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Case No. S18C-06-009 ESB



EXHIBIT H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF DELAWARE DEPARTMENT
OF NATURAL RESOURCES &
ENVIRONMENTAL CONTROL,

Plaintiff,

v.

MOUNTAIRE FARMS OF
DELAWARE, INC.,
a Delaware Corporation.

Defendant.

Civil Action No. _____

VERIFIED COMPLAINT

Plaintiff, State of Delaware Department of Natural Resources and Environmental Control, by and through the Delaware Department of Justice, brings this lawsuit for declaratory and injunctive relief arising out of the actions of Defendant, Mountaire Farms of Delaware, Inc., in violation of the Federal Resource Conservation and Recovery Act ("RCRA") codified in 42 U.S.C. § 6901 *et seq.* and the Federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*

Parties, Jurisdiction, and Venue

1. Plaintiff, State of Delaware, Department of Natural Resources and Environmental Control ("DNREC") and has jurisdiction and authority to regulate and protect the environment and natural resources of the State of Delaware.

2. DNREC is an administrative agency of the State of Delaware established by Chapter 80 of Title 29 of the Delaware Code.

3. DNREC has been legislatively authorized to exercise the police power of the State of Delaware in order to protect the health, safety, and welfare of the citizens of the State. In doing so, the Secretary enforces numerous environmental statutes and regulations, including federal delegation of administration of the Federal Resource Conservation and Recovery Act (“RCRA”) codified in 42 U.S.C. § 6901 *et seq.*; federal delegation of administration of the Federal Clean Water Act codified at 33 U.S.C. 1251 *et seq.* (the “CWA”), Delaware’s water pollution permit requirements codified in Chapter 60 of Title 7 of the Delaware Code (“Chapter 60”), Delaware’s *Regulations Governing the Design, Installation and Operation of On-Site Wastewater Treatment and Disposal Systems* codified at 7 Del. Admin C. § 7101, and *Delaware’s Guidance and Regulations Governing the Land Treatment of Wastes*, 7 Del. Admin C. § 7103.

4. Defendant, Mountaire Farms of Delaware, Inc., (“Mountaire”) is a corporation organized and existing under the laws of the State of Delaware with a principal place of business located at 29005 John J. Williams Highway, Millsboro, Delaware 19966.

Mountaire’s Operations in Millsboro Delaware

5. Nitrate is a chemical compound that is recognized as a contaminant in the groundwater in Sussex County Delaware. Nitrates have an EPA established maximum concentration level of 10mg/L for drinking water (the “MCL”). Certain of the groundwater monitoring wells in and around the Facility have shown consistent, and in some cases increasing, levels of nitrates above the MCL. A number of residential drinking water wells in the vicinity of the Facility have tested at or above the MCL as well.

6. A contributing factor in the presence of nitrates in groundwater is the application of nitrogen to farm fields as a fertilizer, or through spray irrigation of treated wastewater and land application of wastewater treatment plant sludge.

7. Mountaire's Millsboro facility (the "Facility") is located adjacent to and alongside Swan Creek and the Indian River just northeast of Millsboro Delaware. The Facility slaughters and processes approximately 2 million chickens per week. All process and sanitary wastewater generated by the Facility, over 2 million gallons per day, is treated at the Facility's wastewater treatment plant (the "WWTP") which, among other processes, utilizes anaerobic lagoons. Rather than discharge wastewater treated at the WWTP into Swan Creek, the Facility's wastewater is utilized as spray irrigation on 13 spray fields in the immediate vicinity of the Facility. This spray irrigation is subject to Spray Irrigation Permit Number 359191-04, most recently renewed by DNREC on July 31, 2017 (the "Spray Permit"). The Facility's treated wastewater effluent contains a number of constituents that are subject to limits set forth in the Spray Permit.

8. Sludge from the Facility's WWTP is periodically land-applied to a number of different farm fields specially maintained by Mountaire for this purpose under Agricultural Permit Nos. AGU 1402-S-03 and AGU 1403-S-03, most recently renewed on June 1, 2014 (the "Land Application Permits").

9. Among the constituents limited by the Spray Permit is total nitrogen ("TN"). The facility has been designed for monthly effluent Total Nitrogen concentration of 15.6 mg/L. The total amount of nitrogen that may be applied annually to each spray field acre is 320 pounds (the "Effluent Limits"). DNREC imposes the Effluent Limits in order to ensure that the TN applied to Mountaire's spray fields approximates the uptake of TN from these fields by the crops planted

thereon (the “Agronomic Rate”). In this way, the majority of TN applied by Mountaire to its fields will not percolate into groundwater as nitrate in concentrations exceeding the MCL.

10. Similarly, the Land Application Permits limit the application of stabilized sludge from the WWTP to Agronomic Rates specified in the Land Application Permits in order to prevent excessive amounts of nitrates from entering the groundwater.

Mountaire Exceeds the Effluent Limits and Harms the Environment

11. Mountaire grossly exceeded the Effluent Limits in the Spray Permit for TN for calendar year 2017 as a result of a failure of the Facility’s WWTP, caused by Mountaire’s failure to properly maintain the facility.

12. Mountaire exceeded Effluent Limits for certain of its spray fields in prior years as well.

13. During all of 2017, Mountaire applied approximately 2,000,000 gallons of return activated sludge without submitting to DNREC a cropping plan or nutrient calculation for such planned crop as required under the Land Application Permits. Upon information and belief, the amount of sludge applied to the sludge fields was in excess of agronomic rates, thereby contributing to nitrate contamination in groundwater.

14. Many groundwater monitoring wells located downgradient of Mountaire’s sprayfields and sludge fields have demonstrated a gradual increase in nitrate levels since at least 2011.

15. Thirty-four (34) private residences located near the Facility, with drinking water wells, have had these wells tested by DNREC. Eighteen (18) of these drinking water wells tested for nitrites in excess of the MCL.

16. Upon information and belief, Mountaire's failure to keep its wastewater effluent sprayed on its spray fields to within the Effluent Limits specified in the Spray Permit, and to land apply sludge in accordance with an approved cropping plan and limited to specified agronomic rates, has caused or contributed to nitrate levels in the groundwater nearby the Facility exceeding the MCL, thereby causing an imminent and substantial endangerment to human health and the environment.

17. Upon information and belief, Mountaire's anaerobic lagoons are leaking, further causing nitrate contamination in the groundwater in the vicinity of the Facility.

Count I – Imminent and Substantial Endangerment to Health or the Environment

31. Pursuant to 42 U.S.C. § 6972(a)(1)(B), citizens, including States, are authorized to bring suit against any person who is the "past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility, who has contributed or who is contributing to the past or present handling, treatment, storage or disposal of any solid or hazardous waste which may present an imminent and substantial threat to human health or the environment."

32. Pursuant to 42 U.S.C. § 6903(27), solid waste is defined under RCRA as "any...discarded material, including solid, liquid or semi solid...material resulting from industrial, commercial...and agricultural operations."

33. Mountaire's practice of disposing of its process and sanitary wastewater onto spray fields with total nitrogen exceeding Spray Permit limitations has contaminated, and is continuing to contaminate, the surficial aquifer that is used as a drinking water resource by neighboring residences in a manner that presents an imminent and substantial danger to human health, and to the water quality of Swan Creek and Indian River.

Count II – Open Dumping

34. 42 U.S.C. § 6945(a) prohibits the operation of “any solid waste management practice or disposal of solid waste which constitutes the open dumping of solid waste.” “Disposal” means “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste . . . into or on any land or water[.]” 42 U.S.C. § 6903(3). Enforcement of this prohibition is available through RCRA’s citizen suit provision. 42 U.S.C. § 6945(a).

35. As required by statute, the United States Environmental Protection Agency has promulgated criteria under RCRA § 6907(a)(3) defining solid waste management practices that constitute open dumping. *See* 42 U.S.C. § 6944(a); 40 C.F.R. Parts 257 and 258. These regulations prohibit the contamination of any underground drinking water source beyond the solid waste boundary of a disposal site. 40 C.F.R. § 257.3-4(a). The definition of “underground drinking water source” includes an aquifer supplying drinking water for human consumption. 40 C.F.R. § 257.3-4(c)(4). The surficial aquifer contaminated by Mountaire meets this definition.

36. Mountaire’s practice of spray irrigation of wastewater and land application of sludge with TN in excess of permitted limits and agronomic rates, and Mountaire’s leaking lagoons, all constitute “open dumping,” which upon information and belief has caused contamination of an underground drinking water source beyond the boundaries of the Facility.

Count III – Clean Water Act Violations

37. The CWA, at 33 U.S.C. § 1311(a) prohibits the discharge of a pollutant from a point source into waters of the United States unless such discharge is authorized under a National Pollutant Discharge Elimination System (“NPDES”) permit issued by an agency authorized to do so.

38. Mountaire's discharge of pollutants onto spray fields and sludge fields, and Mountaire's leaking lagoons, have upon information and belief contaminated groundwater that is hydrologically connected to Swan Creek and Indian River, both "waters of the United States" for purposes of the CWA. Such activities have also caused contaminated runoff from these fields into Swan Creek and the Indian River.

39. Mountaire has discharged pollutants into waters of the United States without a NPDES permit in violation of the CWA.

Verification

The Declaration of Virgil R. Holmes, Director, DNREC Division of Water, submitted in support and verification of the Complaint, is attached hereto as **Exhibit A** and incorporated herein by reference.

Prayer for Relief

WHEREFORE, Plaintiff DNREC prays for the following relief:

- (a) That this Court declare Defendant Mountaire to be in violation of both RCRA and the CWA.
- (b) That Defendant Mountaire be held liable under each claim for relief set forth in this Complaint;
- (c) That this Court enter a preliminary and permanent injunction prohibiting Mountaire from discharging effluent from its WWTP onto its spray fields in excess of Spray Permit limits.
- (d) That this Court enter a preliminary and permanent injunction prohibiting Mountaire from land applying sludge from its WWTP in violation of any limitation or condition in the Land Application Permits.

(e) That this Court enter a preliminary and permanent injunction prohibiting Mountaire from further contamination of underground drinking water, Swan Creek and the Indian River in violation of the CWA, RCRA or any permit issued by Plaintiff.

(f) That this Court enter a preliminary and permanent injunction requiring Mountaire to investigate and remediate groundwater contamination caused by its spray irrigation of WWTP effluent and land application of WWTP sludge.

(g) That this Court enter a preliminary and permanent injunction requiring Mountaire to provide a permanent alternative water supply to residents with drinking water wells impacted by Mountaire's actions.

(h) That this Court enter a preliminary and permanent injunction requiring Mountaire to upgrade its WWTP, to include evaluation and repair of any leaking lagoons, such that its operation will meet all permit requirements, conditions and limitations.

(j) Such other relief as this Court deems necessary and proper.

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

/s/ Devera B. Scott
Devera B. Scott (Bar I.D. No. 4756)
Deputy Attorney General
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Dover, DE 19904
(302) 739-4636
Devera.Scott@state.de.us

Attorney for State of
Delaware Department of Natural Resources and
Environmental Control

Dated: June 4, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF DELAWARE,
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MOUNTAIRE FARMS OF
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VERIFICATION TO THE COMPLAINT

I, Virgil R. Holmes am employed by plaintiff, Delaware Department of Natural Resources and Environmental Control, as an DIRECTOR. I am authorized by the plaintiff, Delaware Department of Natural Resources and Environmental Control, to verify this Complaint. I have read the Complaint and believe it to be true and accurate.

Virgil R. Holmes
[Name] VIRGIL R. HOLMES
[Title] DIRECTOR

SWORN TO AND SUBSCRIBED before me this 1st day of June, 2018.

Victoria L. Mooers
Notary Public



JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of maintaining the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS Delaware Department of Natural Resources & Environmental Control</p> <p>(b) County of Residence of First Listed Plaintiff <u>Ken</u> (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) Devera B. Scott, Deputy Attorney General Delaware Department of Justice</p>	<p>DEFENDANTS Mountaire Farms of Delaware, Inc.</p> <p>County of Residence of First Listed Defendant <u>Sussex</u> (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known) F. Michael Parkowski, Esquire Parkowski, Guerke & Swayze, P.A.</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) (For Diversity Cases Only)</p> <table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> <td style="width:47%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 4</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input checked="" type="checkbox"/> 4	<input checked="" type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: [Nature of Suit Code Descriptions](#)

<p>CONTRACT</p> <p><input type="checkbox"/> 110 Insurance</p> <p><input type="checkbox"/> 120 Marine</p> <p><input type="checkbox"/> 130 Miller Act</p> <p><input type="checkbox"/> 140 Negotiable Instrument</p> <p><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment</p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)</p> <p><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits</p> <p><input type="checkbox"/> 160 Stockholders' Suits</p> <p><input type="checkbox"/> 190 Other Contract</p> <p><input type="checkbox"/> 195 Contract Product Liability</p> <p><input type="checkbox"/> 196 Franchise</p>	<p>TORTS</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel & Slander</p> <p><input type="checkbox"/> 330 Federal Employers' Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p><input type="checkbox"/> 362 Personal Injury - Medical Malpractice</p> <p>PERSONAL INJURY - Product Liability</p> <p><input type="checkbox"/> 365 Personal Injury - Product Liability</p> <p><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability</p> <p>PERSONAL PROPERTY</p> <p><input type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input type="checkbox"/> 385 Property Damage Product Liability</p>	<p>FORFEITURE/PENALTY</p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 690 Other</p> <p>LABOR</p> <p><input type="checkbox"/> 710 Fair Labor Standards Act</p> <p><input type="checkbox"/> 720 Labor/Management Relations</p> <p><input type="checkbox"/> 740 Railway Labor Act</p> <p><input type="checkbox"/> 751 Family and Medical Leave Act</p> <p><input type="checkbox"/> 790 Other Labor Litigation</p> <p><input type="checkbox"/> 791 Employee Retirement Income Security Act</p> <p>IMMIGRATION</p> <p><input type="checkbox"/> 462 Naturalization Application</p> <p><input type="checkbox"/> 465 Other Immigration Actions</p>	<p>BANKRUPTCY</p> <p><input type="checkbox"/> 422 Appeal 28 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p>PROPERTY RIGHTS</p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 835 Patent - Abbreviated New Drug Application</p> <p><input type="checkbox"/> 840 Trademark</p> <p>SOCIAL SECURITY</p> <p><input type="checkbox"/> 861 HIA (1395f)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p>FEDERAL TAX SUITS</p> <p><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)</p> <p><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609</p>	<p>OTHER STATUTES</p> <p><input type="checkbox"/> 375 False Claims Act</p> <p><input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 410 Antitrust</p> <p><input type="checkbox"/> 430 Banks and Banking</p> <p><input type="checkbox"/> 450 Commerce</p> <p><input type="checkbox"/> 460 Deportation</p> <p><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations</p> <p><input type="checkbox"/> 480 Consumer Credit</p> <p><input type="checkbox"/> 490 Cable/Sat TV</p> <p><input type="checkbox"/> 850 Securities/Commodities/Exchange</p> <p><input type="checkbox"/> 890 Other Statutory Actions</p> <p><input type="checkbox"/> 891 Agricultural Acts</p> <p><input checked="" type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 895 Freedom of Information Act</p> <p><input type="checkbox"/> 896 Arbitration</p> <p><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p>
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V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (Specify) 6 Multidistrict Litigation - Transfer 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. Section 6901, et seq. (RCRA) and 33 U.S.C. Section 1251 et seq. (Clean Water Act)

Brief description of cause:
Environmental violations of Resource Conservation and Recovery Act and the Clean Water Act

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: 06/04/2018 SIGNATURE OF ATTORNEY OF RECORD: 

FOR OFFICE USE ONLY: RECEIPT # _____ AMOUNT _____ APPLYING IFF _____ JUDGE _____ MAG. JUDGE _____