MAR 09 2009
62

PLAINS JUSTICE
www.plainsjustice.org

2 HOURS ... 100 FREE PAGES

February 11, 2009

Alexander Morris
FOIA Officer
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

RE: Freedom of Information Act Request – Title XVII Solicitations

Dear Mr. Morris:

On behalf of Powder River Basin Resource Council and Plains Justice, I write to request that the United States Department of Energy (DOE) provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the regulations of the DOE set forth at 10 C.F.R. Part 1004.

Powder River Basin Resource Council is a nonprofit corporation, tax-exempt under Section 501(c)(3) of the Internal Revenue Code, that educates and empowers its organizational members and other Wyoming residents to raise a coherent voice in the decisions that will impact their environment and rural lifestyle.

Plains Justice is a public interest environmental law center that serves the Northern Plains region, including Iowa, Nebraska, South Dakota, North Dakota, Wyoming, and eastern Montana. We serve communities faced with environmental risks to the air, water, and land that affect daily life. We work to promote the use of clean energy sources by encouraging the development, investment and use of renewable sources of energy. This FOIA request is part of that initiative.

We seek records concerning the role of DOE in providing financial assistance to or otherwise participating in or facilitating coal preparation plants in Montana, North Dakota, and Wyoming. Coal preparation plants wash or dry pre-combustion coal, improving the heat content of the coal. These facilities would be applying for a loan guarantee.

We are submitting this request to obtain documents that will allow for a better understanding of coal preparation plants, the environmental impacts, and the role of DOE's loan guarantee under Title XVII of the Energy Policy Act of 2005 for these facilities.

Cedar Rapids Office:
100 First Street SW, Suite 201
Cedar Rapids, IA 52404
Phone: (319) 362-2120
Fax: (866) 484-2373

Vermillion Office:
P.O. Box 251
Vermillion, SD 57069
Phone: (605) 659-0298
Alt Phone: (605) 675-9268

FOIA-2009000162

Vera

Definitions

For the purposes of this request, the following words have the meanings indicated:

"Ambre" means Ambre Energy Limited and any entity that is a predecessor, successor, parent, or subsidiary of, or is otherwise affiliated with Ambre Energy.

"GTL Energy" means GTL Energy and GTL Energy (USA) Limited and any entity that is a predecessor, successor, parent, or subsidiary of, or is otherwise affiliated with GTL Energy.

"White Energy" means White Energy Company Limited and White Energy Coal North America and any entity that is a predecessor, successor, parent, or subsidiary of, or is otherwise affiliated with White Energy.

"Coal Preparation Plants" means pre-combustion coal treatment technologies to improve heat value, remove sulfur and ash, and increase the energy content of coal. This includes "coal beneficiation plants."

"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, polices, telephone conversations, telefaxes, e-mails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meeting, 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 DOE or any of its offices.

"Transactional Documents" means the documents setting forth the terms of an agreement under which financing is provided or other agreement, including but not limited to loan agreements, promissory notes, guarantees, security agreements, financing statements, mortgages, other documents evidencing security interests, all document modifying, extending, restructuring, replacing, releasing, subordinating, selling, or assigning such financing and security arrangements, and all documents evidencing DOE's consent or approval of such transactions.

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 Plains Justice 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 portion and provide the remainder of the record to Plains Justice.

Records Requested

1. The Transactional Documents for all loans to Ambre Energy, GTL Energy, and White Energy that DOE has made, insured, or guaranteed, provided in whole or in part for the planning, design, construction, modification, or operation of any coal preparation plant in Montana, North Dakota, or Wyoming.

2. The Transactional Documents for all other loans to any entity that DOE has made, insured, or guaranteed, as part of the "Solicitation," for any facility in Montana, North Dakota, or Wyoming, from January 1, 2008 through the end of the Solicitation period.

3. All records relating to an attempt by Ambre Energy, GTL Energy, or White Energy to obtain any financing for any aspect of a coal preparation plant.

4. All records relating to an attempt by any entity to obtain a loan guarantee for a coal preparation plant in Montana, North Dakota, or Wyoming.

5. Any other document relating to a proposed coal preparation plant for Montana, North Dakota, or Wyoming.

Fee Waiver Request

I 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 10 C.F.R. § 1004.9(a). Plains Justice is a nonprofit organization representing other nonprofit organizations that promote the public interest through the development of policies that enhance environmental protection and has received fee waivers under FOIA.

Plains Justice is a regional, nonprofit legal services organization with no commercial interest in obtaining the requested information. Instead, our organization intends to use the requested information to inform the public, so the public can meaningfully participate in the development of energy resources.

As explained more fully below, the above references FOIA request satisfies 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 operation

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).

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

The requested records relate to DOE's determinations regarding its participation in and funding of projects through the Energy Policy Act of 2005. These determinations and the policies and procedures on which they are based, define which energy projects the federal government will help to move forward. These determinations are unquestionably "identifiable operation or activities of the government."

The Department of Justice's *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 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 DOE's decisions because they are not otherwise in the public domain and are not accessible other that through a FOIA request. As these projects move forward, it is important for information relating to government operations or activities involving these projects 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 DOE's decision making process with regard to energy projects.

3. The requestor must have the ability and intention to disseminate the information to the public.

Plains Justice and Powder River Basin Resource Council have a long-standing interest and expertise in the development and use of energy resources. These issues remain at the forefront of our conservation efforts. We are part of a regional coalition seeking the most sustainable and cost-effective energy policy. Therefore, it is understandable why Plains Justice has taken an interest in coal preparation facilities.

Plains Justice disseminates the information it receives from FOIA requests in a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, posts on Plains Justice's website, emailing and list serve distribution to our clients and interested members of the public. Through our partners and clients, we distribute public information on energy issues to thousands of people in the Northern Plains. Our staff also

Record Delivery

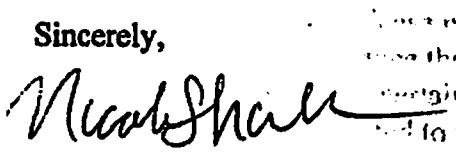
We requested DOE, in responding to this request to comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. 5 U.S.C. § 552(a)(6)(A)(i); 10 C.F.R. § 1004.5(d). Please produce the records above by sending them to me at the address listed below. Please produce 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 material as soon as possible to:

Nicole Shalla
Plains Justice
100 First Street SW, Suite 201
Cedar Rapids, Iowa 52404

If you find that this request is unclear in any way, please do not hesitate to contact me to see if I can clarify the request or otherwise expedite and simply your efforts to comply. I can be reached at (319) 362-2120 or via email at nshalla@plainsjustice.org. Thank you.

Sincerely,



Nicole Shalla
Staff Attorney

makes public presentations, at no charge, across the region and provides public education through publications in the popular press and interviews on a regular basis.

4. The disclosure must contribute "significantly" to public understand of government operations or activities.

There is currently little or no information publicly available regarding DOE's Title XVII solicitation and its role in coal preparation plants. 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 its "operations and activities" associated with these coal preparation plant proposals.

The disclosure of the requested records is also essential to public understanding of the impacts these projects will have on the environment, especially the effects processed coal will have on global warming and its impact on air quality. After disclosure of these records, the public's understanding of these projects will be significantly enhanced. The requirement that the disclosure must contribute "significantly" to the public understanding is therefore met.

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

Plains Justice and its clients have no commercial interest in the requested records. Nor does Plains Justice have any intention to use those records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. Plains Justice is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code, and as such, has no commercial interest. The requested records will be used for the furtherance of Plains Justice's educational mission to inform the public on matters of vital importance to the environment, public health, and natural resources.

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

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, Plains Justice has no commercial interest in the requested records. Disclosure of this information is not "primarily" in Plains Justice's 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 DOE's decision to support certain energy projects. Because the public will be the primary beneficiary of this requested information, please waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4).