



December 5, 2014

U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications
Attn: Ms. Wendy Schumacher
NOAA Freedom of Information Officer
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3), Room 9719
Silver Spring, Maryland 20910

Re: Request for Waiver of Fees With Respect to
Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694

Dear Ms. Schumacher:

The nonprofit Institute for Trade, Standards and Sustainable Development (“ITSSD”) hereby files the attached Freedom of Information Act (“FOIA”) Fee Waiver Request relating to ITSSD’s agreed upon amended/modified/bifurcated FOIA Request No. DOC-NOAA-2014-001694, previously filed with the National Oceanic and Atmospheric Administration (“NOAA”) on October 27, 2014. This amendment/modification/bifurcation of said FOIA request was agreed upon pursuant to an October 21, 2014 phone discussion and two October and November 2014 written correspondences exchanged between ITSSD and NOAA. These documents are discussed in greater detail in the accompanying Fee Waiver Request.

As this amended/modified/bifurcated Fee Waiver Request shows, ITSSD has satisfactorily demonstrated, consistent with 15 C.F.R. §4.11(k)(1)-(3), that “(i) 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; and (ii) Disclosure of the information is not primarily in the commercial interest of the requester.”

We appreciate the opportunity to set forth the clear grounds for granting ITSSD a fee waiver with respect to the above-referenced recently amended/modified/bifurcated FOIA request.

Thank you for your prompt attention to this matter.

Very truly yours,

Lawrence A. Kogan

Lawrence A. Kogan
CEO, ITSSD

Cc: Bruce Gibbs, NOAA-OAR
Gerald Fox, NOAA-OCIO
Roxie Allison-Holman, NOAA-OGC

ITSSD Fee Waiver Request Accompanying Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694

I. Introduction

This Freedom of Information Act (“FOIA”) Fee Waiver Request is being filed in connection with the amendment/modification/bifurcation of the above-referenced FOIA Request, as acknowledged and agreed to by representatives of ITSSD and NOAA’s National FOIA Office/Office of Chief Information Office (“NOAA-OCIO”) and NOAA’s Office of Atmospheric Research “NOAA-OAR”), pursuant to an October 21, 2014 telephone discussion, subsequently concretized by ITSSD per letter correspondence dated October 27, 2014,¹ and written acceptance by DOC-NOAA via email correspondence dated November 7, 2014.² NOAA Office of General Counsel Advisor, Roxie Allison-Holman was a party to the November 7, 2014 email correspondence.³

Pursuant to such agreement, as confirmed in these correspondences, ITSSD bi-furcated its FOIA Request recently filed on September 22, 2014 (FOIA Request No. DOC-NOAA-2014-001694)⁴ into two tranches/caches. The first of these tranches/caches focuses on those documents described in said FOIA request that already provide clear and obvious identification of documents for which immediate uncensored disclosure is sought. In particular, these “clear and obviously identified” files for which immediate and uncensored disclosure is sought pertain specifically to ten (10) NOAA-developed highly influential scientific assessments (“HISAs”) listed on page 2 of ITSSD’s October 27, 2014 correspondence, which NOAA had peer reviewed in an effort to comply with its legal obligations under the Information Quality Act (“IQA”).

As FOIA Request No. DOC-NOAA-2014-001694 clearly explains, NOAA-commissioned peer reviews of such HISAs had been subject to specific Office of Management and Budget (“OMB”) and NOAA IQA-implementing guideline standards. These standards required NOAA to validate that the peer reviews it had commissioned of such HISAs had ensured their quality, objectivity, utility, and integrity, in conformance with OMB and NOAA IQA-implementing guidelines standards on conflicts-of-interest, financial and intellectual independence and panel balance. The public disclosure of these documents is indispensable to determining whether NOAA had fully satisfied its IQA obligations.

This Fee Waiver Request establishes below that ITSSD’s agreed upon amendment/modification/bifurcation of FOIA Request No. DOC-NOAA-2014-001694 satisfies each of the criteria identified in NOAA’s six-factor fee waiver test set forth in applicable NOAA regulations implementing the Freedom of Information Act - 15 C.F.R. §4.11(k)(1)-(3).

Finally, when considering whether ITSSD meets the six-factor fee waiver test, NOAA should recall that FOIA carries a presumption of disclosure and that the FOIA fee waiver amendments of 1986 were designed specifically to allow non-profit public interest groups, such as ITSSD, access to government documents without the payment of fees. The legislative history underlying such FOIA amendments reflected Congress’ particular concern that agencies had been using search and duplication costs to prevent critical public monitoring of their activities. As U.S. Senator Leahy then commented,

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“Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information....”⁵

In light of Congress’ expressed concerns, the District of Columbia Circuit Court of Appeals previously stated, in *Better Gov’t Ass’n v. Department of State*⁶ that:

“The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,’ in particular those from journalists, scholars and nonprofit public interest groups.[] In 1980, however, after some experience with the fee waiver provision, a congressional subcommittee concluded that ‘[m]ost agencies have ... been too restrictive with regard to granting fee waivers for the indigent, news media, scholars’ and, therefore, recommended that the DOJ develop guidelines to deal with these problems.”⁷

Significantly, the requesters seeking public disclosure of governmental records in *Better Gov’t* were prolific filers of FOIA requests. They consisted of “a nonprofit organization that conduct[ed] investigations designed to expose waste, fraud and abuse in the functioning of government programs”, and “a nonprofit [environmental] organization ‘dedicated to the promotion of conservation principles on behalf of a large national...constituency.’”⁸ If, as *Better Gov’t* suggests, it is true that a federal agency cannot inappropriately wield FOIA’s fee waiver provisions as an effective obstacle to prevent activist groups such as these (*which were known to utilize FOIA to monitor and challenge government activities*) from obtaining the requested information, it would be highly inappropriate for NOAA EPA to use 15 C.F.R. §4.11(k)(1)-(3) as an effective obstacle to prevent ITSSD from obtaining the records it requested.

Unlike the nongovernmental organizations in the above-referenced case, ITSSD is primarily an educational nonprofit nongovernmental organization that takes a scholarly approach to publicly developing and disseminating information about government activities it obtains through its own research and development initiatives. ITSSD is not a professional FOIA request filer, and has never, prior to March 14 2014, filed a request under any FOIA statute seeking records from any federal, state or local government agency.

II. ITSSD’s Amended/Modified/Bifurcated FOIA Request Satisfies Each of the Substantive Elements of the Six-Factor EPA Fee Waiver Test

Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government (15 C.F.R. §4.11(k)(2)(i))

As ITSSD’s October 27, 2014 correspondence referenced herein indicates, the first tranche/cache of files for which disclosure is sought pursuant to amended/modified FOIA Request No. DOC-NOAA-2014-001694 consists primarily of documents describing operations or activities of the Federal Government.

1. *NRC/NAS Peer Review Contracts*

Page 4 of ITSSD’s October 27, 2014 correspondence reveals that these documents/files include six (6) contracts, identified by contract#, and one contract referred to by proposal#, issued by NOAA (and/or by other federal agencies on NOAA’s behalf) commissioning the National Research Council/National Academy of Sciences to undertake the external peer review of each of seven (7) NOAA-developed highly influential scientific assessments (“HISAs”) in conformance with the Information Quality Act (“IQA”): USGCRP/CCSP SAP1.1; SAP1.3, SAP3.2 and SAP5.2; SAP2.4; SAP3.3; SAP5.3.

2. *NRC/NAS Climate Study/Report Development Contracts*

Page 4 of ITSSD’s October 27, 2014 correspondence also lists three (3) additional contracts, identified by contract#. These are agreements that NOAA had issued alone or in conjunction with NASA commissioning the National Research Council/National Academy of Sciences to develop scientific studies/reports on climate forcing agents, shore erosion and abrupt climate change. NOAA then used these studies/reports in developing climate science assessments, in its role as the effective ‘lead’ climate science agency for the Federal Government.^{9 10 11 12 13}

3. *NOAA Climate Science Research-Related Grant-Funded Contracts Issued to Universities and Nonprofits Participating in NOAA Cooperative Institutes Program*

Pages 5-6 of ITSSD’s October 27, 2014 correspondence, furthermore, lists thirty-nine (39) grant/award contracts, specifically identified by alpha-numeric reference, that NOAA had issued in response to the proposals that universities and nonprofit institutes had submitted following NOAA’s issuance of Broad Agency Announcements for Federal Funding (“BAA”s). These BAAs *inter alia* had solicited universities and nonprofit institutes bearing climate science research and analysis capabilities to participate in NOAA’s Cooperative Institute (“CI”) Program. ITSSD’s FOIA Request No. DOC-NOAA-2014-001694 reveals that NOAA had issued these grant/award contracts during 2004-2010 in favor of seventeen (17) universities and nonprofit institutes which had already been and/or were capable of participating in NOAA Cooperative Institute Programs. Presumably, these institutions had been selected partly due to the scientists involved and the proximity of their physical locations to specific NOAA laboratories and offices.¹⁴ In addition, ITSSD’s amended/modified/bifurcated FOIA request seeks disclosure of information regarding one or more unidentified grant/award contract(s) NOAA had issued to Oregon State University’s Cooperative Institute for Oceanographic Satellite Studies (CIOSS) during said period. It is unknown to ITSSD or the public whether this CI Program had been funded separately or had been funded pursuant to other grant/award contracts NOAA had entered into with another Oregon State University CI Program (CIMRS).

ITSSD’s FOIA request also shows that NOAA had entered into such arrangements in the exercise of the legal authorities it possessed under a number of federal statutes. These included *inter alia* those facilitating the Secretary of Commerce/NOAA’s authority to: enter into cooperative agreements with nonprofits to promote agency/NOAA programs (15 U.S.C §1540); to establish a National Climate Program Office and “to work [(i.e., enter into contracts, grants or cooperative agreements)] with the National Academy of Sciences and other private, academic, State, and local groups” to undertake climate- related activities (15 U.S.C §2901 et seq.); ensure the “taking of such meteorological observations as may be necessary to establish and record the climatic conditions of the United States” (15 U.S.C §313), “provide, through the [National Climate Program] Office, financial assistance, in the form of contracts or grants or cooperative agreements, for climate-related activities which are needed to meet the goals and priorities of the program” (15 U.S.C. §2904); “work with academic, State, industry, and other groups conducting global change research to

provide for periodic public and peer review of the [U.S. Global Change Research] Program [...] to consider and utilize, as appropriate, reports and studies conducted by federal agencies, and departments, the National Research Council, or other entities [..., and] to consult with academic, State, industry, and environmental groups and representatives” in developing “a National Global Change Research Plan for implementation of the Program” (15 U.S.C §2931-2934); and “enter into cooperative agreements with colleges and universities [...] and with nonprofit organizations relating to cooperative research units [...] [f]or the purpose of developing adequate, coordinated cooperative research and training programs for fish and wildlife resources” (16 U.S.C. 753a).¹⁵

4. *Confirmation of Identification of Roles Served by All Members of NOAA-Established Ad Hoc Federal Advisory Committees Involved With the Development and/or Peer Review of the Ten NOAA-Developed Climate Science-Related HISAs*

Page 3 of ITSSD’s October 27, 2014 correspondence, moreover, lists five (5) *ad hoc* federal advisory committees that NOAA had established pursuant to the Federal Advisory Committee Act (“FACA”) which had been involved with the development and/or peer review of five (5) of the ten (10) listed NOAA-developed and since disseminated HISAs. These federal advisory committees included the Climate Change Science Program (CCSP) Product Development Committee for Synthesis and Assessment Product 1.1 (“CPDC-S&A1.1”), the Climate Change Science Program CCSP Product Development Committee for Synthesis and Assessment Product 1.3 (“CPDC-S&A1.3”), the Climate Change Science Program (CCSP) Product Development Committee for Synthesis and Assessment Product 3.3 (“CPDC-S&A3.3”), the Climate Change Science Program (CCSP) Product Development Committee for Synthesis and Assessment Product 1.1 (“CPDC-S&A5.3”), and the Unified Synthesis Product Development Committee (“USPDC”). ITSSD’s amended/modified/bifurcated FOIA request seeks disclosure of Agency files that confirms the identities of each member within these committees, as well as, the criteria NOAA had used to select them. In addition, such FOIA request seeks disclosure of Agency files identifying the specific roles such individual members served in the development and/or peer review of such HISAs. NOAA had generally used such federal advisory committees to assist in the development and/or review of early draft versions of such HISAs.¹⁶ Clearly, NOAA’s establishment of these federal advisory committees constituted an operation or activity of the Federal Government.¹⁷

Each of the above-referenced “clear and obviously identified” NOAA agency files for which ITSSD’s amended/modified/bifurcated FOIA request seeks immediate and uncensored disclosure is focused on and concerns operations or activities of the Federal Government. In other words, the subject of the requested records concern identifiable “operations or activities of the Federal Government, with a connection that is direct and clear”¹⁸ – i.e., records pertaining to the internal and external climate science research and analyses and peer review operations and activities of NOAA and its third party contractors. Consequently, NOAA-OCIO should find that ITSSD’s agreed upon amended/modified/bifurcated FOIA request satisfies the first factor of the six-factor fee waiver test, consistent with 15 C.F.R. §4.11(k)(2)(i).

Factor 2: Disclosure of the Requested Records Is Likely to Contribute to Public Understanding of Government Operations or Activities (15 C.F.R. §4.11(k)(2)(ii))

Page 5 The records clearly identified in ITSSD’s amended/modified/bifurcated FOIA request focus on the institutional relationships NOAA had entered into with third party entities and individuals and the influence that such relationships had had on NOAA and NOAA third-party contractor climate science research,

analyses and peer review practices and procedures. NOAA had been legally obliged to ensure the quality, objectivity, utility, and integrity of ten (10) NOAA-developed and disseminated climate assessments by validating that they had been peer reviewed in conformance with the Information Quality Act and applicable OMB and NOAA IQA-implementing guideline conflict-of-interest, independence and peer review panel balance standards.

There is no information publicly available concerning any of the contracts NOAA had entered into as described above in the discussion of Factor 1. Thus, disclosure of such agreements will provide the public with meaningful information about the operations or activities of the Federal Government (i.e., NOAA's compliance with Information Quality Act and OMB and NOAA IQA-implementing guideline peer review process standards) that will likely contribute to the public's understanding of such government operations or activities.

1. *NRC/NAS Peer Review Contracts*

NOAA has yet to release to the public or the media information about the six (6) peer review contracts NOAA had entered into with NRC/NAS on its own (directly) and via contracts executed by other federal agencies on NOAA's behalf (indirectly) for the latter's peer review of seven (7) of the ten (10) NOAA-developed and since disseminated climate HISAs that are the subject of this FOIA request. Disclosure of these agreements will reveal, in part, the breadth and depth of the institutional relationship then existing between NOAA and the NRC/NAS. The terms of these agreements also will define the scope of the engagements for each such peer review, and perhaps, also define the criteria that NRC/NAS had employed or had been instructed to employ (by NOAA) in the selection of Peer Review Panel, Report Review Committee and Oversight Board members. For example, the terms of such contracts may have directed the NRC/NAS to solicit the appointment of professors affiliated with universities and nonprofit institutes then participating in NOAA Cooperative Institute and other climate science research-related grant-funded programs to NRC/NAS Peer Review Panels, Report Review Committees and BASC/HDGC Oversight Committees engaged in the peer review of such NOAA-developed climate HISAs.

Furthermore, the disclosure of the types of criteria NRC/NAS had actually employed pursuant to these contracts and in fulfillment of NOAA's legal obligations under the Information Quality Act, is likely to contribute to public understanding about the nature and extent of the peer review processes for which NOAA, as the lead climate science federal agency, had been held legally responsible under the Information Quality Act and corresponding OMB and NOAA IQA-implementing guidelines. For example, it does not appear that NRC/NAS had properly resolved the institutional conflicts-of-interest and independence issues surrounding the selection of Peer Review Panel, Report Review Committee and BASC and HDGC Oversight Committee members who had been affiliated with the same federal agencies and universities/nonprofit institutes and the scientists they employed that had made author contributions to the NOAA-developed HISAs then under peer review. The disclosure of these agreements, therefore, would likely contribute to public understanding of how NRC/NAS' process for selecting persons involved in NRC/NAS' multi-level peer review of such HISAs had *not* satisfied the applicable OMB and NOAA IQA-implementing guideline standards.

Page 6 It is critical for the public and media to understand such matters because the former Administrator of the U.S. Environmental Protection Agency, an independent federal agency,¹⁹ had primarily relied upon these HISAs, in part, as the scientific foundation for her Clean Air Act Section 202(a) GHG Endangerment

Findings, and for the Agency's subsequently issued GHG emissions regulations which such Findings had legally triggered. In particular, EPA's CAA Section 202(a) Endangerment Findings had triggered: 1) GHG tailpipe emissions rules;²⁰ 2) prevention of significant deterioration and Title V GHG tailoring rules for stationary source facilities²¹ which were upheld, in part, by the U.S. Supreme Court;²² 3) proposed new source performance standards for CO2 emissions potentially applicable to new "fossil fuel-fired electric utility generating units;"²³ and 4) proposed carbon pollution emission guidelines for existing electric utility general units.²⁴ In addition, NOAA used these HISAs assessments as the scientific foundation, in part, of NOAA's recently released Third National Climate Assessment^{25 26} (also peer reviewed by the NRC/NAS via a NASA contract entered into on NOAA's behalf!²⁷) which served to further support EPA's GHG emissions regulations. Thus, NOAA's disclosure of such records is likely to contribute to public understanding about these government operations or activities and the specific rules for avoiding, identifying, disclosing and resolving apparent and/or actual (financial and intellectual) independence and institutional conflicts-of-interest matters, which NOAA had improperly addressed.^{28 29 30 31 32 33 34}

2. *NRC/NAS Climate Study/Report Development Contracts*

NOAA has yet to release to the public or the media any information about the three (3) contracts NOAA had entered into with NRC/NAS on its own (alone) and with NASA (jointly) to develop scientific studies/reports on climate forcing agents, shore erosion, and abrupt climate change. Disclosure of these agreements will further reveal the nature and extent of the institutional relationship then existing between NOAA and the NRC/NAS as defined by the contracts' specific terms. In addition, disclosure of the specific terms of these three (3) contracts will reveal the author-contributor and peer reviewer selection criteria, and the nature and extent of any institutional relationships then existing between NOAA, the scientists who had ultimately served in those capacities, and the universities and nonprofit institutes which had then employed them. Such disclosure, in other words, will reveal whether these studies and reports had been developed and peer reviewed by financially and intellectually independent author-contributors and peer reviewers, and whether apparent or actual institutional conflicts-of-interest had been identified, disclosed and resolved as required by the applicable OMB and NOAA IQA-implementing guideline standards. Moreover, the disclosure of these three (3) contracts will reveal the extent of NOAA climate policy objectives, including how to address scientific uncertainties for purposes of assessing climate mitigation and adaptation alternatives. Consequently, the disclosure of these records will likely contribute to public understanding about these government operations or activities which engender the application of OMB and NOAA IQA-implementing standards for avoiding, identifying, disclosing and resolving apparent and/or actual independence and institutional conflicts-of-interest matters which NOAA arguably did not follow.

Moreover, disclosure of all of the nine (9) above-referenced NRC/NAS contracts will likely contribute to public understanding of the parameters of the special relationship that continues to exist between NRC/NAS and the U.S. government, including DOC/NOAA. It is not likely that many persons know that the ostensibly "private" nonprofit NRC/NAS has derived substantial benefits from that special relationship. These benefits have accrued, in part, as the result of the NAS having originally been chartered by Congress in 1863,³⁵ and the NRC, its chief operating unit, having been formed in 1918 via Presidential Executive Order.³⁶ This means that NRC/NAS contracts are "paid" through congressional appropriations/grants rather than commercial contracts.³⁷

Indeed, NRC/NAS had arguably derived substantial benefits that have extended far beyond the contracts it had secured with NOAA (and with other federal agencies on NOAA's behalf) to peer review NOAA-

developed SAPs, and with NOAA and other agencies to develop new climate and other environmental assessments, studies and reports which NOAA *and* other federal agencies (e.g., EPA) then used as the basis for climate recommendations, policies and major regulations. Congressional funding of these NRC/NAS activities may no longer be justified if they result in improperly peer reviewed NOAA-developed climate HISAs. Such funding would not be warranted, for example, if the NRC/NAS’s views and those of the academic and government ‘experts’ it secures to undertake such assignments do not reflect true financial and intellectual independence from NOAA and give rise to apparent or actual institutional conflicts of interest in violation of applicable OMB and NOAA IQA-implementing guideline HISA standards. Consequently, public disclosure of these grant/award contracts will likely contribute to public understanding of government operations or activities that have had and will continue to have a significant impact upon the federal fisc, and ultimately, their wallets.^{38 39}

3. *NOAA Climate Science Research-Related Grant-Funded Contracts Issued to Universities and Nonprofits Participating in NOAA Cooperative Institutes Program*

NOAA has not shared with the public or the media any information about the thirty-nine (39) grant/award contracts NOAA had entered into with sixteen (16) universities during 2004-2010, following its issuance of broad agency announcements/solicitations seeking university and nonprofit institute development of climate science-related research and analyses. Disclosure of these grant/award contracts will reveal their subject matter(s) (i.e., the extent and nature of the work that had been performed) and objective(s) (i.e., whether NOAA had selected specific universities and nonprofit institutes and affiliated scientists for the particular task of preparing studies and reports that NOAA would incorporate into the ten (10) HISAs it would later develop. (These HISAs ultimately served, in part, as the primary scientific foundation of EPA’s 2009 CAA Section 202(a) GHG Endangerment Findings and subsequent EPA GHG emissions regulations). Disclosure also will reveal the terms (durations) of these grant/award contracts (believed to be renewable every five-years).

In addition, the disclosure of such records will reveal the scope of such arrangements, particularly the relationships established incident to these institutions’ participation in NOAA’s Cooperative Institute (“CI”) Programs. NOAA has not yet shared with the public or the media any information about the relationships established as the result of such agreements, or any information about the synergies created therefrom which ITSSD research has shown extends to relationships NOAA had with other third party organizations (e.g., the NRC/NAS, the USGCRP, and the IPCC). For example, as noted below, ITSSD research reveals that many scientists affiliated with universities/nonprofit institutes participating in NOAA CI Programs had served as author-contributors and/or reviewers of the IPCC’s Third and Fourth Assessment Reports, as well as on the Peer Review Panels, Report Review Committees and BASC/HDGC Oversight Committees that the NRC/NAS had established, pursuant to the contracts referenced above to undertake the peer review of seven (7) of ten (10) NOAA-developed HISAs.

Therefore, the relationships in question with respect to the NOAA CI Program grant/award agreements concern specifically those between:

- 1) NOAA and the universities and nonprofit institutes which had participated during 2004-2010 in NOAA grant-funded CI Programs;

- 2) The universities and nonprofit institutes which had participated in CI Programs and the scientists they employed who NOAA and such institutions may have deemed indispensable and integral to the undertaking of such CI Programs, and those scientists who had actually been assigned and/or participated in such programs;
- 3) The universities and nonprofit institutes which had participated in CI Programs and the NOAA-employed scientists who NOAA and these institutions may have deemed indispensable and integral to the undertaking of such CI Programs, and those who had actually been assigned and/or participated in such programs.
- 4) The scientists who had participated along with the universities and nonprofit institutes that employed them in such CI Programs, and other scientists employed by the very same universities and nonprofit institutes, but who had not participated in such programs, and who had otherwise served as:
 - a) Members of NOAA-established federal advisory committees involved in the development and/or peer review of the ten (10) NOAA-developed climate HISAs that are the subject of this FOIA request;
 - b) Members of the Peer Review Panels, Report Review Committees and/or BASC/HDGC Oversight Committees formed by the NRC/NAS to peer review such NOAA-developed climate HISAs;
 - c) Author-contributors to the NOAA climate HISAs the NRC-NAS had peer reviewed; *and/or*
 - d) Author-contributors to and/or reviewers of the Third or Fourth IPCC Assessment Reports (“IPCC AR3 and AR4”); *and*.
- 5) Between NOAA, the NRC/NAS and the universities and nonprofit institutes participating in CI Programs, to the extent the grant/award contracts directed such CI Program participants to ensure their employed scientists sought appointment on the NRC/NAS Peer Review Panels, Report Review Committees and BASC/HDGC Oversight Committees NOAA had commissioned to peer review the seven (7) NOAA-developed climate HISAs referred to above.

Disclosure of these relationships will thus likely contribute to public understanding of how, if at all, NOAA had satisfied its legal obligations under the Information Quality Act with respect to all ten (10) NOAA-developed climate HISAs. Disclosure of such records, in other words, would enable the public to understand how NOAA had been obliged but had failed to ensure the quality, objectivity, utility, and integrity of such HISAs, in conformance with applicable OMB and NOAA IQA-implementing guidelines standards governing peer reviewer conflicts-of-interest and financial and intellectual independence, and peer review panel balance.

Based on the annual reports each university and nonprofit institute had prepared as NOAA CI Program participants during said period,⁴⁰ it is believed that the university/nonprofit institute- and government-employed scientists working in such programs as principal or assistant investigators⁴¹ (many of whom had served either as tenured or tenure-track faculty, non-tenured or non-tenure-track faculty, adjunct faculty or research faculty) had been charged with performing various types of climate science research and analyses. ITSSD research reveals that much of that research and analyses had either been published in peer reviewed/refereed journals, or otherwise reflected as author-contributions to most of the ten (10) NOAA-developed climate HISAs that are the subject of ITSSD’s original and amended/modified/bifurcated FOIA

Request No. DOC-NOAA-2014-001694.⁴² A close inspection of the endnotes of each of these HISAs confirms NOAA's use of many such articles for such purpose.

Disclosure of the thirty-nine (39) CI Program grant/award contracts also will likely contribute to public understanding of how the relationships between NOAA, these institutions and their respectively employed scientists had factored in to the NRC/NAS' subsequent peer review of seven (7) of the ten (10) NOAA-developed climate HISAs. In other words, disclosure will clarify whether such agreements refer to other NOAA agreements with third parties, including NRC/NAS, which did not adequately consider how the relationship between NOAA and these institutions and their respective scientists would impact the peer reviews of such HISAs.

The Annotated Addendum and appendices accompanying FOIA Request No. DOC-NOAA-2014-001694 reveal that many scientists affiliated with universities/nonprofit institutes participating in NOAA CI Programs and/or other NOAA grant-funded programs had served on NOAA-commissioned NRC/NAS Peer Review Panels, Report Review Committees and/or BASC/HDGC Oversight Committees in connection with NRC/NAS' peer reviews of seven (7) of the ten (10) NOAA-developed climate HISAs that are the subject of this FOIA request.^{43 44 45 46 47 48 49} And, still other such scientists who had been affiliated with these institutions served as author-contributors to these same NOAA-developed climate HISAs⁵⁰ or as author-contributors to the IPCC AR3 and AR4.⁵¹ In light of these relationships, disclosure of the thirty-nine (39) grant/award contracts also will contribute to public understanding of whether NOAA had validated the NRC/NAS peer reviews of such HISAs. Consequently, disclosure of the requested records will likely contribute to public understanding of important government operations or activities, including whether NOAA had violated its obligations under the IQA and applicable OMB and NOAA IQA-implementing guideline standards mandating the identification, disclosure and resolution of apparent and/or actual conflicts-of-interest and lack of peer reviewers' financial and intellectual independence (i.e., from both the CI Program-participating universities/nonprofit institutes and from NOAA).

4. Federal Advisory Committees⁵²

As previously noted in the discussion relating to Factor 1, limited and unverifiable information is currently publicly available regarding the identities of all members of the five (5) *ad hoc* federal advisory committees NOAA had established to develop and/or peer review the following NOAA-developed HISAs: SAP1.1/CCSP(2006), SAP1.3/CCSP(2008g), SAP3.3/CCSP(2008i), SAP5.3/CCSP(2008) and *Global Climate Change Impacts in the United States* ("NCA2-2009"). Whatever information is available is unclear about the identities of the individual members of these committees, the criteria employed for their selection, and the roles they had served with respect to the preparation and/or peer review of these NOAA-developed HISAs. For example, disclosure will clarify which, if any, members had assisted in the development of these HISAs and which, if any, members had assisted in the peer review of such HISAs for purposes of determining whether their services had adversely influenced such government processes – i.e., triggered apparent or actual conflicts of interest or betrayed a lack of financial or intellectual independence from NOAA. Disclosure of these Agency records will thus reveal meaningful information about these government operations or activities and will likely contribute to public understanding of such operations or activities.

In order for a requester to meet this fee waiver requirement, it "must demonstrate [if] disclosure of the records will reveal any meaningful information about government operations or activities [and if] one [can]

learn from these records anything about such operations that is not already public knowledge.”⁵³ NOAA cannot credibly contest that the public has a significant interest in learning about how NOAA, and the *ad hoc* federal advisory committee members, third-party climate assessment developers, and third party peer reviewers NOAA had selected had undertaken their tasks, and whether those engagements had compromised NOAA’s ability to satisfy its IQA legal obligations.⁵⁴

ITSSD’s amended/modified/bifurcated FOIA Request No. DOC-NOAA-2014-001694 seeks records reflecting contracts and other cooperative agreements between NOAA and third party institutions and individuals. ITSSD has sought these records because it believes the information derived from them will contribute to “the public’s understanding of the individuals and organizations that influence, or attempt to influence, public opinion regarding [NOAA] policies and programs.”⁵⁵ ITSSD has fulfilled this second factor of the six-factor fee waiver test because it herein “provided details specific to this FOIA request,” has stated that its request is “likely to contribute significantly to public understanding of the activities” of the government *in other than* “perfunctory language,” and has “support[ed] its statements with facts,” as set forth herein and in both the original and amended/modified/bifurcated FOIA Request No. DOC-NOAA-2014-001694.⁵⁶

Furthermore, “the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of the government.”⁵⁷ ITSSD’s amended/modified/bifurcated FOIA Request explains the existence of institutional affiliations between NOAA and the above-referenced third party institutions and individuals arising from the various contracts NOAA had entered into with such parties. In addition, it also explains in careful detail how those institutional affiliations had likely influenced and/or compromised the internal and external peer reviews performed of ten (10) NOAA-developed and disseminated HISAs, the quality, objectivity, utility, and integrity of which NOAA had been obliged to ensure under the Information Quality Act and applicable OMB and NOAA IQA-implementing guideline conflicts-of-interest, financial and intellectual independence, and peer review panel balance standards. These government operations or activities were important because these HISAs had subsequently served as the scientific foundation, in part, of EPA’s Clean Air Act GHG Endangerment Findings and of economically significant EPA GHG emissions regulations such Findings had legally triggered. Moreover, ITSSD’s FOIA Request provides sufficient evidence that the requested records have not already been made public on NOAA agency websites or have not otherwise been shared with the media, and consequently, that their disclosure by NOAA in response to this amended/modified/bifurcated FOIA Request would reveal meaningful information that, for all practical purposes, is not already in the public domain or in the public knowledge.⁵⁸

In sum, disclosure by NOAA of the records ITSSD requested would be “meaningfully informative” about these critically important “government operations or activities”,⁵⁹ and consequently, “likely to contribute to the [public’s] understanding” of them - ⁶⁰ an understanding which did not previously and does not currently exist. Therefore, NOAA-OCIO should find that ITSSD’s amended/modified/bifurcated FOIA request satisfies the second factor of the six-factor fee waiver test, consistent with 15 C.F.R. §4.11(k)(2)(ii) .

Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Reasonably Broad Audience of Persons Interested in the Subject, as Opposed to the Individual Understanding of the Requester (15 C.F.R. §4.11(k)(2)(iii))

Disclosure of the records identified and requested in ITSSD’s amend/modified/bifurcated FOIA Request No. DOC-NOAA-2014-001694 “will contribute to the understanding of a reasonably broad audience interested in the subject”, as opposed to “the understanding of the requester or a narrow segment of interested persons,” within the meaning of 15 C.F.R. §4.11(k)(2)(iii). In other words, ITSSD, led by its professional staff and members of its Board of Advisors, specifically intends to disseminate, and is technically, intellectually and otherwise capable of disseminating the information, once compiled, analyzed, edited and explained, to a reasonably broad public audience, as set forth in the following discussion of Factor 3.

ITSSD is aware that, like the courts, your office will assess the contribution to the public’s understanding that disclosure of such records would provide by considering ITSSD’s intention and ability to effectively convey or disseminate the requested information to a reasonably broad public audience.⁶¹ ITSSD also recognizes that this provision requires ITSSD to demonstrate an actual ability, and not merely, an intent to disseminate information. This means that, as a FOIA requester, ITSSD must provide specific details, not conclusory allegations, of its intent and ability to disseminate the requested information to the general public to enable the agency to make an informed decision as to whether the fee waiver is appropriate.⁶²

a. *ITSSD’s Specific Intent to Disseminate Such Information to a Reasonably Broad Public Audience*

ITSSD specifically intends to disseminate, and is capable of disseminating, the resulting information products to a reasonably broad public audience through use of various methods of communication and forms of online media, including interviews and documentaries, publication of op-eds, letters to the editor, press releases, blog posts, ITSSD website postings, peer reviewed professional law and science journal articles, scholarly reports and studies, congressional briefings and testimony, conferences, symposia and/or debates, webinars, and other methods of online and personal educational communication and outreach. The ITSSD website and blogs are quite easily accessible on the web, as are ITSSD publications.

In support of this statement, ITSSD provides below explicit evidence of its communication efforts to promote public understanding of the complex subject matter discussed in ITSSD’s previously filed and clarified NOAA FOIA Request No. DOC-NOAA-2014-000714,⁶³ and its subsequently filed new and clarified NOAA FOIA Request No. DOC-NOAA-2014-001694,⁶⁴ which has since been amended/modified/bifurcated⁶⁵ to focus only on the first tranche/cache of specific files described herein.

ITSSD’s communication efforts began in May 2014, when it launched a national ‘FOIA Education Campaign’ contemporaneous with the filing of its original NOAA FOIA request.⁶⁶ That campaign’ focused on alerting the public of the general need for federal agencies, especially NOAA and EPA, to adequately peer review highly influential scientific assessments supporting major rulemakings such as EPA’s 2009 Clean Air Act Section 202(a)(1) GHG Endangerment Findings, consistent with the standards imposed by Information Quality Act (“IQA”) and relevant OMB, NOAA and EPA IQA-implementing guidelines. The ITSSD press release had specifically referred to NOAA-developed climate assessments that had been insufficiently peer reviewed in violation of such standards, and discussed the questionable affiliations between NOAA scientists, university-affiliated scientists participating in NOAA-funded climate research grant programs, and the NAS/NRC.

This ITSSD press release and FOIA filing had prompted a number of journalists and media outlets to prepare and disseminate articles describing the subject matter and focus of said filing and press release, including the *Daily Caller*,⁶⁷ *RedState.com*, the *Canada Free Press*, the *Daily Times*, *CFACT.org*, *WesternJournalism.com*,⁶⁸ and the *Washington Examiner*,⁶⁹ which articles were subsequently posted to various websites throughout the internet. In addition, three media outlets, including the *Washington Times*,⁷⁰ the *Asia Law Portal*⁷¹ and the *Los Alamos Monitor*,⁷² had invited ITSSD staff and colleagues to prepare articles they agreed to publish for the purpose of educating a broad public audience about its NOAA (and EPA) FOIA-related activities. The first of these latter articles was subsequently posted to various websites throughout the internet.

Thereafter, during June 2014, ITSSD released a white paper which examined the relationship between recently approved congressional science appropriations, NOAA (and other federal agency, e.g., EPA) Information Quality Act-noncompliant peer review practices, and EPA's reliance on improperly peer reviewed NOAA scientific assessments as the scientific foundation, in part, of EPA's 2009 Clean Air Act GHG Endangerment Findings and subsequent economically significant GHG emissions regulations.⁷³ At least one nonprofit group developed its own article that further explained the subject matter of the ITSSD white paper, and such article, as well, was subsequently posted on various websites throughout the internet.⁷⁴

During May-June 2014, ITSSD outreach efforts extended to senior and professional staffers working for specific members of Congress and congressional committees. For example, ITSSD briefed the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, unaware that the House had just adopted floor amendments on H.R. 4660 – The FY 2015 Commerce, Justice, Science Appropriations Act, as well as, the U.S. House of Representatives Committees on Science, Space and Technology, Oversight and Government Reform, the Judiciary, the U.S. Senate Committee on Environment and Public Works and the U.S. Senate Judiciary Committee. In addition, on May 27, 2014, ITSSD submitted to House Science Committee professional staff a list of questions and reference documentation it had prepared⁷⁵ to assist committee members who had been scheduled to convene a hearing on May 29, 2014, entitled, "Examining the UN Intergovernmental Panel on Climate Change Process."⁷⁶

Additional evidence is set forth below of ITSSD's expressed intent and ability to broadly and publicly disseminate the records ITSSD requested in its amended/modified/bifurcated FOIA request which NOAA chooses to prospectively disclose. It can be found, initially, in the media articles journalists had previously written about ITSSD's June 30, 2014 filing of a new FOIA request with EPA, and in the articles that other media outlets had then invited ITSSD staff and colleagues to prepare in further explanation of such filing. For example, articles about such filing had been published by a family of journals from *Inside Washington Publishers*,⁷⁷ *InsideEPA*,⁷⁸ *InsideEPA's Clean Energy Report*,⁷⁹ *InsideDefense*⁸⁰ and *Inside US Trade*,⁸¹ by the National Association of Scholars,⁸² by investigative reporter Kevin Mooney on his own⁸³ and for the *American Spectator*,⁸⁴ and by The Science & Environmental Policy Project,⁸⁵ and were subsequently posted on various websites throughout the internet. And, several media outlets had invited ITSSD staff and colleagues to prepare articles they agreed to publish for the purpose of educating a broad public audience about its EPA FOIA-related activities. These media outlets included *Townhall.com*, the *Canada Free Press*,⁸⁶ the Heartland Institute's *Somewhat Reasonable Blog* and *WesternJournalism.com*,⁸⁷ the *Asia Law Portal*⁸⁸ and *World Coal.com*.⁸⁹ Furthermore, ITSSD staff took the initiative to craft another short writing in response to a relevant op-ed appearing in the *Wall Street Journal*.⁹⁰

Furthermore, during July 2014, an ITSSD professional staff member attended the Heartland Institute's 9th Climate Change Conference convened in Las Vegas, NV where he liaised with more than six-hundred attendees from around the world. During several panels' Q&A sessions, said staff member engaged in discussion with panelists about ITSSD's IQA-focused NOAA and EPA FOIA requests. In particular, this ITSSD representative explained how such agencies had failed to validate that the peer reviews of NOAA-developed & disseminated highly influential scientific assessments had satisfied IQA and OMB and agency IQA-implementing conflicts-of-interest, financial and intellectual independence and panel balance standards. Said ITSSD representative also explained how these HISAs had subsequently been used by EPA as the scientific foundation, in part, of that agency's controversial Clean Air Act GHG Endangerment Findings. This staff member's presence and perspective were reported briefly by a *Vice.com* journalist attending the event.⁹¹

Moreover, during August 2014, ITSSD filed detailed and annotated comments in response to a June 18, 2014 Federal Register notice soliciting public comments with respect to EPA's proposed rule on GHG emissions standards for existing power plants (Docket No. EPA-HQ-OAR-2013-0602).⁹² These comments focus on Sections II.A1-3 of EPA's "Proposed Power Plant Rule," which cite as the scientific foundation for said rule the "major" climate assessments (including the ten (10) NOAA-developed climate assessments) and computer modeling applications supporting the EPA Administrator's 2009 Clean Air Act Section 202(a)(1) GHG Endangerment Findings and NOAA's Third National Climate Assessment. These comments also provide powerful and compelling evidence of NOAA's, and ultimately, EPA's commission of serious Information Quality Act peer review violations with respect to their validation of these assessments. In particular, the comments describe peer review process failures resulting in unidentified, disclosed and resolved institutional conflicts-of-interest and lack of financial and intellectual independence, as well as, peer review panel imbalance. ITSSD's comments conclude that "EPA is legally precluded from relying on [these] climate assessments and computer modeling applications [...] as the scientific foundation for its Proposed Power Plant Rule, since EPA & DOC-NOAA failed to validate such science in conformance with the Information Quality Act (44 U.S.C. 3516 note) and relevant binding OMB and EPA IQA-implementing administrative guidance."

Contemporaneous with ITSSD's August filing, ITSSD had been approached by journalists from several media outlets, including the *Daily Caller*,⁹³ *WorldCoal.com*⁹⁴ and *InsideEPA*,⁹⁵ which had expressed interest in writing articles about the subject matter of our filing. Following their publication, these articles were subsequently posted on websites throughout the internet.

On December 1, 2014, ITSSD filed a supplement to these comments identifying further IQA peer review process violations committed directly by EPA with respect to EPA-developed highly influential scientific assessments. This supplement also updated the August comments by incorporating by reference the new NOAA FOIA Request No. DOC-NOAA-2014-001694 that ITSSD had subsequently filed on September 22, 2014, including all of its detailed findings.⁹⁶

On September 22, 2014, contemporaneous with ITSSD's filing with NOAA of its new FOIA Request No. DOC-NOAA-2014-001694, journalists at *InsideEPA*⁹⁷ released an article summarizing the contents of that document. Following the publication of this article, ITSSD was approached by journalists at the *Daily Caller* and *WorldCoal.com*. The former invited ITSSD to prepare its own article discussing the focus of said FOIA which it promptly agreed to publish,⁹⁸ while the latter published its own article describing the

contents of this new filing.⁹⁹ These two articles were subsequently posted on websites throughout the internet.

In addition, ITSSD staff co-authored an article at the invitation of journalists at the Berlin-based *Atlantic-Community.org* blog that was published in November 2014. It discusses, in part, the potential international significance of the Information Quality Act with respect to cross-border treatment of scientific assessments used by administrative agencies as the basis for environment, health and safety regulations, in the context of the current Transatlantic Trade and Investment Partnership (“TTIP”) negotiations, consistent with this administration’s “international regulatory cooperation” initiative.¹⁰⁰ This article followed up another more in-depth article that included mention of this subject matter which had previously been co-authored by the same authors and published in the *European Journal of Risk Regulation* during December 2013.¹⁰¹

Lastly, ITSSD developed an eighty (80)-page textual analysis accompanied by nearly one thousand (1,000) footnotes which will be released during January 2015 by a Washington, DC-based legal publisher. The paper will discuss the legislative history and policy objectives of the Information Quality Act, and the legal obligations the IQA and relevant binding administrative guidelines impose upon federal agencies when they adopt, endorse, use and publicly disseminate agency- and third party-developed highly influential scientific assessments (“HISAs”) as the basis for rulemakings. It also will provide *inter alia* a case study discussing specific instances of NOAA and EPA noncompliance with the IQA and OMB and NOAA/EPA IQA-implementing conflict-of-interest, independence and panel balance standards applicable to HISAs, and explain how these IQA compliance failures compromise the scientific foundation of EPA’s 2009 CAA Section 202(a) GHG Endangerment Findings and the enacted and proposed regulations they have triggered. ITSSD is currently in discussion with one or more law reviews interested in publishing a variation and enhanced version of such paper.

Based on all of the above evidence, it is clear that ITSSD has identified at this early stage, to the best of its ability, a number of specific media outlets and contacts that ITSSD intends to and is capable of working with to secure publication of media-developed and ITSSD-developed materials, articles, op-eds, blog entries, etc., which would explain and discuss, in an understandable manner catering to a broad public audience, the Information Quality Act-focused records that NOAA would disclose in response to ITSSD’s amend/modified/bifurcated FOIA request. Consistent with current jurisprudence within and beyond the D.C. Federal Circuit, such information should be sufficient to demonstrate ITSSD’s “firm intention to publish” and ability to otherwise disseminate information about the subject of its FOIA request, and for EPA to grant a fee waiver.¹⁰²

b. *ITSSD’s Specific Technical and Intellectual Capability to Disseminate Such Information to a Reasonably Broad Public Audience*

ITSSD also provides below specific evidence of its technical and intellectual capability “to understand, process, and disseminate the information” to a reasonably broad public audience. The ITSSD website contains information about the particular educational expertise and skills possessed by ITSSD professional staff and Board of Advisors members, which were previously and are currently utilized to successfully convey important information about complex scientific and legal processes to members of the public, journalists, the academic and scientific communities, Congress, and Executive Branch policymakers operating at the agency and interagency levels. This information is contained in the backgrounds and/or resumes of each ITSSD staff and Board of Advisors member available in the [“About Us”](#) section of the

ITSSD website, or in the publicly available documents such individuals have submitted to these bodies or had otherwise published.

ITSSD professional staff and current and former Board of Advisors members (to whom ITSSD maintains ongoing access) have been integrally involved and possess expertise in scientific risk assessment and risk management, scientific peer review, environment, health and safety law and regulatory science policy and atmospheric pollution metrics. This experience spans the fields of chemistry, biology, toxicology, pharmacology, physics and mathematics, engineering and computer simulations of atmospheric pollution, etc. Members of the ITSSD Board of Advisors also have experience in relating complex concepts to undergraduate and graduate students in understandable terms.

For example, several current and former members of the ITSSD Advisory Board serve or have served as adjunct and/or tenured faculty or as researchers at the following universities and colleges: Georgetown University School of Medicine (*Moghissi and McBride, visiting – Kogan*); Georgetown University's McCourt School of Public Policy (*McBride*); Arizona State University College of Law and Arizona State University School of Life Sciences (*Marchant*); Tuskegee University (*Prakash*); Catholic University of America (*Kelly*); University of Georgia (*McBride*); Princeton University (*Zaidi*); and Seton Hall University, School of International Relations and Diplomacy (*Kogan*). One such member also had previously managed the Bioenvironmental/Radiological program at EPA's National Environmental Research Center and Health and Environmental Risk Analysis Program [*Moghissi*], and also represented EPA's Office of Research and Development in a number of working groups responsible for drafting regulations [*Moghissi*]. In addition, one ITSSD professional staff member also has served as a panelist at numerous governmental, academic, industry and civil society conferences addressing various public audiences regarding complex regulatory science and related legal issues.¹⁰³

Various ITSSD professional staff and current and former Board of Advisors members also have experience communicating such complex subject matter to the members of Congress and to federal agencies. For example, during 2009, 2011 and 2012, members of ITSSD's professional staff and/or Board of Advisors submitted oral and written testimony before Congress regarding the need for transparency of the processes EPA uses in performing peer review and formulating regulations based on agency science. (*Moghissi, McBride*)¹⁰⁴ During 2011, one member of the ITSSD Board of Advisors submitted oral and written testimony before Congress regarding the need to separate risk assessment, a primarily scientific undertaking, from risk management, a more policy-related undertaking. (*Marchant*)¹⁰⁵ During 2006, several members of the ITSSD Board of Advisors submitted written comments to the Office of Management and Budget's Office of Information and Regulatory Affairs in response to a federal register notice soliciting public comments on OMB's then proposed risk assessment bulletin. (*Moghissi, McBride, Straja*)¹⁰⁶ During 2013, at least one member participated in public seminars discussing the potential impact of climate change on public health. (*McBride*)¹⁰⁷ During 2010, 2012, and 2013, several members of the ITSSD Board of Advisors authored books on risk assessment, peer review and metrics for evaluating and validating scientific claims,¹⁰⁸ (*Moghissi, Straja*) while at least one member of the ITSSD Board of Advisors has served as editor-in-chief of several prestigious peer reviewed scientific journals. (*Moghissi*)¹⁰⁹ During 2013, one ITSSD professional staff member and a member of the ITSSD Board of Advisors separately analyzed and reached clearly conveyed findings concerning the potential downstream domestic and international scientific, legal and economic impacts of the federal government potentially pursuing policy-based science in lieu of science-based policy with respect to risk assessment and risk management protocols. (*Kogan*)¹¹⁰ During 2014, this professional staff member's contribution to the public understanding of these issues in the

context of ongoing EU-US transatlantic trade negotiations was recognized by this administration, the European Parliament and the New York-based Burton Foundation. (*Kogan*)¹¹¹

Finally, during 2007-2009, ITSSD, led by its professional staff, successfully prosecuted an effective public education campaign to inform members of a broad public audience about the need for the U.S. Congress to undertake a thorough due diligence review of the environmental regulatory component of the United Nations Convention on the Law of the Sea (“UNCLOS”) and its potential downstream impacts on the national economy and military and industrial technology base prior to its being submitted for a full Senate floor vote. ITSSD utilized all of the forms of communication described in Section 3.a above to clearly convey its research findings and recommendations. These included the ITSSD website, a subject matter-relevant ITSSD journal blog, media op-eds, press releases, law journal and law review articles, congressional briefings, media interviews, and public debates at the Reserve Officers Association and the National Defense University with representatives from the U.S. Department of State, Office of the Legal Adviser, the U.S. Department of the Navy, Director, International and Operational Law, Office of the Judge Advocate General, and the Director, National Security Law, Virginia School of Law, University of Virginia. ITSSD believes NOAA would be interested in reviewing ITSSD’s prior legal writings clearly explaining complex legal issues surrounding domestic and international environmental regulatory law, which serves as evidence of how ITSSD is capable of explaining the complex procedural law issues surrounding IQA compliance.¹¹²

Consistent with applicable case law, ITSSD has sufficiently demonstrated it “is able to understand, process, and disseminate the [complex and voluminous] information” NOAA chooses to disclose in response to ITSSD’s amended/modified/bifurcated FOIA Request by explaining how the backgrounds of its staff and members of its Board of Advisors qualify them “to perform the analysis necessary to effectively disseminate the information”¹¹³ once disclosed by NOAA. Having “proffered a list of dissemination mechanisms and expressed intent to disseminate the information”, and “amply showed a capacity to disseminate information generally,” ITSSD need not “have a history of disseminating information derived from FOIA requests to be entitled to a fee waiver.”¹¹⁴

c. *The Reasonably Broad Public Audience to Which ITSSD Specifically Intends to Disseminate Such Information*

As demonstrated in Sections 3.a and 3.b above, ITSSD specifically intends to disseminate, and is capable of disseminating, the requested information, once disclosed by NOAA, to a broad public audience. This audience consists of journalists, individual members of the public, farmers, ranchers, fisherman, nonprofit civil society organizations, for-profit civil society organizations such as trade associations, individual members of industry, members of the Bar, other professional associations, federal policy-makers, executive branch officials, members of Congress and congressional committee (professional) staffs, and members of the academic, scientific and scholarly communities.

Consistent with District of Columbia precedent, the “broad and diverse public audience ITSSD has identified as the intended recipient of the to-be disseminated NOAA information represents a reasonably large segment of the public; the intended audience does not constitute a limited subset of persons.”¹¹⁵ In addition, the Second Circuit Court of Appeals, in the case of *Carney v U.S. Dept. of Justice*,¹¹⁶

“found that a requester’s dissemination of federal agency-disclosed information may satisfy factor 3 of the six-factor FOIA fee waiver test even if the public dissemination assumes the form of scholarly publications. According to the Court the dissemination of scholarly publications ‘often is of great benefit to the public at large’, although it may ‘not reach a general audience’, given ‘the important role of academe in our democracy...[especially where the] evidence in the administrative record [reflects]...that very little has been written regarding [the subject].’¹¹⁷

The Court reasoned that scholarly publications, once disseminated, could potentially ‘enlighten[]’ other interested scholars’ who would then incorporate such publications in their own work and writings,¹¹⁸ which in turn, would inure to the benefit of society at large. According to the Court, therefore, ‘[t]he relevant inquiry...is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject’ (emphasis added).¹¹⁹

Unlike, in *Carney*, where the requester had specifically intended to disseminate the disclosed agency records exclusively via the publication of scholarly articles, ITSSD specifically intends to disseminate disclosed NOAA records through various means and media, including, but not limited to, publication of scholarly articles, and to a broad public audience that includes, but is more diverse than, the scholarly and academic communities. The description of the media articles, to date, set forth in the discussion of ITSSD’s satisfaction of Factor 3.a above, makes clear that ITSSD will disseminate disclosed NOAA records to a broad public audience.

The “[Library](#)”, “[Programs](#)”, “[News](#)”, “[News & Media Archive](#)”, “[References](#)” and “[Testimonials](#)” sections of ITSSD’s website, furthermore, clearly evidence the broad and diversified public audience, to date, to which ITSSD publications, white papers, press releases, media interviews, public debates, and public symposia and conference materials have been disseminated, and the responses to and/or professional recognition of such disseminations ITSSD has received from members of these communities. Indeed, the [ITSSD website](#) has been partially redesigned since the June 30, 2014, to provide the public and the media with simple access to the ITSSD’s NOAA and EPA FOIA Requests and the accompanying exchange of NOAA, EPA and ITSSD correspondences. For example, documents related to ITSSD’s NOAA FOIA Request, Clarification and Fee Waiver Requests are now accessible via the “[ITSSD Portal to NOAA FOIAs](#)” located on the website homepage.¹²⁰ In addition, the redesigned ITSSD website provides easy access to detailed information about [FOIA](#), the [Information Quality Act](#) and [regulatory transparency](#) more generally.

The ITSSD website also provides easy access to these three different types of third party reporting: [mainstream/editorial media](#), [industry/trade/professional media](#) and [NGO/activist media](#) – each of which contains certain articles or blogs discussing ITSSD’s IQA-focused FOIA National Education Campaign. The website homepage (“ITSSD in the News - Media, Trade & NGO”) provides the public with direct access to the most recent of each of these pages, respectively. It also provides the public with direct access to the most recent pages of three types of ITSSD products: [Articles/Op-eds](#), [White Papers](#) and [Letters](#) (Correspondences) which appear in the ITSSD “Library”. The redesign of the ITSSD website demonstrates ITSSD’s specific intent and ability to easily disseminate IQA compliance-related FOIA information, once it has been disclosed by NOAA, and then compiled, analyzed and edited by ITSSD.

Lastly, ITSSD readily concedes it is not likely that all members of the public, especially those who support NOAA and IPCC climate science and an aggressive environmental regulatory agenda, will be interested in

ITSSD’s dissemination of NOAA’s disclosed peer review records, once compiled, analyzed/processed, edited and explained. Nevertheless, ITSSD is confident that there remains a sizeable group of American voters that will be interested in hearing about the facts behind the NOAA and NOAA third-party contracts that the Agency had entered into to facilitate the development and peer review of the ten (10) NOAA climate assessments that are the subject of ITSSD’s amended/modified/bifurcated FOIA request. In particular, such an audience will be interested in learning about how the relationships established incident to those arrangements had influenced the peer review processes, thereby enabling such assessments to be included among those upon which the EPA Administrator subsequently primarily relied to reach positive Clean Air Action 202(a) GHG Endangerment Findings that legally triggered EPA’s promulgation of economically significant GHG emissions control regulations.

For example, polling conducted by reputable sources since, at least, June 2010 strongly suggests that such a public audience likely consists of no less than one-third of all American voters and, potentially, more than two-thirds of the electorate.¹²¹ These results generally comport with and are complimentary to the results of two more recent surveys conducted by the U.K.-based market research firm Ipsos MORI (released in 2014) and by the U.S.-based Pew Research Center (released in 2013). The Ipsos MORI survey found with respect to the environment, that 32 percent (% - approximately one third) of all Americans surveyed do not believe that “the climate change we are currently seeing is largely the result of human activity.”¹²² Meanwhile, the Pew Research Center survey found that 40 percent of all Americans surveyed do not believe that global climate change poses a major threat to their country, “making Americans among the least concerned about this issue of the 39 publics surveyed.”¹²³

All told, these surveys strongly suggest that a considerable portion of the American electorate remains uncertain about the causes of and risks posed by anthropogenic climate change. These surveys also strongly suggest that such a large percentage of Americans would be interested in receiving information, once disclosed by NOAA, and compiled, analyzed, edited, explained and disseminated by ITSSD, revealing whether NOAA and NOAA’s third-party contractors had peer reviewed the ten (10) NOAA-developed assessments which supported the EPA Administrator’s 2009 Clean Air Act GHG Endangerment Findings, in conformance with the most rigorous and least discretionary IQA statutory and administrative standards applicable to HISAs.

Lastly, where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, and has adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public, at least one court has held that the group had met the dissemination prong of the public interest test.¹²⁴

In sum, ITSSD has demonstrated that it specifically intends to and is capable of disseminating the requested records to a broad public audience in an understandable form through various media, once they have been disclosed by NOAA, and then compiled, analyzed/processed, edited and explained by ITSSD professional staff and Board of Advisors members. Therefore, NOAA should find that ITSSD’s amended/modified/bifurcated FOIA Request satisfies factor 3 of the six-factor fee waiver test, consistent with 15 C.F.R. §4.11(k)(2)(iii).

Factor 4: The Disclosure of the Requested Information is Likely to Contribute ‘Significantly’ to Public Understanding of Government Operations or Activities (15 C.F.R. §4.11(k)(2)(iv))

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The records clearly identified in ITSSD's amended/modified/bifurcated FOIA request focus on the institutional relationships NOAA had entered into with third party entities and individuals and the influence that such relationships had had on NOAA and NOAA third-party contractor climate assessment development and peer review practices and procedures. NOAA had been legally obliged to ensure the quality, objectivity, utility, and integrity of ten (10) NOAA-developed and since disseminated climate assessments by validating that they had been peer reviewed in conformance with the Information Quality Act and applicable OMB and NOAA IQA-implementing guideline conflict-of-interest, independence and peer review panel balance standards.

Disclosure of the requested records will "contribute significantly to public understanding" of government operations or activities, consistent with 15 C.F.R. §4.11(k)(2)(iv). These government operations or activities included NOAA's entering into: a) six (6) contracts with the NRC/NAS to peer review seven (7) NOAA-developed & disseminated climate HISAs; b) three (3) contracts with the NRC/NAS to develop climate mitigation and adaptation studies/reports; and c) thirty-nine (39) grant/award contracts with sixteen universities and nonprofit institutes to undertake climate science research and develop climate science analyses as participants in NOAA Cooperative Institute Programs. In addition, these government operations or activities consisted of NOAA's establishment of five (5) *ad hoc* federal advisory committees to develop and/or peer review early drafts of five (5) NOAA-developed HISAs.

D.C. Circuit precedent holds that "[t]he key inquiry with respect to a FOIA fee waiver request is whether 'dissemination' of the requested information is likely to contribute significantly to citizens' understanding of the workings of their government."¹²⁵ "Thus, a requester satisfies its burden by describing with reasonable specificity the link between the request and the enhancement of public awareness and understanding of governmental activities."¹²⁶ "[T]his inquiry involves comparing the public understanding with and without the potential disclosure."¹²⁷

No evidence exists showing that NOAA (or the USGCRP) has yet shared with the public or the media, in any form, information about the NOAA records for which ITSSD has now sought disclosure. The NOAA website (and the USGCRP website which serves as a repository cataloguing many of the peer review files relating to USGCRP/CCSP assessments and reports developed by participating federal agencies, including NOAA)¹²⁸ provides none of the information that ITSSD seeks in its amended/modified/bifurcated FOIA request. There is neither a "courthouse record room" to be searched, nor "a computerized summary located in a single clearinghouse of information."¹²⁹

Consequently, it would be incredulous for NOAA to assert that "there is no new information to be gained through disclos[ure] of the requested documents."¹³⁰ Much to the contrary, it may be reasonably concluded that the public possesses little or no understanding about any of these contractual relationships or their impact(s) on these government operations or activities, as described above in the discussions about Factors 1 and 2. Thus, any disclosure of information about these documents would provide the public and media with a *significantly* greater understanding of such meaningful government operations or activities than they had had about them prior to such disclosure.

Furthermore, ITSSD's description in its discussion of Factor 3 above clearly evidences how ITSSD's specific intent and ability to disseminate such records in various forms and via multiple media sources will contribute significantly to citizens' understanding of: 1) the critically important relationships NOAA had

entered into with third party institutions and individuals to ensure the quality, objectivity, utility and integrity of the ten (10) NOAA-developed climate HISAs; 2) the likely impact that such relationships had had on NOAA and NOAA third party contractor peer review practices; and 3) whether such practices had conformed with NOAA's legal obligations under the Information Quality Act and applicable OMB and NOAA IQA-implementing guideline conflicts-of-interest, financial and intellectual independence and peer review panel balance standards. In other words, ITSSD's original and amended/modified/bifurcated FOIA request "clearly describ[es] with reasonable specificity the link between the request and the enhancement of public awareness and understanding of governmental activities."¹³¹ ITSSD's specific intent and ability to undertake these activities "is particularly significant given Congress' intention to encourage 'open and accountable government' under the FOIA fee waiver provision."¹³²

Moreover, "[t]he documents that [ITSSD] plans to make publicly available, coupled with [ITSSD's] analysis thereof, will allow the public to make a more informed assessment of the 'ethical propriety' and wisdom of the actions of [NOAA] officials [and NOAA third-party contractors, including the NRC/NAS, NOAA-established federal advisory committees] who/which had administered"¹³³ the peer reviews of the ten (10) NOAA-developed climate HISAs. Consequently, "the disclosures likely will result in the expansion of, and therefore a significant contribution to, the public's understanding of the potential conflicts of interest" and the lack of financial and intellectual independence that the NOAA and NOAA third-party contractor peer reviews of such NOAA-developed HISAs and ISI had engendered.¹³⁴

To the extent there are media reports and articles describing ITSSD's NOAA (and EPA)-related FOIA activities, as identified above in the discussion of Factor 3, they do not focus on the details of these specific contracts or the identifies and roles served by the individual members of NOAA-established ad hoc federal advisory committees. And, although other media articles are currently available which discuss the impure connections between U.S. government agencies and the National Research Council of the National Academy of Sciences, particularly, the institutional conflicts-of-interest between them,¹³⁵ and the growing presence of corruption in well-known scientific journals, more generally,¹³⁶ such disclosures "do[] not obviate the need for further dissemination by [ITSSD] or undermine [ITSSD's] satisfaction of the public interest prong."¹³⁷ Lastly, "[t]he records may also serve to clarify the scope of previously disclosed relations between" NOAA, NOAA-employed scientists, universities/nonprofit institutes then participating in NOAA CI Programs, the scientists such institutions and CI Programs had employed, and the NRC/NAS and the scientists and other academics it had selected to participate as Peer Review Panel, Report Review Committee and BASC/HDGC Oversight Committee members.¹³⁸

In sum, ITSSD has demonstrated its specific intent and ability to ensure NOAA's disclosure of the records ITSSD requested will "contribute significantly to public understanding" of government operations or activities. Therefore, NOAA-OCIO should find that ITSSD's amended/modified/bifurcated FOIA request satisfies factor 4 of the six-factor fee waiver test, consistent with 15 C.F.R. §4.11(k)(2)(iv).

Factor 5: The Requester Does Not Have a Commercial Interest That Would Be Furthered by the Requested Disclosure (15 C.F.R. §4.11(k)(3)(i))

The Institute for Trade, Standards and Sustainable Development ("ITSSD") is a nonprofit organization which does not have "commercial interest that would be furthered by the requested disclosure."¹³⁹ ITSSD does not seek to benefit commercially from this information. ITSSD is organized under Section 501(c)(3) of the Internal Revenue Code and is funded entirely by tax-deductible contributions from individuals,

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foundations and corporations. ITSSD neither seeks nor accepts financial support from government sources. ITSSD's scholarly approach to international trade, environment, health and safety (EHS) regulatory, and intellectual property and innovation policy research and analysis relevant to sustainable development has earned it a solid reputation in the public square and in governmental, intergovernmental, and academic venues.

ITSSD's interest in obtaining the requested records is purely to provide a public service. The public service to which ITSSD refers is that of significantly educating a broad public audience about the specific government operations or activities (peer review processes) in which NOAA and its third-party peer review contractors had engaged and/or validated to ensure the quality, objectivity, utility, and integrity of the ten (10) NOAA-developed climate assessments that are the subject of ITSSD's amended/modified/bifurcated FOIA request. These government operations or activities entail particular NOAA and NOAA third-party contractor peer review practices and procedures that should have been undertaken free from the influence and interests of outside groups, entities and individuals,¹⁴⁰ consistent with the most rigorous and least discretionary Information Quality Act statutory and administrative standards applicable to "highly influential scientific assessments" ("HISAs") and "influential scientific information" ("ISI").

ITSSD's interest in securing NOAA's disclosure of the requested records is to employ the professional capacities of ITSSD staff and current and former Board of Advisors to inform and explain to a reasonably broad public audience how NOAA and NOAA third-party peer review contractors had analyzed and validated these HISAs and ISI, including the scientific and statistical data and modeling information and the testing thereof underlying them, which NOAA "disseminated" to the public when finalized. The ten (10) NOAA-developed climate assessments that are the subject of ITSSD's amended/modified/bifurcated FOIA Request ultimately were used by the EPA Administrator as the scientific foundation for EPA's 2009 CAA GHG Endangerment Findings and subsequent national regulatory actions bearing significant potential economic repercussions. The public interest is herein engendered because such NOAA government operations and activities, which engendered pervasive institutional conflicts-of-interest, lack of financial and intellectual independence, peer review panel imbalances already have had direct and indirect economic and non-economic implications for all members of the American public, and they are entitled to know about them.

International scholars have concluded that freedom of information has become a human right which transcends any improper or unjust attempt by government to directly or indirectly quash the right of citizens to seek and impart information concerning governmental decisions.

"Freedom of information (FOI) is a human right. In order to make governments accountable, citizens have the right to know - the right of access to official documents...Freedom of information is recognized in international law. Article 19 of both the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights provide that every person shall have the right to seek and impart information. There is growing recognition that the right to seek information includes a right of freedom of information."¹⁴¹

The comprehensive disclosure by NOAA of the requested records will also serve a secondary noncommercial educational public interest. ITSSD intends to share its forthcoming compilation, analysis, explanation and dissemination of such records with U.S. and foreign nonprofit policy research and advocacy

organizations that are fellow members of the nonprofit Atlas Economic Research Foundation’s global network. These entities are interested in learning about the laws and administrative procedures surrounding the U.S. FOIA and IQA, and in conveying such information to their public audiences to ensure that their governments become and/or remain more transparent and accountable to them. ITSSD is aware that such organizations and the public audiences they serve not only are interested in this subject matter generally, but also are interested in learning about the U.S. scientific peer review process, and specifically, about how that process ensured the identification, disclosure and resolution of apparent and actual incidences of institutional conflicts of interest, lack of financial and intellectual independence and peer review panel imbalance. In particular, ITSSD understands that knowledge of the U.S. FOIA and IQA law and procedure could significantly contribute to such organizations’ efforts to obtain, analyze and disseminate in their own countries government climate science-related records potentially obtainable under analogous FOIA statutes.

Indeed, since the credibility of the peer review process underlying regulatory science is an important element of regulatory transparency, NOAA’s comprehensive disclosure of the records ITSSD requested can significantly contribute to improving public confidence in government climate science-related operations and activities, both here and abroad. Public confidence in government transparency initiatives is essential if governments are to successfully conclude politically ambitious trade agreements the primary goal of which is to achieve international regulatory cooperation,¹⁴² especially where scientific information is shared among governments and can as easily serve as the basis for cross-border regulations as it can for purely domestic regulations. As one recent U.S. Government Accountability Office reveals,

“there is no bright line that separates international regulatory cooperation activities from regulatory programs. For example, *U.S. agencies share scientific and technical information with their foreign counterparts, which can inform all stages of the rulemaking process.* In addition, information sharing can help inform an agency’s decision on whether or not to regulate a product. When countries have differences in regulations in a particular area, *there are opportunities to coordinate on the science underlying regulatory decisions in a particular area*” (emphasis added).¹⁴³

In other words, amid the current environment of international legal positivism and post-modernism where regulatory borders are increasingly viewed as permeable and malleable, there is a real likelihood that hazard-focused precautionary principle-driven policy-based-science rules prevalent in one negotiating jurisdiction will eventually pervade what was once the risk-focused empirical science-based policy framework of another negotiating jurisdiction.¹⁴⁴ Since governments have often been less than transparent concerning its planned treatment of such arcane and obscure subject matter, the question that remains is whether and if a broad public audience will ever learn about it absent compelled disclosure under FOIA.¹⁴⁵

It is well recognized that the intention of FOIA is to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”¹⁴⁶ And, since the U.S. FOIA was enacted in 1966, “many countries [have] [...] follow[ed] the FOIA model on access to government.”¹⁴⁷ As the nonprofit Privacy International reported in 2006,

“Forty years ago, US President Lyndon Johnson signed the Freedom of Information Act on Independence Day, stating ‘I signed this measure with a deep sense of pride that the United States is an open society in which the people’s right to know is cherished and guarded.’ The FOIA was not the first law of its kind but its adoption was nevertheless a

milestone since following the US lead, many countries, first a trickle and then a flood, recognized the crucial importance of the principle and followed suit.”¹⁴⁸

According to said report,

“Nearly 70 countries around the world have now adopted comprehensive Freedom of Information Acts to facilitate access to records held by government bodies and another fifty have pending efforts. A few countries have issued decrees or used constitutional provisions. Many countries have adopted other laws that can provide for limited access including data protection laws that allow individuals to access their own records held by government agencies and private organizations, specific statutes that give rights of access in certain areas such as health, environment, government procurement and consumer protection. Although FOI has been around for over 200 years, it is still evolving. Over half of the FOI laws have been adopted in just the last ten years.”¹⁴⁹

There is a relative lack of experience in many such countries regarding the proper administration of the FOIA laws there enacted. Therefore, ITSSD also intends to use its amended/modified/bifurcated FOIA Request and this Fee Waiver Request, in addition to ITSSD’s forthcoming compilation, analysis, editing, explanation and dissemination of the requested records once disclosed by NOAA, as a unique teaching opportunity that will benefit international civil society and the public interest within those countries in which Atlas network members are resident. The 2006 Privacy International report revealed that, while nearly all countries in Western Europe and the Americas¹⁵⁰ had, at such time, adopted some form of FOIA law, “there ha[d] been more a modest adoption of [FOIA] laws...[i]n the Asia-Pacific region”,¹⁵¹ no adoption of such laws in the Middle East outside of Israel, and only the slow progress of such initiatives in Africa.¹⁵² As a result, the Privacy International report concluded that,

“there is much work to be done to reach truly transparent government. The culture of secrecy remains strong in many countries. Many of the laws are not adequate and promote access in name only. In some countries, the laws lie dormant due to a failure to implement them properly or a lack of demand. In others, the exemptions and fees are abused by governments. Older laws need updating to reflect developments in society and technology. New laws promoting secrecy in the global war on terror have undercut access. International organizations have taken over the functions of national government but have not subjected themselves to the same rules.”¹⁵³

Regrettably, there is no reason to believe that the administration of FOIA laws around the world has progressed much since the release of said report. During 2010, for example, the nonprofit World Resources Institute (“WRI”) reported that, although “over 80 countries ha[d] enacted some form of FOIA, and the vast majority of these have been introduced in the past five or six years...there is still a lot that needs to be done to improve implementation of these laws. Our research has shown that practice lags behind.”¹⁵⁴

ITSSD’s compilation, analysis, explanation and dissemination of the requested records once disclosed by NOAA, therefore, would serve the very useful purpose of continuing public awareness, both in the United States and beyond, about U.S. federal government transparency and accountability on very important all-encompassing environmental regulatory science matters bearing serious economic, social, psychological and emotional implications for the U.S. public at large. For example, the United Nations Educational Scientific

and Cultural Organization (“UNESCO”) found, in 2008, that “[during the last 15 years [i.e., since 1992], there has been increasing recognition that access to information on the environment is key to sustainable development and effective public participation in environmental governance.”¹⁵⁵ In support of its findings, UNESCO cited Principle 10 of the 1992 *Rio Declaration on Environment and Development*¹⁵⁶ and the European Union’s *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)*.¹⁵⁷

Similarly, nonprofit WRI previously noted the importance of governments granting access to environmental information, including the scientific underpinnings supporting environmental decision-making:

“Making the right environmental choices - as consumers, voters and shareholders – depends on having access to accurate information on the issues that confront us every day, from the quality of the food we eat, to the impacts of corporate supply chains, to the voting records of parliamentarians. Much of this data is held by or can only be forced into the open by government.”¹⁵⁸

ITSSD seeks comprehensive NOAA disclosure of the requested information to further ITSSD’s noncommercial public interest. ITSSD’s noncommercial public interest is to educate a reasonably broad public audience that includes *inter alia* fellow civil society network organizations within and beyond the United States about the quality, objectivity, utility, and integrity of the foundations of NOAA climate science research, observations and disseminations, the peer review processes NOAA and NOAA third party contractors had employed to validate them. ITSSD’s noncommercial interest is to inform a broad public audience regarding whether the peer process employed to validate these findings had been unduly influenced by peer reviewer institutional conflicts of interest, lack of peer reviewer financial and intellectual independence and peer review panel imbalances. These HISAs and ISI are significant because the EPA Administrator had primarily relied upon them in reaching positive CAA Section 202(a)(1) GHG Endangerment Findings which, in turn, legally triggered economically significant GHG emissions control regulations. ITSSD’s noncommercial public interest is also to educate a reasonably broad public audience regarding how federal agency peer review practices that do not satisfy the highest, most stringent and least discretionary of Information Quality Act standards can very well result in the issuance of economically significant regulations premised on the precautionary principle that adversely affect all economic actors and citizens.

ITSSD will not earn a profit from disclosure of the requested information. As discussed above, ITSSD will instead use the responsive records to endeavor to expand the public’s and Congress’ knowledge and interest in the peer review practices (governmental operations and activities) NOAA and NOAA third-party contractors had employed to validate the climate science, including the datasets, computer models and applications thereof contained in these ten (10) NOAA-developed assessments. ITSSD is not working on behalf of, and has neither been compensated for nor otherwise paid by, any private party to prepare its new FOIA Request and this FOIA Fee Waiver Request.¹⁵⁹ ITSSD also will not be working on behalf of, and will be neither compensated nor otherwise paid by, any private party to compile, analyze, explain and disseminate to the public the requested NOAA records once disclosed.

Just as with any other government policy-focused nonprofit nongovernmental organization operating in the public spotlight, including environmental protection and conservation-focused and public transparency-focused nonprofit organizations, however, it is entirely conceivable that ITSSD’s informed reporting of the

requested records once disclosed by NOAA could potentially indirectly further some ITSSD commercial, trade, or profit interests; but this is purely speculative and uncertain, and is highly unlikely at the present time.

Consequently, ITSSD has adequately demonstrated that it does not seek the requested information for a use or purpose that furthers [its] commercial, trade, or profit interests.¹⁶⁰ Therefore NOAA should conclude that ITSSD's amended/modified/bifurcated FOIA request satisfies factor 5 of the of six-factor fee waiver test.

Factor 6: The Public Interest in Disclosure is Greater than Any Identified Commercial Interest; Therefore, Disclosure of the Requested Information is Not "Primarily in the Commercial Interest of the Requester" (15 C.F.R. §4.11(k)(3)(ii))

As previously discussed, ITSSD is not working on behalf of, and has not been paid or otherwise compensated by, any private party in connection with its amended/modified/bifurcated FOIA Request or this Fee Waiver Request. Nevertheless, it is possible, following disclosure of such records, that ITSSD could benefit to some extent, sometime in the future, in reputational terms, which could potentially indirectly enhance its longer term efforts to further develop programs related to its charitable mission.

The applicable NOAA fee waiver regulations obviously contemplate that a requester could "put the records to a commercial use" once they have been disclosed by the agency.¹⁶¹ However, such regulations also provide that a fee waiver is justified where "the public interest standard (paragraph (k)(1)(i) of this section) is satisfied and the public interest is greater than any identified commercial interest in disclosure."¹⁶² Should, however, the disclosure of the requested information create a profit motive, it is ITSSD's position that this, by itself, does not run afoul of the commercial interest test. The "not primarily in the commercial interest" test is satisfied, provided the information requested is disseminated in the requestor's professional capacity and would further the public interest. For each of the foregoing reasons, this request qualifies as one that is not primarily in the commercial interest of ITSSD.

This statement is supported by D.C. Circuit jurisprudence. In *Campbell v. U.S. Department of Justice*,¹⁶³ the D.C. Federal Court of Appeals recognized the possibility that bona fide scholars may potentially profit from subsequent scholarly endeavors involving their use of records disclosed by a federal agency in response to a previously filed FOIA request. Citing prior circuit precedent,¹⁶⁴ the Court ruled that such professional activities resulting in personal compensation did not rise to the level of an "overriding commercial interest" so as to convert an otherwise noncommercial dissemination of the requested records "to advance public understanding of government operations" which primarily benefited the general public into a "primarily commercial" use.¹⁶⁵

"[T]he underlying purpose of the fee waiver provisions [is to] afford 'special solicitude' to scholars whose archival research advances public understanding of government operations...The fact that a bona fide scholar profits from his scholarly endeavors is insufficient to render his actions 'primarily...commercial' for purposes of calculating a fee waiver, as Congress did not intend for scholars (or journalists and public interest groups) to forego compensation when acting within the scope of their professional roles. The quasi-commercial nature of Campbell's research was therefore irrelevant for purposes of calculating an appropriate fee waiver."¹⁶⁶

Considering, in the abstract, that any requested records NOAA would disclose could potentially be put to varied uses, ITSSD has set forth in exhaustive detail above its purposes for securing such information.¹⁶⁷ NOAA’s “comparison of the private and public benefits” that ITSSD may derive from its compilation, analysis, explanation and dissemination of such information in a clear and understandable manner to a reasonably broad public audience should entail “no more than a garden-variety ‘weighing’ inquiry.”¹⁶⁸

Under the present circumstances, ITSSD’s described purposes for seeking NOAA disclosure of the requested information reflect an overriding *noncommercial* interest. Since the extent of any ITSSD commercial interest that has been identified is *not* sufficiently great in magnitude in comparison with the public interest in disclosure, ITSSD has adequately shown that the disclosure of the requested records is “not primarily in the commercial interests of the requester.”¹⁶⁹ Therefore, NOAA should conclude that ITSSD’s amended/modified/bifurcated FOIA request satisfies factor 6 of the six-factor fee waiver test.

III. Conclusion

In sum, NOAA should grant ITSSD’s Fee Waiver Request because ITSSD has satisfactorily demonstrated, consistent with 15 C.F.R. §4.11(k)(1)-(3), that “(i) 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; and (ii) Disclosure of the information is not primarily in the commercial interest of the requester.”¹⁷⁰

END

ENDNOTES

¹ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694, Tranche/Cache of Clearly and Obviously Identified NOAA Files* (Oct. 27, 2014), available at: <https://nebula.wsimg.com/27e342084d64f57315a79f9a426c9800?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

² See Institute for Trade, Standards and Sustainable Development, *DOC-NOAA Agreement to Accept ITSSD Amendment/Modification/Bifurcation of FOIA Request No. DOC-NOAA-2014-001694* (Nov. 7, 2014), available at: <https://nebula.wsimg.com/49d9ddec8309db3a37024d77c7b6d781?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

³ *Id.*

⁴ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694* (filed Sept. 22, 2014), available at: <https://nebula.wsimg.com/86e0c3d9f0c18e77b33e25d935498bcc?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

⁵ See 132 Cong. Rec. S. 14298 (statement of Sen. Leahy).

⁶ See *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 89 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D.Mass.1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S.REP. No. 854, 93rd Cong., 2d Sess. 11-12 (1974), U.S. Code Cong. & Admin. News 1974, p. 6267.

⁷ *Id.*

⁸ See *Better Gov't Ass'n v. Department of State*, 780 F. 2d 86, 90.

⁹ See National Oceanographic and Atmospheric Administration Science Advisory Board, *Responses to Recommendations From the Climate Working Group Related to Climate Services External Review Report and Options for Developing a National Climate Service Report* (Oct. 2010), NOAA SAB website, at p. 6, available at: http://www.sab.noaa.gov/Reports/RESPONSES%20TO%20RECOMMENDATIONS%20AND%20OPTIONS%20FOR%20NATIONAL%20CLIMATE%20SERVICE_final.pdf (NOAA served a key and indispensable role in the interagency U.S. Global Change Research Program/Climate Science Program (“USGCRP/CCSP”) during 2005-2009. NOAA also had “sponsored and participated in...the [2010] America’s Climate Choices (ACC) study...conducted by the National Research Council.”) *Id.*; (Indeed, “[b]ased on the leadership roles that NOAA has held, the White House [has] continue[d] to turn to NOAA to fill leadership appointments on interagency climate committees and working groups.”) *Id.*

¹⁰ See *Id.*, at p. 7 (“NOAA agrees...[that it] has been asked by the White House to assume critical leadership roles. These include: NOAA Administrator, Dr. Jane Lubchenco co-chairing both the Interagency Climate Change Adaptation Task Force co-organized by CEQ and OSTP, and the National Science and Technology Council (NSTC) Climate Services Roundtable; the transitional director of NOAA’s Climate Service, Thomas Karl, serving as the USGCRP Chair of the Subcommittee on Global Change Research; and NOAA supporting Dr. Katherine Jacobs’ role at OSTP to support the National Climate Assessment” (emphasis added)); See also U.S. Global Change Research Program, *Tom Karl Named Chair of the Subcommittee on Global Change Research*, Agency Science News (May 25, 2010), available at: <http://www.globalchange.gov/whats-new/agency-news/413-tom-karl-appointed-as-chair-of-the-subcommittee-on-global-change-research.html> (“Tom Karl’s appointment as chair of the subcommittee reinforces NOAA’s long standing history of contributions to the USGCRP. NOAA is a lead Federal agency in the provision of trusted climate science and information, is a co-chair of the White House Interagency Climate Change Adaptation Task Force, and one of the lead agencies in the ongoing National Assessment process. Tom will take on this new leadership role, while continuing to provide guidance for the development of a proposed Climate Service within NOAA... As director of NOAA’s National Climatic Data Center in Asheville, N.C., Tom has helped develop and implement internationally recognized standards for data quality.”) *Id.*

¹¹ See NOAA Science Advisory Board, *A Review of the NOAA Climate Services Strategic Plan Final Report to the National Oceanic and Atmospheric Administration, Final Report* (Sept. 2008), at p. 2, available at: http://www.sab.noaa.gov/Reports/2008/NOAA_SAB_CWG_NCS_Review_Sep08_FINALtoNOAA.pdf (NOAA’s Science Advisory Board (“SAB”) and this Administration have long expressed interest in reorganizing NOAA and installing it as the lead federal agency in a proposed U.S. National Climate Service (“NCS”). In July/September 2008, “a 13-member external Review Team under the auspices of” the NOAA Science Advisory Board’s Climate Working Group (CWG) issued a report recommending that NOAA “lead an effort, with its partners, to compare and contrast specific national options for the development of climate services.”) *Id.*; U.S. Department of Commerce National Oceanographic Administration Science Advisory Board Climate Working Group, *Options for Developing a National Climate Service* (June 5, 2009), at p. 53, available at: http://www.sab.noaa.gov/Reports/2009/NCS_Report_FinaltoNOAA_6_5_09-1.pdf (A June 2005 NOAA SAB report had revealed that one of the four options the SAB’s Climate Working Group had seriously considered for purposes of creating a

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National Climate Service called for “a strategic partnership in which NOAA serve[d] as the lead entity. [...The NCS] “would be located in NOAA[] and consistent with NOAA’s responsibilities and the perceived comparative advantages of NOAA and that of its expected partners.”) *Id.* See also *Id.*, at p. 54 (“A “National Climate Service w[ould] assist the nation and the world in understanding, anticipating, and responding to climate, climate change, and climate variability and their impacts and implications. The Service will inform the public through the sustained production and delivery of authoritative, timely, useful information about impacts on local, state, regional, tribal, national, and global scales.” *Id.*, at p. 54. “On February 8, 2010 the Department of Commerce and NOAA announced their intent to create a Climate Service line office”. See National Oceanographic and Atmospheric Administration Science Advisory Board, *Responses to Recommendations From the Climate Working Group Related to Climate Services External Review Report and Options for Developing a National Climate Service Report* (Oct. 2010), *supra* at p. 3. Such proposal had been vetted beforehand “with Federal partners and the Administration, including the Office of Science and Technology Policy (OSTP), the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ).”) *Id.*; National Oceanographic and Atmospheric Administration, *A Climate Service in NOAA: Connecting Climate Science to Decision Making*, Draft Vision and Strategic Framework (Dec. 18, 2010), at Executive Summary, p. 4, available at: http://www.noaa.gov/climate/resources/resources/CS_Draft_Vision_Strategic_Framework_v9.0%202010_12_20-1.pdf; United States Department of Commerce National Oceanographic Administration, *Proposed Climate Service in NOAA* (Feb. 15, 2010), NOAA website, available at: http://www.noaa.gov/climate/resources/resources/ProposedClimateServiceinNOAA_Feb15rev.pdf.

¹² Congressional funding for the formation of an NCS, however, has not yet moved forward due to various ongoing concerns. See, e.g., Ashley Portero, *Congress Rejects Request for National Climate Service, A Resource for Climate Change Information*, International Business (IB) Times (Nov. 21, 2011), available at: <http://www.ibtimes.com/congress-rejects-request-national-climate-service-resource-climate-change-information-373102>; David A. Kronig, *House Science Committee Grills NOAA Administrator about Climate Service*, FYI: The AIP Bulletin of Science Policy News, American Institute of Physics (June 30, 2011), available at: <http://www.aip.org/fyi/2011/080.html>; *Examining NOAA’s Climate Service Proposal*, Hearing Before the Committee on Science, Space and Technology of the House of Representatives, 112th Cong. 1, Rpt. No. 112–27 (June 22, 2011), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg66927/pdf/CHRG-112hhrg66927.pdf>; Matthew Berger, *Congress Asks NOAA to Study Setting Up National Climate Service*, InsideClimate News (Dec 16, 2009), available at: <http://insideclimatenews.org/print/3803>; Roberta Kwok, *US considers a national climate service*, Nature (Feb. 19, 2009), available at: <http://www.nature.com/news/2009/090219/full/news.2009.108.html>; Rick Piltz, *Congress takes step to create a National Climate Service - but beware of shackles and poison pills*, Climate Science Watch (May 14, 2009), available at: <http://www.climatewatch.org/2009/05/14/congress-takes-step-to-create-a-national-climate-service-but-beware-of-shackles-and-poison-pills/>.

¹³ See U.S. Department of Commerce National Oceanographic Administration Science Advisory Board Climate Working Group, *Options for Developing a National Climate Service* (June 5, 2009), *supra* at pp. 54-55 (Since at least 2008, NOAA’s SAB had identified NOAA as the most logical candidate to head such an effort because it “has more of the attributes and mandates within the domain of the physical climate system to play the lead role. [...These attributes and mandates include its:] [p]redictive capacity of atmospheric and oceanic changes and long-term observations, which is already recognized as part of NOAA’s mission; [a] mandate to operate at both the domestic and international level; [e]stablished relationships that exist with major stakeholders; [s]ophisticated scientific and computational infrastructure that is already in place; [t]he ability to build on existing capability rather than require a new bureaucracy be developed; [s]trong interest within agency for development of climate service; and [o]ffices well represented regionally, which enhances to ability for extension and outreach, as well as coordination with partners.”) *Id.*

¹⁴ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694* (filed Sept. 22, 2014), *supra* at Annotated Addendum, Sections I.2.a.i-ii, pp. 47-49.

¹⁵ *Id.*

¹⁶ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694* (filed on Sept. 22, 2014), *supra* at Annotated Addendum, Sections I.3.b.i.A, p. 61; I.3.b.ii.A, p. 64; I.3.b.v.A, p. 70; I.3.b.vii.A, p. 75; I.4.b, p. 80.

¹⁷ See United States Department of Commerce Office of the Secretary, *Federal Advisory Committees*, available at: <http://www.osec.doc.gov/opog/faca.html>; U.S. General Services Administration, *Federal Advisory Committee Act (FACA) Management Overview*, available at: <http://www.gsa.gov/portal/category/21242>.

¹⁸ See 15 C.F.R. §4.11(k)(2)(i).

¹⁹ See, e.g., U.S. Geological Survey Climate Change Working Group, *U.S. Government Independent Federal Agencies: Climate Change Programs*, available at: http://www.pwrc.usgs.gov/ccwg/resource_usind.htm; The Federal Register, *Environmental Protection Agency*, available at: <https://www.federalregister.gov/agencies/environmental-protection-agency> (“The Environmental Protection Agency was established in the executive branch as an independent agency pursuant to Reorganization Plan No. 3 of 1970 (5 U.S.C. app.), effective December 2, 1970.”) *Id.*

²⁰ See United States Environmental Protection Agency and Department of Transportation National Highway Traffic Safety Administration, *Final Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 FR 25324 (May 7, 2010), at 25326, 25328, 25362, 25373, 25397, 25491, 25541, available at: <http://www.gpo.gov/fdsys/pkg/FR-2010-05-07/pdf/2010-8159.pdf>.

²¹ See United States Environmental Protection Agency, *Final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 FR 31514 (June 3, 2010), at 31519, 31591, available at: <http://www.gpo.gov/fdsys/pkg/FR-2010-06-03/pdf/2010-11974.pdf>.

²² See *Utility Air Regulatory Group v. Environmental Protection Agency, et al.*, ___ U.S. ___, 2014 BL 172973, 78 ERC 1585 (U.S. June 23, 2014), *supra*; See also Kyle Danish, Stephen Fotis, Avi Zevin, and Ilan Gutherz, *Supreme Court Rejects Extending Clean Air Act Permitting Authority Based Solely on GHGs but Upholds GHG Limitations on Otherwise Regulated Stationary Sources*, Van Ness Feldman, LLP (June 24, 2014), available at: <http://www.vnf.com/2991>; Kevin Poloncarz, *Supreme Court Throws Out the Bathwater, Keeps the Baby, On EPA's GHG Regulations*, Paul Hastings (June 24, 2014), available at: <http://www.paulhastings.com/publications-items/details/?id=db6ee169-2334-6428-811c-ff00004cbded>; Alice Kaswan, *Utility Air Regulatory Group v. EPA: Little Impact on EPA Regulation of Greenhouse Gases*, Center for Progressive Reform (CPR) Blog (June 25, 2014), available at: <http://www.progressivereform.org/CPRBlog.cfm?idBlog=D37F47D4-C922-2A0B-E8B38FA11C99E4DF>.

²³ See United States Environmental Protection Agency, *Proposed Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units*, 79 FR 1430 (Jan. 8, 2014), *supra* at 1438, 1456, available at: <http://www.gpo.gov/fdsys/pkg/FR-2014-01-08/pdf/2013-28668.pdf>; United States Environmental Protection Agency, *Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units – Notice of Data Availability*, 79 FR 10750 (Feb. 26, 2014), available at: <http://www.gpo.gov/fdsys/pkg/FR-2014-02-26/pdf/2014-03115.pdf>.

²⁴ See United States Environmental Protection Agency, *Notice of Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units and Solicitation for Public Comments*, 79 FR 34830 et seq. (June 18, 2014), at Section II.A.1-3, pp. 34841-34842, available at: <http://www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13726.pdf>. In addition to the “major assessments” underlying the Administrator’s 2009 CAA Section 202(a)(1) Endangerment Findings, EPA also refers to nine (9) scientific assessments released since the finalization of such Findings as providing further scientific support for its proposed power plant rule. EPA describes these as “strengthening the case that GHGs endanger public health and welfare”, highlighting the continued rise in atmospheric CO₂ concentrations, and “underscor[ing] the urgency of reducing emissions now.” *Id.*, at p. 34842.

²⁵ See Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, Eds., 2014: *Climate Change Impacts in the United States: The Third National Climate Assessment*. U.S. Global Change Research Program (2014), available at: http://nca2014.globalchange.gov/system/files_force/downloads/high/NCA3_Climate_Change_Impacts_in_the_United%20States_HighRes.pdf?download=1.

²⁶ See, e.g., Institute for Trade, Standards and Sustainable Development, *ITSSD Public Comments on EPA Proposed Power Plant Rule*, Docket ID No. EPA-HQ-OAR–2013-0602 (Aug. 13, 2014), available at: <https://nebula.wsimg.com/9293ff84df35eecd25e73a03499114?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>; Institute for Trade, Standards and Sustainable Development, *Supplement to ITSSD Public Comments on EPA Proposed Power Plant Rule*, Docket ID No. EPA-HQ-OAR–2013-0602 (Dec. 1, 2014), available at: <https://nebula.wsimg.com/cef1bf039dfe3ebe149a2667dedbc2ef?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁷ See National Research Council, *A Review of the Draft 2013 National Climate Assessment* (National Academies Press Wash., DC 2013), at p. iii, available at: http://www.nap.edu/catalog.php?record_id=18322 and <http://nas-sites.org/americasclimatechoices/other-reports-on-climate-change/2013-2/895-2/> (“This study was supported by the National Aeronautics and Space Administration under contract #NNH07CC79B, TO #5.”) *Id.*

²⁸ See, e.g., Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694* (filed on Sept. 22, 2014), *supra* at Section I.3.b.B-E, pp. 61-64; Section II, Appendix 4A: “Author-Contributors, USGCRP/CCSP SAP1.1” and Appendix 4B: “NRC Ad Hoc Peer Review Panel USCRP/CCSP SAP1.1”, pp. 118-122 (SAP1.1 Peer Review Panel members William Randel and Junhong Wang of NCAR-NSF had been institutionally affiliated with SAP1.1 author-contributors Tom Wigley, James Hurrell, Gerald Meehl, Adam Phillips and William Collins of NCAR-NSF, *and* SAP 1.1 Peer Review Panel member Richard Lindzen of MIT had been institutionally affiliated with author-contributor Chris Forest of MIT) *Id.*; Section II, Appendix 4C: “NRC Report Review Committee SAP1.1,” p. 123 (SAP1.1 Report Review Committee members Jerry Mahlman and Kevin Trenberth of NCAR-NSF had been institutionally affiliated with SAP1.1 Peer Review Panel members William Randel and Junhong Wang of NCAR-NSF and with SAP1.1 author-contributors Tom Wigley, James Hurrell, Gerald Meehl, Adam Phillips and William Collins of NCAR-NSF, *and* James Angell of NOAA had been institutionally affiliated with SAP1.1 author-

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²⁹ *Id.*, at Annotated Addendum, Section I.3.b.ii.A-B, p. 64; Section II, Appendix 5A: “Author-Contributors USGCRP/CCSP SAP1.3” and Appendix 5C: “NRC Report Review Committee, SAP1.3,” pp. 125-126 and p. 128 (SAP1.3 Report Review Committee member Elizabeth Malone of the University of Maryland and DOE’s Joint Global Change Research Institute had been institutionally affiliated with SAP1.3 author-contributors Phil Arkin, James Carton and Eugenia Kalnay of the University of Maryland) *Id.*; Section II, Appendix 5D: “NRC Oversight Board on Atmospheric Sciences & Climate During Work of Ad Hoc NRC Peer Review Panel - SAP1.3,” (SAP1.3 BASC oversight committee members Rosina Bierbaum of the University of Michigan and A. Busalacchi, Jr. of the University of Maryland had been institutionally affiliated, respectively, with SAP1.3 Report Review Committee member Mary Anne Carroll of the University of Michigan, and with SAP1.3 author-contributors Phil Arkin, James Carton and Eugenia Kalnay of the University of Maryland and with SAP1.3 Report Review Committee member Elizabeth Malone of the University of Maryland.) *Id.*

³⁰ *Id.*, at Annotated Addendum at Sections I.3.b.iii.A-B, pp. 66-67; Section II, Appendix 6A: “Author-Contributors, USGCRP/CCSP SAP2.4” and Appendix 6B: “NRC Ad Hoc Peer Review Panel SAP2.4,” pp. 130-131 (SAP2.4 Peer Review Panel member Michelle Santee of NASA had been institutionally affiliated with SAP2.4 author-contributors Michael Kurylo, Anne Douglass, Jay Herman, Malcolm Ko, Paul Newman, Anne-Marie Schmoltner and Richard Stolarski of NASA). *Id.*; Annotated Addendum at Sections I.3.b.iii.C-E, pp. 67-68; Section II, Appendix 6D: “NRC Oversight Board on Atmospheric Sciences & Climate During Work of Ad Hoc NRC Peer Review Panel SAP2.4,” p. 133 (SAP2.4 BASC oversight committee members Rosina Bierbaum of the University of Michigan and A. Busalacchi, Jr. of the University of Maryland had been institutionally affiliated, respectively, with SAP2.4 Report Review Committee members Mary Anne Carroll of the University of Michigan and Ross J. Salawitch of the University of Maryland.) *Id.*

³¹ *Id.*, at Annotated Addendum, Sections I.3.b.iv.A-B, pp. 68-69; Section II, Appendix 7A: “Author-Contributors, USGCRP/CCSP SAP3.2” and Appendix 7B: “NRC Ad Hoc Peer Review Panel SAP3.2,” pp. 134-135 (SAP3.2 Peer Review Panel Member Philipp Rasch of NCAR-NSF had been institutionally affiliated with SAP3.2 author-contributors Tom Wigley and Jean-Francois Lamarque of NCAR-NSF.) *Id.*; Annotated Addendum Sections I.3.b.iv.C-E, pp. 69-70; Section II, Appendix 7C: “NRC Report Review Committee, SAP3.2 Peer Review Panel Report” and Appendix 7D: “NRC Oversight Board on Atmospheric Sciences & Climate During Work of Ad Hoc NRC Peer Review Panel SAP3.2,” pp. 136-137 (SAP3.2 Report Review Committee member Judith Curry of Georgia Institute of Technology had been institutionally affiliated with SAP3.2 Peer Review Panel member Armistead Russell of Georgia Institute of Technology, while SAP3.2 BASC oversight committee members Thomas Vonder Haar of Colorado State University and A. Busalacchi, Jr. of the University of Maryland, respectively, had been affiliated with SAP3.2 Report Review Committee member Sonia Kreidenweis of Colorado State University, and SAP3.2 Peer Review Panel members Mary Ann Carroll and James Edmonds of the University of Maryland/DOE Joint Global Change Research Institute.) *Id.*

³² *Id.*, at Annotated Addendum, Sections I.3.v.A-B, pp. 70-71; Section II, Appendix 8A: “Author-Contributors, USGCRP/CCSP SAP3.3” and Appendix 8B: “NRC Peer Review Panel SAP3.3,” pp. 138-142 (SAP3.3 Peer Review Panel members Richard Rotunno and Claudia Tebaldi of NCAR-NSF had been institutionally affiliated with SAP3.3 author-contributors Gerald Meehl, Pavel Groisman, Greg Holland and Linda Mearns of NCAR-NSF.) *Id.*; Annotated Addendum Sections I.3.v.C-E, pp. 72-73; Section II, Appendix 8C: “NRC Report Review Committee SAP3.3” and Appendix 8D: “NRC Oversight Board on Atmospheric Sciences & Climate During Work of Ad Hoc NRC Peer Review Panel SAP3.3,” pp. 142-143 (SAP3.3 Report Review Committee member Roland Madden of Scripps Institution of Oceanography of UC San Diego had been institutionally affiliated with SAP3.3 author-contributor Peter Bromirski of Scripps Institution of Oceanography of UC San Diego and SAP3.2 Report Review Committee member Walter F. Dabberdt of Vaisala, Inc. had served simultaneously as a member of the SAP3.3 BASC oversight committee. In addition, SAP3.3 BASC oversight committee members Kerry Emanuel of MIT had served as a SAP3.3 author-contributor, while SAP3.3 BASC oversight committee member Vernon Harris of Howard University had been institutionally affiliated with SAP3.3 Peer Review Panel member Gregory Jenkins of Howard University.) *Id.*

³³ *Id.*, at Annotated Addendum, Section I.3.b.vi.A-B, pp. 73-74; Section II, Appendix 9A: “Author-Contributors, USGCRP/CCSP SAP5.2” and Appendix 9B: “NRC Peer Review Panel SAP5.2,” pp. 144-145 (SAP5.2 Peer Review Panel member Elizabeth Malone of the University of Maryland/DOE Joint Global Change Research Institute had been institutionally affiliated with SAP5.2 author-contributor Thomas Wilbanks of DOE, while SAP5.2 Peer Review Panel member Carol Ann Clayson of Florida State University had simultaneously served on the SAP5.2 BASC oversight committee.) *Id.*; Annotated Addendum, Section

I.3b.vi.C-E, pp. 74-75; Section II, Appendix 9D: “NRC Oversight Board on Atmospheric Sciences & Climate During Work of Ad Hoc NRC Peer Review Panel SAP5.2,” p. 147 (SAP5.2 BASC oversight committee member Carol Anne Clayson of Florida State University simultaneously served as a SAP5.2 Peer Review Panel member, while SAP5.2 BASC oversight committee members Rosina Bierbaum of the University of Michigan and A. Busalacchi, Jr. of the University of Maryland, respectively, had been institutionally affiliated with SAP5.2 Peer Review Panel members Henry Pollack of the University of Michigan and Elizabeth Malone of the University of Maryland/DOE Joint Global Change Research Institute.) *Id.*

³⁴ *Id.*, at Annotated Addendum, Section I.3.b.vii.A-B, pp. 75-76; Section II, Appendix 10A: “Author-Contributors, USGCRP/CCSP SAP5.3” and Appendix 10B: “NRC Peer Review Panel SAP5.3,” pp. 148-150 (SAP5.3 Peer Review Panel member S. Sorooshian of UC Irvine had been institutionally affiliated with SAP5.3 author-contributor

David Feldman of UC Irvine). *Id.*; Section II, Appendix 10D: “NRC Oversight Committee on Human Dimensions of Global Change During Work of Ad Hoc NRC Peer Review Panel SAP5.3,” p. 151 (SAP5.3 HDGC oversight committee members F. Sherwood Roland of UC Irvine, Rosina Bierbaum of the University of Michigan and Dennis Hartmann of the University of Washington, respectively, had been institutionally affiliated with SAP5.2 author-contributors David Feldman of UC Irvine, Maria Carmen Lemos of the University of Michigan and Nathan Mantua and Andrew Wood of the University of Washington.) *Id.*

³⁵ See National Academy of Sciences Office of News and Public Information, *Some Frequently Asked Questions*, available at: <http://www.nationalacademies.org/newsroom/faq/index.html> (“**Is the National Academy of Sciences part of the government?** No, the National Academy of Sciences, National Academy of Engineering, Institute of Medicine, and National Research Council are private, nonprofit organizations. They provide policy advice under a congressional charter granted to the National Academy of Sciences. [...] The congressional charter that established the National Academy of Sciences was signed by President Abraham Lincoln in 1863 to create an independent adviser for the U.S. government on science and technology matters. As requests grew in complexity and scope, the National Research Council was established in 1916 as the academy's operating arm.”) (emphasis in original).

³⁶ *Id.* See also Executive Order No. 2859, *National Research Council of National Academy of Sciences*, (May 11, 1918), available at: <http://www.archives.gov/federal-register/codification/executive-order/02859.html>.

³⁷ See, e.g., 36 U.S.C. 150303, available at: <http://uscode.house.gov/view.xhtml?path=/prelim@title36/subtitle2/partB/chapter1503&edition=prelim> (“On request of the United States Government, the corporation shall investigate, examine, experiment, and report on any subject of science or art. *The corporation may not receive compensation for services to the Government, but the actual expense of the investigation, examination, experimentation, and report shall be paid by the Government from an appropriation for that purpose*”) (emphasis added). *Id.*

³⁸ See Institute for Trade, Standards and Sustainable Development, *Why Should Congress Continue to Fund the U.S. Global Change Research Program (“USGCRP”) and Federal Agency Climate Science-related Research Producing HISAs Not Peer Reviewed in Conformance with U.S. Law (the Information Quality Act?)* (June 3, 2014), available at: https://nebula.wsimg.com/0baa4f08132c24c2fc9cd650501bbc66?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&all_oworigin=1 (Unfortunately, ITSSD had been unaware that the House had just adopted floor amendments on H.R. 4660 – The FY 2015 Commerce, Justice, Science Appropriations Act). See also Peter Wood and Rachele Peterson, *Short-Circuiting Peer Review in Climate Science*, National Association of Scholars (June 6, 2014), available at: http://www.nas.org/articles/short_circuiting_peer_review_in_climate_science.

³⁹ See Institute for Trade, Standards and Sustainable Development, *Questions Prepared for Consideration by Committee*, prepared for Full Committee Hearing “Examining the UN Intergovernmental Panel on Climate Change Process” of the U.S. House of Representatives Committee on Science, Space, and Technology (May 29, 2014), available at: https://nebula.wsimg.com/5f64c8b17c4f54c459b35dcbcd008074?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&all_oworigin=1 (This document contained questions ITSSD prepared and submitted to House Science Committee professional staff along with reference documentation to assist them in supporting committee members’ scheduled May 29, 2014 above-entitled hearing.) *Id.*

⁴⁰ *Id.*, at Annotated Addendum, Section II, Appendix 3E: “Approximate Reported Funding NOAA Cooperative Institute Programs FYs2004-2010,” *supra* pp. 112-116 and accompanying endnotes.

⁴¹ *Id.*, at Annotated Addendum, Section 2.b., p. 53 (“NOAA scientists ha[d] played a close and constructive role in working with CI principal investigators as assigned “program managers”, “collaborators”, “other participating researchers”, “other personnel”, “technical contacts”, or “collaborating NOAA investigators” during the course of their research projects”). *Id.*

⁴² *Id.*, at Section II, Appendix 4A: “Author-Contributors USGCRP/CCSP SAP1.1,” p. 118-121; Appendix 5A: “Author-Contributors USGCRP/CCSP SAP1.3,” pp. 125-126; Appendix 8A: “Author-Contributors USGCRP/CCSP SAP3.3,” pp. 138-141; Appendix 9A: “Author-Contributors USGCRP/CCSP SAP5.2,” p. 144; Appendix 10A: “Author-Contributors USGCRP/CCSP SAP5.3,” pp. 148-149; Appendix 11A: “Author-Contributors USGCRP/CCSP SAP2.2,” pp. 152-158; Appendix

12A: “Author-Contributors/Editors USGCRP/CCSP Global Climate Change Impacts 2009 (NCA2-2009),” pp. 161-163; Appendix 13: “Author-Contributors State of the Climate 2008,” pp. 165-170.

⁴³ *Id.*, at Annotated Addendum, Sections I.3.b.i-vii., pp. 61-78. *See also* Section II, Appendix 4B: “NRC Ad Hoc Peer Review Panel USCRP/CCSP SAP1.1,” pp. 118-122; Appendix 4C: “NRC Report Review Committee SAP1.1,” p. 123; Appendix 4D: “NRC Oversight Committee on Climate Change Research (Of Board on Atmospheric Sciences & Climate) During Work of Ad Hoc NRC Peer Review Panel for SAP1.1,” p. 124.

⁴⁴ *Id.*, at Section II, Appendix: 5B: “NRC Ad Hoc Peer Review Panel SAP1.3,” p. 127; Appendix 5C: “NRC Report Review Committee, SAP1.3,” p. 128; Section II, Appendix 5D: “NRC Oversight Board on Atmospheric Sciences & Climate During Work of Ad Hoc NRC Peer Review Panel - SAP1.3,” p. 129.

⁴⁵ *Id.*, at Section II, Appendix 6B: “NRC Ad Hoc Peer Review Panel SAP2.4,” p. 131; Appendix 6C: “NRC Report Review Committee SAP2.4,” p. 132; Appendix 6D: “NRC Oversight Board on Atmospheric Sciences & Climate During Work of Ad Hoc NRC Peer Review Panel SAP2.4,” p. 133.

⁴⁶ *Id.*, at Appendix 7B: “NRC Ad Hoc Peer Review Panel SAP3.2,” p. 135; Appendix 7C: “NRC Report Review Committee, SAP3.2 Peer Review Panel Report,” p. 136; Appendix 7D: “NRC Oversight Board on Atmospheric Sciences & Climate During Work of Ad Hoc NRC Peer Review Panel SAP3.2,” p. 137.

⁴⁷ *Id.*, at Section II, Appendix 8B: “NRC Peer Review Panel SAP3.3,” p. 142; Appendix 8C: “NRC Report Review Committee SAP3.3,” p. 142; Appendix 8D: “NRC Oversight Board on Atmospheric Sciences & Climate During Work of Ad Hoc NRC Peer Review Panel SAP3.3,” p. 143.

⁴⁸ *Id.*, at Section II, Appendix 9B: “NRC Peer Review Panel SAP5.2,” p. 145; Appendix 9C: “NRC Report Review Committee SAP5.2,” p. 146; Appendix 9D: “NRC Oversight Board on Atmospheric Sciences & Climate During Work of Ad Hoc NRC Peer Review Panel SAP5.2,” p. 147.

⁴⁹ *Id.*, at Section II, Appendix 10B: “NRC Peer Review Panel SAP5.3,” p. 150; Appendix 10C: “NRC Report Review Committee SAP5.3,” p. 150; Appendix 10D: “NRC Oversight Committee on Human Dimensions of Global Change During Work of Ad Hoc NRC Peer Review Panel SAP5.3,” p. 151.

⁵⁰ *See Id.*, at Appendix 3D: “Scientists Affiliated With Entities Participating in NOAA Grant-Funded Climate Science-Research-Related Programs - Contributors to NOAA-Developed USGCRP/CCSP SAPs, NCA2-2009, SOC-2008,” pp. 108-111;

⁵¹ *Id.*, at Section II, Appendix 3A: “Scientists Affiliated With NOAA Grant-Funded Entities, Author Contributors/Reviewers IPCC-AR4-WGI,” pp. 97-100; Appendix 3B: “Scientists Affiliated With NOAA Grant-Funded Entities, Author Contributors/Reviewers IPCC-AR4-WGII,” pp. 101-103; Appendix 3C: “Scientists Affiliated With NOAA Grant-Funded Entities, Author Contributors/Reviewers IPCC-AR3-WGI/WGII,” pp. 104-107.

⁵² NOAA “supports” the National Climate Assessment and Development Advisory Committee (“NCADAC”), a federal advisory committee NOAA had established in 2010 to oversee the activities (development) of the National Climate Assessment. *See* U.S. Global Change Research Program, *National Climate Assessment and Development Advisory Committee*, available at: <http://www.globalchange.gov/ncadac>.

⁵³ *See Citizens for Responsibility and Ethics in Washington v. U.S. Department of Health and Human Services*, 481 F. Supp. 2d 99, 108 (D.C.D.C. 2006), U.S. Dist. LEXIS 95700 (Sept. 8, 2006).

⁵⁴ *See National Resources Defense Council, Inc. v. Environmental Protection Agency*, 581 F. Supp. 2d 491, 499 (S.D.N.Y. 2008), 2008 U.S. Dist. LEXIS 63184 (Aug. 19, 2008) (finding that “the Government does not contest that the public also has a significant interest in how the Government makes policy decisions regarding the use of EDBC’s on potatoes”). *Id.*

⁵⁵ *See Citizens for Responsibility and Ethics in Washington v. U.S. Department of Health and Human Services*, 481 F. Supp. 2d 99, 108 (D.C.D.C. 2006), *supra*.

⁵⁶ 481 F. Supp. 2d 99, 109, quoting *Judicial Watch v. U.S. Dep’t of Justice*, 185 F. Supp. 2d 54, 61 (D.D.C. 2002).

⁵⁷ 481 F. Supp. 2d 99, 109.

⁵⁸ *Id.* Cf. *VoteHemp, Inc. v. DEA*, 237 F. Supp 55, 60 (D.C. D.C. 2002) (“[D]ocuments that are ‘already...in the public domain, in either a duplicative or a substantially identical form’ are not ‘as likely to contribute’ to the public’s understanding.”) *Id.*

⁵⁹ *See* 40 C.F.R. § 2.107(l)(2)(ii).

⁶⁰ *See Project on Military Procurement v. Dep’t of Navy*, 710 F. Supp. 362, 365 n. 8 (D.D.C. 1989), holding that the fee waiver criteria concerning whether “the disclosure is likely to contribute to an increased understanding of government operations or activities,” and whether the “disclosure is likely to contribute significantly to public understanding of government operations or activities as compared to the level of understanding that existed prior to the disclosure,” are “hopelessly intertwined.”) *Id.*

⁶¹ *See Judicial Watch, Inc. v. United States Department of Justice (“Judicial Watch III”)*, 185 F. Supp. 2d 54, 62 (DC DC 2002), available at: <https://www.courtlistener.com/dcd/dVgr/judicial-watch-inc-v-us-dept-of-justice/?q=suitNature:Civil>; *See also D.C. Technical Assistance Org. v. U.S. Department of Housing and Urban Development*, 85 F.Supp.2d 46, 49 (DC DC 2000) (Court

must look to ‘the scope of the requester’s proposed dissemination – whether to a large segment of the public or a limit subset of persons...and the requester’s capacity to disseminate the requested information’) (citations omitted)”.

⁶² See, e.g., *Judicial Watch, Inc. v. Rossoti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *Larson v. Central Intelligence Agency*, 843 F.2d 1481, 1483, 269 U.S. App. D.C. 153, 15 Media L. Rep. 1961 (D.C. Cir. 1988) (fee waiver request properly denied where requester lacked ability to disseminate information because, *inter alia*, he failed to show contacts “with any major newspaper companies.”); *Judicial Watch, Inc. v. U.S. Dept. Of Justice*, 122 F. Supp. 2d 13, 19 (D.D.C. 2000) (“requester who does not give specifics regarding a method of disseminating requested information will not meet this factor, even if the requester has the ability to disseminate information.”) (citations omitted).

⁶³ See Institute for Trade, Standards and Sustainable Development, *Re: FOIA Request No. DOC-NOAA-2014-000714*, (March 26, 2014), available at: <http://nebula.wsimg.com/1ec660f37bd6e62a136dbf64b95ff247?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>. This request was one of seven FOIA requests ITSSD originally had filed with DOC-NOAA Headquarters and six NOAA regional collaboration teams: the NOAA Central, Great Lakes, North Atlantic, Pacific Islands, Southeast & Caribbean, and Western Regional Collaboration Teams - designated as “NOAA-CRCT”, “NOAA-GRCT”, “NOAA-PIRT”, “NOAA-NARCT”, “NOAA-SECART” and “NOAA-WRCT”. DOC-NOAA-HQ subsequently consolidated these seven FOIA requests into a single “consolidated” FOIA Request. See FOIAOnline Request Information, *Tracking Number: DOC-NOAA-2014-000714* (Date Submitted: March 26, 2014), available at: <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28020f236>; Institute for Trade, Standards and Sustainable Development, *ITSSD/DOC-NOAA Email Correspondences Re: Filed ITSSD FOIA Request With DOC-NOAA of March 26-27, 2014*, available at: <http://nebula.wsimg.com/227da97d0d4347c10f0f0d2902d36c65?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>. See also Institute for Trade, Standards and Sustainable Development, *ITSSD FOIA Request Clarification, Consolidated FOIA Request No. DOC-NOAA-2014-000714* (May 5, 2014), available at: <https://nebula.wsimg.com/c25e625aa81981536c980ec0f3307791?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

⁶⁴ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694* (filed Sept. 22, 2014), *supra*; Institute for Trade, Standards and Sustainable Development, *Clarification of New FOIA Request No. DOC-NOAA-2014-001694* (Oct. 1, 2014), available at: <https://nebula.wsimg.com/43d251976355e191bb523611a8fd1cd2?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

⁶⁵ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694, Tranche/Cache of Clearly and Obviously Identified NOAA Files* (Oct. 27, 2014), *supra*.

⁶⁶ See Institute for Trade, Standards and Sustainable Development, *ITSSD Embarks on Public “Education Campaign” To Ensure Federal Agency Peer Review Science Processes Used to Vet Climate Assessments Supporting EPA’s 2009 Greenhouse Gas Endangerment Findings Met Information Quality Act Requirements*, Press Release (May 22, 2014), available at: <http://nebula.wsimg.com/7e6107fef9a0b6b382e80e921b213c65?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

⁶⁷ See Michael Bastach, *Does The EPA’s CO2 Endangerment Finding Violate Federal Law?*, The Daily Caller (May 22, 2014), available at: <http://dailycaller.com/2014/05/22/does-the-epas-co2-endangerment-finding-violate-federal-law/> (This article was subsequently posted *inter alia* to the following websites: [Facebook.com](#), [National Association of Scholars](#), [Climate Depot.com](#), [Daily Surge](#), [Freedom Outpost.com](#), [BarbWire.com](#), [Liberty Unyielding.com](#), [Conservative News.com](#), [Land and Water USA.com](#), [AtlasNetwork.org](#) (of the Atlas Economic Research Foundation), the [Global Warming Policy Foundation](#) (UK), [CNGchat.com](#), [ALIPAC](#) and [Maricopa County AZ Republican Committee \(MCRC\) Briefs](#)).

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⁷¹ See Lawrence A. Kogan, *US Freedom of Information Act (FOIA), Government Transparency and the Asia-Pacific*, Asia Law Portal (June 5, 2014), available at: <http://www.asialawportal.com/2014/06/05/us-freedom-of-information-act-foia-government-transparency-and-the-asia-pacific/>.

⁷² See Lawrence A. Kogan, *Council Candidate Comment Lacks Adequate Peer Review* (June 21, 2014), available at: <http://www.lamonitor.com/content/council-candidate-comment-lacks-adequate-peer-review>; <http://nebula.wsimg.com/ec597d976d28670ab43249bd5c9e0b91?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

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¹⁰⁹ Dr. Alan Moghissi, a longstanding member of the ITSSD Board of Advisors, previously served as Editor-in-Chief of *Environment International* and *Waste Management* (journals of Elsevier Publ.), and of *Technology – Elmsford – Journal of the Franklin Institute*, then *Technology: A Journal of Science Serving Legislative Regulatory and Judicial Systems*.

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¹¹¹ See The Burton Awards, *The Burton Awards Announces the 2014 Distinguished Legal Writing Awards Law Firm Winners*, Press Release (April 14, 2014), available at: <http://www.burtonawards.com/news-2014-law-firm-winners.html> (“The Kogan Law Group, P.C. - Lawrence A. Kogan, Prof. Lucas Bergkamp, Partner at Hunton & Williams, Brussels, Belgium, *Trade, the Precautionary Principle, and Post-Modern Regulatory Process*”).

¹¹² See Lawrence A. Kogan, *Arctic Escapades: Can The Precautionary Principle Be Invoked via UNCLOS to Undermine U.S. Polar Interests?*, Address at the National Defense University and Forces Transformation and Resources Seminar “Transforming National Security Unfrozen Treasures National Security, Climate Change and the Arctic Frontier Laws of the Sea: Changing Air Land and Sea Routes” (May 14, 2008), at 168-219, available at: <https://nebula.wsimg.com/ba39ee4303eb9f7b7d92260c610f51b2?AccessKeyId=39A2DC689E4CA87C906D&disposition=0>; Lawrence A. Kogan, *What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe's Precautionary Principle as U.S. Law*, 7 Santa Clara J. Int'l L. 23 (2009), available at: <http://digitalcommons.law.scu.edu/scujil/topdownloads.html>; <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1064&context=scujil>.

¹¹³ See *Perkins v. United States Department of Veteran Affairs*, 754 F. Supp. 2d 1, 9 (D.D.C. 2010), *supra* (“It is undisputed that the information plaintiff has requested is both technical and voluminous. Thus, plaintiff must demonstrate that he is able to understand, process, and disseminate the information”, citing *McClellan [Ecological Seepage Situation v. C Carlucci US]* 835 F.2d [1282,]...1286 [(9th Cir. 1987)].) ITSSD may do this by explaining how the backgrounds of its staff and members of its Board of Advisors qualify them to perform the analysis necessary to effectively disseminate the information. *Perkins v. United States Department of Veteran Affairs*, 754 F. Supp. 2d at 9-10 (discussing *Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036 (D. Idaho 2004); *South Utah Wilderness Alliance v. U.S. Bureau of Land Management*, 402 F. Supp. 2d 82 (D.D.C. 2005)).

¹¹⁴ See *Citizens for Responsibility and Ethics in Washington v. Department of Health and Human Services*, 481 F. Supp. 2d 99, 115 (DC DC 2006), available at: <https://www.courtlistener.com/dcd/domz/citizens-for-res-and-ethics-v-us-dept-of-hhs/> (“[T]he Court is not aware of a statutory requirement that a requesting party must have a history of disseminating information derived from FOIA requests to be entitled to a fee waiver. Indeed, if this were a requirement, a requesting party otherwise entitled to a fee waiver and capable of disseminating information to the public would have to pay fees associated with its initial FOIA requests until it had shown it was capable of disseminating information obtained through a FOIA request, a scenario that has no basis in FOIA or the legislative intent regarding the liberalization of fee waivers. See *McClellan*, 835 F. 2d at 1284. While the court in *Judicial Watch III* referred to the plaintiff's past dissemination of information derived from FOIA requests as one factor leading to the conclusion that the plaintiff had fulfilled this third prong, the court never indicated that such a record was necessary to be

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entitled to a fee waiver. 185 F. Supp. 2d at 62. Rather...the requesting party’s past dissemination of information obtained through FOIA requests was one of several factors the court considered in addition to the requester’s proffered list of dissemination mechanisms and expressed intent to disseminate the information. *Id.* Such factors are considered because they illustrate the true inquiry: does the requesting party have the ‘ability and intention to effectively convey’ or disseminate the requested information to the public.’ *VoteHemp*, 237 F. Supp. 2d at 62. (quoting *Judicial Watch III*, 185 F. Supp. 2d at 62). While there is nothing in the administrative record as to whether CREW has disseminated new information derived from a FOIA request, the record does indicate that CREW has the capacity to process and disseminate information and has done so in the past. In addition to stating the mechanisms it uses to disseminate information to the public, including reports, memoranda, and its website, which, consistent with *VoteHemp*, *Judicial Watch III*, and *D.C. Technical*, could have sufficed to fulfill this prong, Plaintiff also cited two specific examples – the Abramoff website and the campaign contribution report – show that CREW has the capacity to compile information and disseminate it to the public. *The Court cannot imagine why a requesting party would have to convince an agency that it was capable of disseminating new information or information obtained through a FOIA request when it has amply showed a capacity to disseminate information generally*”) (emphasis added). *Id.*

¹¹⁵ See *VoteHemp, Inc. v. Drug Enforcement Administration*, 237 F.Supp.2d 55, 62 (D.D.C. 2002), *supra*, referencing *D.C. Technical Assistance Org. v. U.S. Department of Housing and Urban Development*, 85 F.Supp.2d 46, 49 (DC DC 2000), *supra* (“Court must look to ‘the scope of the requester’s proposed dissemination – whether to a large segment of the public or a limited subset of persons...and the requester’s capacity to disseminate the requested information’”).

¹¹⁶ See *Carney v U.S. Dept. of Justice*, 19 F.3d 807, 815 (2nd Cir. 1994). From the information he submitted to the DOJ, we are satisfied that Carney will disseminate the disclosed records to a sufficiently broad audience of students and academics interested in his work. There is evidence in the administrative record that very little has been written regarding the role of DOJ in the selection process, and the DOJ does not dispute this. Thus, we are satisfied that Carney’s work is likely to be considered by other scholars.” *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* “DOJ suggests that, because Carney’s dissertation and proposed articles and book on the role of the DOJ in the judicial selection process are scholarly in nature, they will not reach a general audience and hence will not benefit the public at large. Such work by its nature usually will not reach a general audience, but, by enlightening interested scholars, it often is of great benefit to the public at large. To suggest otherwise is to ignore the important role of academe in our democracy. The relevant inquiry, as we see it, is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Id.*

¹²⁰ Similarly, documents related to ITSSD’s EPA FOIA Requests are now accessible via the “[ITSSD Portal to EPA FOIAs](#)” also located on the website homepage.

¹²¹ See Lydia Saad, *In 2010, Conservatives Still Outnumber Moderates, Liberals*, Gallup Politics (June 25, 2010), available at: <http://www.gallup.com/poll/141032/2010-Conservatives-Outnumber-Moderates-Liberals.aspx> (A Gallup/USA Today polling in June 2010 revealed that 42% of those surveyed identify as conservative, 35% as moderate, while 20% identify as liberal); Pew Research Center for the People & the Press, *Voters Rate the Parties’ Ideologies - Dems Viewed as Farther from Political Center than is GOP* (July 16, 2010), available at: <http://www.people-press.org/2010/07/16/voters-rate-the-parties-ideologies/> (A June 2010 Pew poll revealed that 40% of American voters identify themselves as conservatives, 36% as moderates and 22% as liberals, with a strong majority of both liberals and conservatives describing themselves as closer to the center than to the extremes); Jeffrey M. Jones, *Liberal Self-Identification Edges Up to New High in 2013*, Gallup Politics (Jan. 10, 2014), available at: <http://www.gallup.com/poll/166787/liberal-self-identification-edges-new-high-2013.aspx> (As of 2013, self-identified conservatives stand at 34%, moderates at 38%, and liberals at 23%); Art Swift, *Wyoming Residents Most Conservative, D.C. Most Liberal* (Jan. 31, 2014), available at: <http://www.gallup.com/poll/167144/wyoming-residents-conservative-liberal.aspx>.

¹²² See Ipsos MORI, *Global Trends 2014 – Environment*, available at: <http://www.ipsosglobaltrends.com/environment.html>.

¹²³ See Pew Research Center Global Attitudes Project, *Climate Change and Financial Instability Seen as Top Global Threats - Survey Report* (June 24, 2013) at p. 1, available at: <http://www.pewglobal.org/files/2013/06/Pew-Research-Center-Global-Attitudes-Project-Global-Threats-Report-FINAL-June-24-20131.pdf>.

¹²⁴ See *Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036 (D. Idaho 2004).

¹²⁵ See *Citizens for Responsibility and Ethics in Washington v. United States Department of Education*, 593 F. Supp. 2d 261, 270 (D.D.C. 2009), available at: <https://www.courtlistener.com/dcd/cToa/citizens-for-responsibility-v-us-dept-of-educ/>, quoting *Judicial Watch, Inc. v. Gen. Servs. Admin.*, 2000 U.S. Dist. LEXIS 22872, 2000 WL 35538030, at 11 (D.D.C. 2000) and *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, at 1285 (9th Cir. 1987).

¹²⁶ *Id.*

¹²⁷ See *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Health and Human Services*, 481 F. Supp. 2d 99, 116 (D.C.D.C. 2006), U.S. Dist. LEXIS 95700 (Sept. 8, 2006).

¹²⁸ See U.S. Global Change Research Program, *Synthesis & Assessment Products*, available at: <http://www.globalchange.gov/engage/process-products/sap-summary>.

¹²⁹ See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764, 109 S.Ct. 1468, 1477, 103 L. Ed. 2d 774 (1989), quoted in *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Health and Human Services*, 481 F. Supp. 2d at 117 (“Plainly, there is a vast difference between the public records that might be found after a diligent search of courthouse files...and a computerized summary located in a single clearinghouse of information.”) *Id.*

¹³⁰ See *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Health and Human Services*, 481 F. Supp. 2d at 117.

¹³¹ See *Citizens for Responsibility and Ethics in Washington v. United States Department of Education*, 593 F. Supp. 2d 261, 270, 271 (D.D.C. 2009).

¹³² *Id.*, quoting *Gen. Servs. Admin.*, 2000 U.S. Dist. LEXIS 22872, 2000 WL 35538030, at *11.

¹³³ See *Citizens for Responsibility and Ethics in Washington v. United States Department of Education*, 593 F. Supp. 2d 261, 271 (D.D.C. 2009).

¹³⁴ *Id.*

¹³⁵ See Ian Fein, *Reassessing the Role of the National Research Council: Peer Review, Political Tool, or Science Court?*, 99 Calif. Law Rev. 465 (2011), available at: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1045&context=californialawreview> ((This author discussed how politicians and federal agencies have increasingly turned to the NRC to defuse political controversies, particularly in the natural resources arena. However, the author discusses how allegations of NAS/NRC improprieties had been reported in several cases where politicians and federal agencies had sought advice on environmental and/or natural resource-related science-policy issues that were politically controversial and divisive.) See also Edward J. Calabrese, *The Genetics Panel of the NAS BEAR I Committee (1956): epistolary evidence suggests self-interest may have prompted an exaggeration of radiation risks that led to the adoption of the LNT cancer risk assessment model*, Archives of Toxicology (July 4, 2014), at p. 1, Abstract available at: <http://www.ncbi.nlm.nih.gov/pubmed/24993953> (This author has recently uncovered historical evidence revealed in the July 2014 issue of the peer reviewed journal Archives of Toxicology, a renowned toxicologist has alleged that the members of the NAS Biological Effects of Atomic Radiation I (BEAR I) Genetics Panel had been previously “motivated by self-interest to exaggerate risks to promote their science and personal/professional agenda,” and in “found[ing]...the linear-no-threshold (LNT) model for cancer risk assessment [...] on ideological grounds.” He argues that “such activities have profound implications for public policy and may have had a significant impact on the adoption of the LNT model for cancer risk assessment” during the past fifty years.) *Id.*

¹³⁶ See Hank Campbell, *The Corruption of Peer Review Is Harming Scientific Credibility*, The Wall Street Journal (July 13, 2014) (and accompanying comments), available at: <http://online.wsj.com/articles/hank-campbell-the-corruption-of-peer-review-is-harming-scientific-credibility-1405290747> (This author discusses the growing trend of scientist-authors exploiting the peer review processes employed by many scientific publishers to ensure that their papers secured a positive review for placement in their journals. He admonished the public concerning the genuine risk that errors in the peer review process at scientific journals “can have serious consequences if bad science leads to bad [government] policy.” In addition, as support for this proposition, he emphasized how such practices also have permeated and pervaded the National Academy of Science.) *Id.*

¹³⁷ *Id.*, at 271-271, citing *Gen. Servs. Admin.*, 2000 U.S. Dist. LEXIS 22872, 2000 WL 35538030, at *10 (“the fact that...some of the requested information has been released to sources other than requestor, does not necessarily mean that it is readily available to the public.”)

¹³⁸ See *Id.*, at 272, citing and quoting *Forest Guardians v. U.S. Dep't of the Interior*, 416 F. 3d 1173, 1181 (10th Cir. 2005) (“(determining that ‘[k]nowing that [an agency or agency program] permits [or does not permit] the use of [a practice] is not the same as knowing the [details of that practice and the identifies of specific persons involved.]’”) (bold-faced brackets added; other brackets in original). *Id.*

¹³⁹ See 15 C.F.R. §4.11(k)(3)(i).

¹⁴⁰ In *Forest Guardians v. DOI*, 416 F. 3d 1173, 1179-1180 (10th Cir. 2005), the Tenth Circuit Court of Appeals held that, “an understanding of how [a federal agency] makes policy decisions, including the influence of any outside groups on this process, is also important to the understanding of the [agency].”

¹⁴¹ See Gustav Björkstrand & Juha Mustonen, *Introduction: Anders Chydenius' Legacy Today*, in “The World’s First Freedom of Information Act,” Anders Chydenius Foundation (2006), at p. 4, available at: http://www.access-info.org/documents/Access_Docs/Thinking/Get_Connected/worlds_first_foia.pdf.

¹⁴² See Institute for Trade, Standards and Sustainable Development, *International Regulatory Cooperation*, ITSSD website, available at: <http://nebula.wsimg.com/374d8ac5bb729af7b75740edb1e11c98?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁴³ See United States Government Accountability Office, *International Regulatory Cooperation: Agency Efforts Could Benefit from Increased Collaboration and Interagency Guidance*, Report to the Chairman, Committee on Oversight and Government Reform, House of Representatives (GAO-13-588) (Aug. 2013), at p. 18, available at: <http://www.gao.gov/assets/660/656488.pdf> (“EPA Office of Chemical Safety and Pollution Prevention (OCSPP) officials said that for chemical safety regulations, countries are working within different statutory and regulatory frameworks and different levels of acceptance of risk that can make it difficult to reach full agreement on a regulatory approach. In such cases, *sharing information with foreign counterparts can facilitate agreement on a common understanding of the issue or on underlying technical or scientific issues*. According to officials that we interviewed, OCSPP also *focuses on transparency and good regulatory practices*, which lead to commonality between policies, work *sharing on scientific reviews, and greater harmonization in the long term*” (emphasis added). *Id.* See also *Id.*, at Table 2, p. 10 (“All agencies in our study reported that they engage in a range of international regulatory cooperation activities. These activities include U.S. agencies and foreign counterparts sharing scientific data, developing and using the same international regulatory standards, and recognizing each other’s regulations as equivalent. Cooperation can address both existing and avoid future regulatory differences. These activities generally fall into six broad categories...Activity. Information sharing and scientific collaboration. Description. *Agencies share information with their foreign counterparts on scientific data and regulatory approaches*. Illustrative Examples. Pesticide Tolerance Crop Grouping Revisions Program • Chemical Data Information Sharing • Consumer Product Safety Pilot Alignment Initiative (emphasis added).” *Id.*”

¹⁴⁴ See Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* 74 FR 66496, 66506-66509 (Dec. 15, 2009), *supra*; Lawrence Kogan, “Revised U.S. Deep Seabed Mining Policy Reflects UNCLOS and Other International Environmental Law Obligations”, *Emerging Issues* (2013), 6893, available at: <http://nebula.wsimg.com/f97bfb87d31d68c9fba55f48d125fd8a?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁴⁵ See Lucas Bergkamp and Lawrence Kogan, *Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership*, *European Journal of Risk Regulation* (4/2013), *supra* at pp. 500, 504-507 See also Jean D'Aspremont, *Hart and Postmodern Positivism in International Law*, 113 *Revue générale de droit international public*, 635-654 (2009), at abstract, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491493&download=yes; Stanford Encyclopedia of Philosophy, *Legal Positivism*, Center for the Study of Language and Information (Jan. 3, 2003) (last visited 4/25/14), available at: <http://plato.stanford.edu/entries/legal-positivism/>.

¹⁴⁶ See *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 496 (S.D.N.Y. 2008) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

¹⁴⁷ See Gustav Björkstrand & Juha Mustonen, *Introduction: Anders Chydenius' Legacy Today*, in “The World’s First Freedom of Information Act,” Anders Chydenius Foundation (2006), *supra* at p. 4.

¹⁴⁸ See David Banisar, *Freedom of Information Around the World: A Global Survey of Access to Government Information Laws*, Privacy International (2006), at Foreword, available at: http://www.freedominfo.org/documents/global_survey2006.pdf.

¹⁴⁹ *Id.*, at p. 6. “There has been a significant increase by nations in the recognition of the importance of access to information both as a human right and as an important right to promote good governance and fight corruption. At least 80 countries have adopted constitutional provisions that provide for a right of access. Nearly 70 countries around the world have adopted national laws on freedom of information and efforts are pending in around another fifty.” *Id.*, at p. 16.

¹⁵⁰ See United Nations Educational Scientific and Cultural Organization (UNESCO), *Communication and Information, Freedom of Information in Latin America and the Caribbean*, UNESCO website (last visited April 4, 2014), available at: <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/foi-in-latin-america-and-the-caribbean/>.

¹⁵¹ *Id.*, at p. 19. See also United Nations Educational Scientific and Cultural Organization (UNESCO), *Communication and Information, Freedom of Information in Asia-Pacific*, UNESCO website (last visited April 4, 2014), available at: <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/foi-in-asia-pacific/>.

¹⁵² *Id.*, at p. 20. See also United Nations Educational Scientific and Cultural Organization (UNESCO), *Communication and Information, Freedom of Information in Arab States*, UNESCO website (last visited April 4, 2014), available at: <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/foi-in-arab>

[states/](http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/foi-in-africa/); United Nations Educational Scientific and Cultural Organization (UNESCO), Communication and Information, *Freedom of Information in Africa*, UNESCO website (last visited April 4, 2014), available at: <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/foi-in-africa/>.

¹⁵³ See David Banisar, *Freedom of Information Around the World: A Global Survey of Access to Government Information Laws*, Privacy International (2006), *supra* at p. 6.

¹⁵⁴ See Lalanath de Silva, *Freedom of Information Laws Spreading Around the World*, World Resources Institute Blog (Sept. 26, 2010), available at: <http://www.wri.org/blog/freedom-information-laws-spreading-around-world>.

¹⁵⁵ See Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, United Nations Educational Scientific and Cultural Organization (UNESCO) (2008), at p. 16, available at: http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf.

¹⁵⁶ “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes...” See UN Doc. A/Conf.151/26 (vol. 1).

¹⁵⁷ “Considering that, to be able to assert [the right to live in a clean environment] citizens must have access to information ... Recognizing that, in the field of environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns ...” See UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the “Environment for Europe” process, 25 June 1998, entered into force 30 October 2001. As of September 2007, there were 41 Parties to the Convention. The text of the Convention in various languages is available at: <http://www.unece.org/env/pp/treatytext.htm>.

¹⁵⁸ *Id.*

¹⁵⁹ ITSSD also was not paid to prepare its previously filed EPA FOIA Request, Clarifications and Fee Waiver Request and Clarification.

¹⁶⁰ See 15 C.F.R. §4.11(k)(3)(i).

¹⁶¹ See 15 C.F.R. 4.11(k)(3)(i); 15 C.F.R. 4.11(b)(1).

¹⁶² *Id.*

¹⁶³ See *Campbell v. U.S. Department of Justice*, 164 F.3d 20 (DC Cir. 1998).

¹⁶⁴ See *National Treasury Employees Union v. Griffin*, 811 F.2d 644 (D.C.Cir.1987).

¹⁶⁵ See 164 F.3d 20, 36, quoting *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C.Cir.1987) (“The legislative history of the fee waiver provision indicates special solicitude for journalists, along with scholars and public interest groups. See S.Rep. No. 854, 93d Cong., 2d Sess. 3, 11 (1974); *Ettlinger v. FBI*, 596 F.Supp. at 872; Bonine, *Public-Interest Fee Waivers Under the Freedom of Information Act*, 1981 Duke L.J. 213, 238-44.”).

¹⁶⁶ *Id.*

¹⁶⁷ See *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C.Cir.1987) (“A union, however, may put information to such varied uses, many of which are wholly independent of informing the public, that the relation between public and private benefits is by no means constant. Accordingly, when there is a clear understanding of the requester's purposes, comparison of the private and public benefits is no more than a garden-variety ‘weighing’ inquiry and is equally susceptible of resolution. Thus, to secure a finding of predominate public benefit, a requesting union must typically submit more detail than a journalist.”). *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See 15 C.F.R. §4.11(k)(3)(ii).

¹⁷⁰ See 15 C.F.R. §4.11(k)(1)-(3).