

Pepco Potomac River Substation Oil Spill, Alexandria, VA

MEMORANDUM OF AGREEMENT
FOR SETTLEMENT FUNDS MANAGEMENT

AMONG THE

DISTRICT OF COLUMBIA, ACTING THROUGH THE DEPARTMENT OF ENERGY AND
ENVIRONMENT

AND

UNITED STATES DEPARTMENT OF THE INTERIOR, ACTING THROUGH THE NATIONAL
PARK SERVICE AND THE UNITED STATES FISH AND WILDLIFE SERVICE

REGARDING COORDINATION OF NATURAL RESOURCE RESTORATION

I. INTRODUCTION

This Memorandum of Agreement for Settlement Funds Management (the “Agreement”) is entered into by and among the District of Columbia Department of Energy and Environment (“DOEE”), acting on behalf of the District of Columbia and the National Park Service (“NPS”) and U.S. Fish and Wildlife Service (“USFWS”), acting on behalf of the United States Department of the Interior (individually “Trustee” and collectively referred to as the “Trustees”), in recognition of their common interests and responsibilities as Trustees of natural resources on behalf of the public to ensure the coordination and cooperation among the Trustees. The National Oceanic and Atmospheric Administration, although a trustee, has deferred formal participation but will participate in an advisory-only role.

II. PURPOSE AND SCOPE

This Agreement shall provide the framework for the use and expenditure of all natural resource damages recovered jointly, together with interest accruing (the “Settlement Funds”), following receipt jointly by the Trustees from the Potomac Electric Power Company (Pepco) to settle potential natural resource damages liability for injuries to, destruction of, or loss of natural resources and/or their services as a result of the discharge of oil from the Pepco Potomac River Substation located in Alexandria, Virginia on January 23, 2011 (“Pepco Potomac River Substation Oil Spill”). The Trustees will jointly manage and program the Settlement Funds to plan, implement, and oversee the restoration, rehabilitation, or acquisition of equivalent identified in the final Settlement Agreement and Final Restoration Plan, and any amendments thereto, associated with the Pepco Potomac River Substation Oil Spill.

III. PARTIES

The following officials, or their designees, are Parties to this Agreement and act on behalf of the public as Trustees for natural resources under this Agreement:

1. The Director of the District of Columbia Department of Energy and Environment, for the District of Columbia
2. The Deputy Associate Director, Natural Resource Stewardship and Science , National Park Service, acting on behalf of the United States Department of the Interior

IV. AUTHORITIES

The Trustees enter into this Agreement under Section 1006 of the Oil Pollution Act (OPA), 33 U.S.C. § 2706; the National Contingency Plan (NCP), 40 C.F.R. §§ 300.600- 300.615; and other applicable District and federal laws.

V. NATURAL RESOURCE TRUSTEE COUNCIL

A. Organization and Designation of Representatives. The Trustees herein establish the Pepco Potomac River Oil Spill Trustee Council (“Council”) to implement this Agreement. Each Trustee shall designate a Primary Trustee Representative to the Council, who shall be authorized to vote on behalf of that Trustee. Each Trustee may, by written notification to all other Trustees, change the Primary Trustee Representative designee (“Primary Representative”). In addition to the Primary Representative, in-house counsel for each Trustee may appoint one attorney who may attend all meetings of, or organized by, the Council in a legal/consultative role, but such attendance or participation by an attorney shall not create additional voting rights. The Primary Representative for each Trustee is the following:

District of Columbia

Joshua Rodriguez
Department of Energy and Environment
Government of the District of Columbia
1200 First Street, N.E., 5th floor
Washington, D.C. 20002
Joshua.Rodriguez@dc.gov
Phone: (202) 535-2226

U.S. Department of the Interior

Todd Lanning
1201 Oakridge Drive
Fort Collins, CO 80525
todd_lanning@nps.gov
Phone: 970-225-3523

- B. Communications. All correspondence and communication to, between, or among the Trustees pertaining to activities, which are subject to coordination and cooperation under this Agreement, shall be sent to the Primary Representatives.

- C. Duties and Responsibilities. The Council shall coordinate all Trustee activities and matters within the scope of this Agreement. Action to be taken or authorized by the Council in implementing this Agreement include, but are not limited to:
1. Planning, contracting for, or otherwise undertaking and overseeing the development and implementation of the final Damage Assessment and Restoration Plan, and any amendments thereto;
 2. Coordinating Trustee decision-making, planning, and project contracting and implementation to ensure such actions are conducted in accordance with applicable administrative procedures and/or legal requirements (e.g., state/federal permitting requirements);
 3. Making decisions and taking actions as are necessary to manage, administer, and/or oversee projects being developed or implemented with the Settlement Funds and expending the Settlement Funds as appropriate; and,
 4. Designating a Lead Administrative Trustee (LAT): The U.S. Department of the Interior (National Park Service) has been designated the LAT for the Council. The LAT shall fully coordinate its activities with and only act with the consensus of the Council.
 5. Other duties of the LAT include, but are not limited to, the following:
 - a. Scheduling conference calls and meetings of the Council, preparing agendas for those conference calls, and recording actions taken at those conference calls;
 - b. Acting as central contact for the Council;
 - c. Preparing documents for Council consideration and finalizing Council documents for action and/or the public;
 - d. Maintaining records and documents received or generated by the Council, such as public comments on the draft Damage Assessment and Restoration Plan, and final, signed, Trustee Council Resolutions;
 - e. Preparing, issuing, and/or arranging for public notices or reports as determined to be necessary by the Council;
 - f. Maintaining records of Settlement Funds expenditures and receipts related to this Agreement; and,
 - g. Such other duties as are agreed upon by the Council which do not give the LAT decision-making rights beyond those normally held by each Trustee.
 6. Establishing protocols, standards, procedures, budgets, or other directions as necessary to support access to or the use of Settlement Funds from the Pepco Potomac River Substation Site Restoration sub-account within the U.S. Department of the Interior (DOI) Natural Resource Damage Assessment and Restoration (NRDAR) Fund ("Account") described in Section VI hereinafter;
 7. Contracting with such entities as the Council, in their collective discretion, as determined necessary to implement this Agreement; and,
 8. Taking such other actions as the Council determines are necessary or appropriate to implement this Agreement, including actions necessary to fulfill responsibilities of the Trustees under applicable state or federal laws.

- D. Decision-making. All decisions by the Council implementing this Agreement shall be made by consensus and be consistent with the final Settlement Agreement and final Damage Assessment and Restoration Plan for the Pepco Potomac River Substation Oil Spill, and any amendments thereto.
- E. Dispute Resolution. In the event of a dispute involving any decisions under this Agreement, the Council shall initially attempt to resolve the dispute through good faith discussions directed toward obtaining unanimity among the Trustees involved in the dispute and consensus by the Council as a whole. If unanimous consent cannot be reached, the matter shall be elevated to the signatories of this Agreement who may expressly delegate their decision-making authority to a senior supervisory level designee for decision or further instructions. If necessary, the Trustees may establish other mechanisms by which disputes may be resolved.

VI. USE OF SETTLEMENT FUNDS

- A. General Use. The Settlement Funds may be used by the Trustees only to plan and implement appropriate actions to restore, replace, rehabilitate, and/or acquire the equivalent of natural resources or resource services injured, destroyed, or lost as a result of the discharge of oil from the Pepco Potomac River Substation consistent with the Final Settlement Agreement and the Final Damage Assessment and Restoration Plan for the Pepco Potomac River Substation Oil Spill, and any amendments thereto.

Under this Agreement, the Trustees may work with the DOI NRDAR Fund Manager and/or his/her designee, in identifying risk-free investment, such as U.S. Treasury Bills, to earn a higher rate of return appropriate for unexpended Settlement Funds until their use is necessary. Appropriate investment activities will be determined through the consensus decision making process set forth in Section V of this Agreement and will be by unanimous written agreement of all Primary Representatives to the Council. Interest earned on any investment of Settlement Funds from the Account will be made available for use by the Trustees to compensate the public for injuries to natural resources and resource services consistent with this Agreement.

- B. Intended Use. The Trustees acknowledge that funds paid by Settling Defendant under Section IV.5.b of the Settlement Agreement among the United States Department of the Interior, the United States Department of Commerce, the District of Columbia and Pepco for the Pepco Potomac River Substation Oil Spill are intended to be applied to a trash cage project, provided that the implementation of the project remains feasible. For purposes of this agreement, "Trash Cage Project" shall mean the ongoing operation and maintenance of a Trash Interceptor Cage at DC Water storm drain outfall #999 constructed on NPS property located immediately north of the intersection of 14th Street and Gallatin Streets, NE, Washington, D.C, for a period of up to 3 years, or until all funds are expended. The construction and initial operation of the Trash Cage Project is being implemented pursuant to the consent decree entered on April 4, 2014, in *District of Columbia v. Potomac Electric Power Company*, Civil Action No. 2014 CA 001890 B (D.C. Superior Court). Construction and operation of the Trash Cage Project is subject to NPS permitting requirements.

- C. Procedures Relating to Use or Access to Funds. The Council, in accordance with the decision-making process identified in Section V above, shall identify protocols, standards, procedures, budgets, or other directions as necessary to support access to or the use of Settlement Funds, or interest thereon, and to otherwise effectuate the purposes of this Agreement, the final Settlement Agreement, and the Final Restoration Plan. Disbursement of all Settlement Funds from the Account, including for reimbursement of administrative costs and expenses incurred by the Trustees, will be by unanimous written agreement of all Council members.
- D. Funds Dispersed to the District of Columbia. Any and all funds dispersed to the District of Columbia under this Agreement shall be placed in the Clean Land Fund (0663) solely for uses specified in this Agreement.

VII. RESERVATION OF RIGHTS

Each Trustee has and reserves the right to take any action within the scope of its authority as a Trustee, including as may be necessary to pursue and/or to preserve any legal rights or remedies available to it as a Trustee. Nothing in this Agreement is intended to waive or foreclose any such rights.

VIII. MODIFICATION OF AGREEMENT

- A. This Agreement may be modified by the agreement of the Trustees.
- B. Any modification of this Agreement shall be in writing, executed by the Trustees.

IX. TERMINATION

- A. This Agreement shall continue in effect until completion of all work required pursuant to the Restoration Plan and/or until there are no remaining Settlement Funds, or at such other time as the Trustees, in their sole discretion, determine appropriate.
- B. At such a time when there are no remaining Settlement Funds, the LAT will write a letter to the Primary Representatives briefly describing the work performed under this Agreement indicating that the case is completed, and that the Account will be closed. A carbon copy of the letter will also be sent to the DOI NRDAR Fund Manager. The LAT will take such additional steps as may be necessary to formally close the case with the DOI Office of Restoration and Damage Assessment and the DOI NRDAR Fund.
- C. In the event any Trustee withdraws from the Agreement, notification of such withdrawal must be in writing at least thirty (30) days in advance of the withdrawal. Such withdrawing Trustee forfeits all rights pursuant to this Agreement including, without limitation, the right to decide how Settlement Funds are to be expended and to authorize expenditures of Settlement Funds from the Account. Any withdrawing Trustee agrees to provide timely written authorization to the remaining Trustees to enact future transactions from the Account without the participation of the withdrawing Trustee. Such withdrawing Trustee may recoup such administrative costs it has incurred as of the date of its withdrawal from this Agreement, as provided in and subject to the terms of Section

VI above. In the event of such withdrawal, this Agreement remains in full force and effect for the remaining Trustees.

X. LIMITATION

The responsibilities and commitments identified in this Agreement are wholly subject to the lawful availability of funds, including from the Account. Nothing in this Agreement shall be construed as obligating the United States or the District of Columbia, DOEE, NPS, USFWS or any other public agency, their officers, agents, or employees to expend any funds in excess of those that are reimbursable from the Account or authorized by law.

XI. THIRD PARTY CHALLENGES OR APPEALS

The rights and responsibilities contained in this Agreement represent an operational agreement among the respective Parties. This Agreement does not confer any rights on third parties, is not a waiver of any Sovereign Immunity of any Trustees, and is not to be construed as providing the basis of any third party challenges or appeals.

XII. NONDISCRIMINATION

In performing this Agreement, the Trustees will not discriminate against any person because of race, color, religion, sex, national origin, age, physical or mental handicap, sexual orientation, marital status, or political affiliation.

XIII. EXECUTION: EFFECTIVE DATE

The Agreement may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute an original Agreement. The date of execution shall be the date of the last Trustee representative to sign.

XIV. ANTI-DEFICIENCY

Nothing in this Agreement shall be construed as obligating the United States or any State or Federal signatory to this Agreement, their officers, agents, or employees, to appropriate funds, or to expend any funds in excess of appropriations or other amounts authorized by law.

IN WITNESS WHEREOF, the Parties hereto have signed this Settlement Funds Management Agreement on the date appearing under their signatures.

Signature Page: PEPCO POTOMAC RIVER OIL SPILL SETTLEMENT FUNDS MANAGEMENT AGREEMENT


The District of Columbia through the Director of the Department of Energy and Environment

By: Tommy Wells
Tommy Wells
Director
Department of Energy and Environment

Date: 8/12/19

Signature Page: PEPCO POTOMAC RIVER OIL SPILL SETTLEMENT FUNDS MANAGEMENT
AGREEMENT

The U.S. Department of the Interior through the Authorized Official, the Deputy Associate Director,
Natural Resource Stewardship and Science, National Park Service

By:  _____

Guy Adema
Deputy Associate Director

Date: 1/9/20