

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

DISTRICT OF COLUMBIA	)	
A municipal corporation	)	
1200 First St., N.E., 5 <sup>th</sup> Floor	)	
Washington, DC 20002	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 1:11-cv-00282 (BAH)
v.	)	
	)	
Potomac Electric Power Company	)	
701 Ninth Street, N.W.	)	
Washington, D.C. 20068	)	
	)	
Pepco Energy Services, Inc.	)	
1300 North 17 <sup>th</sup> Street	)	
Suite 1600	)	
Arlington, VA 22209	)	
	)	
Defendants.	)	

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**JOINT STATUS REPORT**

On December 1, 2011, the Court entered a Consent Decree between Plaintiff District of Columbia (the “District”), acting by and through the District Department of the Environment (“DDOE”), and Defendants Potomac Electric Power Company and Pepco Energy Services, Inc. (collectively, “Pepco” and together with DDOE, the “Parties”). The Consent Decree obligated Pepco to perform a Remedial Investigation / Feasibility Study (“RI/FS”) for its facility at 3400 Benning Road N.E., Washington, D.C. 20019 (“Facility” or “Site”).

The entry of the Consent Decree was subject to three conditions: (1) before approving certain key documents to be prepared as part of the RI/FS, DDOE was required to make drafts of these documents available for public review for a period of at least 30 days, and to give due consideration to any comments received from the public during that period; (2) DDOE was required to make the final versions of these documents available to the public; and (3) the Parties

were directed to submit a written status report to the Court no later than May 24, 2013.

Electronic Case File (“ECF”) No. 32. This status report is submitted in satisfaction of the last of these three conditions, and describes the progress to date in implementing the terms of the Consent Decree, provides an explanation and a showing of good cause for why the RI/FS has not yet been completed, and explains how the parties expect to complete the RI/FS expeditiously.

As described below, the parties have made significant progress on the RI/FS. Pepco submitted drafts of each of the following documents on (or well in advance of) the due dates specified in the Consent Decree: (i) the RI/FS Statement of Work, (ii) the Community Involvement Plan, and (iii) the RI/FS Work Plan (including a Health and Safety Plan, a Field Sampling Plan, a Quality Assurance Plan, and a Conceptual Site Model). As required by the first condition of the Court’s order approving the Consent Decree, all of these draft documents were made available for public review and comment for a period of at least 30 days, and DDOE prepared written responses to comments received from the public. All of these documents have been approved by DDOE, after being revised in response to DDOE’s review and comments from the public. Copies of the final approved documents have been made available to the public, as required by the second condition of the Court’s order approving the Consent Decree. In addition to the public comment requirements under the Court’s order, DDOE and Pepco have implemented a robust community outreach effort as set out in the Community Involvement Plan, including the creation of websites where key documents and project information have been posted, the formation of a Community Advisory Group to facilitate communications between the DDOE, Pepco and interested members of the community, and have held two public meetings to present information, answer questions, and receive comments about the project.

The field work for the Remedial Investigation began in January of 2013 within 30 days after DDOE's approval of the final RI/FS Work Plan in accordance with the schedule specified in the Consent Decree. This field work – which involves detailed surveying and site inspections and the collection of several hundred soil, groundwater, surface water, and sediment samples – has proceeded expeditiously and is currently expected to be completed by November 2013.

Despite the Parties' diligent efforts, the RI/FS is not yet complete. The May 2013 completion target was ambitious. An RI/FS for a site of this size and nature often requires two or three years (or more). In this case, a key factor prolonging the schedule has been the implementation of an enhanced process for public participation. Under the standard EPA approach for conducting an RI/FS at a Superfund site, public comments are not required for the project planning documents, and typically, public comment is first solicited only upon issuance of the draft Remedial Investigation report, at the earliest. Involving the public earlier in the process in this case has helped to ensure project transparency and has resulted in improved planning documents, but at the tradeoff of a longer period of time required to complete the planning phase of the project. Nonetheless, the project continues to proceed as expeditiously as possible consistent with a thorough sampling program and a robust public participation process, and it is expected the final RI and FS reports will be completed and approved within the next eighteen months. The Parties propose to submit another status report to the Court in one year – *i.e.*, on or before May 24, 2014.

#### **I. Public Review and Comment on RI/FS Documents**

The Order entering the Consent Decree obligated DDOE to make each draft document listed in Paragraph 8 of the Consent Decree available for public review and comment for a period of not less than 30 days. ECF No. 32. DDOE has completed this task for the Statement of

Work, the Community Involvement Plan, the Work Plan, the Conceptual Site Model, the Field Sampling Plan, and Quality Assurance Project Plan. The only outstanding items are the RI and FS Reports.

**A. The Statement of Work.**

The first deliverable subject to public comment was the Statement of Work. Pepco submitted the draft Statement of Work to DDOE on December 21, 2011, more than a month ahead of the due date specified in the Consent Decree. DDOE posted a copy of the draft document to DDOE's project web page on January 3, 2012. The Parties also emailed the draft Statement of Work directly to stakeholders, and placed copies of the document in public libraries. The public comment period originally was set to run from January 3, 2012, to February 3, 2012. However, due to some difficulties with the DDOE website, and to ensure that all stakeholders received adequate notice about the availability of this document for review, DDOE extended the comment period to February 13, 2012. DDOE received no public comments on the Statement of Work, but provided substantial comments of its own. In particular, DDOE requested that the scope of the river sampling be extended approximately 500 feet further downstream to include areas where previous investigations showed sediments contaminated by Polychlorinated Biphenyls ("PCB"), and that the scope of the human health risk assessment be expanded to include potential exposures to persons at the Facility, in addition to potential exposures to persons using the river. Pepco asserted that these additional activities were beyond the scope of work specified in the Consent Decree, but nonetheless agreed to expand the scope of the RI as requested by DDOE in the interest of keeping the project moving forward. *See* Letter from F. Mahvi to P. Connor, March 14, 2012 (attached hereto as Exhibit 1). The final Scope of

Work, reflecting the expanded scope of investigation, was approved by DDOE on April 18, 2012, and posted to the DDOE project web page.

**B. The Community Involvement Plan.**

The Community Involvement Plan (“CIP”) is a living document that describes Pepco’s and DDOE’s plans for involving the community in the RI/FS project. Pepco submitted a draft CIP to DDOE on December 21, 2011, more than six months ahead of the due date specified in the Consent Decree. DDOE posted a copy of the draft document to DDOE’s project web page on February 1, 2012 and DDOE published a notice soliciting public comment on the draft CIP in the *D.C. Register* on February 3, 2012. The Parties also emailed copies of the CIP directly to stakeholders, including an extended group of Advisory Neighborhood Commissioners and civic associations, and copies were placed in local libraries. DDOE also ensured that several environmental advocates were given copies of the documents for further distribution. The Parties also attended a community meeting on February 25, 2012, where the subject of discussion was the RI/FS. The comment period was initially set to run from February 1, 2012 to March 7, 2012, but DDOE extended the period to March 19, 2012 in response to requests from community members. DDOE also accepted late comments.

Many of the comments were incorporated into the final CIP, including the formation of a Community Advisory Group (“CAG”), expanding the direct mailing list from 9862 addresses to more than 11,000 addresses, and the creation of a list serv. DDOE revamped its website to create an easily retrievable web page dedicated entirely to the RI/FS project, in response to several commenters’ suggestions. See <http://green.dc.gov/page/pepco-benning-road-facility-plans-and-deliverables>.<sup>1</sup> DDOE prepared a written response to all of the comments, which was

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<sup>1</sup> Pepco has also launched its own separate website dedicated to informing the public about the project. See <http://www.benningservicecenter.com>. Pepco also has devoted considerable energies to inform the public about

posted on DDOE's project web page. (A copy of DDOE's response to public comments on the CIP is attached hereto as Exhibit 2.) In addition to the outreach mechanisms above, the Parties arranged for robo-calls to inform local residents of upcoming public meetings. Likewise, paper copies of the deliverables are available at four local public libraries near the Facility.

The final CIP was initially approved by DDOE on June 18, 2012. The CIP has been updated several times to reflect additional requests from the community. A copy of the most recent version of the CIP, dated February 2013, is attached hereto as Exhibit 3.

**C. The RI/FS Work Plan and Related Documents.**

Pepco Submitted the draft RI/FS Work Plan to DDOE on July 17, 2012, in accordance with the schedule set out in the Consent Decree. The Work Plan submission included the Conceptual Site Model, a Sampling and Analysis Plan (consisting of a Field Sampling Plan and Quality Assurance Project Plan), and a Health and Safety Plan.

The Work Plan describes the plans to investigate environmental conditions at the Facility and the adjacent segment of the Anacostia River, referred to as the "Study Area." As described in the Work Plan, the investigation includes a "landside" component and a "waterside" component. The "landside" component focuses on the Facility itself, and the "waterside" component focuses on the shoreline and sediments in the segment of the Anacostia River adjacent to and immediately downstream of the Facility.

Based on the current understanding of potential sources and impacted media on the "landside" of the Study Area, distinct target areas were identified at the Facility for further investigation. These target areas included the locations of the six historical PCB releases referenced in the Complaint. The target areas also included areas where past or present activities

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decommissioning the Benning power plant, which ceased operations as of June 2012, and about Pepco's plans for continued use of the Facility to provide electricity to its customers.

included the handling, storage or use of potentially harmful chemicals (*e.g.*, where above ground fuel storage tanks were located). The “waterside” investigation involves sampling of surface water and sediments based on a grid layout designed to characterize the entire waterside portion of the Study Area.

DDOE published a notice soliciting public comment on the draft RI/FS Work Plan and related documents in the *D.C. Register* on August 17, 2012, and DDOE posted a copy of the draft document to DDOE’s project web page. The documents were emailed to a master list of interested parties, a public meeting was scheduled, and notices were mailed and emailed. The draft Work Plan was available for public comment until September 28, 2012. DDOE also handed out flyers, and had them posted at local businesses publicizing the public meeting and public comment periods. The Parties held a public meeting on September 15, 2012, to present information to the public about the Work Plan, and provide an opportunity for members of the public to ask questions and make comments. DDOE received a number of comments on the Work Plan, many of which were incorporated into the final Work Plan. DDOE prepared written responses to all of the comments, with input from the CAG, which were posted on the DDOE web page. (A copy of the response to comments on the RI/FS Work Plan is attached hereto as Exhibit 4). The final Work Plan was approved by DDOE on December 28, 2012, and posted to the DDOE project web page.

A number of comments on the RI/FS Work Plan requested that the field sampling program be expanded to include sampling residential areas in the vicinity of the Facility. In responding to these comments, DDOE explained that, to the extent such sampling was intended to assess potential impacts from deposition of historical air emissions from the power plant, it was beyond the scope of the RI/FS project (which is focused primarily on impacts to the

Anacostia River) and that sampling for this purpose did not appear to be warranted based on the available scientific evidence. However, DDOE also explained that “if the results of the initial sampling indicate that contaminants have migrated in significant amounts beyond the Site boundaries through groundwater flow or surface runoff, or may be affecting areas of the river outside of the study area, additional sampling will be conducted to assess the extent of these impacts beyond the study area.” *See* Response to Comments, Exhibit 4 at 8. The Parties are cognizant of the level of community concern on this issue; however, there are a number of legal, scientific and other concerns that counseled against expanding the scope of the sampling program to the extent proposed. *See* Exhibit 4, at 6-8.

**D. Outstanding Items.**

**1. Remedial Investigation Report.**

The Consent Decree requires Pepco to prepare and submit a draft RI Report within 120 days after completion of RI field activities. The draft RI report will then be given a preliminary DDOE review, to ensure it is in an appropriate form for public distribution, and then released for public comment. DDOE anticipates that this Report will be of great interest to the community and expects that an extended comment period will be required. After the comment period, Pepco will revise the draft RI Report as appropriate to address comments from DDOE, other regulatory agencies, and the public. Pepco will then submit a final RI Report, which will then be made available on the DDOE and Pepco websites. In addition, paper copies will be provided to local public libraries.

**2. The Feasibility Study.**

Within 180 days after completion of the RI field work, Pepco must submit a draft Feasibility Study (“FS”) to DDOE. After a preliminary review of the Draft FS Report, DDOE

will release the draft Report for public comment. After public review and comment, Pepco will submit a Final FS to DDOE for approval. At this point, Pepco's obligations under the Consent Decree will be at an end, and DDOE will proceed with a Proposed Plan, and Record of Decision, regarding further response actions.

## **II. Showing of Good Cause for Delay in Completion of RI/FS**

The Parties have worked diligently to make progress on the RI/FS from the date the Court approved the Consent Decree. As noted above, Pepco has submitted all of the required planning documents on or well ahead of the schedule set out in the Consent Decree, and commenced the field investigation work within 30 days after DDOE's approval of the final RI/FS Work Plan, in accordance with the schedule specified in the Consent Decree. The field work involves multiple phases of sampling and includes the collection of hundreds of soil samples, groundwater samples, surface water samples, and sediment samples, as summarized at Tables 5 and 6 from the RI/FS Work Plan (attached hereto as Exhibit 5). This sampling work has been performed as expeditiously as possible as the necessary permits were issued by various state and federal regulatory agencies.

As detailed above, the key factor prolonging the schedule has been the implementation of an enhanced process for public participation, and in particular the time required to solicit and respond to comments on the RI/FS planning documents, as required by the Court's order approving the Consent Decree. First, to ensure adequate opportunity for public input, DDOE extended the comment period for each of the project planning documents beyond the 30 days required by the Court's order. For example, in response to requests from community members, DDOE extended the comment period for the draft CIP by 14 days, and accepted comments submitted even after the extended deadline. Similarly, the Work Plan was available for public

comment originally from August 17, 2012 to September 17, 2012.<sup>2</sup> However, CAG members stated that because many people go on vacation during August, the comment period should be extended. Consequently, the comment period was extended an additional 11 days to September 28, 2012.

Second, the additional time required to solicit and consider public comment on the planning documents was considerably longer than just the cumulative period of time allowed for submission of comments. In each case, the draft document was subject to an internal review to ensure that it met the appropriate standards for publication by the District government. This involved both a staff review and an approval from management. Once the requisite approvals were obtained, a formal notice announcing the commencement of the public comment period had to be published in the *D.C. Register*. See D.C. Official Code § 2-553 (b)(1) and (d)(2).

The *D.C. Register* is published once a week on Friday. Pursuant to the District of Columbia Municipal Regulations (“DCMR”), notices must be submitted to the Office of Documents and Administrative Issuances by Tuesday before noon, in order to publish the notice on the Friday of that week. 1 DCMR 306.11. Consequently, a management approval obtained at 1:00 PM on a Tuesday, has the practical effect of delaying the start of the comment period by 10 days. DDOE has dutifully tried to manage the intricacies of the notice system in a number of ways, including by providing actual notice to stakeholders by email and other means in addition to the *D.C. Register* notice. However, DDOE is required to follow the formal procedures for publication of public notices. See D.C. Official Code §§ 2-551 *et seq.*, and 1 DCMR 305.

Substantive discussions regarding the planning documents between DDOE and Pepco were deferred for each deliverable until after the end of the public comment period so that

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<sup>2</sup> The official comment period did not commence until notice was published in the *D.C. Register* on August 17, 2012. However, actual copies of the documents were sent to stakeholders beginning on July 20, 2012 and posted on the website on August 9, 2012.

revisions were not made before the public had an opportunity to comment on the document. Only after careful consideration of each comment received was DDOE in a position to begin discussions with Pepco to address agency comments as well as those from the public. Pepco then revised the deliverable to incorporate the comments as appropriate and submitted a final document to DDOE for review and approval.

The need to obtain permits for the field investigation work from multiple local, State, and federal regulatory agencies also has contributed to delays to the project. The sampling program required permits from the United States Army Corps of Engineers, the Maryland Board of Public Works – Wetlands Administration, DDOE, and National Park Service. Pepco's contractor submitted applications for these permits in August, 2012 based on the draft RI/FS Work Plan. The requisite permits and approvals were obtained from the Corps on January 8 and February 7, 2013, from the Maryland Board of Public Works – Wetlands Administration on April 3, 2013, and from DDOE's Water Quality Division on April 8 and 9, 2013. The National Park Service issued a proposed permit on May 17, 2013, but additional time may be required to finalize this approval. Work on the waterside investigation could not begin before these permits were issued. The Parties had anticipated a shorter process for obtaining the required permits, and the delays associated with permitting have created additional delays in the schedule.

### **III. Anticipated Schedule for Completion of the Project.**

As specified in the approved RI/FS Work Plan, the field sampling is being conducted in an iterative manner in which the results of each phase of sampling determines the nature and scope of subsequent sampling efforts until all of the necessary data has been collected. In particular, as explained above, sampling results will be evaluated to determine if any contaminants appear to have migrated beyond the initial study area for which supplemental field

sampling may be warranted. As a result, it is difficult to predict when all of the field work will be completed. However, the parties currently anticipate that sampling will be completed by November 2013.

The completion of all necessary fieldwork will trigger the 120-day deadline in the Consent Decree for Pepco's submittal of a Draft RI Report, and the 180-day deadline for Pepco's submittal of a Draft Feasibility Study. ECF No. 22-1 at 7. The Parties anticipate that these Drafts will be the subject of great interest to the community, and thus will require public meetings along with extended comment periods. In this project, Pepco has provided all of the deliverables in a timely fashion, and the deliverables have been of acceptable quality. DDOE has also conducted its reviews in a timely fashion, and has worked diligently to keep the project on schedule. The Parties to date, have also worked in a cooperative and efficient manner to resolve technical disagreements, and we expect that trend to continue. Further, DDOE has engaged a contractor to help expedite its review of the remaining deliverables. Taking all of these factors into account, the Parties anticipate the RI/FS will be complete – i.e., DDOE will have approved the final RI Report and Feasibility Study – within the next eighteen months.

**IV. Conclusion.**

For the foregoing reasons, the Parties respectfully submit that the Court should find that the Parties have complied to date with the requirements of the Court's order approving the Consent Decree, have shown good cause for why the project has not yet been completed, and should proceed as described herein to complete the project as expeditiously as possible.

Dated: May 23, 2013

Respectfully submitted,

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