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*Attorneys for Plaintiff-Intervenor  
Anacostia Riverkeeper*

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
ANACOSTIA RIVERKEEPER,	)	Civil Action No. 1:15-cv-01845JEB
	)	
Plaintiff-Intervenor	)	
	)	
v.	)	
	)	
POTOMAC ELECTRIC POWER COMPANY,	)	
	)	
_____	)	

**COMPLAINT**

Anacostia Riverkeeper (“ARK”), appearing herein as a Plaintiff-Intervenor by this Court’s Minute Order dated March 14, 2016, files this complaint for injunctive relief and penalties against Potomac Electric Power Company (“PEPCO” or “Defendant”), and alleges as follows:

**NATURE OF ACTION**

1. This is a civil action brought pursuant to section 505(a)(1) of the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977 and the Water Quality Act of

1987 (“CWA” or “Act”), 33 U.S.C. §1365(a)(1), for injunctive relief, the assessment of civil penalties, and other appropriate relief against Defendant for numerous unpermitted and illegal discharges of pollutants to waters of the United States in violation of section 301(a) of the Act, 33 U.S.C. §1311(a). In addition, this civil action seeks injunctive relief, civil penalties, and other appropriate relief against PEPCO pursuant to 505(a)(1) of the Act, 33 U.S.C. §1365(a)(1), for violations of section 301(a) of the Act, 33 U.S.C. §1311(a), and the terms and conditions of its National Pollutant Discharge Elimination System (“NPDES”) permit.

### **JURISDICTION AND VENUE**

2. This court has subject matter jurisdiction over this action pursuant to section 505(a) of the Act, 33 U.S.C. §1365(a), 28 U.S.C. § 1331(a), and Fed. R. Civ. P. 24.

3. Venue is appropriate in this District pursuant to section 505(c)(1) of the Act, 33 U.S.C. §1365(c)(1), because the source and location of the violations is located within this district.

4. Plaintiff-Intervenor gave notice of its intent to sue the named Defendant for violations of the Act on September 11, 2015<sup>1</sup> (“Notice Letter”) pursuant to 33 U.S.C. §1365(a).

5. Less than 60-days later<sup>2</sup>, and in response to Plaintiff-Intervenor’s Notice Letter, on October 30, 2015, the Department of Justice (“DOJ”) filed a Complaint in this Court against Defendant.

6. Defendant’s violations of the Act are continuing or intermittent.

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<sup>1</sup> See Docket No. 7-1, Exhibit 1 attached thereto.

<sup>2</sup> The statute provides a citizen may not file an action until sixty days have passed after sending the Notice Letter. 33 U.S.C. §1365(b). If an action is commenced by the government before sixty days have passed, the citizen has no statutory basis to file a complaint. *Id.* In such an instance, the citizen must seek leave to intervene, as has occurred herein.

7. Plaintiff-Intervenor believes and alleges that, without the imposition of appropriate penalties and issuance of injunctive relief, Defendant will continue to violate the Act, further injuring Plaintiff-Intervenor and its members, and will continue to enjoy the economic benefits of violating the Act.

8. This action is not barred by any prior administrative penalty under section 309(g) of the Act, 33 U.S.C. §1319(g).

### **PARTIES**

9. Plaintiff-Intervenor Anacostia Riverkeeper (“ARK”) is a 501(c)(3) not-for-profit membership corporation. ARK is incorporated under the laws of the District of Columbia, and its principal place of business is at 515 M Street, S.E., Suite 218, Washington, D.C. 20003.

10. ARK is dedicated to advocating for a clean and healthy Anacostia River, engaging in efforts to protect and enhance water quality in the river, enforcing existing federal and state laws governing the Anacostia watershed, and educating the public about issues affecting the Anacostia River.

11. ARK is a membership organization with more than 100 members, with members and staff residing in the District of Columbia, Maryland, Virginia, and other states, many of whom use and enjoy the Anacostia watershed, including the area of and around the Benning Generation Station and Service Center (“facility”) and the adjoining Anacostia River, for recreation, wildlife watching, aesthetic enjoyment, commuting, and other purposes.

12. Defendant PEPCO is a Virginia Corporation with a principal place of business at 701 9th Street NW, Washington, DC 20068. It is wholly-owned subsidiary of Pepco Holdings, and owns and operates the Benning Generation Station and Service Center, located at 3400 Benning Road, NE, Washington, DC.

13. PEPCO holds NPDES Permit No. DC 0000094, issued to PEPCO by the U.S. Environmental Protection Agency in 2009, for the Benning Generating Station.

14. The individual and organizational interests of Plaintiff-Intervenor is adversely affected by Defendant's discharges and threatened discharges that contaminate soil, sediments, and surface waters in and around the Anacostia River.

15. Defendant's discharges and threatened discharges that contaminate soil, sediments, and surface waters in and around the Anacostia River, adversely impact the interests of Plaintiff-Intervenor's individual members and impair the habitability, recreational value, and aesthetic benefits of local communities. Individual members of Plaintiff-Intervenor live in the vicinity of the Anacostia River, and fish, study or enjoy nature, and recreate in the areas adversely impacted by Defendant's activities at the facility.

#### **FEDERAL STATUTES AND REGULATIONS**

16. The Act was enacted by Congress in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a).

17. Section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits the "discharge of pollutants," except in compliance with certain sections of the Act, including section 402 of the Act, 33 U.S.C. §1342.

18. The term "discharge of pollutants" is defined in section 502(12) of the Act, 33 U.S.C. §1362(12), to mean "any addition of any pollutant to navigable waters from any point source . . . ."

19. The term "pollutant" is defined in section 502(6) of the Act, 33 U.S.C. §1362(6), to mean "chemical wastes, . . .and industrial . . .waste discharged into water."

20. The term “point source” is defined in section 502(14) of the Act, 33 U.S.C. §1362(14), to mean “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel . . . from which pollutants are or may be discharged.”

21. The term “navigable waters” is defined in section 502(7) of the Act, 33 U.S.C. §1362(7), to mean “the waters of the United States, including the territorial seas.”

22. Section 402(a) of the Act, 33 U.S.C. §1342(a), provides that EPA may issue NPDES permits to “persons” that authorize the discharge of any pollutant into navigable waters, but only in compliance with section 301 of the Act, 33 U.S.C. §1311, and such other conditions as EPA determines are necessary to carry out the provisions of the Act.

23. Section 402(b) of the Act, 33 U.S.C. §1342(b), provides that a State may establish its own permit program and, after receiving approval of its program by the EPA, may issue NPDES permits. The government of the District of Columbia has not sought its own permit program, and as a consequence, the EPA regional office in Philadelphia has responsibility to directly implement the NPDES permit program in the District of Columbia.

24. Section 505(a)(1) of the Act, 33 U.S.C. §1365(a)(1), grants citizens the authority to bring suit against “any person . . . alleged to be in violation” of an “effluent standard or limitation” established under the Act and to seek penalties for such violations. Section 505(f) of the Act, 33 U.S.C. §1365(f), defines “[e]ffluent standard or limitation” to mean “an unlawful act under subsection (a) of section 1311[,] . . . an effluent limitation or other limitation under section 1311 or 1312[,] [or] a permit condition thereof issued under section 1342.”

25. Section 309(d) of the Act, 33 U.S.C. §1319(d), provides that any person who violates, inter alia, section 301 of the Act, 33 U.S.C. §1311, or who violates any condition or limitation of a NPDES permit issued pursuant to section 402 of the Act, 33 U.S.C. §1342, shall be subject to a civil penalty. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C.

§2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. §3701, any person who violates sections 301 and 402 of the Act, 33 U.S.C. §§1311 and 1342, shall be subject to a civil penalty not to exceed \$27,500 per day for each such violation occurring on or after January 30, 1997, and up to \$32,500 per day per violation occurring on or after March 15, 2004, and up to \$37,500 per day per violation occurring on or after January 13, 2009.

### **GENERAL ALLEGATIONS**

26. Plaintiff-Intervenors re-allege and incorporate by reference all paragraphs 1-25.

27. The Defendant is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. §1362(5).

28. At all relevant times, Defendant did business in the District of Columbia.

29. From the early 1900s to June, 2012, Defendant and/or its affiliates owned and operated the Benning Generating Station, located on 77 acres at 3400 Benning Road, NE, Washington, DC. On or about June 1, 2012, Defendant and/or its affiliates shut down the generating station and now operates the Benning Service Center (“BSC”) at that location.

30. Until 2012, the facility operated as an electric generating station. The former power plant was located on the westernmost portion of the facility. The two oil-fired steam turbine units were installed in 1968 and 1972 and were used to generate electricity during periods of peak electricity demand.

31. PEPCO now owns and operates a service center for PEPCO’s electric transmission and distribution system at the location of the former Benning Generating Station. Its operations include activities related to the construction, operation and maintenance of PEPCO’s electric power transmission and distribution system serving the Washington, D.C. area, including vehicle

fleet service maintenance and refueling, transformer maintenance, central warehousing of materials, supplies and equipment, and temporary storage of hazardous waste.

32. The generating station buildings and cooling towers are being or have been demolished and removed from the facility.

33. On June 19, 2009, EPA issued NPDES Permit No. DC0000094 to PEPCO for the Generating Station, effective July 19, 2009. The 2009 Permit authorized PEPCO to discharge stormwater from Outfall 013. It further established effluent limits and monitoring requirements for all stormwater discharges.

34. NPDES Permit No. DC0000094 requires PEPCO to sample and monitor various discharges into the Anacostia River from the facility, and to certify as true and accurate the measurements contained in each periodic discharge monitoring report it submits to EPA.

35. Outfall 13 is a point source within the meaning of CWA Section 502(14) of the CWA, 33 U.S.C. § 1362(14). It conveys the majority of the runoff from the facility through a 48 inch concrete pipe which becomes a 54 inch pipe as it discharges to the Anacostia.

36. PEPCO discharged stormwater containing metals, including copper, iron, lead, zinc and cadmium and total suspended solids (TSS) in concentrations greater than the effluent limits in the 2009 Permit, through its stormwater sewer to the Anacostia River in every reported quarter between 2009 and the time of the filing of the Notice of Intent by Plaintiff Intervenors, on September 11, 2015.

37. Defendant *reported* on its discharge monitoring reports submitted to EPA as required by NPDES Permit No. DC0000094 exceedances of permitted limits for metals, including copper, iron, lead, zinc and cadmium and TSS on at least 137 occasions since on or about September 30, 2009 to the present, as set forth in Attachment A.

38. Reported exceedances identified in the preceding paragraph are derived from one measurement that Defendant used to be representative of the period being reported.

39. The 2009 Permit requires measured concentrations not exceed both daily maximum and monthly average limitations.

40. Exceedances of average monthly limits represent discharges for each day of that month. Therefore, where measured concentrations taken quarterly exceed average monthly limits, it represents a violation of permitted limits for each day of discharge during that period, or 90 days of exceedances.

41. Assuming daily discharge of effluents from Outfall 013, Defendant exceeded either the monthly average or daily maximum a total of 7,079 times for one or more pollutant including copper, iron, lead, zinc and cadmium and TSS during the periods for which reports were submitted by Defendant.

42. Specifically, Defendant violated its permit for copper 1,911 times, iron 1,724 times, lead 272 times, zinc 1,817 times, cadmium 364 times and TSS 991 times.

43. Copper, iron, lead, zinc, cadmium and TSS are industrial wastes and pollutants within the meaning of CWA Section 502(6) of the CWA, 33 U.S.C. §1362(6).

44. Copper, zinc and lead are heavy metals which can be toxic at low concentrations.

45. The 2009 Permit was scheduled to expire on July 19, 2014. In 2013, PEPCO timely filed an application for a new NPDES Permit prior to expiration of the 2009 Permit. The 2009 Permit is administratively extended so that its terms are still in effect, pending EPA's issuance of a new NPDES Permit for the facility.

46. The Anacostia River is a tributary of the Potomac River, which flows to the Chesapeake Bay, all of which are waters of the United States.

47. The Anacostia River is designated for primary contact recreation (swimming and wading). It is designated for secondary contact recreation (boating, etc.) and for: aesthetic enjoyment; protection and propagation of fish, shellfish and wildlife; protection of human health related to consumption of fish and shell fish and navigation. It is listed as an impaired water due to various pollutants, including metals.

48. Plaintiff-Intervenor has significant, extensive interests that are harmed or irreparably damaged by Defendant's violative conduct as alleged herein. *See* Memorandum of Law, Docket No. 7-1 at pp.12-16 and pp. 19-20 (discussing supporting affiant's uses and use restrictions of the Anacostia River and the watershed generally.)

### **CLAIMS FOR RELIEF**

#### **Permit Effluent Violations at Outfall 013**

49. Paragraphs 1 through 48 are re-alleged and incorporated by reference herein.

50. During the period relevant to this Complaint, Defendant has discharged and likely will continue to discharge stormwater from Outfall 013 containing pollutants in excess of effluent limitations in the 2009 Permit into the Anacostia River, a water of the United States.

51. As described more fully above, Defendant has reported that it exceeded the limits in the 2009 Permit for iron, zinc, lead, cadmium, and TSS on at least 137 occasions. Attachment A identifies the exceedances at Outfall 013 of the daily maximum and monthly average effluent limits.

52. For each exceedance of an effluent limitation, Defendant is in violation of Section 301 of the CWA, 42 U.S.C. §1311, for discharging in violation of the conditions and limitations of the applicable NPDES permit under Section 402 of the CWA, 42 U.S.C. §1342.

53. Unless enjoined, Defendant's violations will continue.

54. Pursuant to Section 309(b) of the CWA, 33 U.S.C. §1319(b), Defendant is liable for permanent injunctive relief.

55. Pursuant to Section 309(d) of the CWA, 33 U.S.C. §1319(d), Defendant is liable for civil penalties of up to \$37,500 per day of violation for the violations on Attachment A, all of which occurred after January 12, 2009.

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiff-Intervenor respectfully requests that this Court grant the following relief:

- A. Assess civil penalties against Defendant PEPCO of up to \$37,500 per day for each violation;
- B. Order Defendant PEPCO to develop and implement an effective plan to permanently eliminate its stormwater violations of the 2009 Permit and any subsequent NPDES permit;
- C. Award the Plaintiff-Intervenor its costs and attorney's fees in this action; and
- D. Grant such other and further relief as this Court deems appropriate.

DATED: March 28, 2016.

Respectfully submitted,

/s/

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Attachment 'A' (September 11, 2015 Notice of Intent to File Letter)