

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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

JOINT STATUS REPORT

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

The entry of the Consent Decree was subject to the requirement that the Parties submit written status reports to the Court. Electronic Case File (“ECF”) No. 32. The Parties submitted their most recent status report on May 22, 2015. The Court issued a Minute Order on May 22,

2015, directing the parties to file a joint status report on or before May 24, 2016,¹ regarding the implementation of the requirements of the Consent Decree and any related plans for remediation of environmental contamination. The Parties are submitting this joint status report in accordance with the Minute Order.

Pepco and DOEE have continued to work diligently and have made significant progress on the RI/FS since the last status report. The Parties have continued to work in a cooperative and efficient manner to resolve technical disagreements, and will continue to do so. The current status of the project is summarized below.

A. Remedial Investigation

Pepco submitted a draft Remedial Investigation (“RI”) Report for Phase I of the RI to DOEE on April 30, 2015, in accordance with the schedule set forth in the Consent Decree. This draft Phase I RI Report described the field activities in detail, presented the results of the sampling and analysis, evaluated potential sources of contamination (including forensic analysis of chemical constituents and assessment of background sources), and reported the overall findings of the investigation. The report includes 24 separate appendices documenting the results of laboratory analyses and data validation efforts, presenting the results of preliminary baseline human health and ecological risk assessments, presenting field sampling data, providing detailed evaluation of background data and analysis of forensic profiles of chemical constituents, and providing general background information about the Site and the larger Anacostia watershed.

As noted in the previous Status Report, the Parties anticipated that DOEE’s review would take several months due to the size and complexity of the draft Phase I RI Report. Based upon

¹ The date specified in the minute order is May 24, 2015, but the Parties understood that to mean May 24, 2016, *i.e.*, approximately one year after the submission of the most recent prior status report.

DOEE's review, there were several major changes made to the draft Phase I RI Report, including the determination that a second phase of field work was necessary to address certain identified data gaps. The Parties and their consultants engaged in extensive technical discussions regarding the findings of the field investigations and data analyses, and negotiated the scope and breadth of modifications to the draft Phase I RI Report in an extended series of calls, meetings, and correspondence. On January 14, 2016, DOEE issued a directive summarizing the additional remedial investigation requirements to fulfil the data gaps identified by the draft RI Report. The directive listed action items and set milestones to complete the RI phase. Pepco revised the draft Phase I RI Report in accordance with DOEE's comments. The revised draft Phase I RI Report and supporting materials were approved by DOEE for public review, and released for public comment on March 1, 2016. The 45-day public comment period ended on April 18, 2016. The Parties held a public meeting on April 2, 2016, to answer questions and receive input from the community. The parties are currently considering comments received from the public, and will issue a final Phase I RI Report with appropriate revisions based on the public comments.

In parallel with the work to finalize the Phase I RI Report, Pepco is preparing an addendum to the RI/FS Workplan ("Workplan Addendum") to describe the tasks needed to complete the RI phase of the project. The activities to be addressed in the Workplan Addendum include: additional field sampling; updates to the Conceptual Site Model ("CSM"); evaluation of additional risk assessment scenarios (such as the current and/or future construction worker, future industrial worker, and future recreational user); and a revised study to develop an appropriate site-specific background data set for comparison to constituent concentration data collected from the study area. Pepco has already prepared and submitted to DOEE three technical memoranda to guide the remaining RI work. One technical memorandum updates the

CSM, a second memorandum presents an updated approach for evaluating background conditions along with a schedule to conduct the remaining investigation to complete the RI (the “Phase II RI Work”), and a third memorandum presents an updated approach for conducting the final human health and ecological risk assessments. Once approved by DOEE, these memoranda will be incorporated into the Workplan Addendum. Once DOEE approves the final Workplan Addendum, it will be made available on the DOEE and Pepco websites, and paper copies will be provided to local public libraries. In accordance with the schedule specified in the Consent Decree, Pepco will begin the Phase II RI field work within 30 days after DDOE’s approval of the Workplan Addendum.

B. Feasibility Study

In accordance with the schedule set out in the Consent Decree, the draft Feasibility Study (“FS”) Report will be due within 180 days after the completion of Phase II RI field work, or within 120 days after DOEE’s approval of a final treatability study report, if DOEE determines that such a study is necessary based on the results of the Phase II RI and a preliminary consideration of potential remedial alternatives. After a preliminary review of the draft FS Report, DOEE will release the draft report for public comment in accordance with Paragraph 2.a. of the Court’s order entering the Consent Decree. After public review and comment, Pepco will revise the draft FS Report as appropriate to address comments from DOEE and the public, and will submit a final FS Report to DOEE for approval. The approved final FS Report will be made available on the DOEE and Pepco websites, and paper copies will be provided to local public libraries. DOEE’s approval of the final FS Report will mark the conclusion of the RI/FS process and Pepco’s obligations under the Consent Decree will be satisfied.

C. Public Participation

The Parties have a robust public participation process based on the approved Community Involvement Plan. In particular, the Parties have continued to support the Benning RI/FS Community Advisory Group (“CAG”), which was formed to facilitate public participation in the RI/FS process. Since the last status report, the CAG has met monthly to receive updates from DOEE and Pepco on progress of the RI/FS and the power plant demolition, and to provide input to DOEE and Pepco on community concerns. DOEE and Pepco also have maintained public websites where relevant documents and information are posted, including the updated schedule for completing the RI/FS.

D. Schedule for Further RI/FS Activities and Intervention Motion

On May 17, 2016, *amici curiae* Natural Resources Defense Council, Anacostia Watershed Society, and Anacostia Riverkeeper (“*amici* environmental groups”) filed a renewed motion to intervene in this action (ECF No. 37) for the purpose of requesting an order from the Court setting a schedule for completing the RI/FS. Counsel for DOEE and Pepco have conferred with counsel for *amici* environmental groups regarding their intervention motion and the schedule for the remaining RI/FS activities. Based on those discussions, DOEE and Pepco consent to the process proposed in the intervention motion for establishing a schedule to complete the RI/FS. Specifically, DOEE and Pepco will submit a joint proposed schedule to the Court by June 6, 2016. *Amici* environmental groups will submit comments on the proposed schedule to the Court by June 13, 2016. DOEE and Pepco will submit any response to such comments to the Court by June 20, 2016. The Court will enter such order as it deems appropriate based on the submissions.

Counsel for *amici* environmental groups have advised that if the Court accepts the process proposed above for setting a schedule to complete the RI/FS, *amici* environmental groups will agree to a stay of further briefing or consideration of their intervention motion until the Court issues an order regarding the schedule for the RI/FS in the expectation that such an order may moot the motion.

Dated: May 24, 2016

Respectfully submitted,

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

DISTRICT OF COLUMBIA,

Plaintiff,

v.

POTOMAC ELECTRIC POWER
COMPANY, *et al.*,

Defendants.

Civil Action No. 11-00282 (BAH)

MEMORANDUM AND ORDER

In December 2011, this Court entered a Consent Decree between the Parties of this case, District of Columbia and Potomac Electric Power Company and Pepco Energy Services, Inc. (collectively, “Pepco”), a local power generation company, requiring Pepco to conduct a remedial investigation and feasibility study (“RI/FS”) on the conditions at a Pepco facility, located at 3400 Benning Road, N.E., Washington, D.C (the “Facility”), and the adjacent areas of the Anacostia River, to determine the link between the Facility and the polychlorinated biphenyls (“PCBs”) in the river, and to assess clean-up options. This Consent Decree was predicated on allegations that, between 1985 and 2003, the Facility made six documented releases of toxic PCBs into the Anacostia River and, over time, these environmentally damaging PCBs have seeped into the river’s sediment.

The RI/FS was initially projected to take approximately two years to complete, but nearly five years later, the Parties have yet to complete it and have now proposed a schedule that contemplates completion no earlier than March 31, 2018, with the possibility for additional delay until June 30, 2018. This delay prompted the *amici*, three environmental organizations—the National Resources Defense Council, the Anacostia River-keeper, and the Anacostia Watershed Society—on May 17, 2016, to move, again, to intervene in this action “in order to ask the Court to

set final deadlines for the consent decree work,” Amici’s Mem. Supp. Mot. Intervene (“Amici’s Mem.”) at 7, ECF No. 37. Additionally, the *amici* suggested that to aid the Court in determining the deadlines, the Parties should be directed “to propose an aggressive but realistic final date for completion of the consent decree work, and to propose and justify deadlines for all necessary interim steps.” *Id.* at 25–26. In response, the Parties “consent[ed] to the process proposed in the intervention motion for establishing a schedule to complete the RI/FS,” Joint Status Report at 5–6, ECF No. 38, and, consequently, with consent from the Parties and the *amici*, the Court issued a Minute Order, on May 25, 2016, that stayed briefing for the *amici*’s motion to intervene “pending resolution of the final schedule for the completion of the [RI/FS],” Minute Order, dated May 25, 2016.

On June 6, 2016, the Parties submitted their joint proposed schedule; on June 13, 2016, the *amici* submitted their own competing proposed schedule, to which the Parties submitted a joint reply. *See* Parties’ Joint Proposed Schedule, ECF No. 39; Amici’s Resp. to Joint Proposed Schedule for Completing the Remedial Investigation/Feasibility Study (“Amici’s Resp.”), ECF No. 40; Parties’ Joint Reply in Supp. of Their Proposed Schedule (“Parties’ Reply”), ECF No. 41. For the reasons explained below, the Court adopts in part and rejects in part the Parties’ joint proposed schedule, over the objection of the *amici*, and, consequently, denies as moot the *amici*’s motion to intervene.

At the outset, the *amici* raise legitimate concern over the delays in the completion of the RI/FS, and are commended for their continued attention to this important matter. Nevertheless, the Parties’ thorough explanation of each of the factors contributing to the multi-year delay in the completion of the RI/FS convincingly sets out the reasons both for prior delays and why more time than that allowed in the *amici*’s proposed schedule is necessary to complete the project.

Notably, part of the delay in completion of the project is attributable to several very good causes. First, during the course of the project, public participation in and opportunities for public comments were expanded. Over the Parties' objections, this Court ordered that they "solicit public comment on nine deliverables typically not made available for comment," adding "at least 270 days to the overall schedule." Parties' Reply at 5. This additional time includes not only the comment periods, which have taken 182 days, but also the time the Parties spent reviewing and responding to the public comments, demonstrating commendable due diligence on the part of the Parties. *Id.* at 6. For example, in response to comments received from the National Park Service ("NPS") regarding "dredging operations near an intake channel result[ing] in the placement of potentially contaminated dredge spoils on NPS property," the Parties will be conducting additional field work, the time for which is not allowed in the *amici*'s proposed schedule. *Id.* at 6, 12. The community and the *amici* have unquestionably benefited from this increased opportunity for participation, giving the *amici* numerous opportunities to voice their concerns that may not have been addressed at the first instance by the Parties.

Second, the scope of the project, which initially contemplated the study of a single type of contaminant, PCBs, was expanded to include the study of how "multiple [additional] contaminants were potentially released from various locations throughout the Facility." Parties' Reply at 4. Correspondingly, the study, thus expanded, has required much more time than initially envisioned in order to examine "many more analytes," involving "a comprehensive assessment of various current and historical sources at the Facility," as well as "additional fielding sampling . . . , significantly expanded laboratory analyses and data evaluation." *Id.* at 4–5.

Finally, Pepco "decided to demolish the former generating plant and cooling towers in response to environmental concerns expressed by the community," allowing the researchers to gain admittance to previously inaccessible areas for additional field study. *Id.* at 5. Concomitant with

the expansion in field study, more time was needed in order to “coordinat[e] and sequenc[e] the additional field investigations and the demolition work.” *Id.* The expansion of the scope of the study to include additional contaminants and additional potential contamination sites undoubtedly inures to the benefit of the public.

In addition to these good causes contributing to the delay of the project, other delays resulted from causes entirely out of the Parties’ control. For example, the Parties have encountered delays navigating various permit requirements from the District Department of Transportation, from various private property owners and from NPS. *Id.* at 13. This already complex and time-consuming process was further compounded by the federal government shut down, which suspended already received permits and requiring a halt in field work from September 30, 2013 to November 14, 2013. *Id.* at 7.

Accordingly, the deadlines set out in the Parties’ Joint Proposed Order are adopted.

At the same time, the Parties’ joint proposal request that the next status report to the Court be filed by October 31, 2017 is denied. Instead, the Parties shall submit the next joint status report by May 31, 2017, the date by which the field work for the Phase II Remedial Investigation should be completed. In that status report, the Parties shall advise whether the field work has been completed according to the schedule set out here and whether the Parties are still on track to meet the remaining deadlines set out in this Order, with explanations for any delays.

Having put in place a final schedule to govern the completion of the project, the *amici*’s motion to intervene “in order to ask the Court to set final deadlines for the consent decree work” is now moot. *Amici*’s Mem. at 7. The purported goal of their motion to intervene is to request the Court to “enter an order setting binding deadlines for the Parties to complete the consent decree work,” and the Court does so here. *Id.* at 25. Furthermore, the arguments made by the *amici* in their memorandum in support of their motion to intervene regarding the necessity of an order setting

“an aggressive but realistic” schedule governing the completion of the RI/FS were echoed in their response to the Parties’ Joint Proposed Schedule, and have been heeded by the Court. Accordingly, it is hereby

ORDERED that the following scheduling order is entered:

- (1) The field work for the Phase II Remedial Investigation shall be completed by May 31, 2017;
- (2) the Phase II Remedial Investigation Report shall be finalized by January 31, 2018; and
- (3) the final Feasibility Study shall be approved by the District Department of Energy and Environment by March 31, 2018, unless a Treatability Study is required, in which case the final Feasibility Study shall be approved by June 30, 2018; and it is further

ORDERED that the Parties may request approval from the Court to adjust the foregoing schedule based on unforeseen circumstances or other good cause; and it is further

ORDERED that the Parties shall submit, by May 31, 2017, a joint status report, advising the Court of the progress and whether the Parties are on track to meet the deadlines set forth here; and it further

ORDERED that *amici*’s Motion to Intervene, ECF No. 37, is DENIED.

SO ORDERED.

Date: June 24, 2016

BERYL A. HOWELL
Chief Judge