

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA  
MARTINSBURG DIVISION**

**POTOMAC RIVERKEEPER, INC.,**

**Plaintiff,**

**v.**

**BERKELEY COUNTY PUBLIC  
SERVICE SEWER DISTRICT,**

**Defendant.**

**Civil Action No. 3:15-cv-00095**

**CONSENT DECREE**

**I. RECITALS**

1. On August 25, 2015, Potomac Riverkeeper, Inc. (“Riverkeeper” or “Plaintiff”) filed an Amended Complaint for Declaratory and Injunctive Relief and for Civil Penalties against Berkeley County Public Service Sewer District (“BCPSSD” or “District”).

2. The Complaint alleged that BCPSSD discharged quantities and/or concentrations of fecal coliform, total kjeldahl nitrogen (TKN), total recoverable zinc and total suspended solids in excess of applicable effluent limits contained in West Virginia / National Pollution Discharge Elimination System (“WV/NPDES”) Permit No. WV0105791 (the “Permit”), which was issued to the District by the West Virginia Department of Environmental Protection (“WVDEP”) under Section 402 of the federal Clean Water Act (or the “Act”) and the West Virginia Water Pollution Control Act.

3. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid further litigation between the Parties, and that this Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

## **II. JURISDICTION AND VENUE**

4. For purposes of this Consent Decree, the Parties agree, and this Court finds, that this Court has jurisdiction over the Parties and over the subject matter of this action under 28 U.S.C. § 1331 (federal question jurisdiction) and 33 U.S.C. § 1365 (Clean Water Act citizen suit provision).

5. Venue is proper in the Northern District of West Virginia under 28 U.S.C. § 1391(b) and (c), because it is the judicial district in which BCPSSD is located, resides and/or does business, and/or in which the violations alleged in the Complaint occurred. Venue is also proper according to 33 U.S.C. § 1365(c)(1), because the source of the alleged violations are located in this judicial district.

6. For purposes of this Consent Decree, or any action to enforce this Consent Decree, BCPSSD consents to this Court's jurisdiction over this Consent Decree and consents to venue in this judicial district.

## **III. APPLICABILITY**

7. The provisions of this Consent Decree apply to and are binding upon:
- a. Potomac Riverkeeper, Inc. and those with authority to act on its behalf, including, but not limited to, its officers, directors, staff and affiliated organizations in the Potomac Riverkeeper Network;
  - b. BCPSSD, and those with authority to act on its behalf, including, but not limited to, its officers, directors, staff, and any of its respective successors and/or assigns; and

c. other persons or entities otherwise bound by the law.

8. No transfer of ownership or operation of the Facility shall relieve BCPSSD of its obligation to ensure that the terms of this Consent Decree are implemented; provided, however, that prior to any transfer, if BCPSSD desires to transfer ownership or operation of the Facility, BCPSSD shall provide a copy of this Consent Decree to the proposed transferee and require the transferee to provide written confirmation acknowledging the terms of the Consent Decree and that the transferee will be bound by those terms. BCPSSD shall provide a copy of proof that it provided a copy of this Consent Decree and the written confirmation by the transferee to Plaintiff within ten business (10) days of receipt of the written confirmation. After Plaintiff's receipt of the proof and written confirmation, BCPSSD shall no longer be subject to this Decree.

9. BCPSSD shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties include direct responsibility for compliance with any provision of this Consent Decree, as well as to any contractor retained to perform work required under this Consent Decree.

#### **IV. DEFINITIONS**

10. Terms used in this Consent Decree that are defined in the Act or in regulations issued pursuant thereto shall have the meanings assigned to them therein, unless defined otherwise in this Decree.

11. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. "Act" shall mean the Clean Water Act, 33 U.S.C. § 1251–1388.

- b. “Complaint” shall mean the Amended Complaint for Declaratory and Injunctive Relief and for Civil Penalties filed by Potomac Riverkeeper, Inc. in this action on August 25, 2015;
- c. “Compliance Date” shall mean the effective date of this Consent Decree;
- d. “Compliance Officer” shall mean the individual hired by the District to conduct annual internal inspections of its facilities and coordinate compliance activities for the District.
- e. “Day” shall mean a calendar day, unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day;
- f. “Defendant” shall mean Berkeley County Public Service Sewer District;
- g. “Effective Date” shall have the definition provided in Section XII (“Effective Date”) of this Decree;
- h. “EPA” shall mean the United States Environmental Protection Agency;
- i. “Facility” shall mean BCPSSD’s discharge outlet and operations subject to WV/NPDES Permit No. WV0105791;
- j. “Maximum daily effluent limit” shall mean maximum daily discharge limitation as defined in 40 C.F.R. § 122.2;
- k. “Monthly average effluent limit” shall mean average monthly discharge limitation as defined in 40 C.F.R. § 122.2;
- l. “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral;

- m. "Parties" shall mean the Plaintiff Potomac Riverkeeper, Inc. and the Defendant BCPSSD;
- n. "Permit" shall mean WV/NPDES Permit No. WV0105791;
- o. "Plaintiff" shall mean Potomac Riverkeeper, Inc., the Potomac Riverkeeper Network and any affiliated organizations;
- p. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral;
- q. "State" shall mean the State of West Virginia;
- r. "WV0105791" shall mean WV/NPDES Permit No. WV0105791;
- s. "WVDEP" shall mean the West Virginia Department of Environmental Protection; and
- t. "WV/NPDES permit" shall mean a West Virginia / National Pollutant Discharge Elimination System permit issued by WVDEP pursuant to Section 402 of the Clean Water Act.

## **V. CIVIL PENALTY**

12. BCPSSD shall pay a civil penalty in the amount of forty-thousand dollars (\$40,000.00) to the United States as set forth in Paragraph 13 below. The payment of this civil penalty is made in settlement of all of the Plaintiff's claims in this action under the Act for violations occurring prior to the Effective Date of this Consent Decree.

13. BCPSSD shall pay the civil penalty due to the United States Treasury within sixty (60) days of the Effective Date of this Decree. That payment shall be made by check or money order to the Treasurer of the United States and should be sent to the following address:

Debt Collection Specialist  
Environment and Natural Resources Division, Executive Office

Post Office Box 7611  
Ben Franklin Station  
Washington, District of Columbia 20044-7754

The check or money order shall reference *Potomac Riverkeeper, Inc. v. Berkeley County Public Service Sewer District*, Case No. 3:15-cv-00095, and payment shall be considered paid upon mailing or direct delivery to the specified address. A copy of the check/money order and cover letter shall be sent to the Plaintiff at the time payment is made and shall state that payment is being made pursuant to this Decree.

14. The sum set forth in **Paragraph 12** resolves all claims for civil penalties under 33 U.S.C. § 1365 arising from the permit violations alleged in the Complaint and any violations of the Permit terms not identified in the Complaint that have occurred or may occur at the Facility prior to the Effective Date of this Consent Decree.

## VI. COMPLIANCE REQUIREMENTS

15. BCPSSD will achieve full compliance with all terms and conditions of its Permit no later than the effective date of this Order (the “Compliance Date”).

16. Within six (6) months of the effective date of this Order, the District will hire a Compliance Officer whose sole responsibility shall be to inspect the District’s facilities and focus the District’s efforts on compliance with all of the District’s WV/NPDES Permits.

17. The District shall identify the Compliance Officer to Potomac Riverkeeper and the WVDEP within ten (10) business days of the officer’s starting date with the District.

18. The District’s Compliance Officer shall conduct formal inspections of each of the District’s facilities at least once per calendar year. As part of the inspection of each District facility, the Compliance Officer shall assess the District’s compliance with the WV/NPDES permit for that facility.

19. The Compliance Officer will generate written reports for each of the annual inspections at each facility.

20. The Compliance Officer's annual inspection of the Marlowe Towne Center wastewater treatment plant (WV/NPDES Permit No. WV0105791) shall be provided to Potomac Riverkeeper and the WVDEP within fifteen (15) business days of completion.

21. The District shall provide the Compliance Officer's inspection reports from the District's other NPDES-permitted facilities to the Potomac Riverkeeper and the WVDEP within thirty (30) days of completion of the report.

22. The District will have ninety (90) days after the completion of each Compliance Officer inspection report to provide a written response describing any actions taken to address issues identified in the report. A copy of the District's written response shall be provided to the Potomac Riverkeeper and the WVDEP within ten (10) business days.

23. Potomac Riverkeeper agrees to forego any type of legal action against the District regarding any violation of an effluent limitation or permit term or condition identified in the written reports generated by the District's Compliance Officer pursuant to paragraph 19.

24. The Plaintiff agrees further that no material from an internal inspection by the District's Compliance Officer shall be used as evidence against the District in any legal action brought by the Plaintiff and that the Plaintiff will not depose or call the Compliance Officer as a witness in any future litigation against BCPSSD.

25. Upon written request on no more than a quarterly basis beginning on the effective date of this Order, the District shall provide the Potomac Riverkeeper with a copy of any written notice of a spill, upset, or incident at the District's facilities that the District sends to the WVDEP

pursuant to the terms and conditions of the WV/NPDES Permit for such facility. The District shall provide requested copies within thirty (30) days of a receipt of the written request.

26. The District shall provide the Potomac Riverkeeper with a copy of the Discharge Monitoring Reports generated and submitted to WVDEP pursuant to WV/NPDES Permit No. WV0105791 within five (5) days of the District sending such Report to the WVDEP.

27. The District's obligations pursuant to paragraphs 17-26 shall continue for a period of three (3) years from the Effective Date.

28. This Consent Decree in no way affects or relieves BCPSSD of its responsibility to comply with applicable federal, state, and local laws, regulations, and permits, but Plaintiff shall not seek any remedies under the Act for violations of the Permit terms identified in the Complaint so long as this Decree is in effect, other than those remedies set forth herein.

## **VII. STIPULATED PENALTIES**

29. BCPSSD shall pay stipulated penalties to the United States Treasury for violations of its Permit as set forth below:

- a. For each violation of a Permit daily maximum effluent limit or a Permit monthly average effluent limit that occurs after the Compliance Date but before the termination of this Consent Decree or the termination of stipulated penalties pursuant to paragraph 31, BCPSSD shall pay a stipulated penalty of five-hundred dollars (\$500.00) to the United States Treasury;

30. BCPSSD shall pay such stipulated penalty within thirty (30) days of receipt of a written demand for such penalty from the Plaintiff. Payment shall be made by check or money order to the Treasurer of the United States and should be sent to the following address:

Debt Collection Specialist  
Environment and Natural Resources Division, Executive Office

Post Office Box 7611  
Ben Franklin Station  
Washington, District of Columbia 20044-7754

The check or money order shall reference *Potomac Riverkeeper, Inc. v. BCPSSD, LLC*, Case No. 3:15-cv-00095 and payment shall be considered paid upon mailing or direct delivery to the specified address. A copy of the check/money order and cover letter shall be sent to the Plaintiff at the time payment is made and shall state that payment is being made pursuant to this Decree.

31. Stipulated Penalties pursuant to this Consent Decree shall terminate when BCPSSD has demonstrated full compliance with all Permit effluent limits for at least nine (9) consecutive months following the Compliance Date. Termination of stipulated penalties pursuant to this provision will not affect BCPSSD's liability for stipulated penalties incurred prior to such termination.

32. The Plaintiff may, in its sole discretion, reduce or waive stipulated penalties pursuant to this Consent Decree.

#### **VIII. FORCE MAJEURE**

33. "Force Majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the reasonable control of BCPSSD, of any entity controlled by BCPSSD, or of BCPSSD's contractors, which delays or prevents the performance of any obligation under this Consent Decree despite BCPSSD's best efforts to fulfill the obligation. The requirement that BCPSSD exercises "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential Force Majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible.

34. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a Force Majeure event, BCPSSD shall provide notice by electronic or facsimile transmission to the Potomac Riverkeeper within fifteen (15) business days of when BCPSSD first knew that the event might cause a delay. Within fifteen (15) days thereafter, BCPSSD shall provide in writing to the Potomac Riverkeeper an explanation of the reasons for the delay, the anticipated duration of the delay, and the actions taken or to be taken to prevent or minimize the delay.

35. If the Potomac Riverkeeper agrees that the delay or anticipated delay is attributable to a Force Majeure event, the time for performance of the obligations under this Consent Decree that are affected by the Force Majeure event will be extended by Potomac Riverkeeper for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the Force Majeure event shall not, of itself, extend the time for performance of any other obligation. Potomac Riverkeeper shall notify BCPSSD in writing within fifteen (15) business days of the length of the extension, if any, for performance of the obligations affected by the Force Majeure event.

36. If Potomac Riverkeeper does not agree that the delay or anticipated delay has been or will be caused by a Force Majeure event, the Riverkeeper will notify BCPSSD in writing of its decision with five (5) days of their receipt of the Force Majeure claim by BCPSSD. Any dispute between the Parties over a Force Majeure claim may be resolved by the Court.

#### **IX. EFFECT OF SETTLEMENT / RESERVATION OF RIGHTS**

37. This Consent Decree resolves the Plaintiff's civil claims for the violations alleged in the Complaint, as well as for violations reported on discharge monitoring reports through the Effective Date of this Decree.

38. For the term of this Consent Decree, Plaintiff shall waive all legal and equitable remedies, except for any proceeding or action to enforce this Decree, which would otherwise be available to enforce discharge, effluent, or water quality limits related to those parameters identified in the Complaint. The Parties each respectively reserve all legal and equitable rights and defenses available to them to enforce or defend the provisions of the Consent Decree.

39. The provisions of this Section shall not prohibit individuals who are members of the Potomac Riverkeeper Network from prosecuting claims against BCPSSD for property damage or personal injury resulting from BCPSSD's discharges. Nothing in this Consent Decree shall be interpreted as a waiver, compromise, or settlement of any cause of action personal to the Potomac Riverkeeper's individual members, under either statutory or common law, for personal injury or property damage resulting from BCPSSD's discharges.

40. This Consent Decree shall not limit or affect the rights of the Plaintiff or BCPSSD against any third parties not party to this Decree.

41. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to the Decree.

#### **X. COSTS AND ATTORNEYS FEES**

42. BCPSSD shall pay reasonable costs and attorneys' fees incurred by the Plaintiff in conjunction with this civil action through the Effective Date of this Consent Decree, in accordance with the fee-shifting provisions of the Act. BCPSSD shall not be responsible for any fees incurred by Plaintiff for responding to possible comments on this Decree by the Department of Justice. The parties agree that those costs and fees shall be no more than thirty-thousand dollars (\$30,000.00).

43. As soon as practicable after the Effective Date of this Consent Order, the Potomac Riverkeeper shall deliver to BCPSSD a summary of the costs and attorneys' fees incurred in the prosecution of this action. This summary shall include a list of each attorney, the number of hours worked, the hourly rate and a brief description of categories or work performed. No later than thirty (30) days from the receipt of said summary, BCPSSD shall deliver to the Riverkeeper's counsel a check for the total amount set forth in the summary payable to Christopher Stroech, of Arnold & Bailey, counsel for Plaintiff in this action, who shall be wholly responsible for the proper distribution of any portions of the delivered sum to any and all attorneys or other entities who may be entitled thereto. The sum delivered under this paragraph shall be a complete settlement of the Plaintiff's claims for costs and fees incurred up to the Effective Date of this Consent Decree.

## **XI. NOTICES**

44. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

a. To the Potomac Riverkeeper:

Kenneth T. Kristl, Esq  
Director, Environmental & Natural Resources Law Clinic  
Widener University Delaware Law School  
4601 Concord Pike  
Wilmington, DE 19803

b. To BCPSSD:

Richard L. Lewis  
Steptoe & Johnson PLLC  
707 Virginia Street East, Suite 1700  
Post Office Box 1588  
Charleston, West Virginia 25326-1588

45. Either Party may, by written notice to the other, change its designated notice recipient or notice address provided above.

46. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided by mutual agreement of the Parties in writing. The calculation of deadlines as set forth in this Decree shall begin upon receipt of any notices set forth herein.

## **XII. EFFECTIVE DATE**

47. The Effective Date of this Consent Decree shall be the date upon which the Court enters this Decree or grants a motion to enter this Consent Decree, whichever occurs first, as recorded on the Court's docket.

## **XIII. RETENTION OF JURISDICTION**

48. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, or effectuating or enforcing compliance with the terms of this Decree.

49. The Parties reserve all legal and equitable rights and defenses available to them to enforce or defend the provisions of this Consent Decree.

## **XIV. MODIFICATION**

50. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

## **XV. TERMINATION**

51. This Consent Decree shall terminate in either of the following circumstances: (A) Except for those provisions covered by paragraph 27 above, the remaining provisions of this Consent Decree shall terminate when BCPSSD has demonstrated full compliance with all Permit effluent limits for twelve (12) consecutive months following the Effective Date of this Consent Decree or three (3) years after the Effective Date of this Decree, whichever occurs first.; or (B) All requirements of this Consent Decree (including those provisions covered by paragraph 27) shall terminate at such time as the termination of the Permit.

## **XVI. SIGNATURES / SERVICE**

52. Each undersigned representative of the Parties certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

53. This Consent Decree may be signed in counterparts and its validity shall not be challenged on that basis.

## **XVII. INTEGRATION**

54. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree. The Consent Decree supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

**XVIII. FINAL JUDGMENT**

55. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the Potomac Riverkeeper and BCPSSD. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Federal Rules of Civil Procedure 54 and 58.

ENTER: \_\_\_\_\_

\_\_\_\_\_  
GINA M. GROH  
CHIEF UNITED STATES DISTRICT JUDGE

For the Plaintiff Potomac Riverkeeper, Inc.:

Phillip Musegaas  
Phillip Musegaas  
Vice President of Programs and Litigation  
Potomac Riverkeeper, Inc.  
1615 M Street NW, 2<sup>nd</sup> Floor  
Washington, DC 20036

Dated: 11/7/16

For the Defendant Berkeley County Public Service Sewer District:

Curtis B. Keller  
Curtis B. Keller, General Manager  
Berkeley County Public Service Sewer District  
65 District Way  
Post Office Box 944  
Martinsburg, West Virginia 25402

Dated: 11/8/16