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December 14, 2009

President Barack H. Obama  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

Dear President Obama:

Nearly one year ago today, the Tennessee Valley Authority (TVA) made headlines when the earthen wall around the Kingston coal ash pond ruptured, spilling more than *1,000,000,000 gallons of toxic coal waste* – an amount nearly 100 times greater than the Exxon Valdez oil spill – into the surrounding community. We write to respectfully request that your Administration clarify that TVA is not immune from federal prosecution for the Kingston spill and other violations of federal law. We ask also that the Directors you appoint to lead TVA pledge to take specific actions to reform the agency and reduce its reliance on dirty coal-fired power plants.

President Franklin D. Roosevelt envisioned TVA as a beacon of hope at the end of the Great Depression, bringing economic development and flood control to the Tennessee River Valley, an area long ignored by private utilities. TVA was also allowed to sell surplus power from its Muscle Shoals facility. Today, however, TVA has become little more than a giant electric utility unchecked by the regulatory agencies that manage electric power production and protect the public in most of the rest of the country.

The Kingston coal ash spill is only the latest and most dramatic example of environmental mismanagement at one of the nation's largest utilities. A withering report from TVA's own inspector general, released in July 2009, exposed TVA's careless coal ash management practices, lax plant maintenance, and an internal corporate culture more likely to cover-up rather than acknowledge and eliminate known environmental risks.<sup>1</sup> In fact, just two weeks after the Kingston Spill, TVA reported a coal ash spill from its Widows Creek Fossil Plant in Alabama and currently owns nearly 3,000 acres of coal ash impoundments, four of which U.S. Environmental Protection Agency (EPA) identified as "high hazard" sites. In addition, TVA coal plants routinely discharge high levels of toxic pollutants to U.S. waterways, and in 2008, TVA's Kingston plant singlehandedly discharged more pollutants, like arsenic, chromium, lead, manganese and vanadium, to surface waters than the entire electric utility industry the previous year.<sup>2</sup>

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<sup>1</sup> Tennessee Valley Authority (TVA), Office of the Inspector General (OIG), Inspection 2008-12283-02, *Review of the Kingston Fossil Plant Ash Spill Root Cause Study And Observations About Ash Management*, (July 23, 2009).

<sup>2</sup> U.S. EPA, Toxics Release Inventory (TRI), Kingston Fossil Plant, Surface Water Discharges (2008); U.S. EPA, TRI, Electric Utility Industry, Total Surface Water Discharges (2008) *available at* <http://www.epa.gov/tri/>

Thirty years ago a group of citizens and environmental organizations took TVA to court over its excessive emissions. EPA joined in that litigation, without hindrance from the Justice Department. President Carter appointed members of the TVA Board who responsibly settled that litigation, cutting TVA's SO<sub>2</sub> emissions by more than one million tons per year – more than 10 per cent of the entire U.S. total emissions today.

Ten years ago, the U.S. EPA identified serious continuing violations of Clean Air Act New Source Review (NSR) permitting requirements at over a dozen of TVA's coal-fired units; while other utilities settled with the government and agreed to clean up their plants, TVA's NSR violations remain unresolved.<sup>3</sup> In addition, according to TVA's inspector general, TVA broke the law again when it bypassed pollution controls at three different coal plants.<sup>4</sup> These actions, which TVA failed to report as required, resulted in over a *thousand tons of unreported air emissions*. Each year, TVA's fleet of antiquated coal plants produce staggering amounts of pollution — over *104 million tons of CO<sub>2</sub>*; over *20 million pounds of hazardous air pollutants*; and *7 million tons of coal combustion waste*.

Any other utility would have been taken to court by the Justice Department long ago. But we understand that some in the Justice Department believe that its hands are tied under the “unitary executive theory,” which limits the Department's ability to prosecute another federal agency under Executive Orders No. 12,146 and No. 12,088. The unitary executive doctrine was adopted in part to avoid conflict between the Justice Department's duty to prosecute and its duty to defend federal agencies accused of violating the law. However, this policy should not apply to TVA, as it is responsible for its own defense in legal matters.

We ask that you restore accountability to TVA by taking the following actions:

1. Clarify, by Executive Order or Justice Department action, that the “unitary executive” theory does not shield TVA from liability for its environmental misconduct. This action should be swiftly followed by federal prosecution of TVA not only for the Kingston spill, but for violation of the Clean Air Act's New Source Review and other environmental requirements that have lingered for years. TVA has complete freedom under the law to arrange for its own legal defense – and, as noted above, makes full use of that freedom.
2. Support legislation to remove TVA's special protections, such as immunity from paying penalties for environmental violations, and anti-competitive measures that keep rival utilities out of its service areas. Making TVA competitive will result in a more interconnected and energy-efficient grid, and create incentives for TVA to stay ahead of changing environmental and energy regulations. Nor does TVA need or deserve immunity from penalty for its own misconduct. Limitations on the ability to recover penalties from federal agencies are supposed to protect the taxpayer – but TVA has not received federal appropriations in decades, and is completely self-financing.

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<sup>3</sup> U.S. EPA, Environmental Appeals Board, *In re Tennessee Valley Authority*, 9 E.A.D. 357 (2000).

<sup>4</sup> TVA, OIG Report, *Review of Reportable Environmental Events at TVA Facilities*, No. 2007-019F (Dec. 17, 2007); TVA, OIG Report, *Widows Creek Fossil Plant - Environmental Matters*, No. 23C-8 (Mar. 4, 2008).

The Obama Administration recently nominated new members to TVA's Board of Directors. New leadership is essential to increase TVA's clean energy production, reduce carbon emissions, and reform its internal culture to comply with environmental laws. We hope that your nominees will commit to:

1. Rapid phase-out of TVA's ash ponds, especially those ponds U.S. EPA identified as "high hazard" sites, and installation of double liners, leachate collection systems, groundwater monitoring and other safeguards at any new disposal sites. In addition, TVA should eliminate toxic wastewater discharges from its coal-fired plants, with "zero-discharge" systems that U.S. EPA has found to be readily available technology for electric utilities.<sup>5</sup>
2. Modernize TVA's approach to electricity production by establishing a schedule to replace TVA's coal-fired power plants with cleaner sources of electricity. Specifically, TVA should commit to cut its emissions of carbon dioxide at least 20% below 2005 levels, consistent with the goals established in the American Climate and Energy Security Act approved by the House in June 2009. TVA's heavy reliance on fossil fuels is unsustainable in a carbon-constrained world, and if reduced, could transform TVA into a leader in clean energy production.

These actions will not only clean up the environment and make TVA accountable for its own mistakes; they will also bring back the enlightened values that led to the creation of this public utility, and restore TVA to the place of pride it once held among America's electricity providers.

Sincerely,

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<sup>5</sup> U.S. EPA, *Steam Electric Power Generating Point Source Category: Final Detailed Study Report*, EPA 821-R-09-008 (October 2009) (many coal plants are able to design and manage coal waste, specifically scrubber sludge, without discharge).

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**cc:**

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