

**SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA  
CIVIL DIVISION**

**DISTRICT OF COLUMBIA**  
**a municipal corporation**  
**1200 First Street, N.E. 5<sup>th</sup> Floor,**  
**Washington, DC 20002**

**Plaintiff,**

**v.**

**POTOMAC ELECTRIC POWER COMPANY**  
**701 Ninth Street, NW**  
**Washington, DC 20068**

**Defendant.**

**Civil Action No.**

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**CONSENT DECREE**

WHEREAS, Plaintiff, the District of Columbia, on behalf of the District Department of the Environment (“DDOE”) (DDOE and the District of Columbia are sometimes referred to collectively herein as the “District”), has filed a Complaint in this action against Defendant Potomac Electric Power Company (“Pepco” or the “Defendant”), alleging that the past releases of mineral oil from property owned and operated by Pepco into the Potomac River constituted an unpermitted release of a pollutant into the waters of the District, in violation of the District of Columbia Water Pollution Control Act, D.C. Official Code §§ 8-103.01, *et seq.* (the “Act”);

WHEREAS, the Complaint alleges that these mineral oil releases (for purposes of this Consent Decree, the term “mineral oil” or “oil” means Naphthenic Oil) occurred on twelve (12) separate occasions between January 23, 2011, and June 23, 2011 from the Pepco Potomac River Substation located in Alexandria, Virginia, into waters of the District;

WHEREAS, Pepco has agreed to comply in all respects with this Consent Decree if this Consent Decree is entered by this Court and not to contest any such facts or conclusions of law solely in any action by the District to enforce this Consent Decree upon its entry by this Court;

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

WHEREAS, the Parties agree, and this Court finds, that settlement of this matter as set forth herein is in the public interest, and that the entry of this Consent Decree without further litigation is the most appropriate means of resolving this matter pursuant to the terms hereof; and

WHEREAS, the District alleges the following facts which serve as the basis for this Consent Decree, which facts are neither admitted nor conceded by Pepco but will not be contested or challenged by Pepco solely in any action to enforce this Consent Decree upon its entry by this Court;

1. Pepco owns and operates the Pepco Potomac River Substation (the "Facility"), an unmanned facility located in Alexandria, Virginia, which is part of Pepco's electric transmission and distribution system;
2. The Facility is bordered on the east by the Potomac River;
3. The Facility is a substation consisting of electrical equipment, oil-filled cables, two oil houses, and a control house in a fenced gravel yard. During the period at issue in the Complaint, the Facility had at least four main transformers each containing a total of approximately 22,100 gallons of oil, and three smaller transformers containing

between 1,800 and 3,700 gallons of mineral oil. The mineral oil is used as an insulating fluid in the facility's transformers.

4. On January 23, 2011, a pipe coupling failed resulting in the release of mineral oil from electric transformer No. 9. The mineral oil flowed into the retention dike and then into the containment reservoir (also known as the oil reclamation pit) through an underground pipe. The liquid level in the oil reclamation pit rose to the height of an 8-inch diameter overflow pipe on the north wall near the top of the reservoir. At that time, the overflow pipe connected to an open stormwater concrete trench and culvert located on the site of an adjacent electric generating station owned by GenOn Energy, Inc. (now NRG Energy, Inc.),
5. This open culvert and trench discharged through stormwater Outfall 006 directly into the Potomac River.
6. Outfall 006 is covered by a general National Pollutant Discharge Elimination System (NPDES) permit issued to GenOn. NPDES permits are issued under the federal Clean Water Act to control water pollution by regulating discharges from point sources into waters of the United States. *See* 33 U.S.C. §§ 1342, *et seq.* Outfall 006 is only permitted for stormwater discharges. *See* NPDES Permit No. DC0022004 and Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP), Permit No. DCR05A910.
7. The main mineral oil tank for Transformer No. 9 holds 21,500 gallons of mineral oil. The underground emergency containment reservoir has a capacity of 23,500 gallons. After the spill, Pepco recovered approximately 4,500 gallons of mineral oil from the transformer. Approximately 17,000 gallons of mineral oil leaked from the

transformer. Of that, approximately 4,500 gallons discharged to the Potomac River. Pepco estimates that approximately 500 gallons of mineral oil was removed from the river during cleanup.

8. After the spill, visible oil sheen was observed on the surface of the Potomac River and shoreline. In addition, residual oil impacted the shoreline, and approximately three deceased oiled birds and at least 5 dead fish were found in the area of the release. The oil sheen was reported from the northern bounds of the Washington Sailing Marina to the southern bounds of National Harbor, a distance of approximately 3.5 miles.
9. DDOE subsequently inspected the Facility and observed a heavy odor and noticeable thickness of oil at Outfall 006, with snow banks stained yellow from the oil. DDOE inspectors noted absorbent booms deployed in the river by Pepco but observed a visible sheen outside of the boomed area on the open water of the river. A heavy sheen and visible oil was also contained within the boomed intake area for the GenOn power generating facility.
10. Oil spills may cause both immediate and long-term harm to human health and the environment. Oil spills threaten both surface and subsurface aquatic organisms and can harm birds and mammals by direct physical contact, toxic contamination, destruction of food sources and habitats, and reproductive problems.<sup>1</sup>
11. In addition to the event on January 23, 2011, Pepco discharged accumulated storm water from the oil reclamation pit into the storm drain with a visible sheen. The discharges occurred on February 1, March 16, March 24, April 1, April 5, April 12, April 19, April 29, May 6, May 23, and June 23, 2011.

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<sup>1</sup>See [http://www.epa.gov/osweroe1/docs/oil/edu/oilspill\\_book/chap1.pdf](http://www.epa.gov/osweroe1/docs/oil/edu/oilspill_book/chap1.pdf) (last reviewed on October 8, 2013).

NOW, THEREFORE, the Parties agree, and it is hereby ORDERED, ADJUDGED, and DECREED, as follows:

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

2. **Sale or Transfer of Potomac River Substation.** In the event that Pepco, at any time prior to termination of this Consent Decree pursuant to Paragraph 17 (Termination), sells, transfers, or assigns any interest in the Potomac River Substation, or any portion thereof, Pepco shall advise the purchaser(s), transferee(s), or assignee(s) prior to such transaction, in writing, of the existence of this Consent Decree and simultaneously provide them a copy of the Consent Decree. Thirty (30) days prior to the completion of the transaction, Pepco shall provide, in writing, to the District legal representative, at the address provided in Paragraph 21 (Notice), the expected date of the transaction and the name(s) and address(es) of such purchaser(s), transferee(s), or assignee(s). No sale, transfer, assignment, change in ownership, corporate or partnership status, transfer of assets by Pepco relating to the Potomac River Substation (or any portion thereof), or other transaction of any nature will in any way cancel, reduce, waive, modify, lessen, transfer, assign, negate, or alter Pepco's obligations under this Consent Decree in any matter whatsoever.

3. **Jurisdiction.** This Court has subject matter jurisdiction over the Defendant pursuant to the Act, including but not limited to D.C. Official Code §§ 8-103.16(e), 8-103.18(b), 11-921(a)(6), and other applicable law. This Court also has personal jurisdiction over Defendant pursuant to D.C. Official Code § 13-423 and other applicable law. Solely for purposes of this Consent Decree and the underlying Complaint, including any further action to enforce the terms

of this Consent Decree upon its entry by the Court, Pepco waives any and all objections and defenses it might have as to venue and jurisdiction and, without admitting or denying the factual allegations contained in the Complaint or in this Consent Decree, fully consents to the terms of this Consent Decree, and to its entry, and to enforcement of this Consent Decree by this Court.

4. **Financial Assurance.** Within thirty (30) days after the entry of this Consent Decree, Pepco shall demonstrate financial responsibility in the amount of Eight Hundred and Seventy-Five Thousand Dollars (\$875,000.00) for the performance of its obligations hereunder by any single mechanism or combination of mechanisms listed in 20 DCMR 6703 through 6711.

5. **Waiver of Hearing.** Solely for purposes of entry of this Consent Decree by this Court, Pepco hereby waives its right to a judicial or administrative hearing with respect to, and to any appeal of, any and all issues of law and/or fact set forth in the Complaint or in this Consent Decree. Pepco, after consultation with legal counsel of its choice, voluntarily consents to the entry of this Consent Decree and agrees and consents to all the terms and conditions hereof. This waiver does not apply in any other proceeding, in any forum, initiated by any party that is not a Party to this Consent Decree or to any claims or assertions of such third-party.

6. **Civil Penalty Payment by Pepco to the District.**

a. Considering the nature of the mineral oil releases giving rise to violations of the Act, and the factors set forth in the Act, including Pepco's efforts to mitigate the effects of the oil releases, and Pepco's binding commitments to take the other actions set forth in this Consent Decree upon this Court's entry of this Consent Decree, the Parties have agreed that an appropriate civil penalty for the alleged violations of the Act as set forth in the Complaint is Two Hundred and Fifty Thousand Dollars (\$250,000.00) (the "Civil Penalty"). This Civil Penalty

encompasses violations of the Act as the result of oil releases at the Facility from January 23, 2011, through the date that this Consent Decree is entered by this Court (the "Effective Date").

b. The Civil Penalty represents a civil penalty assessed by the District, and shall not be deductible by Pepco or any other person or entity for purposes of federal, state, or local taxes.

c. The Civil Penalty shall be paid by Pepco to the District in a one-time lump sum payment, in immediately available funds, no later than sixty (60) calendar days after the Effective Date. Payment shall be made by Pepco by check payable to the D.C. Treasurer and sent to:

District Department of the Environment  
1200 First Street, NE, 5<sup>th</sup> Floor  
Washington, DC 20002  
Attention: Dr. Hamid Karimi, Deputy Director

d. The District shall deposit the Civil Penalty into DDOE's Special Revenue Account 0663 (the Clean Land Fund). The Civil Penalty shall be used by DDOE for one or more environmental projects or for other environmentally beneficial purposes as DDOE may determine from time to time in its sole and exclusive discretion. Pepco shall have no interest of any nature in the Civil Penalty, and no right to be involved in, nor any responsibility whatsoever for, any decisions concerning how the Civil Penalty is expended, including no right to be involved in (nor responsibility for) project evaluation, review, selection or approval or in any other manner whatsoever.

**7. Supplemental Environmental Projects.**

a. Pepco shall implement a Supplemental Environmental Project ("SEP") in accordance with this Consent Decree.

b. As further described in the Statement of Work ("SOW") at Appendix A, the SEP shall consist of the installation and operation of a cage-type trash interceptor at storm water outfall 999 located at Gallatin Street N.E. and 14<sup>th</sup> Street, N.E., in Washington, DC (the "Project").

c. Pepco shall enter into an agreement with Living Classrooms Foundation, Inc. ("Living Classrooms") for the installation, operation, and maintenance of the Project (the "SEP Agreement"). The SEP Agreement shall include the following terms:

- i. The District shall be a third party beneficiary entitled to enforce the obligations of Pepco and of Living Classrooms under the SEP Agreement.
- ii. Pepco will provide funding for the Project in the amount of Six Hundred Thousand Dollars (\$600,000.00).
- iii. Living Classrooms shall diligently pursue design of the Project and shall submit a completed design for the Project to DDOE within 120 days after the Effective Date. The design submission shall include a revised budget for (a) the fabrication and purchase of equipment, (b) the installation and testing of the trash interceptor cage, (c) site improvements required for the operation of the Project, and (d) the total annual Project operating and maintenance costs.
- iv. Upon DDOE's approval of the design, Living Classrooms shall diligently seek all necessary governmental permits and approvals for the installation and operation of the Project.



- v. Living Classrooms shall complete the installation of the trash interceptor cage by not later than six (6) months after DDOE's approval of the design and the receipt of all necessary governmental permits and approvals.
- vi. Pepco shall provide funds to Living Classrooms to cover the costs of the operation and maintenance of the Project in an amount equal to the difference between \$600,000 and the amount paid by Pepco to fund the design and installation of the trash interceptor cage (as documented in the SEP Installation Report to be submitted pursuant to Paragraph 7.e below).
- vii. Living Classrooms shall operate and maintain the Project for as long as the funds provided by Pepco will permit (but in no event less than three years following installation of the trash interceptor cage). In addition, Living Classrooms shall endeavor in good faith to raise additional funds to cover the cost of ongoing operation and maintenance.
- viii. By March 1 of the year following the year in which the installation of the trash interceptor cage is completed, and each year thereafter, as long as the trash interceptor cage is in place, Living Classrooms shall provide a status report regarding maintenance of the Project to DDOE including: the amount of trash removed in the previous calendar year, any problems with maintaining the structure, an itemized accounting of all costs expended for the Project in the previous calendar year, and a description of the environmental and public health benefits resulting from implementation of the Project.

- ix. If at any time the trash interceptor cage is no longer functional or funding is no longer available for maintenance or the District otherwise determines that the cage should be removed, Living Classrooms shall be responsible for removing the cage and restoring the site to its condition prior to the installation of the cage. If Living Classrooms is unwilling or unable to comply with this obligation, Pepco shall be responsible, at its own expense, for removing the cage and restoring the site to its condition prior to the installation of the cage.
- d. With regard to the Project, Pepco certifies the truth and accuracy of each of the following:
  - i. That, to the best of Pepco's knowledge, all cost information provided to DDOE by Living Classrooms in connection with DDOE's approval of the Project is complete and accurate;
  - ii. That, as of the Effective Date of this Consent Decree, Pepco is not required to perform or develop the Project by any federal, state, or local law or regulation, and is not required to perform or develop the Project by agreement, grant, or as injunctive relief awarded in any other action in any forum;
  - iii. That the Project is not a project that Pepco was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Consent Decree, provided that Pepco may have provided initial funding for the Project, at its own risk, in anticipation of but prior to entry of this Consent Decree, and any such funds

provided on or after November 1, 2013, shall be applied towards  
Pepco's obligation hereunder to fund the Project;

- iv. That Pepco has not received and will not receive credit for the Project in any other enforcement action;
- v. That Pepco will not receive any reimbursement for any portion of the Project from any other person; and
- vi. That Pepco is not a party to any open federal, state, or local financial assistance transaction that is funding or could be used to fund the same activity as the Project. To the best of Pepco's knowledge and belief after reasonable inquiry, there is no such open federal, state, or local financial transaction that is funding or could be used to fund the same activity as the Project in the same location, nor has the same activity been described in an unsuccessful federal, state, or local financial assistance transaction proposal submitted to DDOE within two years of the date of this Consent Decree (unless the project was barred from funding as statutorily ineligible). For the purposes of this Paragraph, the term "open federal, state, or local financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal, state or local financial assistance whose performance period has not yet expired.

e. Within sixty (60) days after the completion of the installation of the trash interceptor cage, Pepco shall submit a SEP Installation Report to DDOE, in accordance with Paragraph 21 (Notice.) The SEP Installation Report shall contain the following information:

- i. A detailed description of the trash interceptor cage as installed, including, without limitation, information on any contractor(s) selected and the role of each party in completing the project;
- ii. A description of any problems encountered in installing the trash interceptor cage and the solutions thereto;
- iii. An itemized list of all costs expended for the permitting, design, fabrication, installation, testing and initial operation of the trash interceptor cage. In itemizing its costs in the SEP Installation Report, Pepco shall clearly identify and provide acceptable documentation for all Project costs. For the purpose of this Paragraph, "acceptable documentation" includes invoices, purchase orders, or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made;
- iv. Certification that the trash interceptor cage has been installed and is operational as specified in the SOW; and
- v. A description of the environmental and public health benefits anticipated from implementation of the Project (with a quantification of the benefits and pollutant reductions, if feasible).

f. DDOE may, in its sole discretion, require reasonable information in addition to that described in Paragraph 7.e. above in order to evaluate Pepco's SEP Installation Report.

g. After receiving the SEP Installation Report, DDOE will notify Pepco whether or not it concurs that the SEP has been installed and is operational as specified in the

SOW. If the trash interceptor is not installed and operational in accordance with this Consent Decree, stipulated penalties may be assessed against Pepco under Paragraph 10 (Stipulated Penalties) of this Consent Decree.

h. Disputes concerning the satisfactory installation of the SEP and the amount of eligible SEP costs may be resolved under Paragraphs 34-35 (Dispute Resolution).

i. Each submission required by Pepco under this Section shall be signed by an authorized person with knowledge of the Project.

j. Any written public statement, in print, film, or other media, made by Pepco making reference to the Project under this Consent Decree shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action, District of Columbia v. Pepco, taken on behalf of DDOE under the District's Water Pollution Control Act." In any oral public statement made by Pepco publicizing the Project at a press event or other presentation to news media or in a public gathering, Pepco shall include similar language.

8. **Donation for Enforcement Training.** Within sixty (60) days after the Effective Date, Pepco shall provide Twenty-Five Thousand Dollars (\$25,000.00) to the Northeast Environmental Enforcement Training Fund ("NEETFI), the non-profit training arm of the Northeast Environmental Enforcement Project ("NEEP"). This community service payment shall be utilized by NEETFI to further its programmatic missions, including, but not limited to, the funding of scholarships for environmental enforcement training for its NEEP member states. Scholarships include such expenses as training registration, travel, food and lodging, and incidentals. Payment shall be made by Pepco by check payable to: Northeast Environmental Enforcement Training Fund, and sent to:

Edward Jones Investments  
Attn: Fred Minich, AAMS, Financial Advisor  
1840 Zollinger Road  
Upper Arlington, Ohio 43221-2850

9. **Satisfaction of Compliance Directives.** Pepco has fully satisfied the requirements of the Compliance Directives issued by the District on February 1, 2011, March 22, March 31, and May 25, 2011, and no further actions are required to investigate, assess or remediate impacts to the Potomac River or the affected areas of the shoreline resulting from the oil releases addressed by this Consent Decree. Notwithstanding the foregoing, nothing herein is or shall be deemed to constitute a waiver by or on behalf of the District or any co-trustee or other person or entity with respect to natural resource damages attributable to mineral oil releases, including any further natural resource damages assessment that may be necessary.

10. **Stipulated Penalties.**

a. In the event that Pepco does not timely comply with, fulfill, or complete any of the terms, conditions, requirements, or provisions of this Consent Decree, or any provisions incorporated herein, Pepco shall additionally be liable to the District for stipulated penalties in the following amounts for each calendar day for each and every violation, until such violation is cured or ceases: \$1,000 for each calendar day up to and including the fourteenth (14<sup>th</sup>) calendar day of such failure; \$1,500 for each calendar day from the fifteenth (15<sup>th</sup>) day up to the thirtieth (30<sup>th</sup>) calendar day of such failure; and \$2,000 for each calendar day of such failure from the thirty-first (31<sup>st</sup>) day and thereafter.

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

c. Pepco shall pay stipulated penalties not more than sixty (60) calendar days after receipt of written demand by the District for such penalties. Method of payment shall be by check or money order, payable to the D.C. Treasurer, to the attention of the District Department of the Environment or in such other manner as indicated by the District in writing.

d. It is not the intent of the District to subject Pepco to cumulative stipulated penalties for the same violation of this Consent Decree because the violation arguably relates to more than one provision of or obligation under this Consent Decree, unless such violation is willful or intentional.

e. DDOE may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties or other relief otherwise due it under this Consent Decree.

**11. Force Majeure.**

a. For the purposes of this Consent Decree, "Force Majeure Event" is defined as any event arising from causes beyond the control of Pepco or any entity controlled by Pepco (including but not limited to its contractors and subcontractors) which delays or prevents the performance of any obligation under this Consent Decree despite Pepco's best efforts to fulfill the obligation.

b. If any event occurs which causes or may cause a delay or impediment to performance in complying with any provision of this Consent Decree, Pepco shall notify DDOE: (i) orally or by electronic mail as soon as practicable, and (ii) provide a formal written notice no later than seven (7) business days after the time Pepco first knew of the event or should have known of the event by the exercise of due diligence. Pepco's formal written notice shall specifically reference this Paragraph 11 of this Consent Decree and describe the anticipated length of time the delay may persist, the cause or causes of the delay, the measures taken or to be

taken by Pepco to prevent or minimize the delay, the schedule by which those measures shall be implemented, and the reasons Pepco attributes the delay to a Force Majeure Event (if Pepco does so). Pepco shall take all reasonable measures to avoid or minimize such delays. The formal written notice required by this Paragraph shall be effective upon the mailing of the same by overnight mail or by certified mail, return receipt requested, to DDOE as specified in Paragraph 21 (Notice).

c. Failure by Pepco to comply with the notice requirements specified in Paragraph 11(b) above shall preclude Pepco from asserting any claims of Force Majeure with respect to the particular event involved, unless notice, although delinquent, is provided in sufficient time to allow DDOE to verify the cause and nature of the event in question.

d. DDOE will notify Pepco in writing regarding DDOE's position on Pepco's claim of a delay or impediment to performance as promptly as possible, but no later than fifteen (15) calendar days of receipt of the written Force Majeure notice provided under Paragraph 11(b).

e. If DDOE agrees that the delay or impediment to performance has been or will be caused by a Force Majeure Event, the Parties shall stipulate in writing to an extension of the required deadline(s) for all requirement(s) affected by the Force Majeure Event for a period equivalent to the delay actually caused by the Force Majeure Event. Such stipulation shall constitute a material modification to the Consent Decree pursuant to the procedures of Paragraph 15 (Modification). Pepco shall not be liable for stipulated penalties for the period of any such extension.



f. If DDOE does not accept Pepco's claim of Force Majeure, subject to Pepco's right to invoke dispute resolution procedures in Paragraphs 34 and 35 below, stipulated penalties will accrue as provided in Paragraph 10 (Stipulated Penalties).

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

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

13. **District's Covenant Not To Sue.**

a. Subject to the other terms and conditions of this Consent Decree, including but not limited to the terms and conditions of this Paragraph 13, the District covenants not to sue or to take administrative or judicial enforcement against Pepco with respect to Pepco's

violations of the Act or other Environmental Laws arising from any matters within the scope of the Complaint.

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

c. The District's Covenant Not to Sue shall take effect upon the entry of this Consent Decree, and shall not apply to any future actions, omissions, or new releases which may take place at the Facility any time after the entry of this Consent Decree, except as addressed herein. The District's Covenant Not to Sue shall survive the termination of this Consent Decree pursuant to Paragraph 17.

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

- i. Pepco's faithful compliance in all material respects, now and in the future, with the terms, conditions, and/or requirements of this Consent Decree, and
- ii. The District's Covenant Not to Sue shall not prevent, preclude, waive, release, bar, impede or limit, in any manner, any action by the District against Pepco for or arising out of Pepco's breach of or failure to comply in any respect with this Consent Decree or any portion thereof, or any material facts known to Pepco but not disclosed to DDOE by Pepco relating in any way to the matters within the scope of this Consent Decree.

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

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

- i. Any natural resource damages, or damages for injury to, destruction of, or loss of natural resources;
- ii. Any criminal liability of any person or entity;
- iii. Any violation of applicable laws other than as explicitly described in and encompassed within the District's Covenant Not to Sue;
- iv. Any claims based on a failure by Pepco to meet a requirement of this Consent Decree;
- v. Any liability arising from past, present, or future disposal, release, or threat of release to waters of the District;
- vi. Any liability for violations of federal or District law which occur after the Effective Date; and

- vii. Any releases from or at any sites or locations other than the Facility on the Potomac River in Alexandria, Virginia.

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

15. **Modification.** There shall be no material modification of this Consent Decree without (i) the prior written approval and consent of the Parties to this Consent Decree, and (ii) the approval of the Court. All non-material modifications, such as a change to the person receiving notice under this Consent Decree, may be made by written agreement of the Parties. Changes, modifications, and updates to schedule or deadlines specified in Paragraph 7 or the SOW shall require the written approval of DDOE but shall not require approval of the Court.

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

17. **Termination.** This Consent Decree shall terminate upon an order entered by the Court based on a finding that (a) with respect to the requirements of Paragraph 7 hereof, the District has determined that the SEP has been satisfactorily installed and operation and

maintenance funds have been provided to Living Classrooms, and (b) Pepco has fulfilled all other requirements of this Consent Decree, including but not limited to, any outstanding stipulated penalties, if any, but excluding any contingent obligation under the SEP Agreement to remove the trash interceptor cage. If Pepco believes it has fulfilled all such requirements of this Consent Decree, Pepco may file a motion with the Court seeking termination, for which motion concurrence shall not be unreasonably withheld by the District.

**18. Retention of Jurisdiction.**

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

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

**19. Final Judgment.** Upon approval and entry of this Consent Decree by the Court, the Consent Decree shall constitute a final judgment pursuant to D.C. SCR-Civil Rules 54 and 58.

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

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

District of Columbia

District Department of the Environment  
Attention: Collin Burrell, Associate Director  
1200 1st St., N.E., 5th Floor  
Washington, DC 20002  
Collin.Burrell@dc.gov

District Department of the Environment  
Attention: Amy E. McDonnell, General Counsel  
1200 First Street, N.E., 5<sup>th</sup> Floor  
Washington, DC 20002  
amy.mcdonnell@dc.gov

With a contemporaneous copy to:

Office of the Attorney General for the District of Columbia  
Attention: Ellen Efros  
Deputy Attorney General  
Public Interest Division

441 Fourth Street, N.W., 6<sup>th</sup> Flr.  
Washington, D.C. 20001  
Ellen.efros@dc.gov

Pepco

Wesley McNealy  
Director of Corporate Environmental Services  
Mail Stop: EP6220  
701 9<sup>th</sup> Street, N.W.  
Washington, DC 20068  
Telephone: (202) 331-6537  
wlmnealy@pepco.com

Joanne Scanlon Prestia  
Special Counsel  
Pepco Holdings, Inc.  
Mail Stop: 92DC42  
P.O. Box 6066, Newark, Delaware 19714-6066  
Telephone: 302-429-3144  
joanne.prestia@pepcoholdings.com

22. **Service.** For purposes of this action, the Complaint filed in this action, and the Consent Decree, Pepco hereby agrees to accept service by mail at the addresses provided in Paragraph 21 above, and to waive the formal service requirements of D.C. SCR-Civil Rule 4, including but not limited to, service of a summons.

23. **Applicable Law.**

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

b. This Consent Decree shall be governed by and construed and enforced in accordance with the laws of the District of Columbia, without regard to choice of law principles.

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

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

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

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

27. **No Creation of Rights.** Nothing in this Consent Decree, express or implied, is intended or shall be construed to confer upon or give to any person or entity other than the Parties hereto any rights, remedies or other benefits under or by reason of this Consent Decree. This Consent Decree creates no obligations or duties on the part of Parties other than as stated



specifically in this Consent Decree. The Parties stipulate, agree, and acknowledge that nothing in this Consent Decree may be used by any person or entity for any purpose in any legal proceeding other than by the Parties as stated specifically in this Consent Decree. An alleged violation of this Consent Decree shall not create a new, independent private right of action for anyone other than the Parties hereto and their successors and assigns, and the Parties agree that this Consent Decree does not permit enforcement proceedings on behalf of any other persons or entities. The Parties stipulate, agree, and acknowledge that this Consent Decree is not intended to and does not create any third party beneficiaries.

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

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

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

statements or representations by any other Party or its representatives except those expressly set forth herein.

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

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

33. **Counterparts.** Provided that all Parties hereto execute a copy of this Consent Decree, the Consent Decree may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. Executed copies of this Consent Decree may be delivered by electronic mail or other comparable means. This Consent Decree shall be deemed fully executed and entered as of the Effective Date.

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

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

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

c. All disputes shall initially be the subject of informal negotiations between senior management of the Parties. The period of informal negotiations shall not exceed forty-five (45) calendar days from the date that a Party first served a Dispute Notice regarding the dispute, unless that time period is modified by written agreement of the Parties.

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

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

f. The time periods set out in this Paragraph may be shortened or lengthened upon motion to the Court of one of the Parties to the dispute, explaining the Party's basis for seeking such a scheduling modification, or by agreement of the Parties to the dispute.

g. The existence of any dispute or the invocation of dispute resolution procedures under Paragraph 35 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. Except as otherwise provided in Paragraph 37, stipulated penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance and shall not be abated during any dispute. If Pepco does not prevail on the disputed issue, stipulated penalties shall be paid as provided in Paragraph 10 (Stipulated Penalties).

**35. Formal Dispute Resolution.**

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

b. The invocation of formal dispute resolution procedures under this Paragraph shall not, by itself, extend, postpone, or affect in any way any obligation of Pepco under this Consent Decree, unless the final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance and shall not be abated during the dispute. If Pepco does not prevail on the disputed issue, stipulated penalties awarded by the Court shall be paid as provided in Paragraph 10 (Stipulated Penalties).

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

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

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

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

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

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

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


37. **Interaction of Stipulated Penalties and Dispute Resolution.** Upon the filing of a Dispute Notice by either Party on a matter for which Pepco may be subject to stipulated


penalties, stipulated penalties shall not accrue: (a) with respect to a disputed matter for which Pepco may be exposed to stipulated penalties, during the period, if any, beginning on the 31<sup>st</sup> day after receipt by DDOE of the "Dispute Notice" under Paragraph 34 until the date that DDOE provides its written response to Pepco; (b) with respect to a decision by DDOE senior management, under Paragraph 34(c), during the period, if any, beginning on the 21<sup>st</sup> day after the date Pepco's reply to DDOE's written position is received until the date that DDOE senior management issues a final decision regarding such dispute; or (c) with respect to judicial review by this Court of any dispute under Paragraph 35, (Formal Dispute Resolution) during the period, if any, beginning on the 31<sup>st</sup> day after the Court's receipt of the submission regarding the dispute until the Court issues a final order.

Dated and Entered this \_\_\_\_ day of \_\_\_\_\_, 2014.

For Plaintiff:

Irvin B. Nathan  
Attorney General for the District of Columbia

  
\_\_\_\_\_  
Ellen Efros  
Deputy Attorney General  
Public Interest Division

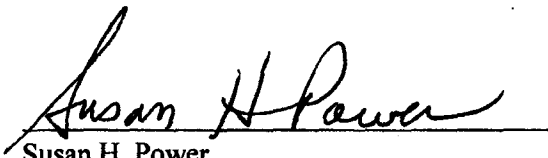
  
\_\_\_\_\_  
Amy E. McDonnell (DC Bar # 488911)  
General Counsel  
District Department of the Environment  
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1200 First Street, N.E., 5<sup>th</sup> Floor  
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Attorneys for the District of Columbia

Date: 3/26/14



For Defendant:



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Deputy General Counsel

Mail Stop: EP1132

701 9<sup>th</sup> Street, N.W.

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Telephone: 202-872-3404

Attorney for Pepco

Date: March 24, 2014