

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA)	
a municipal corporation)	
1200 First St., N.E., 5 th Floor)	
Washington, DC 20002)	
)	Civil Action No.
Plaintiff,)	
)	
v.)	
)	
Potomac Electric Power Company)	
701 Ninth Street, N.W.)	
Washington, D.C. 20068)	
)	
Pepco Energy Services, Inc.)	
1300 North 17 th Street)	
Suite 1600)	
Arlington, VA 22209)	
)	
Defendant.)	

CONSENT DECREE

WHEREAS, Plaintiff, the District of Columbia, on behalf of the District Department of the Environment (collectively, the "District"), has filed a Complaint in this action against Defendants, Pepco Energy Services, Inc., and Potomac Electric Power Company (collectively, "Pepco" or "Defendant"), alleging liability under the Resource Conservation and Recovery Act ("RCRA"), and under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and under Section 401(a)(2) of the District of Columbia Brownfield Revitalization Act of 2000 ("DCBRA")(collectively "the Acts");

WHEREAS, the District in its complaint has entered a plea for relief under RCRA's citizen suit provision (RCRA § 7002(a)(1)(B); 42 U.S.C. § 6972(a)(1)(B)) for abatement of conditions that may present an imminent and substantial endangerment to health and the environment, as well as a plea for cost recovery under 42 U.S.C. § 9607, and D.C. Official Code §§ 8-631 *et seq.*;

WHEREAS, the District in its complaint seeks a declaration of liability under the Acts for costs to be incurred by the District for response actions and oversight undertaken to address the

potential release and/or threat of release of solid wastes at or from Pepco's facility, located at 3400 Benning Road, N.E., Washington, D.C. 20019 (the "Facility").

WHEREAS, the Complaint alleges that conditions resulting from Pepco's generation, management and disposal of hazardous substances at the Facility may present an imminent and substantial endangerment to health and the environment, and Pepco, as the "generator", is liable for the costs of abating such conditions;

WHEREAS, the Complaint alleges that between 1985 and 2003 there have been six (6) documented releases of polychlorinated biphenyls ("PCBs") (hereinafter collectively referred to as the "1985-2003 PCB releases") into the environment at the Facility, and although Pepco conducted remedial actions in response to each of these releases in accordance with applicable legal requirements, because of the Facility's proximate location to the Anacostia River, the PCBs that have been released at the Facility over time may have migrated from the property into the sediment of the adjacent Anacostia River via the storm water system, overland flow or groundwater discharge;

WHEREAS, PCBs are a solid waste, and once released into the environment do not readily break down and therefore may remain for long periods of time cycling between air, water, and soil. PCBs can also be taken up into the bodies of small organisms and fish. As a result, people who ingest fish may be exposed to PCBs that have bioaccumulated in the fish they are ingesting. PCBs have been demonstrated to cause a variety of adverse health effects, including cancer;

WHEREAS, EPA Region 3's reported Biological Technical Assistance Groups (BTAG) levels for Aroclor-1254 and Aroclor-1260 is 59.8 µg/kg. The lowest values of PCBs found in the Anacostia sediment were reported in samples immediately upstream from the Facility. The maximum concentration reported was 1,700 µg/kg of Aroclor-1260, detected from a sediment sample collected in an inlet located along the Anacostia River where two or more storm water outfalls discharge, one of which receives storm water drainage from the Facility. The second highest concentration of PCBs (Aroclor-1254 of 1,000 µg/kg and Aroclor-1260 of 1,100 µg/kg) were detected directly downstream of these outfalls;

WHEREAS, the Complaint alleges that discharge of these contaminants into the Anacostia has contributed to conditions which pose an imminent and substantial endangerment to aquatic life in the Anacostia River, and to human health;

WHEREAS, Pepco denies any liability to the District and, by entering into this Consent Decree, does not admit any statements of fact or conclusions of law set forth herein or in the Complaint, but agrees to comply in all respects with this Consent Decree, and agrees not to contest any facts or conclusions of law set forth herein in any action by the District to enforce this Consent Decree;

WHEREAS, this Consent Decree constitutes a settlement of disputed claims of the District, and the District and Pepco (each a "Party" and collectively, the "Parties"), without the necessity of trial or adjudication of any issues of fact or law, consent to the entry of this Consent Decree and agree to be bound hereby;

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite appropriate response actions for the Facility and Anacostia River and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest;

NOW, THEREFORE, without any adjudication of any issue of fact or law and upon consent and agreement of the Parties to this Consent Decree, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. Parties Bound. The Parties agree that each and all of the provisions of this Consent Decree, and any and all exhibits or other documents referenced and incorporated herein, shall apply to and be binding upon the District and Pepco and their successors and assigns.

2. Statement of Purpose. In entering into this Consent Decree, the objectives of the District and the Respondents are: (a) to determine the nature and extent of contamination and any threat to the public health, welfare, or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants at or from the Facility, by obligating Pepco to conduct a remedial investigation; (b) to identify and evaluate alternatives for remedial action (if any) to prevent, mitigate or otherwise respond to or remedy any release or threatened release of hazardous substances, pollutants, or contaminants at or from the Facility, by obligating Pepco to conduct a feasibility study; and (c) to obligate Pepco to reimburse the District for oversight costs incurred with respect to the work performed by Pepco pursuant to this Consent Decree.

3. Sale or Transfer of Benning Road Facility. In the event that Pepco, at any time prior to termination of this Consent Decree pursuant to Paragraph 17 (“Termination”), sells, transfers, or assigns any interest in the real property where the Benning Road Facility is located, or any portion thereof, Pepco shall advise the purchaser(s), transferee(s), or assignee(s) prior to such transaction, in writing, of the existence of this Consent Decree and simultaneously provide them a copy of the Consent Decree. Within 30 days after the completion of the transaction, Pepco shall provide, in writing, to the District’s legal representative, at the address provided in Paragraph 21 (“Notice”), the date of the transaction and the name(s) and address(es) of such purchaser(s), transferee(s) or assignee(s). No sale, transfer, assignment, change in ownership, corporate or partnership status, transfer of assets by or relating to the Benning Road Facility (or any portion thereof) or Pepco, or other transaction of any nature will in any way cancel, reduce, waive, modify, lessen, transfer, assign, novate, or alter Pepco’s obligations under this Consent Decree in any manner whatsoever.

4. Financial Assurance. Within 30 days after the entry of this Consent Decree, Pepco shall demonstrate financial responsibility in the amount of \$1,100,000 for the performance of its obligations hereunder by means of any single mechanism or combination of mechanisms listed in 20 DCMR 6703 through 6711.

5. Jurisdiction. This Court has subject matter jurisdiction over this Action pursuant to RCRA § 7002(a)(2); 42 U.S.C. § 6972(a)(2), as well as CERCLA § 107; 42 U.S.C. §§ 9607, 28 U.S.C. §§ 1331 and 1367, and other applicable law. This Court also has personal jurisdiction over Defendant. Solely for purposes of this Consent Decree and the underlying Complaint, including any further action to enforce the terms of this Consent Decree, Pepco waives any and all objections and defenses it might have as to venue and jurisdiction and, without admitting or denying the factual allegations contained in the Complaint or in this Consent Decree, fully consents to the terms of this Consent Decree, and to its entry, and to enforcement of this Consent Decree by this Court.

6. Waiver of Hearing. Except as otherwise provided in Paragraph 35 below, Pepco hereby waives its right to a judicial or administrative hearing with respect to, and to any appeal of, any and all issues of law and/or fact set forth in the Complaint or in this Consent Decree. Pepco, after consultation with legal counsel of its choice, voluntarily consents to the entry of this Consent Decree and agrees and consents to all the terms and conditions hereof.

7. Oversight Costs. Pepco will reimburse the District for its costs to oversee the Work (as defined below) (including but not limited to legal fees, and the cost of maintaining the administrative record, as provided in Paragraph 38 herein) and/or any actions taken by the District to oversee, administer, implement, and/or enforce this Consent Decree (“Oversight Costs”) pursuant to the following terms and conditions contained within this Paragraph. Payments for Oversight Costs from Pepco to the District shall be made for every Twelve Month Period. The term "Twelve Month Period" shall mean a period of twelve consecutive calendar months; the first Twelve Month Period shall commence upon the entry of this Consent Decree and end twelve months thereafter, and each subsequent Twelve Month Period shall immediately follow, without gap, the prior Twelve Month Period. Each such payment for Oversight Costs is due and shall be paid in full by Pepco to the District no later than sixty (60) calendar days after a bill for the same is provided to Pepco by the District. The District will send such bills to Pepco annually after the close of each Twelve Month Period. Pepco's method of payment shall be by check or money order, payable to the D.C. Treasurer, to the attention of the District Department of the Environment or as the District may otherwise direct in writing. Pepco shall be liable for interest on any amounts outstanding more than 60 days after Pepco's receipt of the District's annual bill for Oversight Costs.

8. Performance of Work by Pepco.

a. In addition to and not in lieu of payment in full of the District's Oversight Costs, and in addition to and not in lieu of each and all of the other requirements of this Consent Decree, Pepco agrees to and shall expeditiously submit work plans to DDOE for review and approval to undertake, fulfill, fund, implement, and complete each and all of the activities or obligations listed in this Paragraph 8 (“Work”). All Work performed pursuant to this Consent Decree shall be completed expeditiously.

b. All Work performed under this Consent Decree shall be under the direction and supervision of qualified personnel. Pepco shall submit to the District in writing the names, titles, and qualifications of the personnel, including contractors, subcontractors, consultants, and laboratories to be used in carrying out such Work, for the District's approval. Pepco shall notify the District, 5 business days in advance, of any Work that will involve Pepco or any personnel acting at its direction or on its behalf, to come onto any property owned, leased, or otherwise occupied or controlled by the District. The District may have representatives present when the

Work is being done. Pepco will give the District a copy of any report prepared by or on Pepco's behalf describing the process used for any sampling or testing, and the results of any sampling or testing done as part of the Work.

c. Pepco shall conduct a remedial investigation and feasibility study ("RI/FS") for the Facility as described in the Scope of Work Outline attached hereto as Exhibit A and in accordance with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP"), applicable EPA guidance documents, and applicable District law and regulations. The RI/FS shall form the basis for the District's selection of a remedial action for the Facility, and for the Anacostia River sediment associated with the Facility, and shall be undertaken pursuant to the requirements set forth in the Statement of Work ("SOW") outline and Paragraph 8(c)(i) through 8(c)(vi). The RI/FS shall be conducted in such a manner as to provide enough information to conduct the Preassessment Screening ("PAS"), which will be required to initiate a formal Natural Resource Damage Assessment ("NRDA"), including:

- Documenting whether releases of hazardous substances have occurred.
- Documenting whether natural resources have been or are likely to have been adversely affected by the discharge or release of hazardous substances.
- Documenting whether the quantity and concentration of the released hazardous substances are sufficient to potentially cause injury to natural resources.
- Documenting whether data sufficient to pursue an assessment is readily available or likely to be obtained at a reasonable cost.
- Documenting a preliminary assessment of whether the response actions evaluated as part of the RI/FS would remedy any injury to natural resources without further action.

i. Within 60 days after entry of this Consent Decree by the Court, Pepco shall submit to DDOE a draft SOW for conducting the RI/FS in accordance with the NCP, applicable CERCLA guidance documents, and applicable District law and regulations. The SOW shall address plans for (i) Work Plan (WP) (ii) Health and Safety Plan (HSP), (iii) Field Sampling Plan (FSP), (iv) Quality Assurance Project Plan (QAPP), (v) Conceptual Site Model (CSM), and (vi) Community Involvement Plan (CIP). Upon its approval by DDOE, the RI/FS SOW shall be incorporated into and be enforceable under this Consent Decree.

ii. Within 90 days after DDOE's approval of the final SOW Pepco shall submit to DDOE a draft WP, HSP, FSP, QAPP, CSM, and CIP. The WP shall include a proposed schedule for performance of the Work.

iii. Within 30 days of DDOE's approval of the final WP, HSP, FSP, QAPP, CSM and CIP, Pepco shall initiate the remedial investigation field work according to the schedules provided in the Work Plan.

iv. Within 120 days of the completion of the field work, Pepco shall submit a draft RI Report to DDOE.

v. Within 120 days of DDOE's approval of the final treatability study report, if required, or within 180 days of completion of the field work described in the RI/FS Work Plan, if no treatability study is required, Pepco shall submit to DDOE a draft FS Report.

vi. The District may modify the foregoing schedule to extend any of the specified deadlines for good cause shown by Pepco, or in the District's sole discretion.

d. Each and all of the above obligations are sometimes collectively referred to herein as the "Paragraph 8 Requirements." Upon written approval by DDOE of the project schedule contained in the WP, such DDOE approved schedule (the "Paragraph 8 Schedule") shall be incorporated into and become a binding part of this Consent Decree and subject to all of its terms and conditions (including but not limited to the terms and conditions applicable to stipulated penalties in Paragraph 9 hereof). Thereafter, the Paragraph 8 Schedule shall be updated, as necessary, by Pepco on a quarterly basis (i.e., once per quarter) or as DDOE may otherwise direct in writing and, upon such updated schedule being approved in writing by DDOE, the updated schedule shall replace the prior Paragraph 8 Schedule and shall be deemed a binding part of this Consent Decree and subject to all of its terms and conditions (including but not limited to the terms and conditions applicable to stipulated penalties in Paragraph 9 hereof).

e. All plans, reports, and other deliverables submitted to the District under this Consent Decree shall, upon approval or modification by the District, be incorporated into and enforceable under this Consent Decree. In the event the District approves or modifies a

portion of a plan, report, or other deliverable submitted to the District under this Consent Decree, the approved or modified portion shall be incorporated into and enforceable under this Consent Decree.

9. Stipulated Penalties.

a. In the event that Pepco does not timely comply with, fulfill or complete any of the terms, conditions, requirements, or provisions of this Consent Decree, or any provisions incorporated herein, including but not limited to compliance with the Paragraph 8 Schedule, (and unless such noncompliance is the result of Force Majeure under Paragraph 10) Pepco shall additionally be liable to the District for stipulated penalties in the following amounts for each calendar day of each and every violation, until each such violation is cured or ceases: \$1,000 for each calendar day up to and including the seventh (7th) calendar day of such failure; \$5,000 for each additional calendar day of such failure up to and including the fourteenth (14th) calendar day thereof, and \$7,500 for each calendar day thereafter.

b. Stipulated penalties shall begin to accrue on the calendar day after performance is due, and shall continue to accrue through the final calendar day of the completion of the activity or until the violation is otherwise fully cured or ceases, whichever is later.

c. Pepco shall pay stipulated penalties not more than thirty (30) calendar days after receipt of written demand by the District for such penalties. Method of payment shall be by check or money order, payable to the D.C. Treasurer, to the attention of the District Department of the Environment or in such other manner as indicated by the District in writing.

10. Force Majeure.

a. Pepco agrees to perform all requirements of this Consent Decree within the time limits established herein unless the performance is delayed by Force Majeure. For purposes of this Consent Decree, "Force Majeure" is defined as any event arising from causes beyond the control of Pepco or any entity controlled by Pepco (including but not limited to its contractors and subcontractors) which delays or prevents performance of any obligation hereunder despite Pepco's best efforts to fulfill the obligation.

b. If any event occurs which causes or may cause a delay or impediment to performance in complying with any provision of this Consent Decree, Pepco shall (a) notify DDOE orally or by electronic mail as soon as practicable, and (b) provide a formal written notice no later than seven (7) business days after the time Pepco first knew of the event or should have

known of the event by the exercise of due diligence. Pepco's formal written notice shall specifically reference this Paragraph 10 of this Consent Decree and describe the anticipated length of time the delay may persist, the cause or causes of the delay, the measures taken or to be taken by Pepco to prevent or minimize the delay, the schedule by which those measures shall be implemented, and the reasons Pepco attributes the delay to a Force Majeure Event (if Pepco does so). Pepco shall take all reasonable measures to avoid or minimize such delays. The formal written notice required by this Paragraph shall be effective upon the mailing of the same by overnight mail or by certified mail, return receipt requested, to DDOE as specified in Paragraph 21 (Notice).

c. Failure by Pepco to comply with the notice requirements specified in Paragraph 10.b above shall preclude Pepco from asserting any claims of Force Majeure with respect to the particular event involved, unless notice, although delinquent, is provided in sufficient time to allow DDOE to verify the cause and nature of the event in question.

d. DDOE will notify Pepco in writing regarding DDOE's position regarding Pepco's claim of a delay or impediment to performance as promptly as possible but no later than fifteen (15) calendar days of receipt of the written Force Majeure notice provided under Paragraph 10.b.

e. If DDOE agrees that the delay or impediment to performance has been or will be caused by a Force Majeure Event, the Parties shall stipulate in writing to an extension of the required deadline(s) for all requirement(s) affected by the Force Majeure Event for a period equivalent to the delay actually caused by the Force Majeure Event. Such stipulation shall constitute a modification to the Paragraph 8 Schedule pursuant to the last clause of the second sentence of Paragraph 14 (Modification). Pepco shall not be liable for stipulated penalties for the period of any such extension.

f. If DDOE does not accept Pepco's claim of Force Majeure, subject to Pepco's right to invoke the dispute resolution procedures in Paragraphs 34 and 35 below, stipulated penalties will accrue as provided in Paragraph 9 (Stipulated Penalties).

g. Pepco shall also bear the burden of proving the duration and extent of any delay(s) attributable to such Force Majeure Event. Any extension of one compliance date based on a particular Force Majeure Event may, but shall not necessarily, result in an extension of a subsequent compliance date or dates.

11. No Relief From Compliance. This Consent Decree does not and shall not relieve Pepco of any of its obligations to comply with all applicable Laws; nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit, approval or other requirement of any nature. All activities undertaken by Pepco pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and District laws and regulations. Pepco must also comply with all applicable or relevant and appropriate requirements of all federal and District environmental laws and common law. Additionally, except for matters specifically addressed in this Consent Decree, nothing in this Consent Decree shall be construed as prohibiting, altering or in any way limiting the ability of the District or of DDOE to require Pepco to conduct any sampling, monitoring, remediation, cleanup, assessments, investigations, removal or remedial actions, or to take other actions at or about the Facility, the Anacostia River sediment, or in any other location. The District's ability to seek any or all of the foregoing is explicitly preserved and reserved by this Consent Decree.

12. District's Covenant Not To Sue.

a. Subject to the other terms and conditions of this Consent Decree, including but not limited to the terms and conditions of this Paragraph 12, the District covenants not to sue or to take administrative or judicial enforcement against Pepco with respect to the Work, or Oversight Costs.

b. The District also covenants not to sue or take administrative or judicial enforcement against Pepco with respect to any liability it may have for past costs the District may have incurred prior to the entry of this Consent Decree with respect to the matters covered by this Consent Decree.

c. The District's Covenant Not to Sue shall take effect upon the entry of this Consent Decree, and shall not apply to any future actions, omissions, or new releases which may take place at the Facility any time after the entry of this Consent Decree, except as addressed herein.

d. Notwithstanding anything herein to the contrary, the District's Covenant Not to Sue shall be subject to and conditioned upon the following:

i. Pepco's faithful compliance, now and in the future, with each and all of the terms, conditions, and/or requirements of this Consent Decree, and

ii. The District's Covenant Not to Sue shall not prevent, preclude, waive, release, bar, impede or limit, in any manner, any action by the District against Pepco for or arising out of Pepco's breach of or failure to comply in full with this Consent Decree or any portion thereof, or any facts not disclosed to DDOE by Pepco relating in any way to the matters within the scope of this Consent Decree.

e. For as long as Pepco is and remains at all times in compliance with the Consent Decree, and other than actions to enforce this Consent Decree or any portion thereof, the District shall not, prior to Termination of this Consent Decree, bring any other form of judicial action against Pepco concerning (i) matters within the scope of the District's Covenant Not to Sue, (ii) matters within the scope of the Complaint filed against Pepco in this matter, (iii) or any present or past releases from the Facility to the Anacostia; however, notwithstanding the foregoing, the District may bring any form of enforcement or judicial action against Pepco should Pepco fail to comply with this Consent Decree in whole or in part, or as necessary to prevent a substantial danger to public health or welfare.

f. Except for matters related to the RI/FS that are expressly resolved by this Consent Decree, the District reserves and preserves in full, and does not waive, release, diminish or modify in any manner, any and all legal and equitable remedies, causes of action, sanctions, rights, and penalties of any nature which may be available to the District against Pepco or any other person or entity concerning or arising out of any or all of the following:

- i. Any liability for implementation of remedial design and remedial action;
- ii. Any natural resource damages or other damages for injury to, destruction of, or loss of natural resources;
- iii. Any criminal liability of any person or entity;
- iv. Any violations of applicable Laws;
- v. Any violation of applicable Laws other than as explicitly described in and encompassed within the District's Covenant Not to Sue.
- vi. Any claims based on a failure by Pepco to meet a requirement of this Consent Decree;
- vii. Any liability arising from the past, present, or future disposal, release, or threat of release of solid/hazardous waste outside of the Facility;

viii. Any liability based on the ownership or operation of the Facility by Pepco when such ownership or operation commences after signature of this Consent Decree;

ix. Any liability based on Pepco's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of solid/hazardous waste at or in connection with the Facility;

x. Any liability for violations of federal or District law which occur during or after implementation of the Work; and

xi. Any liability, at any time, for additional response actions to address the Anacostia River.

13. **Pepco's Covenant Not to Sue.** Except as otherwise provided under Paragraphs 34 and 35, Pepco (for itself and its successors and assigns) releases, waives its right to recover from, covenants not to sue and agrees not to assert any claims or causes of action against the District or DDOE or any of their agents or employees with respect to the matters addressed in this Consent Decree.

14. **Modification.** There shall be no material modification of this Consent Decree without (i) the prior written approval and consent of the Parties to this Consent Decree and (ii) the approval of the Court. All non-material modifications, such as a change to the person receiving notice under this Consent Decree, may be made by written agreement of the Parties. Changes, modifications, and updates to the Paragraph 8 Schedule shall require the written approval of DDOE but shall not require approval of the Court.

15. **Public Notice.** The Parties acknowledge and agree that this Consent Decree has been revised in response to public comment, as provided in Paragraph 37, and has the District's final approval.

16. **Access to Information.** Subject to applicable legal privileges, Pepco shall provide to the District upon its request copies of all documents within its possession or control and/or that of its contractors or agents relating to activities at or about the Facility or any other activities taken or to be taken pursuant to this Consent Decree. Pepco shall make available to the District for purposes of investigation, information gathering, or testimony, Pepco's employees, agents, contractors, or representatives with knowledge of any facts relevant to the Facility or this Consent Decree.

17. **Termination.** This Consent Decree shall terminate only after a written determination by the District and the Court that Pepco has fulfilled all requirements of this Consent Decree, including but not limited to any outstanding stipulated penalties, if any. If Pepco believes it has fulfilled all requirements of this Consent Decree, Pepco may file a motion with the Court seeking termination, for which motion concurrence shall not be unreasonably withheld by the District.

18. **Retention of Jurisdiction.**

a. Until termination of this Consent Decree, this Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder, as may be necessary or appropriate for the construction, execution, or implementation of this Consent Decree.

b. **Standard of Review.** In any judicial action under this Consent Decree or to enforce any portion of this Consent Decree, including but not limited to any action taken or ordered by the District or DDOE, judicial review shall be limited to the administrative record existing before the District or DDOE. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the Court. In considering any challenges, objections or other arguments raised in any judicial action under this Consent Decree, the Court shall uphold the District's/DDOE's decision or direction, unless Pepco can demonstrate, on the administrative record, that the decision of the District or DDOE was arbitrary and capricious or otherwise not in accordance with applicable law.

19. **Final judgment.** Upon entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the District and Pepco. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

20. **Capacity and Authority.** The undersigned representatives of the Parties certify that they are fully authorized to enter into and to execute the terms and conditions of this Consent Decree and to make such Consent Decree fully and legally binding upon and enforceable against the Party on whose behalf they have executed this Consent Decree. The individuals signing for the District of Columbia are its officials acting within the scope of their authority. The Parties stipulate, agree and warrant that they will not challenge or contest in any

way the capacity or the authority of any Party hereto to enter into this Consent Decree or to make the agreements, covenants, and stipulations herein.

21. **Notice.** Service of any information or documents required or necessitated by this Consent Decree and any and all written communications submitted under this Consent Decree shall be addressed as follows (by both e-mail and first-class mail, by hand delivery or by overnight delivery), unless the listed individuals or their successors give written notice of change(s) to the Parties:

District of Columbia

District Department of the Environment
Attention: General Counsel
1200 1st St., N.E., 5th Floor
Washington, DC 20002
Kim.Katzenbarger@dc.gov

With a contemporaneous copy to:

Office of the Attorney General
for the District of Columbia
Attention: Ellen Efros
Chief, Equity Section I
441 Fourth Street, N.W., 6th Flr.
Washington, D.C. 20001
ellen.efros@dc.gov

PEPCO

Susan H. Power
Deputy General Counsel
Pepco Holdings, Inc.
701 9th Street, N.W.
Washington DC 20068-0001
shpower@pepcoholdings.com

Pepco Energy Services, Inc.
Assistant General Counsel
Attention: Denise Godfrey
1300 N. 17th, Suite 1600
Arlington, VA 22209
dgodfrey@pepcoenergy.com

22. **Service.** For purposes of this action, the Complaint filed in this action, and the Consent Decree, the Parties hereby agree to accept service by mail at the address provided in Paragraph 21 above, and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

23. **Applicable Law; Governing Law.**

a. All activities undertaken by Pepco, or on its behalf, pursuant to this Consent Decree shall be performed in accordance with (i) this Consent Decree and (ii) the requirements of all applicable Laws. Nothing herein shall be deemed a waiver or modification of any Laws.

b. This Consent Decree shall be governed by and construed and enforced in accordance with Federal law and with the laws of the District of Columbia, without regard to choice of law principles. In the event there is a conflict between Federal and District law, the more stringent of the two shall apply.

c. This Consent Decree shall be enforceable in the U.S. District Court for the District of Columbia.

24. **Entire Agreement.** This Consent Decree, and any exhibits or other documents expressly incorporated herein, constitutes the entire agreement and understanding of the Parties with respect to the activities and obligations contemplated herein, is intended as the complete and exclusive statement of the agreement between the Parties with respect to the subject matter hereof, and supersedes all prior agreements and negotiations relating to the matters addressed herein. All exhibits attached hereto are incorporated herein by reference and made a part of this Consent Decree.

25. **Binding Agreement.** This Consent Decree shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns.

26. **Waiver.** No waiver of any provision of this Consent Decree shall be effective unless such waiver is in writing and signed by the Party against whom enforcement of such waiver is sought. Failure to enforce any provision of this Consent Decree or to require at any time performance of any provision hereof shall not be construed to be a waiver of such provision, or to affect the validity of this Consent Decree or the right of any Party to enforce each and every provision in accordance with the terms hereof. No waiver of any provision of

this Consent Decree shall affect the right of any Party thereafter to enforce such provision or to exercise any right or remedy available to it.

27. **No Creation of Rights.** Nothing in this Consent Decree, express or implied, is intended or shall be construed to confer upon or give to any person or entity other than the Parties hereto any rights, remedies or other benefits under or by reason of this Consent Decree. This Consent Decree creates no obligations or duties on the part of Parties other than as stated specifically in this Consent Decree. The Parties stipulate, agree, and acknowledge that nothing in this Consent Decree may be used by any person or entity for any purpose in any legal proceeding other than by the Parties as stated specifically in this Consent Decree. An alleged violation of this Consent Decree shall not create a new, independent private right of action for anyone other than the Parties hereto and their successors and assigns, and the Parties agree that this Consent Decree does not permit enforcement proceedings on behalf of any other persons or entities. The Parties stipulate, agree, and acknowledge that this Consent Decree is not intended to and does not create any third party beneficiaries.

28. **Headings.** The headings of any sections or paragraphs of this Consent Decree are inserted as a matter of convenience and organization only and they shall not modify or affect in any manner the meaning or construction of this Consent Decree.

29. **Construction.** This Consent Decree shall be construed without regard to any presumption or other rule of law requiring construction against the Party who caused it to have been drafted. The Parties agree and acknowledge that this Consent Decree was mutually drafted by the Parties and shall not be construed against either of them as a result of drafting by either Party.

30. **Consultation with Counsel and Understanding of Terms.** The Parties have read this Consent Decree, have had a full opportunity to consult (and have in fact consulted) with legal counsel with regard to it, and have signed this Consent Decree voluntarily and freely and with the full understanding of its terms. The Parties further understand and agree that each has relied wholly upon its own judgment, belief and knowledge of the nature, extent, effect and duration of this Consent Decree, and enter into this Consent Decree without reliance upon any statements or representations by any other Party or its representatives except those expressly set forth herein.

31. **Non-assignment.** None of the obligations and duties of Pepco set forth in this Consent Decree may be assigned or delegated by Pepco to any other person or entity without the express, prior written consent of the District, which the District may withhold, deny, or condition in any manner and in its sole and unlimited discretion.

32. **Severability.** This Consent Decree is not severable.

33. **Counterparts.** Provided that all Parties hereto execute a copy of this Consent Decree, the Consent Decree may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. Executed copies of this Consent Decree may be delivered by facsimile transmission or other comparable means. This Consent Decree shall be deemed fully executed and entered into on the date of its entry by the Court.

34. **Initial Dispute Resolution.** Except as set forth in Paragraph 36, the dispute resolution procedures set forth in this Paragraph shall be the initial (and exclusive, unless the procedures in Paragraph 35 are utilized) mechanism to resolve any and all disputes arising under or with respect to this Consent Decree or any portion thereof.

a. A dispute commences when a Party serves (in accordance with Paragraph 21) on the other Party a written notice summarizing the dispute and that Party's position relating to the dispute (the "Dispute Notice"). The Dispute Notice shall include, but need not be limited to, a concise statement of the dispute, the submitting Party's position regarding the dispute, an explanation of that position, a statement of the relevant facts and applicable law, and a statement of the requested resolution of the dispute.

b. The Party receiving the Dispute Notice shall respond to it in writing within thirty (30) calendar days, unless this time period is modified by the written agreement of the Parties. The Party's response shall include, but need not be limited to, a concise statement of the dispute, the submitting Party's position regarding the dispute, an explanation of that position, a statement of the relevant facts and applicable law, and a statement of the requested resolution of the dispute.

c. All disputes shall initially be the subject of informal negotiations between senior management of the Parties. The period of informal negotiations shall not exceed sixty (60) calendar days from the date that a Party first served a Dispute Notice regarding the dispute, unless that time period is modified by written agreement of the Parties.

d. If the Parties cannot resolve the dispute by informal negotiations, then the written position advanced by the District regarding that dispute (whether set forth in a Dispute Notice, in a response thereto, or otherwise) shall be binding on Pepco, unless, within thirty (30) calendar days after the conclusion of informal negotiations or Pepco's receipt of the written position advanced by the District, whichever is later, Pepco invokes in writing the formal dispute resolution procedures in accordance with Paragraph 35.

e. The existence of any dispute or the invocation of dispute resolution procedures under this Paragraph shall not, by itself, extend, postpone, or affect in any way any obligation of Pepco under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance and shall not be abated during any dispute. If Pepco does not prevail on the disputed issue, stipulated penalties shall be paid as provided in Paragraph 9 (Stipulated Penalties).

f. Notwithstanding the foregoing, nothing in this Consent Decree shall be construed to permit or allow any dispute by Pepco regarding or concerning the validity of the Consent Decree's requirements, terms, conditions, or provisions.

35. Formal Dispute Resolution.

a. The invocation of formal dispute resolution procedures under this Paragraph may only be invoked after full compliance with Paragraph 34 of the Consent Decree and within the timeframe permitted by Paragraph 34(d).

b. The invocation of formal dispute resolution procedures under this Paragraph shall not, by itself, extend, postpone, or affect in any way any obligation of Pepco under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance and shall not be abated during any dispute. If Pepco does not prevail on the disputed issue, stipulated penalties awarded by the Court shall be paid as provided in Paragraph 9 (Stipulated Penalties).

c. Pepco must invoke formal dispute resolution procedures within the time period provided in Paragraph 34(d) by serving on the District a written statement of its position regarding the matter in dispute ("Statement of Position"). The Statement of Position shall include, but need not be limited to, the material required to be included within a Dispute Notice

as well as any other factual data, analysis, or opinion supporting Pepco's position and any supporting documentation relied upon by Pepco.

d. The District shall serve its response to Pepco's Statement of Position within thirty (30) days of receipt of Pepco's Statement of Position, unless otherwise extended by mutual agreement of the District and Pepco or by order of the Court. The District's response shall include, but need not be limited to, the material required to be included within a Dispute Notice as well as any other factual data, analysis, or opinion supporting the District's position and any supporting documentation relied upon by the District. The District's response shall be binding on Pepco, unless Pepco files a motion for judicial review of the dispute in accordance with Paragraph 35(e).

e. Pepco may seek judicial review of the dispute by filing with the Court and serving on the District, in accordance with Paragraph 21 of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within 30 calendar days of Pepco's receipt of the District's response to Pepco's Statement of Position. The motion shall attach and be based upon Pepco's Dispute Notice (or response to the District's Dispute Notice) and Pepco's Statement of Position for the dispute at issue and shall also attach the District's Dispute Notice or response thereto and its response to Pepco's Statement of Position for the dispute at issue. Positions, law, or facts with respect to the dispute at issue not summarized or otherwise set forth within Pepco's Dispute Notice or its response to a Dispute Notice from the District, or in Pepco's Statement of Position shall be deemed to have been waived by Pepco. Moreover, Pepco shall not and may not request relief materially different than that requested by Pepco in its Dispute Notice or its response to a Dispute Notice from the District, or in Pepco's Statement of Position.

f. In proceedings on any disputes governed by this paragraph, Pepco shall bear the burden of demonstrating that the decision of DDOE is arbitrary and capricious or otherwise not in accordance with law. Only evidence previously submitted to or prepared by the District concerning the dispute, or otherwise part of the administrative record, may be considered by the Court and the Court's review shall be limited to the matters contained with the administrative record maintained by the District for the dispute in question. The District's/DDOE's decision shall be upheld by the Court unless Pepco can demonstrate, on the

administrative record, that the decision of the District or DDOE was arbitrary and capricious or otherwise not in accordance with applicable law:

g. The District shall respond to Pepco's motion within the time period allowed by the applicable rules or orders of this Court. Pepco may file a reply memorandum, to the extent permitted by the applicable rules or orders of this Court.

36. The District and/or DDOE may, in its sole discretion, elect not to utilize the procedures set forth in Paragraphs 34 and 35 with respect to any actions by the District or DDOE to enforce any obligations of Pepco that Pepco has not timely disputed in accordance with Paragraphs 34 or 35. Should the District or DDOE so elect, either may file an appropriate motion with this Court seeking such enforcement without following the procedures set forth in Paragraphs 34 or 35 but, in such a case, the Court's review is nonetheless limited to the administrative record and the District's/DDOE's position shall be upheld by the Court unless Pepco can demonstrate, on the administrative record, that the decision of the District or DDOE was arbitrary and capricious or otherwise not in accordance with applicable law.

37. **Lodging and Opportunity for Public Participation.**

a. Pepco shall cooperate with the District in providing information and soliciting public comment regarding any and all work for which it is responsible pursuant to the Paragraph 8 Requirements as the District may from time to time request and shall otherwise reasonably cooperate and participate with the District in soliciting public participation. As requested by the District, Pepco shall participate in the preparation of such information for dissemination to the public and/or in public meetings which may be held or sponsored by the District to explain activities at or relating to the Facility or other matters set forth in this Consent Decree.

b. The original version of his Consent Decree was lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. This Consent Decree has been revised in response to comments received on the original version. The comments did not disclose facts or considerations which indicate that the Consent Decree, as revised, is inappropriate, improper, or inadequate. Pepco consents to the entry of this Consent Decree without further notice, and shall not challenge entry, provided this Consent Decree is not further modified by the District for any other reason without the written consent of Pepco.

38. **Administrative Record.** In accordance with Section 113(k)(1) of CERCLA, 42 U.S.C. § 9613(k)(1), the District shall establish and maintain an administrative record which shall contain all relevant and public documentation pertaining to any work performed pursuant to this Consent Decree. A copy of the administrative record will be made available to the public at a location near the Facility, and, pursuant to Paragraph 7 herein, Pepco shall reimburse the District for any expenses incurred in establishing, maintaining and housing the administrative record at a location near the Facility. In addition, the District shall maintain the Administrative Record in an electronic form available to the public on a website to be designated at a later date.


39. **Contribution Protection.** The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree constitutes a judicially-approved settlement for purposes of Section 113(f)(2) and (f)(3) of CERCLA, 42 U.S.C. § 9613(f)(2) and (3), and that Pepco is entitled, as of the date the Consent Decree is entered, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for matters addressed in this Consent Decree.

[signatures appear on the following pages]


For Plaintiff:

IRVIN B. NATHAN
Attorney General for the
District of Columbia

ELLEN EFROS
Assistant Deputy Attorney General
Civil Litigation Division

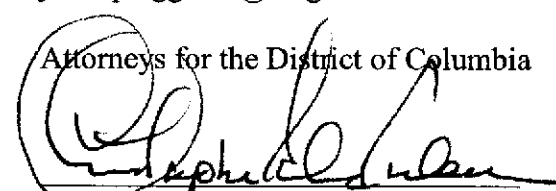

KIMBERLY KATZENBARGER (DC Bar # 476049)
General Counsel
District Department of the Environment
1200 First Street, N.E., 5th Floor
Washington, D.C. 20002
Telephone Number: (202)535-2608
kimberly.katzenbarger@dc.gov

Date: 7-28-11


JARED PIAGGIONE (DC Bar # 991558)
Assistant Attorney General
District Department of the Environment
1200 First Street, N.E., 5th Floor
Washington, D.C. 20002
Telephone Number: (202)481-3845
jared.piaggione@dc.gov

Date: 7/28/11

Attorneys for the District of Columbia


CHRISTOPHE A.G. TULO
Director
District Department of the Environment
1200 First Street, N.E., 5th Floor
Washington, D.C. 20002
Telephone Number: (202)535-2600
christophe.tulou@dc.gov

Date: 7.29.11

For Defendants

SUSAN H. POWER
Counsel for Potomac Electric Power Company
Pepco Holdings, Inc.
701 Ninth Street, N.W.
Washington, D.C. 20001
shpower@pepcoholdings.com

By: _____

Date: _____

MARK S. KUMM
President, Retail Electric Supply
Pepco Energy Services, Inc.
1300 North 17th Street
Suite 1600
Arlington, VA 22209
mkumm@pepcoenergy.com

By: Mark S Kumm

Date: 7-28-2011

For Defendants

SUSAN H. POWER
Counsel for Potomac Electric Power Company
Pepco Holdings, Inc.
701 Ninth Street, N.W.
Washington, D.C. 20001
shpower@pepcoholdings.com

By: Susan H. Power

Date: 7-28-11

MARK S. KUMM
President, Retail Electric Supply
Pepco Energy Services, Inc.
1300 North 17th Street
Suite 1600
Arlington, VA 22209
mkumm@pepcoenergy.com

By: _____

Date: _____