



June 18, 2009

Via Facsimile and U.S. Postal Service, First Class Mail

US Army Humphreys Engineer Center
ATTN: CEHEC-OC
7701 Telegraph Rd.
Alexandria, VA 22315-3860
foia@usace.army.mil
FAX: 703-428-7633

RE: Freedom of Information Act Request – High Hazard Coal Combustion Waste Disposal Sites

To Whom It May Concern:

On behalf of the Sierra Club, Earthjustice, Natural Resources Defense Council and the Environmental Integrity Project, I am writing to request that the United States Army Corps of Engineers (“Army Corps”) provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the Army Corps regulations at 32 C.F.R. § 518.1, *et seq.*

The Sierra Club is the nation’s oldest environmental organization. It has more than 700,000 members nationwide and is dedicated to the protection and preservation of the natural and human environment. The Sierra Club’s Beyond Coal Campaign is dedicated to solving the pressing environmental and health problems associated with the mining, burning and disposal of coal and its combustion by-products.

Earthjustice is a nonprofit public interest law firm dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment. Earthjustice brings about far-reaching change by enforcing and strengthening environmental laws on behalf of hundreds of organizations, coalitions and communities. Earthjustice has been a leader in advocating for the protection of communities from the hazards of coal combustion waste disposal, including the publication of reports and testimony to Congress on the issue of coal ash disposal.

The Natural Resources Defense Council is a nonprofit environmental action group established in 1970 by a group of law students and attorneys at the forefront of the environmental

movement. The Natural Resources Defense Council's purpose is to safeguard the Earth: its people, its plants and animals and the natural systems on which all life depends. NRDC uses law, science and the support of 1.2 million members and online activists to protect the planet's wildlife and wild places and to ensure a safe and healthy environment for all living things. NRDC has worked over several years to ensure the proper regulation of coal combustion waste disposal.

Environmental Integrity Project is a nonpartisan, nonprofit organization established in March 2002 by former U.S. Environmental Protection Agency ("EPA") enforcement attorneys to advocate for more effective enforcement of environmental laws. The organization pursues three main objectives: to provide objective analysis of how the failure to enforce or implement environmental laws increases pollution and affects the public's health; to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and to help local communities in key states obtain the protection of environmental laws. Environmental Integrity Project has worked extensively on coal combustion waste disposal issues recently, including the publication of reports and advocacy before state and federal regulatory bodies on the hazards of coal combustion waste.

Records Requested and Definitions

The Sierra Club, Earthjustice, Natural Resources Defense Council and Environmental Integrity Project are hereinafter referred to collectively as the "Requesting Parties." The Requesting Parties ask that the Army Corps provide any and all records relating to the identification or assessment of coal combustion waste disposal sites in the United States identified by EPA or any other federal agency as the forty-four (44) coal combustion waste disposal sites that pose a "high hazard" to human health.

A list, database or other compilation of 44 "high hazard" coal combustion waste disposal sites was the subject of recent communications between the office of Senator Barbara Boxer and EPA and subsequent, extensive media coverage. Senator Boxer reported that EPA has determined that at least forty-four (44) of the hundreds of coal ash piles across the country pose a "high hazard," meaning that their failure would cause a probable loss of human life. It was reported that EPA has collected information on the locations of the highest hazard sites from the power companies owning or operating the sites. It was also reported that the Army Corps of Engineers and Department of Homeland Security instructed EPA not to disclose the list of 44 "high hazard" sites to Senator Boxer, due to unspecified national security concerns.

For the purposes of this request, the term "records" means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, e-mails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or

otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of the Army Corps or any of its offices nationwide.

Exempt Records

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Requesting Parties to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Requesting Parties at the address listed below.

Fee Waiver Request

We respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 518.19(d). The Requesting Parties have spent years promoting the public interest through the development of policies that protect human health and the environment, and have routinely received fee waivers under FOIA.

The Requesting Parties are all national, nonprofit, environmental organizations with no commercial interest in obtaining the requested information. Instead, our organizations intend to use the requested information to inform the public, so the public can meaningfully participate in the identification, stabilization and remediation of hazards associated with coal combustion waste disposal.

As explained below, this FOIA request satisfies the factors listed in Army Corps' governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 32 C.F.R. § 518.19(d).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The requested records relate to EPA's assessments and determinations regarding the hazards associated with coal ash disposal sites. These determinations and the policies and procedures on which they are based are unquestionably "identifiable operations or activities of the government."

The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. There can be no question that this is such a case.

2. The disclosure of the requested documents must have an informative value and be "likely to contribute to an understanding of Federal government operations or activities."

The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise in the public domain and are not accessible other than through a FOIA request. Given the hazards associated with these ash disposal sites, it is important for information relating to government operations or activities involving the project to be made available to the public. This information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's decision-making process with regard to the high hazard sites.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

As described above, the Requesting Parties and their members have a longstanding interest and expertise in the subject of coal combustion waste disposal. More importantly, the Requesting Parties unquestionably have the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

The Requesting Parties intend to disseminate the information they receive through FOIA regarding these government operations and activities in a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, posting on the organizations' websites, emailing and list-serve distribution to members.

4. The disclosure must contribute "significantly" to public understanding of government operations or activities. The public's understanding must be likely to be enhanced by the disclosure to a significant extent.

There is currently little or no information publicly available regarding the "high hazard" coal combustion waste disposal sites identified by EPA. Absent disclosure of the records requested, the public's understanding will be shaped only by what is disclosed by the private

interests involved. The records requested will contribute to the public understanding of the government's role, or their "operations and activities" associated with this critically important information.

The disclosure of the requested records is also essential to public understanding of the impacts that high hazard disposal sites may have on their communities and homes and the broader environment, including but not limited to threats to human dwellings and drinking water sources. After disclosure of these records, the public's understanding of this problem will be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

The Requesting Parties have no commercial interest in the requested records. Nor do the Requesting Parties have any intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. The Requesting Parties are all tax-exempt organizations under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such have no commercial interest. The requested records will be used for the furtherance of the Requesting Parties' mission to inform the public on matters of vital importance to the environment and public health.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, the Requesting Parties have no commercial interest in the requested records. Disclosure of this information is not "primarily" in the Requesting Parties' commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of the scope and magnitude of high hazard coal combustion waste disposal sites.

We respectfully request, because the public will be the primary beneficiary of this requested information, that the Army Corps waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A). In the event that your agency denies a fee waiver, please send a written explanation for the denial. Also, please continue to produce the records as expeditiously as possible, but in any event no later than the applicable FOIA deadlines.

Record Delivery

We request that the Army Corps, in responding to this request, comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. 5 U.S.C. § 552,

(a)(6)(A)(i); 32 C.F.R. § 518.8(d). Please produce the records above by sending them to me at the address listed below. Please produce them on a rolling basis; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.

Please mail copies of all requested records as soon as possible to:

Patrick Gallagher
Legal Director
Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94105

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at 415.977.5709 or by e-mail at pat.gallagher@sierraclub.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Pat', with a long, sweeping horizontal line extending to the right.

Patrick Gallagher
Legal Director
Sierra Club