

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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<p>DISTRICT OF COLUMBIA,</p> <p>Plaintiff,</p> <p>v.</p> <p>POTOMAC ELECTRIC POWER COMPANY &amp; PEPCO ENERGY SERVICES INC.</p> <p>Defendants.</p>	<p>Case No.: 1:11-cv-00282-BAH Judge: Beryl Howell</p>
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**FIRST ADDENDUM TO CONSENT DECREE**

WHEREAS, in this matter, the Court on December 1, 2011, entered a Consent Decree (“Consent Decree”) filed by the District of Columbia (“District”), Potomac Electric Power Company (“Pepco”), and Pepco Energy Services Inc.<sup>1</sup>;

WHEREAS, under the Consent Decree, Pepco was required to perform a Remedial Investigation and Feasibility Study (“RI/FS”) concerning releases of hazardous substances at Pepco’s Benning Road Facility, located generally at 3400 Benning Road, NE, Washington, DC 20019 and to assess how released hazardous substances impact human health and the environment;

WHEREAS, Pepco has completed its Remedial Investigation at the Benning Road Facility, including the Landside Operable Unit and the Waterside Operable Unit that includes an area known as the Benning Cove;

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<sup>1</sup> Pepco Energy Services, Inc. has since been dissolved.

WHEREAS, Pepco is in the process of finalizing the Feasibility Studies for the Landside Operable Unit and the Benning Cove, and it is anticipated that those reports will be completed by the first quarter of 2024;

WHEREAS, the District and Pepco agreed in the Consent Decree, at ¶ 8.c, that the remedial investigation and feasibility study would form the basis for the District's selection of a remedial action for the Benning Road Facility;

WHEREAS, contemporaneous and in connection with this First Addendum to the Consent Decree, Pepco has agreed to enter into the following additional agreements related to alleged releases or threatened releases of hazardous substances and alleged discharges of pollutants at and from the Benning Road Facility, Pepco's Buzzard Point Facility, located at the intersection of First Street and V Street in Southwest, D.C. ("BP Facility"), and Pepco's network of approximately 60,000 subsurface vaults and manholes, primarily located throughout the District of Columbia as part of Pepco's area-wide electrical distribution system ("Vault System"): (i) a separate consent order to resolve a separate enforcement action filed in the Superior Court for the District of Columbia against Pepco under the Water Pollution Control Act, D.C. Code §§ 8-103.01 *et seq.*, the Brownfield Revitalization Act of 2000, as amended, D.C. Code §§ 8-631.01 *et seq.*, and the Hazardous Waste Management Act, D.C. Code §§ 8-1301 *et seq.*, related to operations at Pepco's BP Facility, and its Vault System, *see District of Columbia v. Potomac Electric Power Company*, D.C. Sup. Ct. Case No. \_\_\_\_\_ (filed concurrently with this case), pursuant to which Pepco has agreed to pay a civil penalty of \$10 million and conduct certain environmental evaluations and response actions related to the BP Facility and the Vault System and (ii) a separate consent decree to resolve Pepco's liability to the District for the District's costs incurred in performing an RI/FS as part of the Anacostia River Sediment Project ("ARSP"), a multi-year investigation and cleanup

of the Anacostia River pursuant to the Brownfield Act and the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), as amended, 42 U.S.C. §§ 9601 *et seq.*, and the costs the District will incur in implementing the ARSP Interim Record of Decision with a total payment to the District of \$47 million, *see District of Columbia v. Potomac Electric Power Co.*, No. 1:23-cv-\_\_\_\_\_ (D.D.C.) (filed concurrently with this case);

WHEREAS, Pepco has agreed to implement and complete the selected remedial actions at the Benning Road Facility while also waiving certain claims against the District as addressed herein;

WHEREAS, the District and Pepco agree that the Consent Decree, except as amended by this First Addendum to the Consent Decree, shall govern the rights and obligations of the District and Pepco; and

NOW, THEREFORE, without any admission of liability, adjudication of any issue of fact or law, and upon consent and agreement of the parties to this First Addendum to Consent Decree (“First Addendum”), it is hereby ORDERED and ADJUDGED as follows:

#### GENERAL TERMS

1. **Parties Bound.** The parties agree that all the provisions of the Consent Decree, as modified or supplemented by this First Addendum, shall apply to and be binding upon the District and Pepco and their successors and assigns.

2. **Definitions.** Unless otherwise defined herein, terms used in this First Addendum are defined consistent with CERCLA and in regulations promulgated under CERCLA.

“Benning Cove” means the area depicted in Appendix B.

“Benning Road Facility” means the area comprised of the Landside Operable Unit and the Waterside Operable Unit, as depicted in Appendix A.

“CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act, as amended and set forth at 42 U.S.C. §§ 9601-9675.

“Effective Date” means the date upon which the approval of this First Addendum is recorded on the Court’s docket.

“Landside Operable Unit” means the area as depicted in Appendix A.

“National Contingency Plan” means the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Natural Resource Damages” means the natural resources in the tidal Anacostia River, Kingman Lake, and the Washington Channel, as well as within terrestrial and upland areas, that are potentially impacted by releases or discharges of hazardous substances or pollutants.

“Transfer” means to sell, assign, convey, lease, mortgage, or grant a security interest in, or, where used as a noun, a sale, assignment, conveyance, or other disposition of any interest by operation of law or otherwise.

“Waterside Operable Unit” means the area as depicted in Appendix A.

3. **Statement of Purpose:** Per the terms and conditions of this First Addendum, the District and Pepco agree to the following: (a) Pepco will draft necessary Proposed Plan(s), an updated Community Involvement Plan, and Record of Decision(s), and associated documents for the Benning Road Facility, all of which are subject to the District’s review and approval; (b) Pepco will fully fund and/or implement the remedial actions selected by the District for the Benning Road Facility; (c) Pepco will reimburse the District for oversight costs incurred overseeing the work performed in subsections (a) and (b); (d) Pepco will release the District from claims pertaining to Pepco’s response actions to address releases of hazardous substances at the Benning Road Facility;

and (e) the District will provide to Pepco certain releases as to the work contemplated in this First Addendum.

4. **Remedy Selection(s).** Pepco shall perform the following specific actions ((a)-(c), collectively, “the Work”) in furtherance of remedy selection at the Benning Road Facility and shall fund and/or implement all selected remedial action(s).

- a. Proposed Plan. Within 120 days after the District approves a required Feasibility Study under the Consent Decree, and consistent with the National Contingency Plan, applicable EPA guidance documents, and applicable District law and regulations, Pepco shall submit for the District’s approval a proposed remedy for any media that poses an unacceptable risk to human health and the environment (“Proposed Plan”).
- b. Community Involvement. The Proposed Plan shall be subject to a public notice and comment process approved by the District. Consistent with the National Contingency Plan, applicable EPA guidance documents, and applicable District law and regulations, Pepco shall update and submit to the District for the District’s review and approval, its existing Community Involvement Plan to promote community involvement and participation in the comment process for the Proposed Plan and the selection and implementation of one or more remedies.
- c. Record of Decision. Within 120 days after the close of the public comment process, Pepco shall submit to the District a matrix of proposed responses to comments and a proposed Record of Decision. The District will consider

Pepco's proposed responses in the District's selection of the remedy or remedies when the District publishes its Record of Decision.

5. **Funding or Performing Remedy Implementation.** For any remedy selected by the District for the Benning Road Facility, Pepco agrees, at its option, to either:

- a. Fully fund remedy implementation, including any underlying Remedial Design and Remedial Action documents and accompanying work; or
- b. Implement the selected remedy, including the drafting of underlying Remedial Design and Remedial Action documents and accompanying work.

In the event Pepco implements a selected remedy, Pepco agrees to implement the remedy pursuant to a separate Consent Decree or a Second Addendum to the current Consent Decree between the District and Pepco.

6. **Performance of Remedy.** In the event Pepco elects to the perform the remedy, Pepco shall expeditiously implement the selected remedy: (i) in compliance with CERCLA, the National Contingency Plan, applicable EPA guidance documents, and applicable District law and regulations; and (ii) under the direction and supervision of qualified personnel. Pepco shall submit to the District for the District's approval, the names, titles, and qualifications of the personnel, including contractors, subcontractors, consultants, and laboratories to be used for the implementation of the remedy.

7. **Pepco's Payment of the District's Oversight Costs.** Pepco shall reimburse the District for its costs to oversee the work and/or any actions taken by the District to oversee, administer, implement, and or/enforce this First Addendum ("Oversight Costs"). In the event Pepco implements a selected remedy, Pepco shall reimburse the District for its costs to oversee Pepco's implementation of the remedy and to administer, implement, and/or enforce any related

agreement (e.g., separate Consent Decree or Second Addendum related to response actions at the Benning Road Facility). Pepco's payment to the District of Oversight Costs shall be made for every Six-Month Period, which is a period of six consecutive calendar months, with the first such period commencing upon the entry of this First Addendum and ending six months thereafter. Each subsequent Six-Month Period shall immediately follow, without gap, the prior Six-Month Period. Each such payment for Oversight Costs is due and shall be paid in full by Pepco to the District no later than sixty (60) days after a bill for the same is provided by the District to Pepco.

8. **Pepco's Covenants.** Pepco 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 with respect to the matters addressed in this First Addendum, including but not limited to Pepco's response action or actions at the Benning Road Facility and Natural Resource Damages at the Landside Operable Unit and the Benning Cove.

9. **The District's Covenants.** The District releases, and covenants not to sue or take administrative or judicial enforcement against Pepco, its parent companies or their subsidiaries, or any of their predecessors and successors, officers, directors, or employees with respect to all work and obligations required and performed consistent with the terms of this First Addendum. This paragraph shall take effect upon the entry of this First Addendum, subject to and conditioned upon the following:

- a. Pepco's compliance, now and in the future, with each and all of the terms, conditions, and/or requirements of this First Addendum.
- b. The District's Covenants shall not prevent, preclude, bar, impede, or limit, in any manner, any action by the District against Pepco for or arising out of Pepco's breach of or failure to comply in full with this First Addendum or any

portion thereof, or any facts not disclosed to the District by Pepco related in any way to the matters within the scope of this First Addendum.

- c. This paragraph does not apply to any future actions, omissions, or new pollution releases that may take place at the Benning Road Facility at any time after the entry of this First Addendum.

#### **OTHER TERMS AND CONDITIONS**

10. **Stipulated Penalties.** In the event Pepco does not timely comply with, fulfill, or complete any of the terms, conditions, requirements, or provisions of this First Addendum, or any provisions incorporated herein, Pepco shall be liable to the District for stipulated penalties in the following amounts for each calendar day of each and every violation, until each such violation is cured or ceases: \$1,000 for each calendar day up to and including the seventh day of such failure; \$5,000 for each additional day of such failure up to and including the fourteenth day thereafter, and \$7,500 for each day thereafter. Stipulated penalties shall begin to accrue on the day after performance is due and shall continue to accrue through the final day of the completion of the activity or until the violation is otherwise fully cured or ceases, whichever is later. Pepco shall pay any stipulated penalty within fifteen (15) days after receipt of written demand by the District to Pepco for such penalties. The District may, in its unreviewable exercise of discretion, reduce or waive stipulated penalties otherwise due under the First Addendum. Pepco shall pay stipulated penalties to the District's Litigation Support Fund, D.C. Code § 1-301.86b.

11. **Reservation of Rights.** Nothing in this First Addendum diminishes the right of the District pursuant to D.C. Code § 8-634.09, or Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any other potentially responsible persons for additional response costs or response actions and to enter into settlements that give rise to contribution protection pursuant



to Section 113(f)(2) of CERCLA. The District reserves, and this First Addendum is without prejudice to, all rights against Pepco with respect to all matters not expressly included within Paragraph 9 (The District's Covenants). Notwithstanding any other provision of this First Addendum, the District reserves all rights against Pepco with respect to:

- a. Liability for failure of Pepco to meet a requirement of this First Addendum, except to the extent stipulated penalties have been assessed and paid pursuant to Paragraph 10 and the non-compliance has been cured;
- b. Liability for response costs incurred or to be incurred by the District;
- c. Any violations of applicable Laws other than as explicitly described in and encompassed within the District's Covenant Not to Sue;
- d. Criminal liability; and
- e. Liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments or restoration.

Pepco reserves all rights and defenses with respect to the foregoing matters, except as specified in Paragraph 8.

12. **This First Addendum Does Not Impact Non-Parties.** Nothing in this First Addendum shall be construed to create any rights in, or grant any cause of action to, any person not a party to this First Addendum. The District and Pepco each expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Benning Road Facility against any person not a party hereto.

13. **Civil Action under the Brownfield Act and CERCLA.** The District and Pepco further agree, and by entering this First Addendum this Court finds, that the complaint filed by the District in this action is a civil action within the meaning of D.C. Code § 8-634.09(a) and Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this First Addendum constitutes a judicially-approved settlement pursuant to which the District and Pepco have, as of the Effective Date, resolved liability amongst themselves within the meaning of D.C. Code § 8-634.09(c) and Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

14. **Pepco's Notifications to the District of Any Suit or Claim.** Pepco shall, with respect to any suit or claim brought by or against Pepco for matters related to this First Addendum, notify the District in writing within 30 days in either of the following events: (i) prior to the initiation of such suit or claim by Pepco; and (ii) after receipt of service of a claim against Pepco.

15. **Subsequent Actions by the District.** In any subsequent administrative or judicial proceeding initiated by the District for injunctive relief, recovery of response costs, or other relief not relating to the selection or implementation of remedial actions at the Benning Road Facility, 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-splitting, or other defenses based upon any contention that the claims raised by the District in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by the District set forth in Paragraph 9.

16. **Payments.** Any payment required under this First Addendum by Pepco to the District shall be made by wire consistent with instructions to be provided by the District. Pepco shall provide the District with a receipt of the wire within five business days of making the

payment. Pepco agrees to cooperate with the District in obtaining any modification to the language of this paragraph needed to facilitate the administration of payments to the District.

17. **Notifications.** Any time a party is required to notify another party under this First Addendum, such notification shall be performed in accordance with this paragraph. All notices sent pursuant to this First Addendum shall be provided to the following electronic mail addresses, unless a different address is specified in writing by the party changing such address:

**FOR THE DISTRICT**

WESLEY ROSENFELD  
Assistant Attorney General  
DAVID HOFFMANN  
Senior Assistant Attorney General  
District of Columbia Office of the Attorney General  
400 Sixth St. NW  
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[Wesley.rosenfeld1@dc.gov](mailto:Wesley.rosenfeld1@dc.gov)  
[David.hoffmann@dc.gov](mailto:David.hoffmann@dc.gov)

DAVID DICKMAN  
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Department of Energy and Environment  
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**FOR PEPCO:**

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Vice President & General Counsel  
Pepco Holdings, Inc.  
701 Ninth Street, N.W.  
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DAVID TOMLINSON  
Assistant General Counsel  
Exelon  
1310 Point Street  
Baltimore, MD 21231  
[David.Tomlinson@Exeloncorp.com](mailto:David.Tomlinson@Exeloncorp.com)

18. **The District Shall Maintain the Administrative Record.** In accordance with 42 U.S.C. § 9613(k)(1), the District shall establish and maintain an administrative record that shall contain all relevant and public documentation pertaining to Pepco's Work and the performance of any selected remedy. The District shall maintain the Administrative Record in an electronic form available to the public on a website to be designated later.

19. **Pepco's Notice to Successors-In-Title.** Prior to entering a contract to transfer part or all of the Benning Road Facility, Pepco shall provide notice to the prospective transferee(s) that the Benning Road Facility is the subject of an environmental response action that will require remedial action for the Landside Operable Unit and the Waterside Operable Unit and a copy of the Consent Decree and this First Addendum to the proposed transferee(s) and notify the District of the name and address of the proposed transferee(s) and provide the District with a copy of the above notice that Pepco provided to the proposed transferee(s). Pepco shall continue to comply with its obligations under the First Addendum regardless of a transfer of all or any part of the Benning Road Facility, unless the District otherwise consents to transfer the obligations to a transferee or transferees in writing.

20. **Retention of Jurisdiction.** This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this First Addendum. *See* Consent Decree, ¶ 18.

21. **Waiver of Hearing.** 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 First Addendum, except pursuant to Paragraphs 34 and 35 of the Consent Decree.

22. **No Relief from Compliance.** This First Addendum does not and shall not relieve Pepco of any of its obligations to comply with all applicable Laws; nor shall it be construed as a ruling on, or determination of, any issue related to any federal or District permit, approval, or other requirement. Nothing in this First Addendum shall be construed as prohibiting, altering, or in any way limiting the ability of the District to require Pepco to conduct any sampling, monitoring, remediation, cleanup, assessments, investigations, removal or remedial actions, or to take other response actions in the District. No waiver of any provision of this First Addendum shall affect the right of the District or Pepco thereafter to enforce such provision or to exercise any right or remedy available to it.

23. **Entire Agreement, Integration, and Appendices.** The District and Pepco agree that the Consent Decree, except as amended by this First Addendum to the Consent Decree, shall govern the rights and obligations of the parties hereto with respect to the settlement embodied in the Consent Decree and this First Addendum. The District and Pepco acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this First Addendum and the Consent Decree. The following appendices are attached to and incorporated into this First Addendum: “Appendix A” is a map of the Benning Road Facility, which includes the Landside Operable Unit and Waterside Operable Unit of the facility; and “Appendix B” is a map of the Benning Cove.

24. **Consent/Signatories.** Pepco, after consultation with legal counsel of its choice, voluntarily consents to the entry of this First Addendum and agrees and consents to all the terms and conditions hereof. Each undersigned representative of the District and Pepco certifies that he or she is authorized to enter into the terms and conditions of this First Addendum and to execute and bind legally such party to this document.

25. **Modification.** There shall be no material modification of this First Addendum without (i) the prior written approval and consent of the District and Pepco and (ii) the approval of the Court. All non-material modifications, such as a change to the person receiving notice under this First Addendum, may be made by written agreement of the District and Pepco. Changes, modifications, and updates to the deadlines in Paragraph 4 shall require the written approval of the District but shall not require approval of the Court.

26. **Construction.** The First Addendum 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 District and Pepco agree and acknowledge that this First Addendum was mutually drafted by the parties and shall not be construed against either of them as a result of drafting by either party.

27. **Non-assignment.** None of the obligations and duties of Pepco set forth in this First Addendum 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.

28. **Severability.** This First Addendum is not severable.

29. **Counterparts.** Provided that all parties hereto execute a copy of this First Addendum, the First Addendum 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 First Addendum may be delivered by facsimile transmission or other comparable means. This First Addendum shall be deemed fully executed and entered into on the date of its entry by the Court.

30. **No Effect on Consent Decree.** This First Addendum does not impact or affect any of the terms of the Consent Decree.

31. **Termination.** This First Addendum shall terminate only after a written determination by the District and the Court that Pepco has fulfilled all requirements of this First Addendum. If Pepco believes it has fulfilled all requirements of this First Addendum, Pepco may file a motion with the Court seeking termination, for which motion concurrence shall not be unreasonably withheld by the District.

32. **Lodging and Opportunity for Public Participation.** The District and Pepco acknowledge and agree that the final approval by the District and entry of this First Addendum are subject to public comment in accordance with 42 U.S.C. § 9622(d)(2) and 28 C.F.R. § 50.7. Pepco agrees to entry of this First Addendum without further notice and shall not challenge its entry, provided this First Addendum is not modified by the District in response to any public comment or for any other reason without the written consent of Pepco, with the exception of stating the First Addendum was not modified in response to comments received.

33. **Final Judgment.** Upon entry of this First Addendum by the Court, this First Addendum shall constitute the final judgment between and among the District and Pepco. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Federal Rules of Civil Procedure 54 and 58.

**For Plaintiff District of Columbia**

BRIAN L. SCHWALB  
Attorney General for the District of Columbia

JENNIFER C. JONES  
Deputy Attorney General

ARGATONIA D. WEATHERINGTON  
Chief, Social Justice Section

/s/ Wesley Rosenfeld  
WESLEY ROSENFELD [1002428]  
Assistant Attorney General

Date: 10/02/2023

/s/ David S. Hoffmann  
DAVID S. HOFFMANN [983129]  
Senior Assistant Attorney General  
Public Advocacy Division  
400 Sixth Street, NW, 10th Floor  
Washington, D.C. 20001

Date: 09/27/2023

*Attorneys for the District of Columbia*

**For Defendant Potomac Electric Power Company**

/s/ Anne Bancroft  
ANNE BANCROFT  
Vice President & General Counsel  
Pepco Holdings, Inc.  
701 Ninth Street, N.W.  
Washington, DC 20068

Date: 9/27/23

**IT IS SO ORDERED, ADJUDGED, AND DECREED.**

\_\_\_\_\_  
Date

\_\_\_\_\_  
[JUDGE]