

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 and )  
 )  
 ANACOSTIA RIVERKEEPER, )  
 )  
 Plaintiff-Intervenor )  
 )  
 v. )  
 )  
 POTOMAC ELECTRIC POWER COMPANY, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Civil Action No. 1:15-cv-01845

**CONSENT DECREE**

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Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), filed a Complaint in this action on October 30, 2015, alleging that Potomac Electric Power Company (“Pepco”) violated Section 309(b) and (d) of the Federal Water Pollution Control Act (“Clean Water Act” or “CWA”), 33 U.S.C. § 1319(b) and (d).

The Complaint against Pepco alleges that Pepco violated the terms and conditions of its National Pollutant Discharge Elimination System (“NPDES”) permit, issued by EPA to Pepco in 2009 pursuant to CWA Section 402(b), 33 U.S.C. § 1342(b), for Pepco’s facility located at 3400 Benning Road N.E., Washington, D.C (“Facility”). Specifically, the United States alleges that on numerous occasions Pepco exceeded the permit effluent limitations for metals and Total Suspended Solids (“TSS”) in its stormwater discharges through Outfall 013 into the Anacostia River.

Pursuant to CWA regulations at 40 C.F.R § 122.6(a) the 2009 Permit is administratively extended and its provisions remain in effect pending EPA’s issuance of a subsequent NPDES Permit for the Facility.

The Facility functions as the Service Center for Pepco’s electric distribution system in the District of Columbia. A portion of the Facility also was formerly the site of an electric generating station. The generating station ceased operation in June 2012, and by May 2015 the generating station structures were demolished, the building debris was removed, and the building footprint was backfilled to grade with stone.

Pepco independently is conducting a Remedial Investigation and Feasibility Study of the Facility and the adjacent segment of the Anacostia River pursuant to other environmental statutes, and in 2011 entered into a judicial consent decree with the District of Columbia for that work in the case, *District of Columbia v. Potomac Electric Power Company et al.*, Civil Action No. 1:11-cv-00282 (BAH)(D.D.C).

Notice of the United States' Complaint in this matter was provided to the District of Columbia at the time of filing.

On March 11, 2016, Anacostia Riverkeeper filed an uncontested Motion to Intervene in the pending lawsuit (Rec. Doc. 7), and the Court in a minute order granted that Motion on March 14, 2016.

Pepco does not admit any liability to the United States arising out of the transactions or occurrences alleged in the Complaint.

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 will avoid litigation between the Parties and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

## I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b) and over the Parties. Venue lies in this District pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391 (b) and (c) and 1395(a), because the violations alleged in the Complaint are alleged to have occurred in, and Pepco is located and conducts business in, this judicial district. For purposes of this Decree, or any action to enforce this Decree, Pepco consents to the Court's jurisdiction over this Decree and any such action and over Pepco and consents to venue in this judicial district.

2. For purposes of this Consent Decree, Pepco agrees that the Complaint states claims upon which relief may be granted pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), but does not admit any liability under these claims.

## II. APPLICABILITY

3. The obligations of this Consent Decree apply to and are binding upon Pepco and any successors, assigns, or other entities or persons otherwise bound by law, and the United States.

4. No transfer of ownership or operation of the Facility, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Pepco of its obligation to ensure that the terms of the Decree are implemented. At least 60 Days prior to such transfer, Pepco shall

provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a summary of the principal terms of the prospective transfer, to EPA Region III, the United States Attorney for the District of Columbia, and the United States Department of Justice, in accordance with Section XVII (Notices). Any attempt to transfer ownership or operation of the Facility without complying with this Paragraph constitutes a violation of this Decree.

5. Pepco shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Consent Decree. Pepco shall advise such contractor that its performance of the work must be in conformity with the terms of this Consent Decree.

6. In any action to enforce this Consent Decree, Pepco shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

### III. OBJECTIVES

7. The objectives of the Parties in entering into this Consent Decree are to ensure that Pepco continues to take measures, and performs additional measures, necessary to achieve compliance with the Clean Water Act and its NPDES permit with respect to discharges of metals and other pollutants from the Facility into the Anacostia River. The obligations of this Consent Decree to treat and control stormwater run-off have the objective of causing Pepco to attain, and

thereafter maintain, full compliance with the foregoing standards and requirements on a permanent and sustainable basis.

#### IV. DEFINITIONS

8. Terms used in this Consent decree that are defined in the CWA or in regulations promulgated pursuant to the CWA shall have the meanings assigned to them in the CWA or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

“BMP” or “Best Management Practice” shall mean measures to reduce or eliminate pollutant loads in stormwater flows entering into the Facility’s stormwater Drainage System.

“Complaint” shall mean the complaint filed by the United States in this action;

“Consent Decree” or “Decree” shall mean this Decree and all appendices attached hereto listed in Section XXVI;

“Day” shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day;

“Drainage System” shall mean the system of pipes, manholes, other inlets, and any other connected components and appurtenances, used to carry stormwater or permitted process

water flows from within the Facility to the Anacostia River through Outfalls 013 and 101.

“Effluent Limits” shall mean the limits imposed by Pepco’s NPDES Permit on discharges from the Facility, including the concentration-based limits for discharges of metals and Total Suspended Solids from Outfall 013.

“EPA” shall mean the United States Environmental Protection Agency and any of its successor departments or agencies;

“Effective Date” shall have the definition provided in Section XVIII;

“Facility” shall mean the Service Center and former Generating Station owned and operated by Pepco, located at 3400 Benning Road N.E., Washington, D.C.;

“NPDES Permit” shall mean National Pollutant Discharge Elimination System Industrial Permit No. DC0000094, issued by EPA Region III to Pepco on June 19, 2009, and effective July 19, 2009, which has been administratively extended from July 19, 2014, and any subsequent NPDES Permits issued to Pepco at this Facility.

“Operating Group” shall mean the various functional departments within Pepco’s organizational structure, and, in the event of a corporate reorganization, any comparable operational units that subsequently may be formed.

“Paragraph” shall mean a portion of this Decree identified by an arabic numeral;

“Parties” shall mean the United States and Pepco;

“Pepco” shall mean defendant Potomac Electric Power Company and any successors thereto;

“Performance Standards” shall mean the standards to be developed pursuant to Section VI.B., Paragraph 37.d to govern the design of the Treatment System.

“Place into Operation” shall mean to achieve steady-state operation and to operate consistently in such a way as to accomplish the intended function (i.e., following acceptance testing), even though all construction close-out activities (such as completion of a punchlist and resolution of contract disputes or close-outs) may not yet be completed.

“Section” shall mean a portion of this Decree identified by a roman numeral;

“State” shall mean the District of Columbia;

“Storm Drain Inlets” shall mean manholes, drains and any other constructed opening at the surface through which stormwater and other flows enter the Drainage System.

“Storm Drain Inlet Controls” shall mean the booms, filters, and other devices deployed in and around each Storm Drain Inlet at the Facility to prevent and filter metals, TSS, and other pollutants from entering the Drainage System at the Facility.

“Stormwater” shall have the meaning set forth in 40 C.F.R. § 122.26(b)(13).

“Stormwater Retention Project Abandonment” shall mean, solely for purposes of the stipulated penalty in Paragraph 82.b associated with the Stormwater Retention Project, that prior to satisfactory completion of the project: (1) Pepco notifies EPA that it will no longer pursue the Stormwater Retention Project, because it is technically infeasible or for any other reason; or (2) EPA determines that Pepco is not diligently pursuing the Stormwater Retention Project; or (3) more than nine months have elapsed after the deadline in Section VIII, Paragraph 54 for completion of the Stormwater Retention Project.

“SWPPP” or “SWP3” shall mean the Stormwater Pollution Prevention Plan required by Section II.C of Pepco’s NPDES Permit and Section VI.D of this Consent Decree, to serve as a complete and comprehensive compendium of all material stormwater related activities, procedures, and records at the Facility.

“TMDL” or “Total Maximum Daily Load” shall mean the total maximum daily loads of various pollutants and wasteload allocations for the Anacostia and Chesapeake Bay, developed pursuant to CWA Section 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C);

“Treatment System” shall mean the control technology to be selected and installed permanently pursuant to Section VI.B to filter and remove metals and suspended solids from the stormwater in the Drainage System prior to discharge to the Anacostia River. Such technology may be applied at multiple locations within the Drainage System.

“United States” shall mean the United States of America, acting on behalf of EPA;

“Work” shall mean Pepco’s obligations set forth in Section VI (Compliance Requirements);

V. CIVIL PENALTY

9. Within 30 Days after the Effective Date, Pepco shall pay the sum of \$1,600,000.00 (One Million Six Hundred Thousand Dollars) as a civil penalty, together with interest accruing from the date on which the Consent Decree is lodged with the Court, at the rate specified in 28 U.S.C. § 1961 as of the date of lodging.

10. Pepco shall pay the civil penalty due via FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account, in accordance with instructions provided to Pepco by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the District of Columbia after the Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection System (“CDCS”) number, which Pepco shall use to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

Jeffrey Snyder  
Assistant Treasurer  
Pepco Holdings, Inc.  
500 N. Wakefield Drive  
Newark, DE 19702  
Jeff.snyder@pepcoholdings.com

on behalf of Pepco. Pepco may change the individual to receive payment instructions on its behalf by providing written notice of such change to the United States and EPA in accordance with Section XVII (Notices).

At the time of payment, Pepco shall send notice that payment has been made: (i) to EPA via email at [cinwd\\_acctsreceivable@epa.gov](mailto:cinwd_acctsreceivable@epa.gov) or via regular mail at EPA Cincinnati Finance Office, 26 W. Martin Luther King Drive, Cincinnati, Ohio 45268; (ii) to the United States via email or regular mail in accordance with Section XVII and (iii) to EPA in accordance with Section XVII. Such notice shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States et al. v. Potomac Electric Power Company*, and shall reference the civil action number, CDCS Number and DOJ case number 90-5-1-1-11336.

11. Pepco shall not deduct any penalties paid under this Decree pursuant to this Section or Section XI (Stipulated Penalties) in calculating its federal income tax.

## VI. COMPLIANCE REQUIREMENTS

12. Overview. Pepco shall continue to implement Best Management Practices that it has adopted to reduce pollutants in stormwater discharged into the Drainage System; adopt new BMPs and other measures as necessary to attain compliance with the NPDES Permit limits and requirements applicable to its stormwater discharges; and install and operate stormwater treatment system(s) as set forth in this Section.

A. Stormwater System Best Management Practices.

13. Drainage System Maintenance and Integrity: Pepco certifies that it has developed a map and characterization of its Drainage System at the Facility and has identified the areas that contribute to or drain into each manhole and inlet. Pepco shall update its Drainage System map as changes are made to that system, and shall maintain an up-to-date map as part of the SWPPP.

14. Pepco shall maintain its Drainage System in accordance with good engineering practices. Pepco shall take reasonable actions to minimize sediment build-up in the laterals and trunk lines so as to eliminate that potential source of metals contamination of the stormwater and to sustain flow through the system and also shall maintain the structural integrity of the system.

15. Pepco certifies that in 2015 it performed a closed circuit television (CCTV) inspection of the main trunk line of the Drainage System and subsequently cleaned out the trunk and lateral lines and made necessary repairs to the underground pipes.

16. Pepco shall perform, using a qualified contractor, an annual internal visual inspection of the Drainage System, including the main trunk line and laterals, using CCTV or other appropriate technology. Pepco shall remove sediments and other pollutants from the Drainage System to ensure that the sediments are not discharged through Outfall 013, and shall repair and replace pipes as necessary, consistent with EPA Guidance Document EPA/625/6-91/030 – Sewer System Infrastructure Analysis and Rehabilitation.

17. Pepco shall prepare a written summary of the results of the annual Facility Drainage System inspection and sediment removal activities, and a schedule for all additional structural repairs that ensures their completion as soon as practicable after identification. For any corrective actions requiring more than six months from the date of the inspection to complete, Pepco shall provide EPA with a notice describing the actions and explaining the reasons that completion will require more than six months, and such actions shall be subject to EPA review and approval. The summary shall be included as an appendix to the next quarterly report that is due at least 30 days following the annual inspection as set forth in Section X (Reporting Requirements) below.

18. Storm Drain Inlet Controls: Pepco certifies that it has worked with vendors and consultants to install Storm Drain Inlet Controls on all Storm Drain Inlets leading to Outfall 013 and Outfall 101 at the Facility.

19. Pepco shall continue to use Storm Drain Inlet Controls on all Storm Drain Inlets. Pepco shall ensure that each inlet filter is properly sized and fitted to the inlet and shall operate and maintain the filters or booms as per the manufacturer's or vendor's specifications.

20. Pepco shall maintain adequate staff and/or funding for qualified stormwater contractor support and shall have dedicated staff or contractors on-site during business hours. Pepco shall maintain a back-up supply of appropriately graded, heavy-duty metal sorbent inlet filters, including custom-fitted inlet filters, and booms, to ensure that replacements are made within 48 hours of discovery of the need for replacements.

21. Storm Drain Inlet Inspection Program: Pepco shall inspect each Storm Drain Inlet at the facility at least once per week to ensure that the Storm Drain Inlet Controls are properly in place and functioning as intended, and shall perform a drive-by inspection of the Storm Drain Inlets following precipitation events exceeding .5 inches. The regular weekly inspections shall be conducted by a team consisting of one or more dedicated contractors and one Pepco representative from the Underground Maintenance and Construction Department or other appropriate Department. The precipitation-based inspections may be conducted by a single person, either a dedicated contractor or an appropriate Pepco representative. Pepco shall ensure it maintains adequate staff or a vendor to conduct the routine and precipitation-based inspections.

22. During each inspection, any accumulated sediment shall be removed from the Storm Drain Inlet Controls around the inlet and any Controls that are damaged or no longer functional shall be replaced within 48 hours of discovery of the need for replacement.

23. The Storm Drain Inlet Controls also shall be replaced at the end of their service lives as recommended by vendor specifications. If inspections show the Storm Drain Inlet Control in a particular location is underperforming, Pepco shall replace it with a heavier duty or more effective control. Pepco shall then evaluate the performance of the replacement Storm Drain Inlet Control to verify that it is achieving required performance objectives. If the replacement Storm Drain Inlet Control does not achieve performance objectives, Pepco shall evaluate and install other Storm Drain Inlet Controls as necessary to achieve those objectives. The replacement of underperforming Storm Drain inlet Controls shall be reported in the Quarterly Report, together with the actions taken by Pepco to correct the underperformance.

24. All Storm Drain Inlet inspections shall be documented in a log, database or spreadsheet which shall include the date of inspection, inspector name or designation, specific controls required for each inlet, a narrative description of the condition of each inlet and any maintenance or replacement performed, along with the date of such maintenance or replacement, during the inspection. The inspection logs shall be reviewed and signed by the responsible manager or his designee on a monthly basis.

25. Pepco shall submit copies of the logs for each quarter with its quarterly reports pursuant to Section X (Reporting Requirements).

26. Metals Management: Pepco shall take the following actions to eliminate or minimize stored and staged metals at the facility that may be a source of metals in stormwater that flows to the Facility Drainage System.

27. Pepco certifies that it has made arrangements with its vendors to remove offline or removed-from-service distribution system transformers from the Facility on a weekly basis in order to minimize the number of such transformers staged at the Facility at any given time and the length of time that any individual transformer is exposed to stormwater before removal from the site. Pepco shall continue such practice until such time as offline or removed-from-service transformers are staged in the new covered structure to be built pursuant to Paragraph 53.

28. Pepco shall request that its vendors (i) use newer disposal bins and replace rusty bins; (ii) place scrap metal bins indoors wherever possible; and (iii) empty scrap metal bins as soon as possible after they are filled. Pepco has implemented and shall continue such practices.

29. All wiring splicing activities conducted as part of Pepco's cable installation and repair training shall take place indoors. Pepco certifies that it does not conduct other outdoor training activities that potentially contribute to metals contamination of stormwater but in the event it develops such programs, it shall provide enhanced housekeeping and cleanup for them or conduct such activities indoors to the extent that adequate indoor space is available.

30. During each monthly inspection pursuant to Paragraph 48 below, Pepco shall identify any unneeded, used, or scrap equipment or materials which are exposed to storm water that flows to the Facility Drainage System and shall arrange to have such equipment or materials removed from the facility or relocated under cover.

31. Spill Control: Pepco shall set forth procedures in its SWPPP for the response to and clean-up of spills containing oil, grease, metals, PCBs, or hazardous substances. Pepco shall follow such SWPPP procedures in responding to and cleaning up spills at the Facility. A list of any such spills, along with the measures taken in response, shall be maintained as part of the SWPPP.

32. Discharges of PCBs: Discharges of PCBs through any outfall are prohibited. Pepco shall advise EPA by phone within 24 hours and in writing within five days of any spills or releases of PCBs outside secondary containment areas at the facility.

B. Treatment System.

33. Pepco shall install a permanent system for the treatment of storm water to be discharged from the Facility's Drainage System (the "Treatment System") to achieve the objectives of this Consent Decree as set forth in Section III (Objectives).

34. The Treatment System shall operate in addition to the Best Management Practices described in Section VI.A above.

35. The Treatment System shall provide in-pipe treatment to reduce concentrations of dissolved and particulate metals in appropriate areas sufficient to attain compliance with the Effluent Limits in Pepco's NPDES Permit. Pepco thus far has identified the following "hot spots" where it shall provide treatment, subject to the further design work pursuant to Paragraph 37:

- a. Hotspot 1A: Roof Drains at building 35
- b. Hotspot 1B: Roof Drains at buildings #54 and 56
- c. Hotspot 1C: Transformer Shop (Inlets 42 and 43)
- d. Hotspot 2: Former Power Plant Area (Inlet 17)
- e. Hotspot 3: Former Fuel Tank Area (Inlet 08)
- f. Hotspot 4: Salvage Yard (Inlets 65 and 66).

In the event Pepco, upon review of its data collection and pilot projects in Paragraph 37 below, identifies additional “hot spots” where Treatment Systems may be considered, adopts changes to planned treatment technologies, or eliminates any of the locations a. through f. above, it shall provide the underlying data and justification for these changes in the Final Conceptual Design Report and/or Final Treatment System Design Report pursuant to Paragraphs 37.c and 37.d below.

36. The Treatment System shall utilize industry accepted technology, properly sized and customized for the Pepco installation. The Treatment System shall employ filtration, chemically-assisted separation, mechanically-assisted separation or a combination of these technologies as necessary to fully achieve the Objectives of this Consent Decree.

37. Design and installation of the Treatment System shall be sequenced and implemented pursuant to the following schedule:

- a. Additional data collection: Pepco shall collect data concerning flow rates in areas of the Drainage System where treatment will be provided, and perform any other sampling necessary for design of the Treatment System. It shall use such data to calibrate its stormwater model, and shall complete the data collection as soon as practicable but no later than September 30, 2016.
- b. Bench testing and pilot projects: Pepco shall perform bench scale treatability testing and pilot projects on different technologies and media

to provide data concerning their performance. It shall use the results of the bench scale testing and pilot projects, along with other information, to select the technologies to be used in the Treatment System. Pepco shall complete its bench testing and pilot projects as soon as practicable but no later than September 30, 2016.

- c. Final Conceptual Design Report: On or before November 15, 2016, Pepco shall submit to EPA for its review and comment a revised conceptual design report, which shall (i) summarize results of the foregoing data collection, bench scale testing and pilot projects and (ii) describe the specific Treatment System components selected (including treatment media), and the likely location of such components, and (iii) explain the underlying justification and rationale for the selection of Treatment System components and locations.
  
- d. Final Design of the Treatment System: As soon as practicable, but no later than February 15, 2017, Pepco shall submit for EPA review and approval a Final Treatment System Design Report (Final TSDR). The Final TSDR shall include: (1) the location, type, and sizing of the specific Treatment System components necessary to meet the objectives of this Consent Decree; (2) the expected minimum contaminant removal percentage for each Treatment System component (“Performance Standards”); (3) the criteria for performance acceptance testing for each

individual Treatment System component; and (4) a preliminary plan for Operation and Maintenance of the Treatment System.

- e. Applications for permits: Pepco shall arrange for a pre-application scoping meeting with the District of Columbia permitting agency(ies) on or before January 15, 2017. Pepco shall apply for any permits required by District of Columbia statutes or regulations no later than 90 days after it submits the Final TSDR to EPA for its review and approval or five days after EPA approves the Final TSDR, whichever is later. Any contention by Pepco that it failed to meet a deadline due to a delay in obtaining approval of a permit shall be evaluated under the Force Majeure provisions in Section XII of this decree.
  
- f. Installation and Construction: Pepco shall commence construction and installation of the Treatment System as soon as practicable but no later than June 15, 2017. After EPA approves the Final TSDR, any proposed substantive revision to the Final TSDR regarding the location, type, or sizing of a Treatment System component, schedule for installation, or the criteria for performance acceptance testing shall be submitted to EPA for review and approval not less than 90 days prior to installation of that revised Treatment System component.

- g. Treatment System Placed into Operation: Pepco shall place the Treatment System into Operation on or before December 31, 2017. It shall send a Notice to EPA pursuant to Section XVII (Notices) of this Consent Decree certifying pursuant to Section X (Reporting), Paragraph 71 the date that the Treatment System was Placed into Operation.

38. Construction Oversight. Pepco shall ensure that the treatment system has been built to the design in the Final TSDR and is certified by a licensed Professional Engineer having the necessary training and experience to properly evaluate and certify conformance to the Final TSDR. Pepco shall maintain documentation at the facility demonstrating that the treatment system was constructed as specified in the design and make such documentation available to EPA upon request.

39. Acceptance Testing. Pepco shall perform field testing of each treatment system upon completion of construction to demonstrate that the system achieves the performance objectives called for in the Final TSDR. Acceptance testing shall also serve as the baseline for tracking any changes in the performance of the treatment system over time.

40. Operation and Maintenance (O & M). Pepco shall properly operate and maintain the Treatment System in accordance with the Operation and Maintenance Plan. All O&M activities shall be documented in a log or spreadsheet that identifies the date of activity, the individual and department, vendor, or contractor performing O&M activities, and the specific O&M activities completed. The information shall be maintained in the SWPPP. Pepco may rely

on the authorized representative of the manufacturer or other qualified third party to operate and maintain the Treatment System but Pepco remains solely responsible under this Consent Decree for the Treatment System's proper operation and maintenance.

41. Ongoing Performance Testing. At least once every 180 days from the date the Treatment System is first placed into operation in accordance with Paragraph 37.g. of this Consent Decree, Pepco shall conduct performance (i.e., pollutant removal effectiveness) testing of all components of the Treatment System to determine (a) changes in performance rates over time, (b) changes required in the O&M procedures, (c) if remedial measures are required to ensure that any treatment component continues to achieve the applicable Performance Standard, and if necessary (d) the need for feedback for updating the Performance Standards for any future treatment system designs. This testing program should be documented in the O&M log for each treatment system. The results of performance testing shall be documented in a report that identifies the date of testing, process deployed, and the need for additional testing activities or other remedial activities, including a date for their completion. Where testing reveals that the performance of a Treatment System component is no longer meeting the applicable Performance Standard, Pepco shall (a) notify EPA of that failure within five Days and (b) develop and submit to EPA within 30 days thereafter a corrective action plan to return the Treatment System component to its Performance Standard.

42. In the event EPA issues an NPDES Permit for the Facility that contains more stringent limits for metals at Outfall 013, or new limits at Outfall 101, Pepco shall analyze the data concerning the performance of the BMPs and Treatment System and their removal rates

against the more stringent standards or new standards. As soon as practicable but no later than 120 days from issuance of the final NPDES Permit effluent limits, Pepco shall submit to EPA for review and approval a plan to add additional treatment and/or BMPs to meet the more stringent standards, or for a new Treatment System or BMPs for Outfall 101, along with a schedule for their design and implementation, or justify why no additional treatment is needed. Upon approval by EPA, any new components to the Treatment System or additional BMPs shall be implemented. Nothing in this Paragraph shall act as an extension of the effective date of the NPDES Permit effluent limits or Pepco's obligation to comply with such limits.

43. After the Treatment System is Placed into Operation, in the event the Treatment System and BMPs provided for in this Section fail to attain compliance with the Effluent Limits at Outfall 013 in Pepco's NPDES Permit, or with new limits at Outfall 101 in a future NPDES Permit, as evidenced by the exceedances of effluent limits in three consecutive quarters of sampling, Pepco shall submit to EPA for its review and approval an analysis of the reasons for the effluent limit exceedances, a plan for additional Treatment System components to attain compliance, and a schedule for design and implementation of such additional treatment. This Paragraph does not excuse Pepco from liability for any violation of the Effluent Limits nor from any stipulated penalties.

C. Corporate Practices and Recordkeeping.

44. Training: Pepco shall require employee training at least annually to ensure that each employee is aware of stormwater requirements as necessary for the tasks each employee performs and the areas of the Facility in which he or she works. Most employees shall receive general stormwater awareness training. Those employees directly responsible for implementation of the SWPPP shall receive more extensive training commensurate with their responsibilities.

45. Pepco shall update as necessary its training program for employees and contractors at the Facility who are directly responsible for storm water management to reflect (a) new site conditions after shut down and demolition of the former power plant, (b) responsibilities and requirements for implementation, inspection, and maintenance of storm drain controls and BMPs at the facility, (c) the installation and operation/maintenance of the Stormwater Treatment Systems, and (d) the SWPPP in effect at the time of the training and in particular new provisions in that SWPPP. Pepco shall ensure such training will be provided to designated employees and contractors at least once per year, and shall maintain records to document that such training has occurred.

46. The updated training program(s) shall be submitted to EPA for review and comment in the next quarterly report falling at least 30 days from any update. Pepco shall include as part of the quarterly reports under Section X (Reporting Requirements) a list of

persons who received training related to stormwater management during the prior quarter, the dates of the training and the topics covered.

47. Management: Pepco shall create an interdisciplinary pollution prevention team comprised of at least one liaison from each company Operating Group at the Facility and one representative from Pepco's corporate environmental department. The team members shall be identified in the SWPPP. Pepco shall designate one member of the team to act as the "Coordinator" for stormwater compliance at the Facility and implementation of the requirements of this Consent Decree that pertain to stormwater management practices at the Facility.

48. On a monthly basis, the Coordinator or his or her designees shall perform a site-wide stormwater inspection of the facility, in coordination with the Operating Group liaison for each area, to assess compliance with the Facility's SWPPP and the requirements of this Consent Decree that pertain to stormwater management at the Facility. The inspection team shall prepare a report of the inspections, summarizing findings, including instances of non-compliance and any corrective actions taken. Copies of the monthly inspection reports shall be submitted to EPA as part of the quarterly reports required under Section X (Reporting Requirements) of this Consent Decree

49. Recordkeeping: Pepco shall maintain an orderly and accessible system of records for the Best Management Practices and Treatment System set forth in Section VI. A and VI. B above to facilitate compilation of Facility data and an understanding of the Stormwater Drainage

System. It may continue to use its work order system or other programs to schedule, track and record information as follows:

- a. Storm Drain Inlet Controls--for each inlet: the type of control in place; the history of inspection, maintenance and replacement activities; the identity of the inspecting team; and dates of inspections, as per Paragraphs 24 and 25 above.
- b. Drainage System: the location of trunk lines, lateral lines, and inlets; the history of inspection of each component, including the results of annual inspections; and the maintenance, structural repair and/or replacement of each component, including sediment removal activities. For any structural repair that cannot be performed immediately, the work order system shall include a schedule for the repair that ensures completion as soon as practicable as set forth in Paragraph 17 above.
- c. Sampling associated with manholes, inlets and pipes: For each sample collected upstream of Outfall 013, the parameter, results, location, date, and total precipitation for that day and the duration of any wet weather event.
- d. Treatment System: the date of installation, the date and results of any acceptance testing; the date, nature, and results of subsequent performance

testing; date and description of any operational issues; and date and nature of maintenance activities, as per Section VI.B. above.

D. Stormwater Pollution Prevention Plan.

50. No more than thirty days from entry of the consent decree, Pepco shall submit an updated SWPPP as required by its NPDES Permit and consistent with EPA publication, "Developing Your Stormwater Pollution Prevention Plan: A Guide for Industrial Operators," Feb. 2009, or other applicable EPA guidance, that incorporates the requirements of this Consent Decree, including but not limited to:

- a. Training requirements and implementation, as provided in Section VI.C, Paragraphs 44 and 45;
- b. Inspection protocols and implementation, as provided in Section VI.A, Paragraphs 16, 21, 24, 31 and 41;
- c. Logs of inspections of Storm Drain Inlets and corrective actions taken, as provided in Section VI.A, Paragraphs 24 and 25;
- d. Metals Management Program, as provided in Section VI.A, Paragraphs 26 through 30;
- e. Treatment System data, as provided in Section VI.C., Paragraph 49.d above.

51. The comprehensive SWPPP shall be updated and amended promptly any time there is a significant change in BMPs or treatment at the Facility, or as otherwise required. The updated portions of the SWPP shall be submitted to EPA in the next quarterly report following no less than 30 days from the update. If there are no such changes, Pepco shall review and revise the SWPPP as necessary at least annually and in accordance with permit requirements to ensure that it remains complete and up-to-date.

E. Sampling.

52. Pepco shall perform the sampling required by the NPDES Permit.

VII. ADDITIONAL INJUNCTIVE RELIEF

53. Covered Storage Shed. Not later than December 31, 2016, Pepco shall construct a covered structure at the facility for the storage of offline or removed-from-service transformers and other electric distribution system equipment while being stored for processing, re-use, recycling, or disposal.

VIII. MITIGATION PROJECT

54. Pepco shall design and construct a project consisting of a bioinfiltration basin, wetland, plantings, or similar green stormwater controls designed to capture, retain and filter or treat stormwater that currently drains to Outfall 101, as set forth more fully in Appendix A (Stormwater Retention Project). The Stormwater Retention Project shall be completed on or before June 30, 2018.

55. On or before June 30, 2017, Pepco shall submit to EPA for review and approval pursuant to Section IX (Review and Approval of Submissions to EPA) a Stormwater Retention Project Plan, which shall include:

- a. The design of the Stormwater Retention Project;
- b. A schedule for its construction; and
- c. A plan for its operation and maintenance, which shall include regular inspections, replacement of vegetation as needed, and other necessary measures to ensure its ability to retain and filter stormwater as required in this Section.

56. The Stormwater Retention Project shall satisfy the following criteria:

- a. The Stormwater Retention Project shall provide retention sufficient to meet or exceed the District of Columbia stormwater retention standards, *i.e.*, the volume of rainfall from a 1.2 inch storm, for the area drained by Outfall 101.
- b. Pepco shall ensure that the soil and subsurface soils are clean under District of Columbia stormwater standards and any other applicable regulations so that an infiltration stormwater control is appropriate.
- c. Pepco shall treat any stormwater not retained by the Stormwater Retention Project, due to extreme storm events or otherwise, by (1) directing the

overflow or excess volume of water to the Drainage System for Outfall 013; or (2) through other appropriate measures sufficient to treat any discharge so that it will meet District of Columbia water quality standards and Total Maximum Daily Loads for the Anacostia River.

- d. Pepco shall properly operate and maintain the Stormwater Retention Project.
- e. Pepco shall obtain and comply with all necessary permits from the District of Columbia or EPA.

57. Pepco is responsible for the satisfactory completion of the Stormwater Retention Project in accordance with the requirements of this Decree. "Satisfactory completion" means the Project has been Placed into Operation, is capable of meeting or exceeding the 1.2 inch standard required by the District of Columbia stormwater regulations, and any volume of water in excess of the Stormwater Retention Project's designed retention is addressed appropriately. Pepco may use contractors or consultants in planning and implementing the Stormwater Retention Project.

58. Pepco shall report on the progress of the Stormwater Retention Project in its quarterly reports pursuant to Section X until it is Placed into Operation. Pepco shall report on its Operation and Maintenance of the Stormwater Retention Project in its quarterly reports.

59. Pepco shall finance the Stormwater Retention Project itself and will not receive reimbursement or funding from any other party. It shall absorb any cost overruns associated with the Stormwater Retention Project.

60. Pepco shall not apply for, request, or seek to benefit in any way from a Stormwater Retention Credit provided under the District of Columbia Stormwater Regulations, a waiver or reduction of DC stormwater fees, or similar incentive programs for implementation of Green Infrastructure.

61. Any public statement, oral or written, in print, film, or other media, made by Pepco making reference to the Stormwater Retention Project under this Decree shall include the following language: “This project was undertaken in connection with the settlement of an enforcement action, *United States v. Potomac Electric Power Company et al.*, Civil Action No. 1:15-cv-01845 (D.D.C.), taken on behalf of the U.S. Environmental Protection Agency under the Clean Water Act.”

62. For federal income tax purposes, Pepco agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the Stormwater Retention Project.

#### IX. REVIEW AND APPROVAL OF SUBMISSIONS TO EPA

63. After review of any plan, report, or other item that is required to be submitted pursuant to this Consent Decree, EPA shall in writing: (a) approve the submission; (b) approve

the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission.

64. If the submission is approved pursuant to Paragraph 63, Pepco shall take all actions required by the plan, report, or other document, in accordance with the schedules and requirements of the plan, report, or other document, as approved. If the submission is conditionally approved or approved only in part pursuant to Paragraph 63(b) or (c), Pepco shall, upon written direction from EPA, take all actions required by the approved plan, report, or other item that EPA determines are technically severable from any disapproved portions, subject to Pepco's right to dispute only the specified conditions or the disapproved portions, under Section XIII (Dispute Resolution).

65. If the submission is disapproved in whole or in part pursuant to Paragraph 63(c) or (d), Pepco shall, within 45 days or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is approved in whole or in part, Pepco shall proceed in accordance with the preceding Paragraph.

66. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, EPA may again require Pepco to correct any deficiencies, in accordance with the preceding Paragraphs, subject to Pepco's right to invoke Dispute Resolution and the right of EPA to seek stipulated penalties as provided in the preceding Paragraphs.

67. Any stipulated penalties applicable to the original submission, as provided in Section XI, shall accrue during the 45 day period or other specified period, but shall not be payable unless the resubmission is untimely or is disapproved in whole or in part; provided that, if the original submission was so deficient as to constitute a material breach of Pepco's obligations under this Decree, the stipulated penalties applicable to the original submission shall be due and payable notwithstanding any subsequent resubmission.

#### X. REPORTING REQUIREMENTS

68. Pepco shall submit the following reports:

- a. Quarterly Reports: On or before April 30, July 31, October 31, and January 31 of each year, commencing on the first quarterly date that is at least 30 days after the lodging of this Consent Decree, until termination of this Decree pursuant to Section XXI, Pepco shall submit a quarterly report for the preceding three months, in the form of one hard copy and a computer disc to the NPDES Program Branch, and computer discs to EPA ORC and DOJ, that shall include with respect to the reporting period:
  - (1) Copies of all discharge monitoring reports submitted to EPA for the quarter pursuant to Section V.5 of the NPDES Permit, copies of any five-day letter submitted to EPA pursuant to Section VI.6 of the NPDES Permit;

- (2) Results of the annual inspection of the Drainage System required in Section VI.A. Paragraph 16 and any subsequent actions taken, including clean-out or repairs;
- (3) Logs of the inspections of Storm Drain Inlets including corrective actions taken;
- (4) Results of monthly inspections required by Paragraph 48, including actions taken in connection with the metals management program in Section VI.A, Paragraphs 26 to 30, including any change in agreements with vendors or scrap dealers; completion of the covered structure required in Paragraph 53; a summary of equipment or materials removed from exposure to stormwater and identification of any remaining equipment or materials to be removed from exposure to storm water pursuant to Paragraph 30; activities identified as potentially contributing to metals contamination of stormwater and steps taken to eliminate them; and actions taken as a result of monthly Facility-wide inspections;
- (5) Progress in and status of designing and constructing the Treatment System(s), including compliance with milestones and deadlines during the reporting period; an explanation or justification for failure to meet any deadline in the reporting period; any delays

encountered that might jeopardize meeting one or more future deadlines and an explanation of the reasons for such delay and attempts to mitigate it; and results attained in acceptance and performance testing;

- (6) Training: list of persons who received training related to stormwater management during the prior quarter, the dates of the training and the topics covered.;
- (7) SWPPP: status of any updates and copies of updated portions of the SWPP;
- (8) Any corporate reorganizations changing the management responsibilities in Paragraph 47;
- (9) Additional Work: progress in completion of the covered storage structure in Section VII.
- (10) Stormwater Retention Project: a discussion of Pepco's progress in satisfying its obligations in connection with the Stormwater Retention Project under Section VIII, including, at a minimum, a narrative description of activities undertaken; status of any construction or compliance measures, including any milestones in

the Stormwater Retention Project Plan; and operation and maintenance activities; and

(11) a description of any non-compliance with the requirements of this Consent Decree and Effluent Limits and an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation.

- b. If Pepco violates, or has reason to believe that it may violate, any requirement of this Consent Decree or the Effluent Limits that is not subject to reporting requirements in the next Paragraph (i.e., imminent threats to public health or the environment), Pepco shall notify the United States of such violation and its likely duration, in writing, within ten working Days of the Day Pepco first becomes aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Pepco shall so state in the report. Pepco shall investigate the cause of the violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation, within 30 Days of the Day Pepco becomes aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves Pepco of its obligation to provide the notice required by Section XII (Force Majeure).

69. Whenever any violation of this Consent Decree or of any applicable permits or any other event affecting Pepco's performance under this Decree, or the performance of its Facility, may pose an imminent threat to the public health or welfare or the environment, Pepco shall notify EPA orally or by electronic or facsimile transmission as soon as possible, but no later than 24 hours after Pepco first knew of the violation or event. Pepco shall provide a written notice and explanation within 5 days after Pepco first knew of the violation or event.

70. All reports shall be submitted to the persons designated in Section XVII (Notices). Pepco also shall post on its website, in a location available to the general public, the quarterly reports required under Section X and NPDES Permit sampling under Section VI.E, Paragraph 52. Pepco also shall post to its website the Final Treatment System Design Report required under Paragraph 37.d and the Stormwater Retention Project Plan required under Paragraph 55 promptly following their submission to EPA.

71. Each report submitted by Pepco under this Section shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

72. In every instance in Section VI where Pepco “certifies” a particular fact, the Pepco official executing this consent decree certifies as follows:

Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

73. This certification requirement does not apply to emergency or similar notifications if compliance would be impractical.

74. The reporting requirements of this Consent Decree do not relieve Pepco of any reporting obligations required by the CWA or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

75. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

#### XI. STIPULATED PENALTIES

76. Pepco shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section XII (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree, according to all applicable

requirements of this Decree and within the specified time schedules established by or approved under this Decree.

77. Late Payment of Civil Penalty. If Pepco fails to pay the civil penalty required to be paid under Section V (Civil Penalty) when due, the following stipulated penalties shall accrue:

<u>Penalty Per Violation Per day</u>	<u>Period of Noncompliance</u>
\$ 2,000.....	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 3,000.....	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 4,000.....	31 <sup>st</sup> day and beyond

78. Effluent Limits.

- a. The following stipulated penalties shall accrue per quarter for each violation of the Effluent Limits occurring after December 31, 2017, or any later date by which the Treatment System must be placed into operation as a result of an extension granted by EPA pursuant to Paragraph 95 due to an event of Force Majeure:

Each violation of a Daily Maximum Effluent Limit ..... \$15, 000  
 Each violation of a Monthly Average Effluent Limit .....\$10, 000

- b. Pepco shall pay a stipulated penalty of \$8,500 per quarter for each exceedance of the numeric value for any parameter listed in the Table in

Appendix B occurring on or before December 31, 2017, or any later date by which the Treatment System must be placed into operation as a result of an extension granted by EPA pursuant to Paragraph 95 due to an event of Force Majeure.

79. Compliance -- BMPs.

- a. The following stipulated penalties shall accrue per violation per Day for each violation of the requirements identified in subparagraph 79.b:

<u>Penalty Per Violation Per day</u>	<u>Period of Noncompliance</u>
\$ 1,000.....	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 2,500.....	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 4,000.....	31 <sup>st</sup> day and beyond

- b. Any failure to satisfy any of the requirements of Section VI.A (BMPs), including any provision in the following Paragraphs: ¶¶ 13-16 (Drainage System); ¶¶18-20 (Storm Drain Inlet Controls; ¶¶ 21-25 (Storm Drain Inlet Inspection Program); ¶¶ 26-30 (Metals Management); ¶¶ 31 (Spill Control); and ¶ 32 (Discharges of PCBs).

80. Compliance— Treatment System.

- a. After December 31, 2017, the following stipulated penalties shall accrue per violation per Day for each violation of the requirements identified in Section VI.B (Treatment System):

<u>Penalty Per Violation Per day</u>	<u>Period of Noncompliance</u>
\$ 5,000.....	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 8,000.....	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 10,000.....	31 <sup>st</sup> day and beyond

- b. The following stipulated penalties shall accrue per violation per Day for each violation prior to December 31, 2017, of the requirements identified in Section VI.B (Treatment System); provided, however, that stipulated penalties for any interim deadline shall be deferred and, if Pepco satisfactorily Places into Operation the Treatment System on or before December 31, 2017, such stipulated penalties shall be waived:

<u>Penalty Per Violation Per day</u>	<u>Period of Noncompliance</u>
\$ 2,000.....	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 3,000.....	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 6,000.....	31 <sup>st</sup> day and beyond

81. General Requirements.

- a. The following stipulated penalties shall accrue per violation per Day for each violation of the requirements identified in subparagraph b. below:

<u>Penalty Per Violation Per day</u>	<u>Period of Noncompliance</u>
\$ 2,000.....	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 3,000.....	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 4,000.....	31 <sup>st</sup> day and beyond

- b. Each failure to allow access as per Section XIV; violation of the requirements of Section X (Reporting); and violation of or any non-compliance with any other requirement of this Consent Decree not listed in the other Paragraphs in this Section.

82. Stormwater Retention Project.

- a. If Pepco fails to comply with the milestones in the Stormwater Retention Project Plan for implementing the Stormwater Retention Project, Pepco shall pay stipulated penalties for each failure to meet an applicable deadline, as follows:

<u>Penalty Per Violation Per day</u>	<u>Period of Noncompliance</u>
--------------------------------------	--------------------------------

\$ 2,000.....	1 <sup>st</sup> through 20 <sup>th</sup> day
\$ 5,000.....	21st day and beyond

b. In the event of a Stormwater Retention Project Abandonment, as defined in Section IV, Paragraph 8, whether due to a *force majeure* event or not, Pepco shall pay a stipulated penalty of \$500,000. The penalty under this subparagraph shall accrue as of the date the Stormwater Retention Project Abandonment occurs. If Pepco fails to meet the deadline in Paragraph 54, but has diligently pursued completion of the Project, confirms its intention to complete the Project, and thereafter diligently pursues the Project to satisfactory completion within nine months of the deadline in Paragraph 54, Pepco shall be subject to stipulated penalties for late completion pursuant to subparagraph a and not under this subparagraph b. The amount of the stipulated penalty for a Stormwater Retention Project Abandonment under this subparagraph b shall not be offset by costs incurred by Pepco in connection with the project.

83. Except as provided in paragraph 87, stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

84. Pepco shall pay any stipulated penalty within 30 Days of receiving the United States' written demand.

85. The United States may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

86. Stipulated penalties and interest shall continue to accrue as provided in Paragraph 105, during any Dispute Resolution, but need not be paid until the following:

- a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Pepco shall pay accrued penalties determined to be owing, together with interest, to the United States within 30 Days of the effective date of the agreement or the receipt of EPA's decision or order.
- b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Pepco shall pay all accrued penalties determined by the Court to be owing, together with interest, within 60 Days of receiving the Court's decision or order, except as provided in subparagraph c, below.
- c. If any Party appeals the District Court's decision, Pepco shall pay all accrued penalties determined to be owing, together with interest, within 15 Days of receiving the final appellate court decision.

87. Obligations Prior to the Effective Date. Upon the Effective Date, the stipulated penalty provisions of this Decree pertaining to (1) violations of consent decree deadlines and

requirements for construction of the Treatment System that have occurred prior to the Effective Date of this Decree; and/or (2) any NPDES effluent violations subsequent to the date this Decree is lodged with the Court shall be retroactively enforceable, provided that stipulated penalties that may have accrued prior to the Effective Date may not be collected unless and until this Consent Decree is entered by the Court.

88. Pepco shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Section V (Civil Penalty), Paragraph 10, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

89. If Pepco fails to pay stipulated penalties according to the terms of this Consent Decree, Pepco shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for Pepco's failure to pay any stipulated penalties.

90. The payment of penalties and interest, if any, shall not alter in any way Pepco's obligation to complete the performance of the requirements of this Consent Decree.

91. Non-Exclusivity of Remedy. Stipulated penalties are not the United States' exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section XV (Effect of Settlement/Reservation of Rights), the United States expressly reserves the right to seek any other relief it deems appropriate for Pepco's violation of this Decree or applicable law,

including but not limited to an action against Pepco for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt. However, the amount of any statutory penalty assessed for a violation of this Consent Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid pursuant to this Consent Decree.

## XII. FORCE MAJEURE

92. “Force majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Pepco, of any entity controlled by Pepco, or of Pepco’s contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Pepco’s best efforts to fulfill the obligation. The requirement that Pepco exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure, such that the delay and any adverse effects of the delay are minimized. “Force Majeure” does not include Pepco’s financial inability to perform any obligation under this Consent Decree.

93. Permits. Where any compliance obligation under this Section requires Pepco to obtain a federal, state, or local permit or approval, Pepco shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. Pepco may seek relief under the provisions of Section XII (Force Majeure) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any

permit or approval required to fulfill such obligation, if Pepco has submitted timely and complete applications and has taken all other actions necessary to obtain all such permits or approvals.

94. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Pepco shall provide notice orally or by electronic or facsimile transmission to EPA, within 72 hours of when Pepco first knew that the event might cause a delay. Within seven days thereafter, Pepco shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Pepco's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Pepco, such event may cause or contribute to an endangerment to public health, welfare or the environment. Pepco shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure event. Failure to comply with the above requirements shall preclude Pepco from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Pepco shall be deemed to know of any circumstance of which Pepco, any entity controlled by Pepco, or Pepco's contractors knew or should have known.

95. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those

obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify Pepco in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

96. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Pepco in writing of its decision.

97. If Pepco elects to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Pepco shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Pepco complied with the requirements of Paragraphs 93 and 94. If Pepco carries this burden, the delay at issue shall be deemed not to be a violation by Pepco of the affected obligation of this Consent Decree identified to EPA and the Court.

### XIII. DISPUTE RESOLUTION

98. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Pepco's failure to seek resolution of a dispute

under this Section shall preclude Pepco from raising any such issue as a defense to an action by the United States to enforce any obligation of Pepco arising under this Decree.

99. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Pepco sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 30 Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 30 Days after the conclusion of the informal negotiation period, Pepco invokes formal dispute resolution procedures as set forth below.

100. Formal Dispute Resolution. Pepco shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Pepco's position and any supporting documentation relied upon by Pepco.

101. The United States shall serve its Statement of Position within 45 Days of receipt of Pepco's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of

Position shall be binding on Pepco, unless Pepco files a motion for judicial review of the dispute in accordance with the following Paragraph.

102. Pepco may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XVII (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within 15 Days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Pepco's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

103. The United States shall respond to Pepco's motion within the time period allowed by the Local Rules of this Court. Pepco may file a reply memorandum, to the extent permitted by the Local Rules.

104. Standard of Review

- a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 100 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA under this Consent Decree; the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all

other disputes that are accorded review on the administrative record under applicable principles of administrative law, Pepco shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

- b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 100, Pepco shall bear the burden of demonstrating that its position complies with this Consent Decree and better furthers the objectives of the Consent Decree set forth in Section III.

105. The invocation of dispute resolution procedures under this Section 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, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 86. If Pepco does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XI (Stipulated Penalties).

XIV. INFORMATION COLLECTION AND RETENTION

106. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry into any facility covered by this Consent Decree, at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by Pepco or its representatives, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Pepco's compliance with this Consent Decree.

107. Upon request, Pepco shall provide to EPA or its authorized representatives splits of any samples taken by Pepco. Upon request, EPA shall provide to Pepco splits of any samples taken by EPA.

108. Until five years after the termination of this Consent Decree, Pepco shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its

contractors' or agents' possession or control, and that relate in any manner to Pepco's performance of its obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States, Pepco shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

109. At the conclusion of the information-retention period provided in the preceding Paragraph, Pepco shall notify the United States at least 90 Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States, Pepco shall deliver any such documents, records, or other information to EPA. Pepco may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Pepco asserts such a privilege, it shall provide the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by Pepco. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

110. Pepco may also assert that information required to be provided under this Section is protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to any

information that Pepco seeks to protect as CBI, Pepco shall follow the procedures set forth in 40 C.F.R. Part 2.

111. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or obligation of Pepco to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

#### XV. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

112. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the date of lodging.

113. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. Except as provided in the preceding paragraph, this Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the CWA or implementing regulations, or under other federal laws, regulations, or permit conditions. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, Pepco's Facility, whether related to the violations addressed in this Consent Decree or otherwise.

114. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, other appropriate relief under any statute relating to the Facility or to Pepco's violations of the Effluent Limits or its NPDES Permit, specifically including but not limited to actions concerning legacy contamination at that Facility and/or in the Anacostia River, Pepco shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 112.

115. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Pepco is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Pepco's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Pepco's compliance with any aspect of this Consent Decree will result in compliance with provisions of the CWA, 33 U.S.C. § 1251, *et seq.*, or with any other provisions of federal, State, or local laws, regulations, or permits.

116. This Consent Decree does not limit or affect the rights of Pepco or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of

third parties, not party to this Consent Decree, against Pepco, except as otherwise provided by law.

117. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

#### XVI. COSTS

118. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Pepco.

#### XVII. NOTICES

119. Unless otherwise specified in this Decree, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

As to the United States by email:

[eescdcopy.enrd@usdoj.gov](mailto:eescdcopy.enrd@usdoj.gov)

Re: DJ # 90-5-1-1-11336

As to the United States by first-class mail:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Box 7611 Ben Franklin Station  
Washington, D.C. 20044-7611  
Re: DOJ No. 90-5-1-1-11336

As to EPA:

Chief  
NPDES Enforcement Branch (3WP42)  
Water Protection Division  
U.S. Environmental Protection Agency, Region 3  
1650 Arch St.  
Philadelphia, PA 19103-2029

As to Pepco:

Wesley L. McNealy  
Director, Environmental Services  
Pepco Holdings, Inc.  
701 Ninth Street, NW  
Washington, DC 20068  
[wlmcnealy@pepco.com](mailto:wlmcnealy@pepco.com)

120. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

121. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XVIII. EFFECTIVE DATE

122. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket; provided, however, that Pepco hereby agrees that it shall be bound to perform duties scheduled to occur prior to the Effective Date. In the event the United States withdraws or withholds consent to this Consent Decree before entry, or the Court declines to enter the Consent Decree, then the preceding requirement to perform duties scheduled to occur before the Effective Date shall terminate.

XIX. RETENTION OF JURISDICTION

123. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections XIII and XX, or effectuating or enforcing compliance with the terms of this Decree.

XX. MODIFICATION

124. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

125. Any disputes concerning modification of this Decree shall be resolved pursuant to Section XIII (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 104, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

## XXI. TERMINATION

126. After Pepco has completed the requirements of Section VI (Compliance Requirements), has thereafter maintained continuous compliance with all effluent limits in the NPDES Permit (or any renewed or reissued permit) and has otherwise maintained satisfactory compliance with this Consent Decree for a period of three years, has complied with all other requirements of this Consent Decree, including those relating to the Stormwater Retention Project required by Section VIII, and has paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, Pepco may serve upon the United States a Request for Termination, stating that Pepco has satisfied those requirements, together with all necessary supporting documentation.

127. Following receipt by the United States of Pepco's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Pepco has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

128. If the United States does not agree that the Decree may be terminated, Pepco may invoke Dispute Resolution under Section XIII. However, Pepco shall not seek Dispute Resolution of any dispute regarding termination until 180 Days after service of its Request for Termination.

## XXII. PUBLIC PARTICIPATION

129. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Pepco consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Pepco in writing that it no longer supports entry of the Decree.

## XXIII. SIGNATORIES/SERVICE

130. Each undersigned representative of Pepco and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

131. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Pepco agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

#### XXIV. INTEGRATION

132. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, the Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

#### XXV. FINAL JUDGMENT

133. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States 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.

XXVI. APPENDICES

134. The following Appendices are attached to and part of this Consent Decree:

“Appendix A” is the conceptual description of the Stormwater Retention Project referenced in Section VIII (Mitigation Project), Paragraph 54.

“Appendix B is the Table of Parameters referenced in Section XI (Stipulated Penalties), Paragraph 78.

Dated and entered this day of \_\_\_\_\_, 2017

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UNITED STATES DISTRICT JUDGE

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States et al. v. Potomac Electric Power Company et al.*, Civil Action No. 1:15-cv-01845

FOR THE UNITED STATES OF AMERICA:

\_\_\_\_\_  
Date

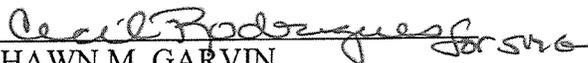
  
\_\_\_\_\_  
JOHN C. CRUDEN  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

  
\_\_\_\_\_  
NANCY A. FLICKINGER  
Senior Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, DC 20044-7611

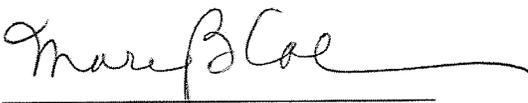
THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v. Potomac Electric Power Company, et al., Civil Action No. 1:15-cv-01845*

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

12/21/2016  
Date

  
SHAWN M. GARVIN  
Regional Administrator  
U.S. Environmental Protection Agency Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

December 16, 2016  
Date

  
MARY B. COE  
Regional Counsel  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

December 16, 2016  
Date

  
ROBERT J. SMOLSKI  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

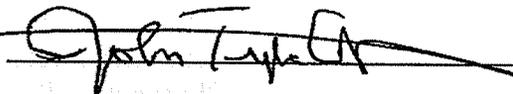
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~~THE UNDERSIGNED PARTIES~~ enter into this Consent Decree in the matter of *United States v. Potomac Electric Power Company, Civil Action No. 1:15-cv-01845*

FOR POTOMAC ELECTRIC POWER COMPANY

12/12/16

Date



John Tyler Anthony  
Senior Vice President and  
Chief Operating Officer  
Potomac Electric Power Company.  
701 Ninth Street, N.W.  
Washington, DC 20068

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## APPENDIX A

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Appendix A

**Conceptual Description of Stormwater Retention Project**

The Stormwater Retention Project at the PEPCO facility will have two primary objectives. One objective is to eliminate the discharge of stormwater from the facility to the Anacostia River via Outfall 101. The other objective is to capture, retain, and treat on-site the stormwater that otherwise would have been discharged via Outfall 101 through the use of green stormwater management infrastructure. This green retention feature will rely on the water quality and water quantity (volume) control benefits provided by vegetation and soil. The retention feature will consist of one or more shallow, depressed, vegetated systems, potentially also including some deeper areas to meet storage capacity requirements. It will be designed to promote natural processes which are well documented to provide water quality treatment benefit, including direct settlement, adsorption, and biological processes including vegetative uptake of pollutants. To meet design requirements, the Project may entail substantial amendments to native soils or the importation of soil suitable for the unique hydrologic conditions within the stormwater retention feature. At a minimum, the retention feature will provide temporary storage for stormwater runoff both within the depressed surface storage area as well as the engineered soil layer with sufficient capacity to accommodate flows from the 1.2 inch (90<sup>th</sup> percentile) storm for the area drained by Outfall 101 in accordance with the District of Columbia's stormwater regulations. The Project also will provide appropriate management for any stormwater overflows from the retention feature either by (1) directing the overflow or excess volume of water to the Drainage System for Outfall 013; or (2) through other appropriate measures sufficient to treat any discharge so that it will meet District of Columbia water quality standards and Total Maximum Daily Loads for the Anacostia River.

## **APPENDIX B**

## Appendix B

Effluent Concentrations at Outfall 013 Triggering Stipulated Penalties  
Pursuant to Paragraph 78.b.

Constituent	Concentration
pH	not less than 6.0 standard units nor more than 8.5 standard units
TSS (monthly average)	30 mg/L
TSS (daily maximum)	100 mg/L
copper	26.88 ug/L
lead	129.16 ug/L
zinc	234.36 ug/L
cadmium	4.95 ug/L
iron	2.00 mg/L