

A. In the event final approval and issuance of a CPCN for a central water supply system for the Residential Area cannot be obtained, Mountaire shall offer to provide to all owners of residences in the Residential Area the installation of a deep



ED_006227_00000070-00056

well on the residential property with any necessary treatment system to provide potable water which meets the applicable drinking water standards at no cost to the owners of the residences. Such offer shall be made to the residential property owners within forty-five (45) days of the date it is determined that final PSC approval of a CPCN cannot be reasonably obtained, and Mountaire shall provide to DNREC within thirty (30) days thereafter a report on its efforts to contact the owners of the residences and their responses to the offer.

B. For those owners of residences in the Residential Area who accept the offer of installation of a deep well Mountaire shall coordinate and assist such owners in obtaining the necessary approvals for the installation of the wells, and after such approvals are obtained proceed to have the wells installed within sixty (60) days of the date of each approval, subject to the receipt of all necessary permits and approvals.

The availability of a central water supply system or the alternative installation of deep wells with treatment systems in the Residential Area as provided hereunder shall not be dependent on whether or not the then current drinking water supply meets the drinking water standard.

Filtration Option

Mountaire shall offer to install, at Mountaire's sole cost, a whole-house nitrate reduction system of a design selected by Mountaire for each residential property



ED_006227_00000070-00057

owner in the Residential Area. Such nitrate reduction system shall be demonstrated to reduce nitrate to levels to at or below 10 mg/l. To each residential property owner that accepts such nitrate reduction system (each, an "Accepting Property Owner"), Mountaire will also make a one-time payment of One Thousand Dollars ($1,000.00) to cover any and all future maintenance costs of the nitrate reduction system. System installation and payment shall be completed for each Accepting Property Owner within ninety days of acceptance of the offer by such Accepting Property Owner.

For Accepting Property Owners only, Mountaire shall not be required to cover the costs associated with connection to a central water supply system, should this become available, nor is Mountaire required to offer a deep well option in the event that a central water supply cannot be made available.



ED_006227_00000070-00058

## EXHIBIT H

## MITIGATION MEASURES

A. The Spray Permit as issued on July 31, 2017, imposes the following total nitrogen (TN) related limitations on the spray effluent:

1. The WWTF has been designed for a monthly average effluent total nitrogen (TN) concentration of 15.6 mg/l.

2. The total amount of nitrogen (TN) that may be applied to the spray fields in the form of effluent and fertilizer is 320 lbs/acre/yr.

Mountaire shall calculate the pounds of total nitrogen applied to the spray fields in excess of the above permit limitations for the period of time beginning from the issuance of the current Spray Permit, Permit No. 359191-04, until the Primary WWTF Upgrades are completed and the WWTF is operational. Mountaire shall determine the quantity of total nitrogen (TN) in pounds per acre applied using the Facility's monthly total nitrogen (TN) effluent sampling data in conjunction with the total monthly effluent volume irrigated per acre plus any fertilizer applied. The total nitrogen (TN) as pounds per acre per year shall be compared to the above permitted annual loading limit. Following the execution of this Agreement, Mountaire shall submit monthly reports to DNREC included in Mountaire's monthly Discharge Monitoring Reports (DMRs) that includes the calculations of the quantity of excess total nitrogen (TN) applied as a total cumulative loading of total nitrogen (TN) in



ED_006227_00000070-00059

pounds per acre for the year and as a percent of the annual loading limit. The first monthly report shall include a summary of calculations for all prior months beginning from the issuance of the Spray Permit through the execution month of this Agreement. Upon completion of the Primary WWTF Upgrades and once the Primary WWTF Upgrades are operational, Mountaire shall submit a final summary of excess total nitrogen (TN) applied for DNREC's review and written consent.

B. The nitrogen (N) sprayed on the fields converts to nitrates ($NO_3$) as it enters the groundwater. Mountaire will relocate its process water production wells which draw from the surface aquifer to areas of the spray fields with consideration given to areas which have higher concentrations of nitrates, and the groundwater containing such higher levels of nitrates will be used as process water for the WWTF. The location of the relocated process water production wells shall be determined in cooperation with and coordination with DNREC, and proposed locations shall be submitted for DNREC's review and consent. The locations and number of relocated production wells shall be sufficient and feasibly capable of satisfying Mountaire's process water needs. In addition, the primary design goals for the production well relocation should include both nitrate removal, as well as, the establishment of the highest level of hydraulic control practicable based on Mountaire's process water needs. The relocated process water production wells shall be installed and put into operation in accordance with Mountaire's modified operation permit as soon as



ED_006227_00000070-00060

practicable, but no later than the time as the Primary WWTF Upgrades are operational. Process water produced by the relocated production wells will be used at the processing plant and treated at the WWTF.

In order to determine the net reduction of total nitrogen (TN) in the groundwater, the total nitrogen (TN) concentrations in the relocated production wells shall be measured along with the quantity of flow withdrawn at each individual well in order to determine the pounds of total nitrogen (TN) withdrawn. Next, the corresponding quantity of effluent flow irrigated, as measured by the spray irrigation effluent meters, shall, along with the concentration of total nitrogen (TN) in the treated effluent, be used to determine the amount of total nitrogen (TN) sprayed on the fields. The difference between the amount of total nitrogen (TN) withdrawn from the relocated production wells and the amount of total nitrogen (TN) applied to the fields via spray and fertilizer shall represent the net reduction in total nitrogen (TN) achieved. The calculations of the net reduction of total nitrogen (TN) shall be made on a weekly basis. On a monthly basis with Mountaire's monthly Discharge Monitoring Reports (DMRs), Mountaire shall submit its weekly calculations of net total nitrogen (TN) removal as compared to the excess quantity of total nitrogen (TN) sprayed on the fields determined under Paragraph A above. At a minimum, Mountaire shall remove total nitrogen (TN), as mass (pounds), from groundwater



ED_006227_00000070-00061

equaling two times (2X) the mass of excess total nitrogen (TN) applied to the spray fields as determined under Paragraph A above.

C. Mountaire, in consultation with DNREC, shall be entitled from time to time to further relocate the process water production wells to locations designed to capture higher levels of nitrates in the groundwater based on available groundwater monitoring data, or to attain the highest level of hydraulic control practicable based on Mountaire's process water usage, provided that the number and location of such production wells shall be sufficient for, and capable of, satisfying Mountaire's process water needs. Mountaire shall utilize data from existing groundwater monitoring facilities and equipment, along with data from any necessary additional groundwater monitoring facilities and equipment, to evaluate the overall effectiveness of the nitrate removal mitigation process and assess the level of hydraulic control established of the groundwater underlying the Mountaire property. Upon completion of this mitigation effort, Mountaire will maintain its production wells in locations approved under the final mitigation design plan.

D. It is recognized that there are historic and current sources of nitrates which through groundwater flow enter onto the Mountaire property. Nothing shall limit or preclude Mountaire from pursuing action against parties that contribute nitrates to the groundwater on its property.



ED_006227_00000070-00062

E. Mountaire is committed to working cooperatively with DNREC in evaluating all options for enhancement of the mitigation provisions of this Agreement. Mountaire has submitted a "Work Plan for Drilling and Testing Relocated Non-Potable Process Water Supply Wells" (work plan) for Department review and approval. Upon Department approval of the work plan, Mountaire's consultant will proceed with production well relocation and testing activities in accordance with the work plan approval. Within sixty (60) days of completion of production well relocation and testing field activities, Mountaire shall submit a final mitigation design plan detailing results of the production well testing and proposing operational parameters that provide for enhanced total nitrogen removal and maximized hydraulic control beneath the spray fields. As provided in the final mitigation design plan approved by DNREC, this hydraulic control shall be based on the need to establish and consistently maintain a hydraulic gradient away from offsite potable wells, and in part, on Mountaire's process water needs. Following Department review and approval of the final mitigation design plan, Mountaire will commence operation of the relocated production wells as soon as practicable but no later than 24 months from the issuance of the construction permit for the Long-Term WWTF Upgrade.



ED_006227_00000070-00063