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January 6, 2009

Via Certified Mail- Return Receipt Requested

Tom Kilgore, President and CEO
Tennessee Valley Authority
400 W. Summit Hill Dr.
Knoxville, TN 37902-1499

Re: Notice of Intent to Sue Pursuant to Section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(b)(2)(A), Section 310 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659(d), Section 326 of the Emergency Response and Community Right-to-Know Act, 42 U.S.C. § 11046(d), and Section 505 of the Clean Water Act, 33 U.S.C. § 1365

Dear Sir:

This notice of intent to sue is being sent on behalf of the Sierra Club (85 Second Street, 2nd Floor, San Francisco, CA 94105, (415) 977-5500), its Tennessee Chapter (2021 21st Ave. S, Suite 436, Nashville, TN 37212, (615) 386-3640), and the members of the Sierra Club and its Tennessee Chapter. This notice letter is also being sent on behalf the following individuals:

Name	Address	Phone
Blanchard, Mary Margaret	100 Steven Lane, Harriman, TN 37748	865-696-6284
Bunch, Wenell and Mary	173 Lakeshore Dr., Harriman, TN 37748	865-882-6239
Cheshire, Camille	489 Emory River Rd., Harriman, TN 37748	606-226-9354
Chivington, Victoria and Steve	107 Peninsula, Peachtree City, AL 30269	404-433-4049
Crowe, Jerry	502 Gunther Way, Harriman, TN 37748	865-719-5247
Daugherty, Kenny	396 Emory River Rd, Harriman, TN 37748	423-319-7795
Daugherty, Glen	564 Emory River Rd, Harriman, TN 37748	865-882-3224
Duncan, Jerry and Teresa	490 Emory River Rd, Harriman, TN 37748	865-882-7699
Ford, Glays and Robert	123 Lakewood Dr., Harriman, TN 37748	865-376-5515
Gaby, Willard & Jane	444 Emory River Rd, Harriman, TN 37748	865-414-3780, 865-414-0499

Green, Robert	116 Artesia Dr., Oak Ridge , TN 37830	865-599-8503
Gupton, Sandra and Terry	1307 Swan Pond Cir., Harriman, TN 37748	865-590-0539
Hamilton, Doug	394 Emory River Rd. Harriman, TN 37748	865-483-4777
Hapner, Sue and Skip	424 Emory River Rd., Harriman, TN 37748	865 882 6710
Harmon, Ronnie and Barbara	120 Steven Lane, Harriman, TN 37748	865-882-2955
Hillman, Melinda	540 Emory River Rd., Harriman, TN 37748	865-590-0324
Hurt, Barry and Lisa	406 Emory River Rd., Harriman, TN 37748	865-696-2536
Johnson, Raezean	1120 Swan Pond Circle, Harriman, TN 37748	865-882-1762
Lester, Tammy	502 Gunther Way, Harriman, TN 37748	865-719-5247
Long, Lois J.	1132 Swan Pond Circle, Harriman, TN 37748	865-882-6234
Long, Richard	107 Steven Lane , Harriman, TN 37748	865-285-9195
May, David	105 Rockingham Ln., Oak Ridge, TN 37830	865-220-8800
McAbee, Mary Grace	924 Swan Pond Circle, Harriman, TN 37748	865-248-8138
Pierce, Fred	154 Lakeshore Dr., Harriman, TN 37748	
Pierce, James and Laura	474 Emory River Rd, Harriman, TN 37748	865-719-7509
Pitak, Ed	496 Emory River Rd, Harriman, TN 37748	865-882-6836
Quimby, Bob and Lynn	374 Emory River Rd, Harriman, TN 37748	865-882-2684
Riggs, Ray and Teresa	430 Emory River Rd., Harriman, TN 37748	865-250-3969
Riggs, Tony and Yolonda	103 Lakeshore Dr., Harriman, TN 37748	865-882-8140
Rogers, Mickey	1725 James Ferry Rd., Kingston, TN 37767	865-466-8089
Rose, Doug	621 Lakeshore Dr., Kingston, TN 37767	865-717-0506
Scofield, Robert	926 Swan Pond Circle, Harriman, TN 37748	865-248-8388
Sewell, Bill and Gail	514 Emory River Rd, Harriman, TN 37748	865-882-9319
Smith, Ron and Joanie	1309 Swan Pond Cir, Harriman, TN 37748	865-591-0551
Smith, Ron and Tafonda	136 Birkshire Ln., Harriman, TN 37748	865-323-3159
Snow, Richard and Tina	661 Swan Pond Cir., Harriman, TN 37748	865-248-8009
Strandberg, Charlotte and Gerald	558 Emory River Rd, Harriman, TN 37748	865-882-1456
Thomas, Mike	618 Emory River Rd, Harriman, TN 37748	815-207-8840
Topmiller, Gary and Pam	504 Gunther Way, Harriman, TN 37748	865-590-1264
Willis, Cathy and Bob	789 Swan Pond Cir., Harriman, TN 37748	865-882-5306
Winter, Joby and Paul	301 Lake St., Harriman , TN 37748	865-591-6262
Zulliger, Bill	120 W. Melborne Rd, Oak Ridge, TN 37830	865-482-8648

These individuals and some of Sierra Club's members live and recreate in the vicinity of the Tennessee Valley Authority's Kingston Fossil Plant at 714 Swan Pond Road, Harriman, Roane County, Tennessee. This plant sits on the banks of the Emory River, which feeds into the Clinch River and then the Tennessee River and Watts Bar Reservoir further downstream.

On December 22, 2008, an earthen dike for a coal ash dredge cell impoundment failed at the Kingston Fossil Plant. That failure caused the release of about 5.4 million cubic yards of coal ash sludge and contaminated water into the Emory and Clinch Rivers and onto about 300 acres of land in the vicinity of the impoundment. Most of this waste material remains in those waters or in locations where it is likely to move into those waters. In particular, there are piles of coal ash

on the land portion of the spill that will continue to leach and channel contaminants into those two rivers when rainfall falls on those piles. On December 27, 2008, Appalachian Voices sampled toxic metals in some of those piles and found that they contained elevated levels of those metals, including as much as 135 ppm of arsenic and 25 ppm of lead. See attached report.

This release substantially endangers the affected environment and the health of persons who live and travel near the area of this release, as well as users of the water downstream from the release. Coal ash contains significant levels of toxic metals, including arsenic, thallium, antimony, lead, chromium, nickel, copper, zinc, cadmium, manganese, mercury, selenium, boron, antimony, barium, cobalt, beryllium, and molybdenum. In its December 22, 2008 oral notification to the National Response Center (Incident Report #893172), the Tennessee Valley Authority (TVA) reported that, based on a “guesstimate” that the spill size was 2.6 million cubic yards, the release may have exceeded the reportable quantities for eight designated hazardous substances under 40 C.F.R. § 302.4: arsenic, beryllium, mercury, chromium, copper, lead, nickel, zinc, boiler ash, and oil. The metals in this ash may leach into and contaminate surface and ground water and may become airborne as particulates when the ash dries out. This poses a substantial health risk to persons who consume contaminated water, eat contaminated fish, or breathe airborne dust.

On December 27, 2008, Appalachian Voices took water samples of the Emory River between the spill site and 1.94 miles downstream. Those samples contained concentrations of arsenic, barium, cadmium, chromium, lead, mercury, nickel, and thallium that exceeded Tennessee drinking water standards and water quality standards. In addition, according to the U.S. Environmental Protection Agency’s (EPA’s) Press Release #2, dated December 29, 2008, “Samples taken closer to the fly ash release did slightly exceed drinking water standards for several heavy metals. Arsenic was found in one sample close to the spill to be above the maximum contaminant level allowed for drinking water.” Water samples taken by EPA on December 23, 2008, downstream from the release, showed levels of arsenic, antimony, beryllium, cadmium, chromium, lead and thallium that exceeded federal Maximum Contaminant Levels for drinking water. Sediment samples taken by EPA on that date showed levels of arsenic and vanadium that exceeded Region IX Preliminary Remediation Goals at Superfund sites. See http://epaosr.net/doc_list.asp?site_id=4642. The Tennessee River is the source of drinking water for the City of Kingston, Tennessee, and the Watts Bar Reservoir downstream is used by several communities for their drinking water supply. The contaminated water may also endanger fish and aquatic life in the Emory, Clinch, and Tennessee Rivers and in the Watts Bar Reservoir.

1. RCRA Violations. The Resource Conservation and Recovery Act (RCRA) provides that citizens may commence a citizen suit against any person “who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B). Coal ash is a solid waste pursuant to RCRA. *Id.*, § 6903(27). TVA’s December 22, 2008 release and disposal of this waste may present an imminent and substantial endangerment to the health of the public and to the environment. After the close of the ninety-day waiting period, we intend to file suit in federal court and will seek a

court order requiring TVA to abate this endangerment, including taking steps to measure and disclose the full extent of the contamination to air, groundwater, surface water, soil and sediment, remove all coal ash contamination from the environment, monitor the health of natural resources and the public during and after the cleanup process, and otherwise restore private property and the environment.

RCRA also provides that citizens may commence a citizen suit against any person who violates any prohibition in effect under that statute. 42 U.S.C. § 6972(a)(1)(A). RCRA prohibits the open dumping of solid waste and the operation of open dumps. *Id.*, § 6945(a). The criteria for determining what constitutes an open dump are set forth in 40 C.F.R. Part 257. According to 40 C.F.R. § 257.3-3(a) and (b), a facility shall not cause an unpermitted discharge of pollutants into waters of the United States in violation of § 402 of the Clean Water Act, or an unpermitted discharge of dredged or fill material into waters of the United States in violation of § 404 of the Clean Water Act. TVA's release of approximately 1 billion gallons of coal ash waste on December 22, 2008 and thereafter constitutes open dumping and therefore is in violation of these provisions. In addition, as specified in more detail below, TVA has violated the terms and conditions of its NPDES Permit No. TN0005452, which also constitutes open dumping pursuant to 40 C.F.R. § 257.3-3(a). TVA's release of coal ash waste on December 22, 2008 and thereafter is a dumping and deposit of solid waste in violation of these provisions. After the close of the sixty-day waiting period, we intend to file suit in federal court to enforce these prohibitions on the dumping and deposit of solid waste.

2. CWA Violations. Section 301(a) of the Clean Water Act (CWA) provides that “[e]xcept as in compliance with this section and sections 302, 306, 307, 308, 402, and 404 of this Act (33 U.S.C. §§ 1312, 1316, 1317, 1328, 1342, and 1344), the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). A violation of this section is federally enforceable in a citizen suit under 33 U.S.C. § 1365(f)(1). Beginning on December 22, 2008, TVA has violated and continues to violate § 301(a) of the CWA by discharging liquid components of the coal ash, including suspended solids and dissolved or suspended fractions of the toxic metals listed above, without an NPDES permit under § 402 of the CWA from an unapproved outfall, namely the failed dike at coal ash dredge cell #2. Moreover, rainfall on the piles of coal ash on the land portion of the spill has created and/or will create additional point sources in the form of discrete conveyances that will carry pollutants from the ash piles into waters of the United States. Those violations of § 402 continue for every day that TVA fails to eliminate the cause of the violation, i.e., for every day that it has failed to repair the breached dike and fails to remove the piles of coal waste that are continuing to leach pollutants into the Emery and Clinch Rivers.

Alternatively, if TVA's releases are subject to its NPDES Permit No. TN0005452, TVA has violated the terms and conditions of that permit. A violation of this permit is federally enforceable in a citizen suit under 33 U.S.C. § 1365(f)(6). Beginning on December 22, 2008, TVA's releases from dredge cell #2 have violated the following conditions of that permit:

1. A condition on page 3 provides that “There shall be no distinctly visible floating scum,

oil or other matter contained in the wastewater discharge.” The releases on and after that date have contained distinctly visible matter, including coal ash, that is apparent floating on the surface of the water in aerial photographs of the Emory and Clinch Rivers downstream from the release.

2. A condition on page 3 provides that “The wastewater discharge shall not contain pollutants in quantities that will be hazardous or otherwise detrimental to humans, livestock, wildlife, plant life, or fish and aquatic life in the receiving stream.” The releases on and after that date have killed fish in the Emory and Clinch Rivers, as shown in photographs with fish lying dead on the river bank. Those releases have also caused pollution in quantities detrimental to humans and aquatic life, because they have exceeded applicable Tennessee drinking water and water quality standards.

3. A condition on page 4 provides that “Sludge or any other material removed by any treatment works must be disposed of in a manner which prevents its entrance into or pollution of any surface or subsurface waters.” The releases on and after that date have allowed sludge to enter into and pollute the surface waters of the Emory and Clinch Rivers.

4. Part II.A.4.a. on page 9 provides that “The permittee shall at all times properly operate and maintain all facilities and systems (and related appurtenances) for collection and treatment which are installed or used by the permittee to achieve compliance with the terms and conditions of this permit.” TVA failed to comply with this condition because its collection system at dredge cell #2 was improperly operated and maintained until it experienced a catastrophic failure and release.

5. Part II.C.3 on page 12 prohibits “overflows,” which are defined to mean “the discharge to land or water of wastes from any portion of the collection, transmission, or treatment system other than through permitted outfalls.” The releases on December 22, 2008 and thereafter through the breached dike are prohibited overflows within the meaning of this provision.

Beginning on December 22, 2008, TVA has also violated and continues to violate § 301(a) by discharging coal ash and other solid materials, including solid fractions of the toxic metals listed above, without a dredge and fill permit under § 404 of the CWA from the failed dike at coal ash dredge cell #2. The TVA’s discharge of these solid materials are discharges of “fill material” as defined in 33 C.F.R. § 323.2(e) and (f), because they have had the effect of changing the bottom elevation of portions of waters of the United States, namely portions of the Emory and Clinch Rivers where the solid fraction of the coal ash has settled. This violation of § 404 continues for every day that TVA has failed to eliminate the cause of the violation, i.e., for every day that TVA has failed to remove the coal ash and other solid materials from the portions of the Emory and Clinch Rivers.

After the close of the sixty-day notice period, we intend to file suit in federal court and

will seek civil penalties and injunctive relief for these unpermitted discharges of liquid pollutants and solid fill material, including an order requiring the cleanup of these discharges.

3. CERCLA and EPCRA Violations. Section 103(a) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) requires facilities to report immediately releases of hazardous substances that exceed certain threshold amounts to the National Response Center. 42 U.S.C. § 9603(a); 40 C.F.R. § 302.6(a). Citizens may commence a citizen suit against facilities that fail to report these releases. 42 U.S.C. § 9659(a)(1). TVA's coal ash release on December 22, 2008 released at least the following designated hazardous substances under 40 C.F.R. § 302.4 in amounts that exceeded their reportable quantities: arsenic, beryllium, mercury, chromium, copper, lead, nickel, selenium, and zinc.

Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA) requires facilities to report immediately releases of hazardous substances that are required to be reported under section 103 of CERCLA to the local emergency planning committee (LEPC) and the state emergency planning commission (SEPC). 42 U.S.C. § 11004; 40 C.F.R. § 355.40. This initial report must contain “[a]n estimate of the quantity of any such substance that was released into the environment.” 40 C.F.R. § 355.40(b)(2)(iii). In addition, any such release must be followed within 14 days by a follow-up report to these same agencies containing additional information that updates the information contained in the initial report. 40 C.F.R. § 355.40(b)(3). Citizens may file a citizen suit against facilities that fail to report these releases. 42 U.S.C. § 11026(a)(1).

In its December 22, 2008 oral notifications to the National Response Center, Roane County LEPC, and the Tennessee SEPC, TVA reported only releases that exceeded the reportable quantities for arsenic, beryllium, mercury, chromium, copper, lead, nickel, zinc, boiler ash, and oil. TVA failed to quantify the amounts of those hazardous substances that were released. TVA also failed to report releases for other hazardous substances in coal ash that, based on the enormous size of the release and TVA's Toxic Release Inventory reports, are also likely to have exceeded their reportable quantities, including selenium. TVA's 2007 Toxic Release Inventory reports for its Kingston Fossil Plant show that in just one year, it released to land about 45,000 pounds of arsenic, 86,000 pounds of chromium, 129,000 pounds of copper, 49,000 pounds of lead, 235 pounds of mercury, 72,000 pounds of nickel, 8,000 pounds of selenium, and 115,000 pounds of zinc. See <http://www.tva.gov/environment/air/kingston.htm>. At the time of its initial reports to the National Response Center, TVA knew the approximate amount of coal ash released as a result of the dike failure, but nevertheless failed to quantify the amount of hazardous substances that were contained in that release.

In addition, TVA failed to include in its immediate notification to the National Response Center the known or anticipated acute or chronic health risks associated with contact, inhalation or ingestion of the coal ash and to provide information on proper precautions to take as a result of the release of hazardous substances. TVA was required to provide such information pursuant to 40 C.F.R. § 355.40(a)(6) and (7).

The specific amounts of hazardous substances released by TVA must be contained in TVA's follow-up written reports that are required under EPCRA. 40 C.F.R. § 355.40(b)(3). If those reports fail to contain that information, this will constitute a further violation of CERCLA and EPCRA. After the close of the sixty-day notice period, we intend to file suit in federal court for these reporting violations and will seek remedies designed to require the full reporting of the amount, time, and circumstances of each release of these additional substances, as well as civil penalties for each reporting violation.

4. Additional Violations. We also incorporate by reference the alleged violations in the December 30, 2008 notice letter to TVA from Gary A. Davis & Associates on behalf of the Southern Alliance for Clean Energy.

Sincerely,

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