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NATURAL RESOURCES DEFENSE COUNCIL

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April 21, 2009

VIA FAX, E-MAIL AND CERTIFIED MAIL

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FOIA/Privacy Act Office
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Re: FREEDOM OF INFORMATION ACT REQUEST REGARDING THE QUANTITY, METHOD AND LOCATION OF COAL COMBUSTION WASTE DISPOSAL SITES RESULTING FROM ELECTRIC UTILITY STEAM GENERATING FACILITIES.

Dear FOIA Officer,

On behalf of the Natural Resources Defense Council ("NRDC"), I write to request the disclosure of records in the possession of the U.S. Department of Energy ("DOE") regarding coal combustion waste ("CCW") disposal sites associated with electric utility steam generating facilities. I make this request pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and pertinent DOE regulations, 10 C.F.R. § 1004.9(a)(8)(i)-(ii).

I expect that you will consider this request consistent with President Obama's January 21, 2009 memoranda to the heads of executive departments and agencies, which announce a policy of transparency and openness and which say the following with regard to FOIA:

> In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.
>
> The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to

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requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA. 74 Fed. Reg. 4683 (Jan. 21, 2009); 74 Fed. Reg. 4685 (Jan. 21, 2009).

I. Description of Records Sought

This request covers any records[1] that indicate, discuss, describe, or identify:

(1) the location of sites in the U.S. which, currently dispose, previously disposed, or will prospectively dispose of coal combustion. These disposal sites include, but are not limited to, methods (1)(a)-(c):
- (a) coal combustion waste impoundments; (ex: Harriman, Tennessee)
- (b) coal combustion waste landfill sites; (ex: Central City, Kentucky, prospective site)
- (c) coal combustion waste minefill sites;

(2) any analysis or evaluation of the integrity of any existing CCW disposal (or storage) facilities, including any information regarding any confirmed or suspected leaks, breaches, or other releases of contaminants (whether to surface water, ground water, soils, or other receptors) from any CCW disposal (or storage) facility;

(3) any inventory or assessment of the method or methods by which coal combustion waste is disposed of, if known, at sites identified pursuant to paragraph (1), above;

(4) any inventory or assessment of the quantity of coal combustion waste currently or expected to be disposed of at sites identified pursuant to paragraph (1), above.

The wastes referred to in items (1)-(4), above include, but are not limited to:
- (a) fly-ash;
- (b) bottom-ash;
- (c) scrubber sludge; and
- (d) boiler slag.

II. Request for a Fee Waiver

NRDC requests that DOE waive the fee that it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge if "disclosure of the information is in the public interest because it is likely to contribute

[1] The term, "records," is used herein to mean anything denoted by the use of that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, all writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored) in DOE's possession, including, but not limited to, correspondence, minutes of meetings, memoranda, notes, e-mails, notices, telephonic facsimiles, charts, tables, presentations, orders, and filings

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); 10 C.F.R. § 1004.9(a)(8)(i). The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as a "representative of the news media" entitled to a reduction of fees under the FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 10 C.F.R. § 1004.9(a)(8)(i).

1. First Requirement

The disclosure requested here would be "likely to contribute significantly to public understanding of the operations or activities of the government." 5. U.S.C. § 552(a)(4)(A)(iii). The records described above directly concern the "operations or activities of the government" because they encompass information that will be relevant to DOE's development of disposal requirements for CCW, the improper disposal of which can pose risks of both chronic and catastrophic harm to neighboring communities.

The request in this letter is designed to seek important materials that will contribute meaningfully and significantly to public understanding of DOE's recording and monitoring of the size, method, and location of CCW disposal sites resulting from electric utility steam generating facilities. Further, the materials will provide the basis for a national understanding of the disposal of CCW in the U.S. following the slurry pond break in Harriman, Tennessee last December.

The disclosure of the requested records will contribute to the public understanding of a broad audience of persons because NRDC intends to analyze and summarize the material and disseminate newsworthy the information conveyed in the records. NRDC has a proven ability to digest and disseminate information effectively. In addition to its web site (www.nrdc.org) which is updated daily, NRDC has numerous other means to widely disseminate information to the public including numerous and varied publications, educational programs, media initiatives, and public interest litigation.

Four factors are to be considered when determining whether the first fee waiver requirement is met: that "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 10 C.F.R. §1004.9 (a)(8)(i). These factors are: (A) the subject of the request; (B) the informative value of the information to be disclosed; (C) whether the contribution to an understanding of the subject by the public is likely to result from disclosure; and (D) the significance of the contribution to public understanding. 10 C.F.R. §1004.9 (a)(8)(i)(A)-(D).

A. Subject of the Request

Under DOE's regulations, one must consider "[w]hether the subject of the requested records concerns 'the operations or activities of the government,'" 10 C.F.R. §1004.9(a)(8)(i)(A). The documents requested herein clearly and directly concern identifiable operations of the Federal government as they regard the extent to which an executive agency monitors the disposal of CCW. DOE's recording of CCW disposal sites is an important consideration in evaluating if DOE is aware of the location and type of CCW disposal sites throughout the nation for use in

DOE's future regulations concerning those sites. This information could likewise inform the Environmental Protection Agency's assessment of the risks of CCW disposal as it develops regulations for CCW.

B. Informative Value of the Information to be Disclosed

DOE's regulations also require the agency to evaluate "[w]hether the disclosure is 'likely to contribute' to an understanding of government operations or activities." 10 C.F.R §1004.9(a)(8)(i)(B). The documents requested herein would be meaningfully informative about how, if at all, DOE tracks CCW disposal on a national scale and are therefore likely to contribute to an increased public understanding of such activities.

Upon receiving the requested information, NRDC plans to construct an interactive tool for the dissemination of such information to the public. Currently, NRDC has some information from the Energy Information Administration on CCW disposal and storage, but those data do not specify many of the details sought in this request. This additional information includes, but is not limited to: the location of every CCW disposal site in the U.S.; the type of CCW disposal site at each locale; and the volume of CCW disposed of at each site. To our knowledge, this information is currently unavailable on the DOE's website or in any other place in the public domain.

C. Contribution to an Understanding of the Subject by the Public

DOE next analyzes "[t]he contribution to an understanding by the general public likely to result from disclosure." 10 C.F.R. §1004.9(a)(8)(i)(C). The documents requested will clearly contribute to the public understanding of the DOE's role in monitoring CCW. Further, this information would contribute to the understanding of a very broad audience of persons interested in the safe disposal of CCW.

With the recent coal ash pond spill in Kingston, Tennessee, the issue of safe CCW disposal has become an issue of national concern. National media attention has included articles regarding numerous aspects of CCW disposal and many have focused on the regulation of CCW disposal sites. For instance, the Washington Post has published an article concerning the Tennessee spill's influence on national and state legislation. *See* Juliet Eilperin, "Disposal of Coal Ash Rises As Environmental Issue; Recent Spill Spurs Proposals for Tighter Control," *Washington Post* (Jan. 16, 2009) at A04. Also, the New York Times has published an article addressing the lack of regulation of CCW disposal sites. *See* Shaila Dewan, "Hundreds of Coal Ash Dumps Lack Regulation," *New York Times* (Jan. 7, 2009) at A1.

D. Significance of Contribution to Public Understanding

Finally, DOE considers "[w]hether the disclosure is likely to contribute 'significantly' to public understanding of government operations or activities." 10 C.F.R. §1004.9(a)(8)(i)(D). The documents requested will contribute significantly to public understanding of government activities because NRDC intends to create a national evaluation of CCW disposal sites so as to provide complete and navigable information about the CCW disposal procedures in the U.S.

This information is intended to be used to educate persons residing in close proximity to CCW disposal sites and public officials. Additionally, other forms of dissemination may be used to educate persons interested in CCW disposal through the internet or other media.

NRDC has a proven ability to digest and disseminate such information to the public quickly, through numerous and varied publications, educational programs, media initiatives, and public interest litigation. For example, NRDC featured the environmental impacts of tar sands extraction in a recent issue of its magazine, *OnEarth*, which is read by approximately 450,000 individuals through subscriptions, sales at newsstands, and bookstores, and available free of charge at http://www.nrdc.org/onearth. *See* Andrew Nikiforuk, "Canada's Highway to Hell," *OnEarth*, Fall 2007, at 34 (attached as Exhibit A) (*also available at* http://www.onearth.org/article/canadas-highway-to-hell).

NRDC also has the ability to disseminate information on CCW disposal through its website (www.nrdc.org) (homepage at Attachment 1), which is updated daily and draws approximately 2.7 million page views and 800,000 visits per month, future issues of *OnEarth* (sample issue at Attachment 2); its *Nature's Voice* newsletter on current environmental issues, which is published and distributed five times a year to NRDC's approximately 429,000 members nationwide and online at http://www.nrdc.org/naturesvoice/default.asp (sample issue at Attachment 3), as well as other newsletters and alerts. NRDC's *Earth Action* email list has more than 144,000 subscribers who receive biweekly information on urgent environmental issues (sample email at Attachment 4). This information is also made available through NRDC's online Action Center at http://www.nrdc.org/action/default.asp (Attachment 5). NRDC sends its *Legislative Watch* bulletin to more than 36,000 people biweekly during Congressional sessions (sample email bulletin at Attachment 6) and publishes the bulletin online at http://www.nrdc.org/legislation/legwatch.asp (Attachment 7). *This Green Life* is an electronic newsletter on environmentally sustainable living distributed by email to more than 64,000 subscribers (sample email at Attachment 8) and made available online at http://www.nrdc.org/thisgreenlife/default.asp (Attachment 9). NRDC issues press releases; participates in press conferences and interviews with reporters and editorial writers; and has over twenty staff members dedicated to communications work, *see* "Communications" staff list at http://www.nrdc.org/about/staff.asp (Attachment 10). Finally, NRDC employees provide Congressional testimony, appear on television, radio and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. *See, e.g.*, Attachments 11 (testimony of Gina M. Solomon, M.D., M.P.H., NRDC Senior Scientist, before United States Senate Committee on Environment and Public Works, Feb. 6, 2007), 12 (transcript, "Climate Change: Experts gauge fallout from G8 nations' nonbinding decision on global warming, E&ETV, *On Point*, July 12, 2005 (featuring NRDC Climate Center Deputy Director Dan Lashof)), 13 (transcript, "Protest Raised over New Tests of Naval Sonar," National Public Radio, *All Things Considered*, July 24, 2007 (featuring NRDC Marine Mammal Project Director Joel Reynolds)), 14 (conference panel outline, "Enforcement of Environmental Laws: Equalizing Effect on Compliance Efforts?," 2007 Environmental Law Conference at Yosemite, Oct. 19, 2007 (featuring NRDC Senior Attorney Michael E. Wall)), 15 (editorial, "California's cool(ing) opportunity," *San Francisco Chronicle*, Apr. 11. 2006 (co-authored by NRDC California Energy Program Director Devra Wang)), and 16 (publisher's notes to *Saving Energy, Growing Jobs: How Environmental Protection Promotes Economic Growth*,

Profitability, Innovation and Competition (Bay Tree Publishing 2007), by NRDC Energy Program Director David B. Goldstein)); *see also* Attachments 17-37, many of which are discussed below.

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

(1) NRDC obtained through a court-enforced FOIA request records of the operations of Bush Administration's Energy Task Force, headed by Vice President Dick Cheney. It made those records available, along with analysis of selected excerpts and links to the administration's index of withheld documents, on NRDC's website at http://www.nrdc.org/air/energy/taskforce/tfinx.asp (Attachment 17). NRDC's efforts helped to inform the public about an issue that, even before the records' release, had attracted considerable attention. *See, e.g.*, Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times* (Mar. 28, 2002), at A22 (Attachment 18); Bennett Roth, "Houston Energy-Drilling Firm Appears in Documents from Energy Department," *Houston Chronicle* (Apr. 12, 2002) (Attachment 19).

(2) NRDC obtained through a FOIA request a memorandum by ExxonMobil advocating the replacement of a highly respected atmospheric scientist, Dr. Robert Watson, as the head of the Intergovernmental Panel on Climate Change. NRDC used this memorandum to help inform the public about what may have been behind the decision by the Bush Administration to replace Dr. Watson. *See* NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," (Apr. 3, 2002) (Attachment 20); Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times* (Apr. 4, 2002), at A19 (Attachment 21).

(3) NRDC incorporated information obtained through FOIA into a 2005 report, published and provided free of charge at NRDC's website, *see* http://www.nrdc.org/wildlife/marine/sound/contents.asp, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life*. See NRDC, *Sounding the Depths II* (Nov. 2005) (update to 1999 report) (Attachment 22). Since the report's publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, "Protest Raised over New Tests of Naval Sonar," National Public Radio, *All Things Considered*, July 24, 2007 (transcript at Attachment 13).

(4) NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and

Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists* (Mar./Apr. 2004) (Attachment 23).

(5) NRDC has used White House documents obtained through FOIA to inform the public about EPA's failures to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See* http://www.nrdc.org/health/pesticides/natrazine.asp (Attachment 24); *see also* William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?," *Harper's Bazaar* (Aug. 1, 2006) (referencing documents obtained and posted online by NRDC) (Attachment 25).

(6) NRDC has obtained through FOIA information on the levels of arsenic in drinking water supplies across the country. NRDC incorporated much of the information into a report, *Arsenic and Old Laws* (2000), printed and made available online through NRDC's website, *see* http://www.nrdc.org/water/drinking/arsenic/aolinx.asp (Attachment 26), and provided analysis describing its significance and guiding interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; *see also* Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune* (June 5, 2000) at B1 (referencing NRDC report) (Attachment 27).

(7) In 2000, NRDC used information obtained through FOIA to publish a report analyzing the impacts of manure pollution from large livestock feedlots on human health, fish and wildlife. *See* NRDC, *Spills & Kills* (Aug. 2000) (Attachment 28).

(8) In 1999, NRDC obtained through FOIA a Defense Department document, *History of the Custody and Deployment of Nuclear Weapons: July 1945 through September 1977*. The document attracted significant press attention once it was disclosed. *See, e.g.*, Walter Pincus, "Study Says U.S. Secretly Placed Bombs; Cold War Deployments Affected Mostly Allies," *Washington Post* (Oct. 20, 1999) at A3 (Attachment 29). One of NRDC's nuclear scientists, Robert Norris, published a detailed analysis of this document explaining its significance to the public. Robert S. Norris, William M. Arkin, and William Burr, "Where They Were," *Bulletin of Atomic Scientists* (Nov./Dec. 1999) (Attachment 30).

(9) In 1996, NRDC obtained through FOIA test results regarding lead levels in the District of Columbia's drinking water supplies. NRDC made the test results public along with analysis explaining the significance of the results. *See* D'Vera Cohn, "Tap Water Safeguards Still Stalled; City Failed to Tell Some Residents of Excess Lead Contamination," *Washington Post* (Apr. 18, 1996) at J1 (Attachment 31).

(10) In 1989, NRDC obtained through FOIA testimony, previously suppressed by the first Bush administration, by federal experts who opposed oil drilling off the coasts of California and Florida. *See* Larry Liebert, "Oil Testimony Reportedly Quashed; Environmentalists say Federal Experts Pressured by Bush," *Orange County Register* (Oct. 5, 1989) at A6 (Attachment 32).

(11) In 1988, NRDC obtained through FOIA a report by the U.S. Fish and Wildlife Service that declared that the government's review of offshore oil drilling in Northern California was incomplete and overly optimistic. Reagan Administration officials had tried to keep the report secret and then repudiated it upon its release. *See* Eric Lichtblau, "Federal Report Blasts Offshore Oil Studies," *L.A. Times* (June 4, 1988) at A32 (Attachment 33).

(12) In 1982, NRDC obtained through a FOIA request a U.S. EPA memorandum stating that most air pollution monitors have repeatedly underestimated levels of toxic lead in the air. NRDC used the memorandum to inform the public about the consequences of EPA's proposal to relax restrictions on lead in gasoline. *See* Sandra Sugawara, "Lead in Air is Undermeasured, EPA Section Chief's Memo Says," *Washington Post* (July 11, 1982) at A6 (Attachment 34).

2. Second Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii). NRDC is a not-for-profit organization and, as such, has no commercial interest. "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted). NRDC's interest in obtaining the requested materials is to serve the public interest by disclosing information that will contribute meaningfully and significantly to public understanding of DOE's recording and monitoring of the size, method, and location of CCW disposal sites resulting from electric utility steam generating facilities. Further, the materials will provide the basis for a national understanding of the disposal of CCW in the U.S. following the slurry pond break in Harriman Tennessee last December.

Two factors are considered when determining whether the second fee waiver requirement is met: that the request "is not primarily in the commercial interest of the requestor." 10 C.F.R. §1004.9(a)(8)(ii). These factors are: (A) the existence and magnitude of a commercial interest; and (B) the primary intent in disclosure. 10 C.F.R. §1004.9(a)(8)(i) (1)-(2).

A. Nonexistence of a Commercial Interest

DOE must determine "[w]hether the requester has a commercial interest that would be furthered by the requested disclosure." 10 C.F.R. §1004.9(a)(8)(ii)(B). As noted, NRDC is a not-for-profit organization and, as such, has no commercial interest. The use to which NRDC would put the disclosed information is purely one directed at the education of the public. Disclosed information will not be offered for commercial sale; to the contrary, NRDC intends to make its analysis available, free of charge, to the general public.

B. Primary Intent in Disclosure

Finally, DOE must determine "[w]hether 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.'" 10 C.F.R. §1004.9(a)(8)(ii)(B). Disclosure in this case would not further any commercial interest of NRDC; indeed, because there is no commercial interest to weigh against the public interest, this requirement is easily met.

3. NRDC is a Media Requestor

Even if DOE denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under the FOIA, 5 U.S.C. § 552(a)(4)(A)(ii)(II), and DOE's FOIA regulations, 10 C.F.R. § 1004.9(b)(3); 1004.2(m), *(l)*. *See generally Elec. Privacy Info. Ctr. v. United States Dep't of Def.*, 241 F. Supp. 2d 5, 11-14 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public). As described earlier in this request, NRDC publishes a quarterly magazine, *OnEarth*, which has approximately 450,000 readers and is available at newsstands and bookstores; publishes a periodic newsletter for its more than 420,000 members nationally; issues regular electronic newsletters, action alerts, public reports and analyses; and maintains a free online library of reports and analyses. These publications routinely include information about current events of interest to the readership and the public. NRDC staff members are also regular contributors to numerous periodicals and books; television, radio, and web programs; and hearings and conferences. As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of NRDC's publications or other suitable channels.

III. Willingness to Pay Fees Under Protest

Please provide the records described above irrespective of the status and outcome of your evaluation of NRDC's fee category assertion and fee waiver request. In order to prevent delay in DOE's provision of the requested records, NRDC states that it will, if necessary and under protest, pay fees. Please consult with me, however, before undertaking any action that would cause the fee to exceed two hundred and fifty dollars ($250.00). Such payment will not constitute any waiver of NRDC's right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

IV. Conclusion

I trust that, in responding to this request, DOE will comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. Please produce the records above by sending them to me, in electronic format, at the address appearing on the first page of this letter. Please produce them on a rolling basis; at no point should DOE's search for – or deliberations concerning – certain records delay the production of others that DOE has already retrieved and elected to produce.

In case DOE believes that some of the records requested herein may already be publicly available, I will be happy to discuss these instances with DOE officials in an effort to narrow the scope of this request. Do not hesitate to call me with any questions. Thank you for your prompt attention to this matter.

Sincerely,

Jon P. Devine, Jr.
Senior Attorney, Water Program