UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, Plaintiff, ANACOSTIA RIVERKEEPER, INC., ANACOSTIA WATERSHED SOCIETY, and NATURAL RESOURCES DEFENSE COUNCIL, INC. Proposed Plaintiff-Intervenors, v. POTOMAC ELECTRIC POWER CO., and PEPCO ENERGY SERVICES, INC., Defendants.	No. 1:11-cv-00282 (BAH) ORAL HEARING REQUESTED

MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT

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INTRODUCTION

This is a stalled environmental cleanup case related to contamination in and along the Anacostia River in Northeast DC. The District of Columbia sued the Potomac Electric Power Company and Pepco Energy Services, Inc. (collectively, Pepco) in 2011 to compel an investigation of Pepco's Anacostia River pollution. The parties immediately settled, and this Court approved their proposed consent decree, but the parties have since failed to meet their commitments to the Court and to the public to do the required work promptly.

In 2011, the parties promised the Court that the consent decree work would take at most two years to complete. It has now taken four and a half years and counting, and may not be finished until at least fall 2017, based on the parties' latest projections. Absent a Court order, the parties are not bound to finish the work even by then.

The Anacostia Riverkeeper, Anacostia Watershed Society (AWS), and Natural Resources Defense Council (NRDC) (collectively, Environmental Plaintiffs) seek approval to intervene, in order to ask the Court to set final deadlines for the consent decree work. Environmental Plaintiffs moved to intervene in this case five years ago, to challenge shortfalls in the proposed consent decree. The Court denied the motion at the time and entered the consent decree, finding that intervention might delay the remedial investigation and feasibility study proposed by the settling parties. But the Court acknowledged the proposed intervenors' right to renew the motion if the parties did not proceed expeditiously.

The parties have now missed every target date they proposed to finish the work. Environmental Plaintiffs thus seek to intervene to ask the Court to set binding deadlines for the parties to complete the remedial investigation and feasibility study. This is necessary to ensure a timely and meaningful remedy that protects public health and the environment.

Counsel for Environmental Plaintiffs conferred with counsel for the District on May 9, May 12, and May 16, 2016, who indicated that the District would not oppose the motion to intervene but reserved the right to oppose the requested relief. Counsel for Environmental Plaintiffs conferred with counsel for Pepco on May 12 and May 16, 2016, who indicated that Pepco opposes this motion.

BACKGROUND

I. The Pepco Benning Road Service Center

Pepco is a public utility supplying electric power in Maryland and Washington, DC. Pepco owns a former generating station and service center facility in the District at 3400 Benning Road NE, next to the Anacostia River. For over 100 years, Pepco and its predecessors operated a power plant at this location. The power plant was closed in 2012 and demolished by mid-2015. Proposed Compl. ¶¶ 3, 11-12; ECF No. 35 at 5-6.

The Pepco service center is a 77-acre industrial facility (roughly the size of 60 football fields) currently used for electrical transmission and distribution, transformer maintenance, vehicle fleet maintenance, temporary hazardous waste storage, and warehousing for supplies and equipment. Proposed Compl. ¶ 11. The site is bordered by the Anacostia River to the west, a city trash transfer station to the north, a maintenance yard owned by the National Park Service to the northwest, and residential neighborhoods to the east and south (Parkside and River Terrace). *Id.*; *see* Colangelo Decl. Ex. A (maps of the site).

On at least six occasions between 1985 and 2003, Pepco released polychlorinated biphenyls (PCBs) at the facility. Proposed Compl. ¶ 25. PCBs are long-lasting toxic chemicals that cause serious harm to people and wildlife. *Id.* ¶¶ 17-21. Because of the severity of the environmental and health risks, the manufacture of PCBs was banned in the

United States in 1979. *Id.* ¶ 17. PCBs do not break down readily and can persist in the environment for decades. *Id.*

Over time, the PCBs released by Pepco have migrated from the Benning Road facility into the Anacostia River. *Id.* ¶ 26. PCB contamination persists in the river today because of these releases. *Id.* ¶¶ 26, 28-29. Sediment sampling has detected PCBs immediately downstream of Pepco's storm water outfalls at levels dozens of times higher than those known to cause harm to plants and animals. *Id.* ¶¶ 27-30. A fish consumption advisory for the Anacostia River was issued in 1989 and remains in effect, but some local residents continue to eat and share fish they catch from the river. *Id.* ¶ 24.

II. The Anacostia River

The Anacostia River begins near Bladensburg, Maryland and runs for about nine miles, before meeting the Potomac River at Hains Point in Washington, DC. *Id.* ¶ 23. The river supports hundreds of species of fish, birds, reptiles, and mammals. *Id.* The river also provides recreational opportunities for DC and Maryland residents, including canoeing and kayaking in the river, and walking and biking along the Anacostia River Trail. *Id.* The U.S. National Arboretum sits on the west side of the Anacostia River, and is currently home to its first nesting pair of bald eagles since 1947, plus a pair of eaglets that hatched in mid-March. *Id.* There are two national parks on the Anacostia River: Kenilworth Park and Aquatic Gardens, and Anacostia Park. *Id.* There are also several local parks on the river, including Kingman Island, directly across from Pepco's Benning Road Service Center. *Id.*

The Anacostia River is heavily polluted. Washington DC's combined sewer system discharges billions of gallons of raw sewage and stormwater directly into the river every year, and there are six identified toxic hotspots in the river from earlier industrial spills. *Id.*

¶ 24. The city is undertaking some efforts to address these problems. The DC Water and Sewer Authority is implementing a multi-billion dollar initiative to eliminate combined sewer overflows. *Id.* The District Department of Energy and Environment has also begun a system-wide remedial investigation and feasibility study to determine how to redress toxic sediment hotspots. *Id.*

PROCEDURAL HISTORY

I. The District's hazardous waste cleanup suit against Pepco

In 2010, the District sent Pepco a notice of intent to sue regarding PCB contamination in the Anacostia River. *See* ECF No. 1 ¶ 5.[1] In February 2011, the District filed a complaint against Pepco in this case, and published a proposed consent decree to resolve the lawsuit three days later. ECF No. 1; 58 D.C. Reg. 001148 (Feb. 4, 2011). The complaint asserted claims under three hazardous waste cleanup laws: the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the District of Columbia Brownfield Revitalization Act. ECF No. 1 ¶¶ 12-14. Among other claims, the District alleged that Pepco's PCB contamination presents "an imminent and substantial endangerment to health and the environment" under RCRA, 42 U.S.C. § 6972(a)(1)(B), and requested that Pepco be held liable for abating that endangerment. ECF No. 1 ¶¶ 8, 13, Prayer for Relief ¶ b.

The consent decree requires Pepco to prepare a remedial investigation and feasibility study (referred to as an RI/FS) to assess the extent of environmental and health risk from

[1] Pepco Holdings, Inc., the parent company of Pepco, completed a merger transaction with Exelon Corporation on March 23, 2016. *See, e.g.*, Pepco Holdings, *Exelon Corporation and Pepco Holdings, Inc. Are Now One Company*, http://www.pepcoholdings.com/about-us/exelon-acquisition/ (last visited May 10, 2016). That does not change Pepco's responsibilities under the consent decree. ECF No. 22-1 ¶ 3.

Pepco's PCB pollution and to propose possible remedies. ECF No. 22-1 ¶ 8(c). During the comment period on the proposed consent decree in 2011, Environmental Plaintiffs reviewed the proposed settlement and found it to be deficient. ECF No. 2-2 Ex. A (comments on proposed consent decree). In particular, the proposed consent decree failed to set any deadlines for completing the required work. *Id.* Ex. A at 12. The consent decree also failed to include meaningful opportunities for public participation while the study was underway. *Id.* Ex. A at 15-16.

Environmental Plaintiffs moved to intervene to challenge the decree. ECF No. 2. The Court held a hearing on the motion in November 2011, and denied the request to intervene a month later, but granted leave to participate as amici curiae. ECF Nos. 31, 32. In its order and memorandum approving the consent decree, the Court directed the parties to allow for greater public participation in the RI/FS process, but declined to set any deadlines for final action. ECF No. 31 at 13, 16; ECF No. 32 ¶ 2. The Court recognized that the consent decree did not contain final deadlines, but noted that it required all work to be performed "expeditiously." ECF No. 31 at 13. Based on that, the Court concluded that "the danger of Pepco dragging the RI/FS process out for years, as amici fear, would contravene the intent of the consent decree and would appear to require that the District also fail to act in good faith by holding Pepco to reasonable, binding deadlines for the completion of the work." *Id.*

During the hearing in November 2011, the parties' counsel told the Court that eighteen months was a reasonable time period for completing the work, and that two years was the "outside date." ECF No. 31 at 14 n.4; Colangelo Decl. Ex. B (Tr. 24:21-25:1, 26:10-15 (the District's counsel); Tr. 45:8-13 (Pepco's counsel)). According to the District,

"[t]ypically these are one to two year investigations, that's the typical run-of-the-mill thing." Colangelo Decl. Ex. B (Tr. 26:13-14). The Court cited those representations in its order denying intervention, ECF No. 31 at 14 n.4, and the Court stated during the hearing that "I would be very concerned if this took more than one to two years." Colangelo Decl. Ex. B (Tr. 25:14-15).

In approving the consent decree, the Court directed the parties to file a status report eighteen months later, in May 2013. ECF No. 31 at 14-15. The Court stated that "[i]f the RI/FS has not been completed by the reporting date, the status report shall provide an explanation and showing of good cause for why it has not been completed and shall explain to the Court in detail how the parties plan to complete the RI/FS expeditiously." *Id.*

II. The stalled remedial investigation and feasibility study

The parties did not complete the required work by the time of the first status report in May 2013, eighteen months later. Instead, they announced that the "May 2013 completion target was ambitious," and that "[a]n RI/FS for a site of this size and nature often requires two or three years (or more)." ECF No. 33 at 3. The parties blamed their delay on "the implementation of an enhanced process for public participation." *Id.* The parties declared that the project was nonetheless proceeding "expeditiously" and they expected the work to be "completed and approved within the next eighteen months," or by November 2014. *Id.*

The Court directed the parties to file a second status report one year later.

In the second status report, filed in May 2014, the parties pushed back the expected completion date once more. This time the parties announced that they expected the work to be "completed and approved within the next 18 to 24 months," or between November 2015 and May 2016. ECF No. 34 at 2. Again the parties blamed their delay on "involving the

public," which "helped to ensure project transparency and has resulted in improved planning documents, but at the tradeoff of a longer period of time required to complete the project." *Id*. The parties also blamed some of the delay on "the need to obtain permits for the field investigation work from multiple local, State, and federal regulatory agencies." *Id*. at 5. The parties announced that the District had hired an outside engineering firm, Tetra Tech, to "help expedite [the District's] reviews and as well enhance the quality of the technical oversight for the project." *Id*. at 7. And the parties again declared that "the sampling work has been performed as expeditiously as possible." *Id*. at 6.

The Court directed the parties to file a third status report one year later.

The third status report, filed in May 2015, pushed back the expected completion date yet again, to "the latter part of 2016." ECF No. 35 at 7. This time, the parties did not offer any specific explanation for the continued delay. Instead, the parties listed a series of vague interim deadlines for the remaining work. First, the parties stated that the District would publish Pepco's draft remedial investigation report for public comment within "several months," or roughly late-summer of 2015. *Id*. at 3-4. Second, the parties said that Pepco would revise that report in response to comments and prepare a final report, which "may be submitted by the end of 2015." *Id*. at 6-7. Third, the parties said that Pepco will submit a draft feasibility study report to the District "during the first part of 2016." *Id*. Fourth, the parties stated that Pepco will revise that feasibility study report in response to comments and submit the final report to the District "in the latter part of 2016." *Id*. In the third status report, the parties no longer claimed to be acting "expeditiously," as required under the consent decree, but they did assert that they "have continued to work diligently." *Id*. at 2.

The Court directed the parties to file a fourth status report one year later, in May 2016.

The parties did not meet any of the interim deadlines set forth in the third status report. First, the District did not release the draft remedial investigation report for public comment within "several months," as promised, and instead released it on March 1, 2016, ten months after Pepco first submitted it. *Compare* ECF No. 35 at 4, *with* Proposed Compl. ¶¶ 44-45. Second, Pepco did not revise or submit a final remedial investigation report by the end of 2015, as promised, and still has not done so. *Compare* ECF No. 35 at 7, *with* Proposed Compl. ¶ 45. Third, Pepco did not submit a draft feasibility study report to the District "during the first part of 2016," as promised, and still has not done so. *Compare* ECF No. 35 at 7, *with* Proposed Compl. ¶ 45. Finally, the parties will not finish the consent decree work "in the latter part of 2016," as they claimed. *Compare* ECF No. 35 at 7, *with* Proposed Compl. ¶ 45. As explained below, given the mounting delays, the parties will miss that target by at least another year.

III. The parties' remaining tasks under the consent decree

The parties have not publicly released an up-to-date schedule for the completion of the RI/FS. Proposed Compl. ¶ 45. However, at the current pace and based on the remaining tasks, the parties apparently do not intend to complete the RI/FS until fall 2017, and the process could take even longer absent a binding deadline to finish the work. *Id.*

In their most recent public statements, the District and Pepco said that additional remedial investigation field work is needed and that the work plan for this field work should be approved by the end of June 2016. *Id.* ¶¶ 45-46. Pepco estimated that the additional field work will take about four months to conduct once it is approved. *Id.* ¶ 46. After the field

work is completed, Pepco will prepare a revised remedial investigation report, the District and the public will comment on it, and then Pepco will prepare a final remedial investigation report for the District's approval. *Id.*

But finishing the remedial investigation report is not the end of the RI/FS process. The District has not yet decided whether Pepco will need to conduct a treatability study. *Id.* ¶ 47. A treatability study generally involves field or laboratory testing to determine how site-specific wastes and media (like contaminated sediments) react to various treatment options, in order to better inform the evaluation of possible remedies. *Id.* If it is needed, the treatability study will require (1) Pepco to propose a work plan, (2) the District to review and approve the work plan, (3) Pepco to obtain any necessary permits for the work, (4) Pepco to complete any field or lab work and to draft the treatability study report, (5) the District to review and comment on the draft report, (6) Pepco to revise the treatability study report, and (7) the District to review and approve the final report. *Id.* Neither the consent decree nor the Court's prior order contain any deadlines or public comment requirements for the treatability study. *See* ECF No. 22-1 ¶ 8(c); ECF No. 32 ¶ 2. Pepco has estimated that it would take six to nine months to complete a treatability study after the work plan and permits are approved. Proposed Compl. ¶ 47.

Finally, Pepco will prepare the feasibility study report. The consent decree requires Pepco to submit a draft feasibility study report either 120 days after the approval of the final treatability study report or 180 days after completion of the field work described in the RI/FS work plan, if no treatability study is needed. ECF No. 22-1 ¶ 8(c)(v). The consent decree contains no deadlines for the District's review of the report, public comments on the report, Pepco's revision, or the District's final approval. *See id.*; Proposed Compl. ¶ 48.

Combining these estimates, and assuming that a treatability study is not necessary, the parties' apparent best case scenario is that Pepco will complete the additional remedial investigation field work by late October 2016 and submit a draft feasibility study report to the District by late April 2017. If the District were to release the feasibility study report for public comment within two weeks, the public comment period could be completed by mid-June 2017.[2] Then, assuming two months for the District to review the feasibility study report and respond to the public comments, and two months for Pepco to revise it, the final feasibility study report would be submitted and approved in October 2017. That schedule would require Pepco and the District to progress through the upcoming milestones faster than they have achieved the milestones completed to date, and the schedule could apparently be extended by nine months or more if a treatability study is required.

The ultimate purpose of the RI/FS is to characterize the severity of the pollution and identify possible remedies, so that the river can be cleaned up. The District has said that, after all of the steps listed above are finished, it will take two more years to issue a Record of Decision and choose a remedy. Proposed Compl. ¶ 49. Thus, even if the RI/FS is finished within eighteen months, or by the fall of 2017, work on a remedy to clean up this pollution will not start until late 2019 or early 2020 at the absolute earliest, and that schedule assumes that Pepco does not contest the chosen remedy.

ARGUMENT

Environmental Plaintiffs have significant interests in the cleanup of Pepco's toxic contamination in the Anacostia River. These interests are inadequately represented by the existing parties, whose ongoing delay is impeding Environmental Plaintiffs' ability to

[2] So far, it has taken the District a minimum of 15 days and up to 306 days to release draft RI/FS documents for public comment. Colangelo Decl. Ex. C (table of comment periods).

protect their interests. The Court should permit intervention and enter an order setting binding deadlines for the District and Pepco to finish the remaining steps in their Anacostia River cleanup study and remedy proposal. The Court should also require quarterly status reports from the parties, to ensure effective oversight. Without a court order, the RI/FS process could continue to drag out indefinitely, with no accountability. Any presumption of deference to the parties' asserted need for flexibility has been overcome by their inability to meet self-imposed schedules and failure to complete the required work in a timely manner.

I. Environmental Plaintiffs are entitled to intervene

Federal Rule of Civil Procedure 24 establishes the requirements for intervention. To intervene as of right, Rule 24(a)(2) requires prospective intervenors to: (1) make a timely motion, (2) identify an interest in the subject of the action, (3) be situated such that "disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest," and (4) be inadequately represented by existing parties. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003) (internal quotation marks omitted); *see also Jones v. Prince George's County*, 348 F.3d 1014, 1017 (D.C. Cir. 2003). These same factors are referenced in RCRA, 42 U.S.C. § 6972(b)(2)(E), which this Court noted "may best be read as clarifying the circumstances in which Rule 24(a) intervention of right is appropriate in a RCRA action." ECF No. 31 at 9 n.2.[3] In addition, a prospective intervenor in this circuit must demonstrate that it has standing. *Fund for Animals*, 322 F.3d at 731-32. Environmental Plaintiffs satisfy these requirements.

[3] The only difference between the Rule 24(a)(2) factors and the RCRA factors is that under RCRA the governmental party bears the burden of proving adequacy of representation, whereas under Rule 24(a)(2) the applicant bears the burden of showing inadequacy of representation. *See* S. Rep. No. 98-284, at 56 (1983) (attached at Colangelo Decl. Ex. D). This difference does not affect the outcome here.

A. Environmental Plaintiffs have standing

Environmental Plaintiffs are non-profit environmental membership organizations and seek to intervene in this action on behalf of their affected members. Proposed Compl. ¶¶ 13-16. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Members of the Environmental Plaintiff organizations have standing to sue when they can show a concrete and particularized injury that is fairly traceable to the defendant's challenged action and likely to be redressed by a favorable decision. *Id.* at 180-81.

Standing to intervene, like other aspects of intervention, "should be viewed on the tendered pleadings." *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 75 (D.C. Cir. 1988). The allegations in the proposed complaint in intervention must be accepted as valid. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980); *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (noting that the court treats the proposed intervenor's "factual allegations as true and must grant [the intervenor] the benefit of all inferences that can be derived from the facts alleged" (internal quotation marks omitted)).

Environmental Plaintiffs have standing to assert the RCRA claim alleged in their proposed complaint. All three groups are environmental organizations with specific interests in ensuring clean water, promptly cleaning up toxic substances in the environment, and protecting human and environmental health. Proposed Compl. ¶¶ 13-16. Anacostia

Riverkeeper and AWS specifically focus on protecting and restoring the health of the Anacostia River and the local communities that use the river. *Id.* ¶¶ 13-14. This action is germane to these organizations' purposes. *See Friends of the Earth*, 528 U.S. at 181.

Members of the Environmental Plaintiff organizations are injured by actual and threatened exposure to Pepco's PCB contamination, and by diminished use and enjoyment of the Anacostia River due to their well-founded fears about the PCB contamination. Proposed Compl. ¶¶ 13-16; *Friends of the Earth*, 528 U.S. at 183 ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (citation omitted)); *Bldg. & Const. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Devel., Inc.*, 448 F.3d 138, 146 (2d Cir. 2006) (allegations that an organization's members have been exposed to hazardous contamination, such as "contaminated soil and waste materials," are sufficient to support standing under RCRA).

Pepco caused and contributed to these injuries by releasing toxic PCBs onto its property and into the Anacostia River, and has exacerbated these injuries by failing to remediate the PCB contamination in a timely manner. Proposed Compl. ¶¶ 25-32. A favorable decision ordering Pepco to fully assess the extent of contamination by a date certain will redress these injuries by allowing Environmental Plaintiffs' members to tailor their behavior to the actual conditions in the river and by setting the stage for a possible remediation that could prevent further exposures and risks of exposure to Pepco's PCBs. *Id.* ¶ 16; *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 n.5 (1st Cir. 2006) (concluding that a scientific study of the extent of pollution provides "adequate redress because it will allow the plaintiffs to tailor their behavior to the actual condition of the

[river]," even if remediation is not undertaken); *Interfaith Cmty. Org. v. Honeywell Intern., Inc.*, 399 F.3d 248, 257 (3d Cir. 2005) (holding that redressability in a RCRA case is shown by the availability of relief that "will materially reduce [Plaintiffs'] reasonable concerns about . . . endangerments"). Finally, the requested relief does not require the participation of individual members of any of the Environmental Plaintiff organizations. Proposed Compl. ¶¶ 58-61; *see Friends of the Earth*, 528 U.S. at 181.

Pepco is not the only source of pollution to the Anacostia River. But when a pollution problem has multiple contributors, the availability of partial redress is sufficient to show standing. "Plaintiffs need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III." *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 73 (3rd Cir. 1990). It is enough if "an injunction will redress that injury at least in part." *Id.*; *see also Mass. v. Envtl. Prot. Agency*, 549 U.S. 497, 525-26 (2007).

Environmental Plaintiffs therefore have standing to intervene.

B. The motion to intervene is timely

Environmental Plaintiffs' motion to intervene is timely. This case was filed five years ago, but Environmental Plaintiffs' motion to intervene at the time was denied. There has been no activity in court since then, other than the parties' submission of three status reports. At the 2011 hearing, the Court twice suggested that it could entertain a renewed intervention motion if it became clear that the work required under the consent decree was not proceeding promptly. Colangelo Decl. Ex. B (Tr. 13:12-25, 26:10-27:15). It has been four and a half years since the RI/FS work started, and it apparently will not be finished for at least another year and a half.

Timeliness is also measured in part against what the intervenors seek to do in the case. Specifically, timeliness "is to be judged in consideration of all the circumstances" including (1) "time elapsed since the inception of the suit," (2) "the purpose for which intervention is sought," (3) "the need for intervention as a means of preserving the applicant's rights," and (4) "the probability of prejudice to those already parties in the case." *Am. Tel. & Tel. Co.*, 642 F.2d at 1295. The circumstances here demonstrate that this motion is timely. Environmental Plaintiffs seek final deadlines for the parties to complete the consent decree work. There would be no prejudice to the parties if intervention were allowed now to ask for that; it would not delay the resolution of the case, or force the parties to reopen discovery, or cause any other harm of the type that typically supports denying intervention for lack of timeliness. *Cf. United Nuclear Corp. v. Cannon*, 696 F.2d 141, 142-43 (1st Cir. 1982). To the contrary, in the context of the extraordinary delays so far, intervention is meant to and likely will accelerate the resolution of this case (and ultimately the cleanup of the Anacostia River).

C. Environmental Plaintiffs have a significant interest in the prompt assessment and remediation of toxic contamination in the Anacostia River

Environmental Plaintiffs have a sufficient interest in this action to intervene. A finding that a party has "constitutional standing is alone sufficient to establish that [the party] has 'an interest relating to the property or transaction which is the subject of the action.'" *Fund for Animals*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2)); *Jones*, 348 F.3d at 1018-19. The same factual allegations that support standing establish a sufficient interest for intervention. Fed. R. Civ. P. 24(a)(2). Specifically, Environmental Plaintiffs have significant interests in protecting human health and the health of their members in particular, and in protecting and restoring the Anacostia River. Proposed Compl. ¶¶ 13-16.

This includes an interest in the timely assessment and abatement of Pepco's toxic contamination in the river. *Id.* ¶ 16.

D. Environmental Plaintiffs' ability to protect their interests has been impaired by the disposition of this action and will be further impeded if they are unable to intervene

The current disposition of this action—through a consent decree that lacks deadlines for the completion of the RI/FS—has impaired and will continue to impair Environmental Plaintiffs' ability to protect their interests. First, the delays in the RI/FS process have postponed indefinitely any cleanup of Pepco's PCB pollution in the river. Although this lawsuit will not directly resolve the question of the best remedy, the RI/FS must be completed before a remedy can be sought, designed, and implemented. The ongoing delays in the RI/FS process therefore impair Environmental Plaintiffs' ability to protect their interests in a prompt and thorough cleanup.

Second, Environmental Plaintiffs' ability to protect their interest in timely assessment of the contamination has been impaired by the lack of enforceable deadlines. As described above, the scientific information generated by the RI/FS is an important part of any relief for Environmental Plaintiffs—even absent a subsequent cleanup order—because it allows their members to tailor their behavior to the conditions in the Anacostia River revealed by the RI/FS. *See Me. People's Alliance*, 471 F.3d at 283 n.5. The delays in the RI/FS process are preventing Environmental Plaintiffs' members from having access to this information within a reasonable time period.

The parties' repeated broken promises about the RI/FS schedule are a significant changed circumstance since the first motion to intervene was filed in 2011. The RI/FS process has now dragged on for years, and the status quo in this case—ongoing PCB

contamination in the Anacostia River—is harming Environmental Plaintiffs and their members on a daily basis. The only way for Environmental Plaintiffs to protect their interests is to intervene in this case to seek the "reasonable, binding deadlines for the completion of the work" that the Court previously assumed the District would set and enforce, ECF No. 31 at 13, but which have not materialized.

E. No other party adequately represents Environmental Plaintiffs' interests

Under Rule 24, a prospective intervenor satisfies the requirement of inadequate representation "'if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.'" *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). This requirement is "not onerous." *Id.* Representation may be inadequate where the interests of the party seeking intervention and those of the existing party are "different," even if they are not "wholly 'adverse.'" *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967). The interests of a governmental party and a seemingly aligned prospective intervenor "might diverge during the course of litigation," and the D.C. Circuit "ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736.

The District does not adequately represent Environmental Plaintiffs' interests.[4] The District has not held Pepco to the RI/FS schedule that was promised to the Court in 2011, or to the updated schedules promised in subsequent status reports in 2013, 2014, or 2015. Experience now shows that Environmental Plaintiffs cannot rely on the District to adequately represent their interest in prompt completion of the RI/FS.

[4] Nor does Pepco adequately represent Environmental Plaintiffs' interests.

F. If not granted leave to intervene as of right, Environmental Plaintiffs should be granted permissive intervention, or the Court should treat this motion as a further amicus submission

If this Court denies intervention as of right, Environmental Plaintiffs move for permission to intervene under Federal Rule of Civil Procedure 24(b). Rule 24(b)(1)(B) provides that "[o]n timely motion" a party may intervene if it "has a claim or defense that shares with the main action a common question of law or fact." In granting permissive intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The D.C. Circuit generally requires applicants for permissive intervention to present "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

Environmental Plaintiffs satisfy these criteria. The proposed complaint asserts a claim under RCRA and thus provides an independent ground for subject matter jurisdiction. This claim shares common questions of law and fact with the claims in the District's complaint. The motion is timely for the reasons described above.

In 2011, this Court denied permissive intervention because it was "likely to unduly delay the adjudication of the original parties' rights," ECF No. 31 at 10, but that concern is inapplicable now. The consent decree has been entered, and Environmental Plaintiffs do not seek to undo it. Instead, consistent with the parties' original intended schedule, Environmental Plaintiffs seek to expedite the completion of the RI/FS required by the consent decree. Allowing permissive intervention now will not cause any delays; to the

contrary, this motion has been prompted by the parties' delay in executing the work required by the consent decree.

Finally, if not granted leave to intervene, Environmental Plaintiffs request that this motion be treated as a further submission from amici curiae. This Court previously noted that it "has broad discretion to permit the proposed intervenors to participate as amici curiae." ECF No. 31 at 10-11. If the Court denies Environmental Plaintiffs' motion to intervene, the Court should treat this motion as an amicus brief in response to the parties' status reports regarding consent decree implementation.

II. The Court should direct the parties to complete the consent decree work by a date certain, to effectuate the parties' intent and to prevent injustice

The Court should set binding deadlines for the parties to complete the remaining work they committed to do in the consent decree. Otherwise, the RI/FS process may continue to drag on indefinitely, to the detriment of the intervenors and the public, and contrary to the parties' professed intent and obligation to proceed expeditiously. The Court should also direct the parties to file quarterly status reports instead of annual reports, to ensure adequate oversight of the rest of the work.

A. The Court should enter an order setting binding deadlines for the parties to complete the consent decree work and requiring quarterly status reports

This Court has equitable authority to modify the consent decree in order to achieve the decree's stated purpose. Courts have applied two different tests when evaluating a request to amend a consent decree, both of which Environmental Plaintiffs satisfy here.

First, "[a]t the request of the party who sought the equitable relief, a court may tighten the decree in order to accomplish its intended result." *United States v. W. Elec. Co.*, 46 F.3d 1198, 1202 (D.C. Cir. 1995) (citing *United States v. United Shoe Mach. Corp.*, 391 U.S.

244, 252 (1968)); *see also Thompson v. HUD*, 404 F.3d 821, 825 (4th Cir. 2005) ("[C]ourts are vested with the inherent power to modify injunctions they have issued. That same authority also exists with regard to a court's consent decrees . . . ."). If a decree has not "achieved its 'principal objectives,'" the court "should modify the decree so as to achieve the required result with all appropriate expedition." *United Shoe*, 391 U.S. at 251-52. The "essential inquiry" is "whether modification or clarification is necessary to achieve the intended result" of the consent decree. *Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC (WMATC)*, 985 F. Supp. 2d 23, 28 (D.D.C. 2013) (modifying prior injunctive order to include another business owned and operated by the defendant). This standard applies when a plaintiff "seeks modification or clarification of the Order to ensure that it achieves its intended results." *Id.* at 28 n.4.

Second, Federal Rule 60(b)(5) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" because "applying it prospectively is no longer equitable." The Supreme Court, interpreting this Rule, stated that a consent decree "is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992). The Court held that, under Rule 60(b)(5), "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* at 383. This initial burden may be met by showing a significant change "either in factual conditions or in law." *Id.* at 384. The Court listed three factual situations that would warrant revision; the one most relevant here is "when enforcement of the decree without modification would be detrimental to the public

interest." *Id.* In addition, a proposed modification to a consent decree must be "suitably tailored to the changed circumstance." *Id.* at 391.

On its face, Rule 60(b)(5) (and by extension the *Rufo* standard) "does not inherently seem to apply when the beneficiary of a decree seeks to extend the decree, rather than relieve itself of obligations." *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141, 168 (D.D.C. 2008). But Rule 60(b)(5) "has been described as 'little more than a codification of the universally recognized principle that a court has continuing power to modify or vacate a final decree.'" *W. Elec.*, 46 F.3d at 1202 (quoting 11 Wright & Miller, Fed. Prac. & Proc. § 2961 (1994)). Courts have routinely applied *Rufo* to cases "in which the beneficiary of a consent decree sought to extend the decree's term or sought other modifications to consent decrees." *New York*, 531 F. Supp. 2d at 169 (citing cases from the D.C., Second, Fourth, Sixth, and Tenth Circuits); *see also Johnson v. Robinson*, 987 F.2d 1043, 1050 (4th Cir. 1993) (explaining that "a district court may, of course, modify a consent decree to impose new duties upon a party"). The parties' consent or opposition is irrelevant: "[A] court's equitable power to modify its own order in the face of changed circumstances is an inherent judicial power that cannot be limited simply because an agreement by the parties purports to do so." *David C. v. Leavitt*, 242 F.3d 1206, 1210 (10th Cir. 2001).

The Court need not decide which of these standards governs here, because Environmental Plaintiffs meet both. *See, e.g.*, *New York*, 531 F. Supp. 2d at 167-69 (discussing both standards and holding that both had been met). The Court may amend the consent decree to accomplish its intended purpose (under *United Shoe* and *Western Electric*), which was to compel a timely assessment of Pepco's PCB pollution and the possible remedial solutions. *See* ECF No. 22-1 ¶¶ 2, 8(a) (stating that the purposes of the consent

decree include determining the nature and extent of the contamination and identifying and evaluating remedial alternatives, and that all work "shall be completed expeditiously"); ECF No. 31 at 13 (concluding that "dragging the RI/FS process out for years . . . would contravene the intent of the consent decree"). In addition, modification of the decree to add deadlines for the remaining work is both necessary and suitably tailored to protect the public interest (under *Rufo* and Rule 60(b)(5)), in light of the parties' years of ongoing delay and missed deadlines. *See, e.g.*, *Juan F. v. Weicker*, 37 F.3d 874, 879 (2d Cir. 1994) (applying *Rufo* and approving district court amendment of a consent decree to add a graduated timetable to "ensure full and timely compliance").

The Court should also require the parties to file quarterly status reports going forward. Submission of quarterly reports would help the Court ensure that the remaining RI/FS work stays on track and is finished promptly. It would allow the Court to review more often than once a year the parties' summary of their most recent efforts, their work planned for the current quarter, and any need to reconsider the governing schedule in light of extraordinary and unanticipated circumstances.

The Court has authority to direct this relief *sua sponte*, even if the Court denies intervention. *Alberti v. Klevenhagen*, 46 F.3d 1347, 1365-66 (5th Cir. 1995) (holding that a "district court has wide discretion to interpret and modify a forward-looking consent decree . . . regardless of the parties' silence or inertia . . . when the court sees that the factual circumstances or the law underlying that decree has changed"); *see also United States v. City of Miami*, 2 F.3d 1497, 1506 (11th Cir. 1993); *In re Pearson*, 990 F.2d 653, 658-59 (1st Cir. 1993) ("[N]otwithstanding the parties' silence or inertia, the district court is not doomed to some Sisyphean fate, bound forever to enforce and interpret a preexisting decree without

occasionally pausing to question whether changing circumstances have rendered the decree unnecessary, outmoded, or even harmful to the public interest.").

B. The parties' reasons for their repeated delays are inadequate

The parties' reasons for their ongoing delays do not explain why it is taking so long to finish the RI/FS they committed to do. First, Pepco and the District have repeatedly blamed public participation for their delay. *E.g.* ECF No. 33 at 3 (May 2013 status report); ECF No. 34 at 2 (May 2014 status report). But the few opportunities for public comment that they have afforded cannot explain why the parties have fallen years behind schedule. There have been four public comment periods so far during the RI/FS process, some of which overlapped.[5] Colangelo Decl. Ex. C. Combined, these periods comprised 182 days, or six months. But the work may now take a minimum of six years to finish (until late 2017)—four years beyond the "outside date" of two years total that the parties told the Court they would meet. Proposed Compl. ¶ 45; ECF No. 31 at 14 n.4. Six months of public comment do not explain a four-year delay. Also, three of the four public comment periods were finished by the fall of 2012, more than three and a half years ago, and cannot be used to shift blame for the parties' delay since then.

Second, the parties have attempted to blame the delays on permitting and weather issues. ECF No. 34 at 5-6. For example, a National Park Service permit to conduct river sediment sampling was not granted until September 2013, which meant that the sediment sampling could not be completed until January 2014. *Id.* at 5. But Pepco's other field

[5] The four public comment periods were (1) for the statement of work, January 5, 2012 to February 13, 2012, a total of 39 days; (2) for the community involvement plan, February 3, 2012 to March 19, 2012, a total of 45 days; (3) for the RI/FS work plan, health and safety plan, field sampling plan, quality assurance project plan, and conceptual site model, August 9, 2012 to September 28, 2012, a total of 50 days; and (4) for the draft remedial investigation report, March 1, 2016 to April 18, 2016, a total of 48 days. Colangelo Decl. Ex. C.

work—unaffected by the National Park Service permit—took almost another year to finish, until December 2014. Colangelo Decl. ¶ 6 & Ex. E. The permitting delay thus had no net effect on the parties' schedule whatsoever. Similarly, a lack of rainfall delayed the completion of storm drain sampling from June 2013 until October 2013, and very cold weather briefly delayed field work for one week in November 2013. ECF No. 34 at 5-6. But these short-term weather issues were minor inconveniences and do not explain why the remedial investigation field work still took more than another year to complete. *See* Colangelo Decl. ¶ 6 & Ex. E.

Instead, according to the written record, significant delays have resulted from the parties' lengthy reviews of and negotiations over the data and draft reports. For example, Pepco submitted a draft remedial investigation work plan addendum on about October 15, 2013, which the District did not approve until March 26, 2014, more than five months later. *See* Colangelo Decl. Ex. F. Pepco then submitted a draft remedial investigation report in April 2015, but the District did not make it public for comment until March 2016, about ten months later. Proposed Compl. ¶¶ 44-45.

In addition, the District's billing records show that the District should be able to move the RI/FS along faster if it dedicates more resources to the effort. The consent decree requires Pepco to be responsible for all of the District's oversight costs, without limitation, ECF No. 22-1 ¶ 7, and the District hired an outside engineering firm, Tetra Tech, to perform some of the city's technical oversight work, ECF No. 34 at 7. But the amount of time committed to this project, between the District and Tetra Tech combined, has not reflected the resources at the District's disposal. For example, for the period from August 2011 to August 2012, the District billed Pepco only $16,599 for all work by District staff on

the RI/FS. *See* Colangelo Decl. Ex. G. For the same periods in 2013-14 and 2014-15 the District billed Pepco $21,394 and $23,386 respectively, which includes both the District's and Tetra Tech's work.[6] *Id.* Thus, even combining the efforts of District and Tetra Tech staff, the District's work on this project appears to have amounted to less than one-third of the equivalent of one full-time legal or technical employee per year.[7]

The consent decree provides the District with access to ample resources to move this project along much more quickly. Furthermore, as the Court noted previously, under the consent decree it is the District's responsibility to set and enforce reasonable deadlines to finish the work. *See* ECF No. 31 at 13-14. By setting binding deadlines for the RI/FS, the Court can compel the District to dedicate the necessary resources, at Pepco's expense, to meet these responsibilities and finish the RI/FS as promptly as possible.

The parties' continuing delay harms the public, undermines the purpose of the consent decree, and violates the parties' commitments to this Court.

C. The parties may propose reasonable deadlines for the Court to order

To determine appropriate deadlines, the Court should direct the parties to propose an aggressive but realistic final date for completion of the consent decree work, and to propose

[6] As of April 21, 2016, counsel for the District was unable to locate an invoice for the period from August 2012 to August 2013. *See* Colangelo Decl. Ex. G. The invoices for 2011-12 and 2013-14 were sent to Pepco together on December 31, 2014, which suggests that the District may not have recorded or billed Pepco for any oversight costs for 2012-13. *Id.*

[7] The District's 2014-15 invoice sought $45.29 per hour for the District's principal engineer on this matter (Apurva Patil) and $55.12 per hour for the District's principal lawyer on this matter (Jared Piaggione) for their most recent work related to the RI/FS. *See* Colangelo Decl. Ex. G. Assuming a 35-hour work week for 50 weeks per year, these rates would yield annual costs of $79,257.50 and $96,460.00 respectively for a single full-time employee. Tetra Tech's rates were redacted on the invoices, but are likely higher. The most the District has billed Pepco in any year for oversight work under the consent decree is $23,386.14, or less than a third of the annual rate for a single legal or technical employee.

and justify deadlines for all necessary interim steps. Finishing the RI/FS by the fall of 2017 seems fully achievable and even generous based on the parties' latest public statements (unless a treatability study is required). Proposed Compl. ¶¶ 46-48; *supra* pp. 8-10. To account for any uncertainty about the treatability study, the parties could propose two schedules if necessary, one that includes the treatability study and one that does not. Environmental Plaintiffs should be provided an opportunity to object to or comment on the parties' proposed schedule(s). The Court should then set binding deadlines for each of the remaining RI/FS components based on the evidence submitted, and the parties should be bound by those final dates, with no further extensions absent truly extraordinary circumstances.

CONCLUSION

The District and Pepco have failed to meet four earlier commitments to complete the remedial investigation and feasibility study—commitments that the parties made to this Court in November 2011, May 2013, May 2014, and May 2015. Until the work is done, Pepco will not begin cleaning up the toxic waste that it spilled into the Anacostia River over the past three decades. A Court order setting deadlines and requiring more frequent reporting from the parties is necessary to end the chronic delays and compel completion of the consent decree work, in order to begin restoring the health of the river.

REQUEST FOR HEARING

Pursuant to Local Rule 7(f), the Environmental Plaintiffs request an oral hearing on this motion.

Respectfully submitted,

/s/ Aaron Colangelo

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Counsel for Proposed Plaintiff-Intervenors

Dated: May 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this date, May 17, 2016, I caused to be served a true and correct copy of the Motion to Intervene and Memorandum in Support; Declaration of Aaron Colangelo and attached exhibits; Proposed Complaint in Intervention for Declaratory and Injunctive Relief; and Proposed Order on all counsel using the Court's ECF system.

/s/ Aaron Colangelo
Aaron Colangelo