

1 David A. Bahr (Oregon Bar No. 90199)
Bahr Law Offices
2 1035 ½ Monroe Street
3 Eugene, OR 97402
(541) 556-6439
4 (541) 334-1786 (facsimile)
davebahr@mindspring.com
5 (Application for admission *pro hac vice* pending)

6 Todd True (Washington Bar No. 12864)
7 Earthjustice
705 Second Avenue, Suite 203
8 Seattle, WA 98104
(206) 343-7340 xt. 30
9 (206) 343-1526 (facsimile)
ttrue@earthjustice.org
10 (Application for admission *pro hac vice* pending)

11 Peter Morgan (California Bar. No. 255210)
12 Sierra Club Environmental Law Program
13 85 Second St., 2nd Floor
San Francisco, CA 94105
14 (415) 977-5727
15 (415) 977-5793 (facsimile)
peter.morgan@sierraclub.org

16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

18 **THE SIERRA CLUB** and
19 **ENVIRONMENTAL INTEGRITY PROJECT,**
20 Plaintiffs,
21 vs.
22 **UNITED STATES ENVIRONMENTAL PRO-**
23 **TECTION AGENCY,**
24 Defendant.

Case No. _____

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Freedom of Information Act
Administrative Procedure Act

25 Plaintiffs, Sierra Club and Environmental Integrity Project (collectively “Plaintiffs”), allege as
26 follows:
27
28

1 **INTRODUCTION**

2 **1.** This action is premised upon, and consequent to, violations of both the Freedom of Information
3 Act (“FOIA”), 5 U.S.C. § 552 *et. seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701
4 *et. seq.* It challenges the unlawful failure of the Defendant, the Environmental Protection Agency
5 (“EPA” or “Agency”), to respond to Plaintiffs’ FOIA request within the time required by FOIA. On
6 June 18, 2009, Plaintiffs submitted a FOIA request to the EPA seeking access to records relating to the
7 identification and assessment of the most hazardous (“high hazard”) coal combustion waste impound-
8 ments in the country. This request was submitted as part of Plaintiffs’ ongoing efforts to solve the press-
9 ing environmental and health problems associated with the storage and disposal of the solid waste gener-
10 ated by the burning of coal by electric generating plants. Although the Agency has disclosed certain
11 documents responsive to Plaintiffs’ request, it has both engaged in unnecessary and unreasonable delay
12 in processing claims that certain of the remaining responsive records are subject to withholding as confi-
13 dential business information (“CBI”) under FOIA’s Exemption Four, 5 U.S.C. § 552(b)(4), and failed to
14 comply with the time limits for responding completely to a request established in FOIA. The Agency has
15 also failed to produce additional records identified in Plaintiffs’ FOIA request.
16
17
18
19

20 **2.** Prompt access to the requested information is crucial to the Plaintiffs because it is directly rele-
21 vant to their ability to effectively engage in, and provide public oversight of, the EPA’s regulation of
22 coal combustion waste disposal. Defendant is currently planning to propose a rule by the end of this cal-
23 endar year that will regulate coal combustion residues (“CCR”). *See, e.g.*, EPA’s Coal Ash Survey Re-
24 sults Frequent Questions (“Q: What are EPA’s current plans/schedule for the coal combustion residuals
25 rulemaking? Answer: Administrator Jackson has committed to proposing a rule by the end of this cal-
26 endar year. The agency is currently evaluating all available options for regulating CCRs and expects to
27
28

1 propose a rule this year.”) (available at: <http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys/faqs.htm#21> (last visited, November 18, 2009)). Defendant’s CCR rulemaking process is progressing at this time, and EPA’s withholding of the requested information is substantially and adversely affecting Plaintiffs’ ability to take part in that process.

2
3
4
5
6
7 **3.** Defendant is unlawfully withholding public disclosure of information sought by Plaintiffs, information to which they are entitled and for which no valid disclosure exemption applies. Defendant failed to comply with the statutory mandates and deadlines imposed by FOIA through its failure to provide a final determination resolving Plaintiffs’ FOIA request within the time required by law. Accordingly, Plaintiffs seek declaratory relief establishing that Defendant has violated the FOIA and APA. Plaintiffs also seek injunctive relief directing Defendant to promptly provide Plaintiffs with the requested material.

8
9
10
11
12
13
14
15 **JURISDICTION, VENUE AND BASIS FOR RELIEF**

16 **4.** This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under the FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

17
18
19
20
21 **5.** Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district.

22
23
24
25 **6.** Intradistrict Assignment. Pursuant to Civil Local Rule 3-2(c), assignment to the San Francisco Division is appropriate because Plaintiff Sierra Club is incorporated in California and resides and maintains its headquarters in San Francisco County.

1 7. Declaratory relief is appropriate under 28 U.S.C. § 2201.

2
3 8. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

4
5 **PARTIES**

6 9. The Sierra Club is the nation's oldest environmental organization. It has more than 700,000
7 members nationwide and is dedicated to the protection and preservation of the natural and human envi-
8 ronment. The Sierra Club is dedicated to protecting the earth's ecosystems and resources and educating
9 the public about its mission. Among the Sierra Club's highest priorities is solving the pressing environ-
10 mental and health problems associated with the mining, burning, and disposal of coal and its combustion
11 by-products. In support of these efforts, by letter dated June 18, 2009, Sierra Club submitted to EPA the
12 FOIA request at issue in this case.
13

14
15 10. The Environmental Integrity Project is a nonpartisan, nonprofit organization established in March
16 2002 by former EPA enforcement attorneys to advocate for more effective enforcement of environ-
17 mental laws. The organization pursues three main goals: to provide objective analysis of how the failure
18 to enforce or implement environmental laws increases pollution and affects the public's health; to hold
19 federal and state agencies, as well as individual corporations, accountable for failing to enforce or com-
20 ply with environmental laws; and to help local communities in key states obtain the protection of envi-
21 ronmental laws. Environmental Integrity Project has worked extensively on coal combustion waste dis-
22 posal issues recently, including the publication of reports and advocacy before state and federal regula-
23 tory bodies on the hazards of coal combustion waste. Environmental Integrity Project is a co-signatory of
24 the June 18, 2009 FOIA request at issue in this case.
25
26
27
28

1 **11.** Defendant United States Environmental Protection Agency, is an agency of the executive branch
2 of the United States government, it is in possession and control of the records sought by Plaintiffs, and
3 as such, it is subject to the FOIA pursuant to 5 U.S.C. § 552(f).
4

5 **STATEMENT OF OPERATIVE FACTS**
6 **Coal Combustion and Waste Production; EPA's Response**

7 **12.** On December 22, 2008, a breach in a dike at the Tennessee Valley Authority ("TVA") Kingston
8 Fossil Plant resulted in the release of 5.4 million cubic yards of coal ash — also referred to as coal com-
9 bustion residue ("CCR") — into the nearby Emory River. The spill covered more than 300 acres, made 3
10 homes uninhabitable and damaged 23 other homes, plus roads, rail lines, and utilities. *See, e.g.*, Gov-
11 ernmental Accountability Office, "Coal Combustion Residue: Status of EPA's Efforts to Regulate Dis-
12 posal" ("GAO Report"), GAO-1085R (October 30, 2009) at 5 (available at: <http://www.gao.gov/->
13 [new.items/d1085r.pdf](http://www.gao.gov/new.items/d1085r.pdf) (last visited November 18, 2009)).
14

15
16 **13.** In March 2009, in response to the Kingston incident, the EPA sent out information request let-
17 ters to 162 facilities and 61 corporate offices. *Id.* at 18. These companies identified 48 additional plants
18 that operated CCR impoundments, and the EPA sent a second round of letters to these facilities. The
19 EPA has received responses from all companies and power plants that were sent letters. *Id.* The EPA's
20 purpose was to determine the number of CCR surface impoundments and similar units and to obtain
21 specific information about them, particularly relating to their potential to pose threats to human health
22 and the environment. *Id.* Ultimately, EPA aims to assess the structural stability of these impoundments
23 and determine if and where corrective measures are needed. *Id.*
24
25

26
27 **14.** In a separate effort initiated in 2009, the EPA is looking at whether to regulate the structural in-
28

1 integrity of CCR surface impoundments through wastewater discharge permits. *See, e.g.,* GAO Report at
2 23. In addition, because an evaluation found that state wastewater permits vary widely in their structural
3 requirements for impoundments, the EPA plans to draft best management practices for state wastewater
4 permits for these facilities. *Id.*

5
6
7 **15.** Additionally, from 1999 to 2005, the EPA gathered or received information on 135 sites where
8 alleged danger to human health and the environment had been caused by CCR disposal. *Id.* at 24. Ac-
9 cording to the EPA, approximately 65 cases were not evaluated because they lacked adequate supporting
10 information. *Id.* Of the remaining cases, the EPA found that 24 cases in 13 states involved proven dam-
11 age to groundwater and surface water, and an additional 39 involved potential damage to these re-
12 sources. *Id.* The EPA followed up on 16 cases of proven damage to groundwater and, as of July 2009,
13 corrective actions have been completed at seven sites and are ongoing at nine sites. *Id.*

14
15
16 **16.** As part of another study, begun in 2005, the EPA examined the toxins present in CCR wastewa-
17 ter discharges to surface water from coal ash ponds. *Id.* at 25. In September 2009, the EPA completed its
18 study. *Id.* The EPA found that current effluent guidelines should be revised because of the high level of
19 toxic-weighted pollutant discharges from coal-fired power plants and the expectation that these dis-
20 charges will increase significantly in the next few years as new air pollution controls are installed (*e.g.,*
21 scrubbers used to meet air quality regulations). *Id.*

22
23
24
25 **17.** As of July 2009, the EPA had collected data from all of the facilities to which it originally sent
26 out information request letters in March, 2009. *See* GAO Report at 19. It also has created a database that
27 contains information on 584 surface impoundments or similar units in 35 states that were identified by
28

1 utilities. *Id.*

2
3 **18.** The EPA reports the following near term actions regarding CCR:

4
5 • September 2009 — The EPA began releasing the reports of the assessment of the high hazard coal ash impoundments. *Id.* at 36.

6
7 • September 2009 —The EPA announced its decision to initiate a rulemaking effort to revise the effluent guidelines, including those related to CCR wastewater discharges. Proposed regulations are expected in 2012. The EPA has not set target dates for wastewater related efforts such as issuance of best management practices for state wastewater permits and structural requirements to be included in permits. *Id.*

8
9
10 • October 2009 — The EPA forwarded a draft proposed CCR disposal rule to the Office of Management and Budget (“OMB”). *Id.* OMB’s review is proceeding at this time.

11
12 • December 2009 — The EPA plans to issue proposed rule for public notice and comment. The EPA could choose to hold public hearings as well. *Id.*

13
14 **Plaintiffs’ FOIA Request and the EPA’s Violation of FOIA**

15 **19.** By letter dated June 18, 2009, Plaintiffs submitted a FOIA request to the EPA seeking information received or generated in the course of activities described above. *See* Exhibit A (filed herewith).

16
17
18
19 **20.** Plaintiffs’ FOIA request sought disclosure of “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 . . . most hazardous or ‘high hazard’ sites.” *See* Exhibit A at 2.

20
21
22
23 **21.** The FOIA requires an agency to issue a final determination resolving an information request within twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(i).

24
25
26
27 **22.** The FOIA allows an agency to extend its determination deadline by 10 business days when “un-

1 usual circumstances” exist and when the agency so notifies a requester in writing. 5 U.S.C. § 552(a)-
2 (6)(B); *see also* 40 C.F.R. § 2.104(d) (establishing basis for extension of determination deadline).

3
4
5 **23.** In limited circumstances, the FOIA allows an agency to impose an “unusual circumstances” deci-
6 sion extension beyond 10 business days when certain conditions are satisfied:

7 With respect to a request for which a written notice [purports to apply the “unusual cir-
8 cumstances” extension beyond 10 business days], the agency shall notify the person mak-
9 ing the request if the request cannot be processed within the time limit specified in that
10 clause *and shall provide the person an opportunity to limit the scope of the request so*
11 *that it may be processed within that time limit or an opportunity to arrange with the*
agency an alternative time frame for processing the request or a modified request. To aid
the requester, each agency shall make available its FOIA Public Liaison, who shall assist
in the resolution of any disputes between the requester and the agency.

12 5 U.S.C. § 552(a)(6)(B)(ii) (emphasis added).

13
14
15 **24.** By letter dated June 24, 2009, the EPA informed Plaintiffs that a decision deadline extension was
16 required due to “the need to search for, collect and appropriately examine a voluminous amount of sepa-
17 rate and distinct records involved in [Plaintiffs’] request” and the “need for consultation . . . with another
18 agency or EPA office.” *See* EPA Letter (June 24, 2009)(filed herewith as Exhibit B). The EPA Letter
19 unilaterally established an “initial determination” deadline of August 28, 2009. *Id.*

20
21
22 **25.** The EPA did not provide Plaintiffs with an opportunity to limit the scope of their FOIA request
23 so that it could be processed within FOIA’s statutory decision deadlines.

24
25 **26.** The EPA did not provide Plaintiffs with an opportunity to voluntarily develop with the agency an
26 alternative time frame for processing their request or a modified request.

1 **27.** The EPA did not make its FOIA Public Liaison available to Plaintiffs to assist in the resolution
2 of any disputes between the Requesters and the Agency.

3
4
5 **28.** The EPA has provided some information to Plaintiffs responsive to their FOIA requests.

6
7 **29.** The EPA has informed Plaintiffs that there is a significant number of documents responsive to
8 their FOIA request for which a disclosure determination has not yet been made due to the EPA's ongo-
9 ing review of the claims made by industry that the information is confidential business information
10 ("CBI") possibly subject to FOIA's Exemption 4. 5 U.S.C. § 552(b)(4); 40 C.F.R. § 2.204, 2.205, 2.208.
11 The EPA has informed Plaintiffs that the data being withheld pertain to nearly 25% of the impoundment
12 dams designated as "high hazard" by the agency.

13
14
15 **30.** The EPA has failed to release additional records responsive to Plaintiffs' FOIA requests or to
16 provide a basis for its failure to release these records.

17
18
19 **31.** Plaintiffs are actively participating in the EPA's ongoing CCR regulatory review process. Access
20 to the information sought in the FOIA request at issue in this case is of central importance to Plaintiffs'
21 efforts in this regard.

22
23 **32.** None of FOIA's exemptions to mandatory disclosure apply to the information currently being
24 withheld by the EPA that is responsive to Plaintiffs' FOIA request.

25
26
27 **33.** As of the date this action was filed, the deadline for the EPA to issue a final determination on
28

1 Plaintiffs' FOIA request has passed.
2

3 **34.** As of the date this action was filed, the EPA had not issued a final determination on Plaintiffs'
4 FOIA request.
5

6
7 **35.** Plaintiffs have fully exhausted all administrative remedies required by FOIA. 5 U.S.C. §§
8 552(a)(6)(A), (a)(6)(C).
9

10 **36.** Plaintiffs have been required to expend costs and to obtain the services of a law firm, consisting
11 of attorneys, law clerks, and legal assistants, to prosecute this action.
12

13 **CAUSES OF ACTION**
14 **COUNT I**

15 **VIOLATION OF THE FREEDOM OF INFORMATION ACT-**
16 **DETERMINATION DEADLINE VIOLATION**

17 **37.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
18 herein.
19

20 **38.** Plaintiffs have a statutory right to have Defendant process their FOIA request in a manner which
21 complies with FOIA. Plaintiffs' rights in this regard were violated when the Defendant unlawfully de-
22 layed its response to their information request beyond the determination deadline imposed by the FOIA.
23 5 U.S.C. §§ 552(a)(6)(A)(i), (B).
24

25
26 **39.** At no time during its review of Plaintiffs' information request did Defendant provide Plaintiffs
27 with the written notice or administrative options required to invoke the "unusual circumstances" clause
28

1 of FOIA that would allow a longer than 10-day extension to the Act's FOIA determination deadline. 5
2 U.S.C. § 552(a)(6)(B)(ii).

3
4
5 **40.** There are no "unusual circumstances" within the meaning of 5 U.S.C. § 552(a)(6)(B)(ii) that ap-
6 pply to Defendant's determination of Plaintiffs' information request.

7
8 **41.** Defendant is unlawfully withholding public disclosure of information sought by Plaintiffs, in-
9 formation to which they are entitled and for which no valid disclosure exemption applies.

10
11 **42.** Based on the nature of Plaintiffs' organizational activities, they will undoubtedly continue to em-
12 ploy FOIA's provisions in information requests to Defendant in the foreseeable future.

13
14
15 **43.** Plaintiffs' organizational activities will be adversely affected if Defendant is allowed to continue
16 violating FOIA's response deadlines as it has in this case.

17
18
19 **44.** Unless enjoined and made subject to a declaration of Plaintiffs' legal rights by this Court, Defen-
20 dant will continue to violate the rights of Plaintiffs to receive public records under the FOIA.

21
22 **45.** Plaintiffs are entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA.
23 5 U.S.C. § 552(a)(4)(E).

24
25
26 **COUNT II**
VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

27 **46.** The allegations made in all preceding paragraphs are realleged and incorporated by reference
28

1 herein.

2
3 **47.** Defendant has failed to act in an official capacity under color of legal authority by failing to
4 comply with the mandates of FOIA consequent to its failure and refusal to issue a timely final determina-
5 tion on Plaintiffs' information request.
6

7
8 **48.** Defendant has unlawfully withheld agency action by failing to comply with the mandates of
9 FOIA consequent to its failure and refusal to issue a timely final determination on Plaintiffs' information
10 request.
11

12
13 **49.** Plaintiffs have been adversely affected and aggrieved by the Defendant's failure to comply with
14 the mandates of FOIA. Defendant's failure and refusal to issue a timely final determination on Plaintiffs'
15 information request has injured Plaintiffs' interests in public oversight of governmental operations and
16 constitute a violation of Defendant's statutory duties under the APA.
17

18
19 **50.** Plaintiffs have suffered a legal wrong as a result of the Defendant's failure to comply with the
20 mandates of FOIA. Defendant's failure and refusal to issue a timely final determination on Plaintiffs'
21 information request has injured Plaintiffs' interests in public oversight of governmental operations and
22 constitutes a violation of Defendant's statutory duties under the APA.
23

24
25 **51.** Defendant's failure and refusal to issue a timely final determination on Plaintiffs' information
26 request constitutes agency action unlawfully withheld and unreasonably delayed and is therefore action-
27 able pursuant to the APA, 5 U.S.C. § 706(1).
28

1 **52.** Alternatively, Defendant's failure and refusal to issue a timely final determination on Plaintiffs'
2 information request is in violation of FOIA's statutory mandates and is therefore arbitrary, capricious, or
3 an abuse of discretion and not in accordance with law and is therefore actionable pursuant to the APA, 5
4 U.S.C. § 706(2).
5

6
7 **53.** Plaintiffs are entitled to judicial review under the Administrative Procedure Act 5 U.S.C. §§ 702,
8 706.
9

10 **54.** Plaintiffs are entitled to costs of disbursements and costs of litigation, including reasonable attor-
11 ney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C.S. § 2412.
12
13

14 **REQUEST FOR RELIEF**

15 WHEREFORE, Plaintiffs pray that this Court:

16 **1.** Order Defendant to promptly provide Plaintiffs all of the information sought in this ac-
17 tion and to immediately disclose the requested documents.
18

19 **2.** Declare Defendant's failure to disclose the documents requested by Plaintiffs to be un-
20 lawful under the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), as well as agency action unlawfully withheld and
21 unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discretion, and not in
22 accordance with law, 5 U.S.C. § 706(2).
23

24 **3.** Declare Defendant's failure to timely make a determination on Plaintiffs' information
25 request to be unlawful under the FOIA, 5 U.S.C. § 552(a)(6)(A)(i), as well as agency action unlawfully
26 withheld and unreasonably delayed, 5 U.S.C. § 706(1), and/or arbitrary, capricious, an abuse of discre-
27 tion, and not in accordance with law, 5 U.S.C. § 706(2).
28

1 4. Award Plaintiffs their costs and reasonable attorney fees pursuant to 5 U.S.C. §
2 552(a)(4)(E) and 28 U.S.C. § 2412.

3 5. Grant such other and further relief as the Court may deem just and proper.
4

5
6 Respectfully submitted for the Court's consideration, this 1st day of December, 2009.
7

8 s/ David Bahr

9 David Bahr (Oregon Bar No. 901990)
10 Bahr Law Offices
11 1035 ½ Monroe Street
12 Eugene, OR 97402
13 (541) 556-6439
14 (541) 334-1786 (facsimile)
15 davebahr@mindspring.com
16 (Application for admission *pro hac vice* pending)

8 s/ Todd True

9 Todd True (Washington Bar No. 12864)
10 Earthjustice
11 705 Second Avenue, Suite 203
12 Seattle, WA 98104
13 (206) 343-7340
14 (206) 343-1526 (facsimile)
15 ttrue@earthjustice.org
16 (Application for admission *pro hac vice* pending)

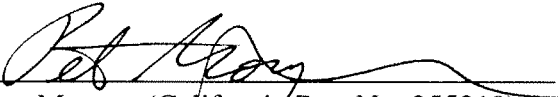
14
15 
16 Peter Morgan (California Bar. No. 255210)
17 Sierra Club Environmental Law Program
18 85 Second St., 2nd Floor
19 San Francisco, CA 94105
20 (415) 977-5727
21 (415) 977-5793 (facsimile)
22 peter.morgan@sierraclub.org
23
24
25
26
27
28

EXHIBIT A



June 18, 2009

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

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
FAX: 202-566-2147
E-mail: hq.foia@epa.gov

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 Environmental Protection Agency (“EPA”) provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the EPA regulations at 40 C.F.R. § 2.100, *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 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 EPA 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) most hazardous or "high hazard" sites.

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 to not 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 EPA 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 40 C.F.R. § 2.107(l). 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 EPA's 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* 40 C.F.R. § 2.107(l).

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 problem 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 EPA 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 EPA, in responding to this request, to 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); 40 C.F.R. § 2.104. 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 'Patrick Gallagher', with a long horizontal flourish extending to the right.

Patrick Gallagher
Legal Director
Sierra Club

EXHIBIT B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

July 24, 2009

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

Re: Freedom of Information Act Request HQ-RIN-1489-09

Dear Mr. Gallagher:

This is in response to your June 18, 2009, Freedom of Information Act request. An extension of the time required to comply with your request is necessary.

The reasons for the extension are:

- The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records involved in your request. (40 CFR 2.112(e)(2)); and
- The need for consultation, which shall be conducted with all practicable speed, with another agency or EPA office having a substantial subject-matter interest in your request. (40 CFR 2.112(e)(3)).

An initial determination is expected by August 28, 2009.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sheretta Harris".

Sheretta Harris, FOIA Coordinator
Office of Resource Conservation and Recovery