



June 30, 2014

Mr. Larry Gottesman
National FOIA Officer
Office of Environmental Information
U.S. Environmental Protection Agency, Headquarters
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

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Re: New FOIA Fee Waiver Request
Superseding Withdrawn FOIA Fee Waiver Request
for EPA-HQ-2014-004938

Dear Mr. Gottesman,

The nonprofit Institute for Trade, Standards and Sustainable Development (“ITSSD”) hereby files the attached new Freedom of Information Act (“FOIA”) Fee Waiver Request relating to ITSSD’s new FOIA Request recently filed with Environmental Protection Agency Headquarters (“EPA-HQ”) under separate cover. This new FOIA Fee Waiver Request supersedes the prior FOIA Fee Waiver Request and Clarification ITSSD filed with your offices with respect to EPA-HQ-2014-004938, which is hereby simultaneously withdrawn (without prejudice).

As this new FOIA Fee Waiver Request shows, ITSSD has satisfactorily demonstrated, consistent with 40 C.F.R. §2.107(l)(1), 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.”¹ For these reasons, EPA should grant ITSSD’s new FOIA Fee Waiver Request.

Should EPA decide not to grant this new Fee Waiver Request under FOIA and the applicable EPA FOIA regulations, however, ITSSD requests that EPA treat ITSSD as an “educational institution” contemplated by 5 USC Sec. 552(a)(4)(A)(ii)(II) and 40 CFR Sec. 2.107(b)(4),² and as thus qualifying for the reduced fee structure applicable to such entities.³

In addition, if EPA decides not to grant this new FOIA Fee Waiver Request, ITSSD respectfully requests that EPA, prior to undertaking any of the activities necessary to locate and disclose the identified records, provide notice to ITSSD regarding whether or not it believes such records exist at all. If the records identified in ITSSD’s new FOIA Request exist and can be located and disclosed, ITSSD respectfully requests that EPA also notify ITSSD regarding the actual or estimated amount of the fees to be charged therefor,⁴ and secure ITSSD’s advance approval of the anticipated total fee.⁵

We appreciate the opportunity to clarify for your offices the grounds for granting ITSSD a FOIA fee waiver as set forth in this new FOIA Fee Waiver Request.

Thank you for your prompt attention to this matter.

Very truly yours,

Lawrence A. Kogan

Lawrence A. Kogan

CEO
ITSSD

Cc: Dana Hyland, EPA Office of Air and Radiation

Institute for Trade, Standards and Sustainable Development (ITSSD)
P.O. Box 223
Princeton Junction, New Jersey USA 08550
(609) 658-7417
www.itssd.org

ITSSD New FOIA Fee Waiver Request

I. Introduction

This new FOIA Fee Waiver Request establishes that ITSSD's new FOIA Request filed with EPA-HQ on June 30, 2014,⁶ under separate cover, satisfies each of the criteria identified in EPA's six-factor fee waiver test set forth in EPA regulations implementing the Freedom of Information Act - 40 C.F.R. §2.107(l)(1)-(3).

When considering whether ITSSD meets the six-factor fee waiver test, EPA 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,

“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...”⁷

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*⁸ 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.”⁹

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.’”¹⁰ 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 EPA to use 40 C.F.R. §2.107(l)(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 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 Satisfaction of Each of the Substantive Elements of the Six-Factor EPA Fee Waiver Test

Factor 1: The Subject of the Requested Records Concern Identifiable Operations or Activities of the Federal Government, With a Connection That is Direct and Clear (40 C.F.R. §2.107(l)(2)(i))

ITSSD's new FOIA Request¹¹ seeks disclosure of all "EPA climate science-related peer review files" (hereinafter referred to as "EPA Peer Review Records" and defined in Section III of this FOIA Request) created, transmitted, stored and/or archived from January 1, 2005 through December 31, 2011, substantiating the specific measures EPA had taken, consistent with the highest, most rigorous and least discretionary standards applicable to highly influential scientific assessments ("HISAs") imposed by the Information Quality Act ("IQA")¹² and the Office of Management and Budget ("OMB")¹³ and EPA¹⁴ IQA-implementing guidelines, to ensure the quality, integrity and reliability of all EPA- and third-party- developed and peer reviewed climate science-related assessments and reports upon which the Administrator primarily relied in reaching its 2009 positive Greenhouse Gas ("GHG") Endangerment and Cause or Contribute Findings under Clean Air Act ("CAA") Sec. 202(a)(1).¹⁵

Section I of ITSSD's new FOIA Request makes clear that ITSSD seeks disclosure of four identified categories of EPA Peer Review Records ("EPA climate science-related peer review files") corresponding to each of the four legal obligations EPA bore under the IQA and interpretive OMB and Agency guidelines with respect to the development of HISAs subsequently used as the basis for the Administrator's CAA Section 202(a)(1) Findings:

- First, EPA was required to validate the IQA compliance of EPA-established federal advisory committees' and/or third parties' peer reviews of EPA-developed HISAs that supported the Administrator's CAA Section 202(a)(1) Findings;
- Second, EPA was obliged to validate the IQA compliance of other federal agency or third-party peer reviews of such other federal agency, National Research Council and the Intergovernmental Panel on Climate Change (IPCC)-developed HISAs that supported the Administrator's CAA Section 202(a)(1) Findings;

- Third, EPA was required to validate the IQA compliance of an interagency panel's peer review of the EPA-developed Technical Summary Document ("EPA-TSD") which summarized and synthesized twenty-eight (28) individual HISAs designated as "core reference documents" that EPA, other federal agencies and third parties had developed and/or peer reviewed which accompanied the Administrator's GHG Endangerment Findings; *and*
- Fourth, EPA was obliged to ensure the IQA compliance of the administrative mechanisms that EPA and third parties had employed to ensure that affected persons may seek and obtain correction or reconsideration of scientific information EPA and such third parties had disseminated in violation of the IQA and OMB and agency IQA-implementing guidelines.

Sections II.1-II.4 and III.4 of ITSSD's new FOIA Request identify and seek disclosure of specific EPA climate science-related peer review files that correspond to each of these four EPA IQA obligations. Additional annotated Explanations following these sections and an accompanying Addendum describe the specific types of records EPA had been required to create, retain and produce as part of its normal peer review operations and activities. These portions of ITSSD's new FOIA Request also include ITSSD research describing what EPA, to date, has *not* done to comply with its respective IQA obligations.

Section II.1 of ITSSD's new FOIA Request identifies and seeks disclosure of specific peer review records that EPA needed to prepare and assemble, include in the administrative record and publicly disclose via the Agency's website(s), with respect to EPA-established federal advisory committee-developed and peer reviewed HISAs supporting the Administrator's CAA Section 202(a)(1) Findings, consistent with the IQA and applicable OMB and EPA IQA-implementing guidelines. In addition, Section II.1 of ITSSD's new FOIA Request identifies and seeks disclosure of the specific records focusing on the criteria EPA and EPA-established federal advisory committees needed to employ in screening and selecting peer reviewers and forming peer review panels to validate the science underlying EPA and EPA-established federal advisory committee-developed HISAs, consistent with the IQA and applicable OMB and EPA IQA-implementing guidelines. Furthermore, Section II.1 of ITSSD's new FOIA Request identifies and seeks disclosure of the specific records addressing the IQA standards that governed how EPA-selected peer reviewers may be utilized in the peer review processes of two or more EPA- or EPA-established federal advisory committee-developed HISAs. Finally, Section II.1 of ITSSD's new FOIA Request identifies and seeks disclosure of specific records relating to EPA actions to ensure that interested stakeholders had been given the opportunity to be heard at a public meeting focused on addressing questions posed to peer reviewers regarding the scientific issues surrounding such HISAs, the IQA and applicable OMB and EPA IQA-implementing guidelines. The administrative guidance discussed in the Explanation following Section II.1 of ITSSD's new FOIA Request and Section II.3 of the accompanying Addendum indicates how EPA had been responsible for producing such records.

Section II.2 of ITSSD's new FOIA Request identifies and seeks disclosure of specific peer review records that EPA needed to prepare and assemble, include in the administrative record and publicly disclose via the Agency's website(s), with respect to third-party peer reviews of third party (USGCRP/CCSP (federal agency), NRC and IPCC)-developed HISAs that EPA endorsed, adopted

and disseminated as its own as primary support for the Administrator's CAA Section 202(a)(1) Findings, consistent with the IQA and applicable OMB and EPA IQA-implementing guidelines. The administrative guidance discussed in the Explanation following Section II.2 of ITSSD's new FOIA Request and Sections II.1-II.2 of the accompanying Addendum clearly indicate that EPA had remained responsible for validating the IQA compliance of third party peer review practices with respect to such HISAs, because EPA had endorsed, adopted and disseminated (used) them as its own and proclaimed that they represented the U.S. government view of the climate science, in support of the Administrator's CAA Section 202(a)(1) Findings. In other words, EPA had been obliged to validate the IQA compliance of third party peer review practices with respect to third party-developed HISAs as if EPA had developed those HISAs itself.

Section II.3 of ITSSD's new FOIA Request identifies and seeks disclosure of the specific peer review records that EPA needed to prepare and assemble, include in the administrative record and publicly disclose via the Agency's website(s), with respect to its validation of the IQA-compliance of the OMB-selected interagency panel's peer review of the EPA-developed Technical Support Document ("EPA-TSD") accompanying the Administrator's CAA Section 202(a)(1) Findings. The administrative guidance discussed in the Explanation following Section II.3 of ITSSD's new FOIA Request indicates that EPA had remained responsible for validating the IQA-compliance of said panel's peer review practices because the EPA-TSD, which summarized and synthesized the twenty-eight "core reference documents" from the USGCRP, IPCC, and NRC primarily supporting the Administrator's CAA Section 202(a)(1) Findings had, itself, qualified as a HISA. In addition, the Explanation following Section II.3 of ITSSD's new FOIA Request and Section III.1 of the accompanying Addendum describe how the September 2011 EPA-OIG report investigating the IQA-compliance of the interagency panel's peer review of the EPA-TSD had found a number of IQA violations that EPA could correct only on a *forward-looking* basis. Furthermore, the Explanation following Section II.3 of ITSSD's new FOIA Request and accompanying Appendix 1: "EPA-TSD Reviewers Who Authored Summarized 'Core Reference Documents' - Apparent Conflicts-of-Interest; Lack of Independence" describe how at least seven of twelve (7/12) interagency peer reviewers of the EPA-TSD had coauthored the very assessments that the TSD had summarized and synthesized.

Section II.4 of ITSSD's new FOIA Request identifies and seeks disclosure of the specific peer review records that EPA needed to prepare and assemble, include in the administrative record and publicly disclose via the Agency's website(s), with respect to the adequacy of the administrative review mechanisms EPA and third party organizations had provided to address stakeholder requests for correction and/or reconsideration, consistent with IQA Section 515(b)(2)(B) and applicable OMB and EPA IQA-implementing guidelines. The administrative guidance discussed in the Explanation following Section II.4 of ITSSD's new FOIA Request also indicates why such mechanisms are necessary to validate the scientific information (including computer models and datasets and applications thereof) contained in the EPA, USGCRP/CCSP (other federal agency), NRC and IPCC-developed HISAs peer reviewed by EPA and/or third parties that supported the Administrator's Section 202(a)(1) Findings. In other words, ITSSD's new FOIA Request identifies and seeks disclosure of specific records that would indicate whether EPA's and third parties' chosen administrative review procedures actually afforded IQA stakeholders a meaningful opportunity to address their scientific and technical concerns regarding such HISAs.

Section III.4 of ITSSD's new FOIA Request identifies and seeks disclosure of additional specific Agency records validating the IQA compliance of peer reviews performed by EPA, EPA-established federal advisory committees and/or third parties of the numerous science and econometric computer models and datasets and applications thereof contained in the twenty-eight EPA and third party-developed HISAs designated as "core reference documents" that primarily supported the Administrator's CAA Section 202(a)(1) Findings. The administrative guidance discussed in the Explanation following Section III.4 of ITSSD's new FOIA Request also indicates how EPA had been obliged to validate that each computer model, dataset and application thereof incorporated within such HISAs had been adequately peer reviewed in conformance with applicable administrative guidance documents.

In sum, EPA, a federal agency, was obliged by statute and administrative guidance to document for the administrative record and for the public how it had undertaken each of the congressionally-directed government activities and operations described above. The subject of the specific records identified and discussed in Sections I, II.1-II.4 and III.4 of ITSSD's new FOIA Request, as described in detail in the Explanations that followed such sections and Sections II.1-II.3 and III.1 of the accompanying Addendum sufficiently relates to government operations and activities concerning routine peer review science and administrative review processes and procedures applicable to HISAs supporting major government actions. 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"¹⁶ – i.e., records pertaining to the internal and external operations of the EPA.

Therefore, EPA should find that ITSSD's new FOIA Request satisfies the first factor of the six-factor fee waiver test.

Factor 2: Disclosure of the Requested Records Is Likely to Contribute to Public Understanding of Government Operations or Activities (40 C.F.R. §2.107(l)(2)(ii))

As explained above, ITSSD's new FOIA Request identifies and seeks disclosure of specific records substantiating how the scientific peer review operations and activities EPA had undertaken to ensure the quality, integrity and reliability of the highly influential scientific assessments ("HISAs") supporting the Administrator's 2009 CAA Section 202(a)(1) Findings had fulfilled the Agency's four levels of legal obligations imposed by the Information Quality Act ("IQA") and interpretative Office of Management and Budget ("OMB") and EPA IQA-implementing guidelines.

EPA has failed to make publicly available, readily accessible and easily understandable in an organized form many of the specific records clearly identified in Sections II.1-II.4 and III.4 of ITSSD's new FOIA Request, consistent with the relevant provisions of the IQA and applicable administrative guidance. These records, if publicly disclosed, would establish whether or not EPA had satisfied its IQA statutory and administrative law obligations. Due to the unavailability and inaccessibility of such EPA records, the public has remained uninformed and lacks a basic understanding of these critical government operations and activities, the legal bases for their authority, and the indispensable role that legally compliant peer review practices serve in Agency

climate science development, policymaking and rulemaking. EPA's continued nondisclosure of the requested records has given rise to significant public skepticism regarding whether EPA had actually satisfied these IQA legal obligations. As a result, the climate science claims upon which the Administrator's CAA Section 202(a)(1) Findings and Agency climate change policies rest, the legality of EPA's subsequent aggressive CAA regulatory efforts to implement those policies in furtherance of such Findings, and the very trust that the public has placed in transparent and accountable government generally are each now held in considerable doubt.

The administrative record reflects that EPA had merely summarily accounted to the American public for how it had complied with each of its four levels of IQA legal obligations.

a. *EPA Still Needs to Disclose Many Specific Records That Would Reveal Whether EPA Satisfied its Level-One IQA Obligations*

The Explanation following Sections II.1 and III.4 of ITSSD's new FOIA Request and Section II.3 of the accompanying Addendum discuss the administrative guidance relevant to the first level of EPA's IQA legal obligations. These discussions reveal that EPA has not disclosed, to date, many of the records identified in Section II.1 of ITSSD's new FOIA Request. The requested records seek substantiation of how EPA had validated the IQA compliance of peer reviews performed by three Agency-established *ad hoc* federal advisory committees (HICCAC, ASCERAC, and CESLAC) and an interagency panel¹⁷ of two EPA-developed USGCRP/CCSP HISAs (containing computer models and datasets and applications thereof) the EPA-TSD designated as "core reference documents"¹⁸ which directly supported the Administrator's CAA Section 202(a)(1) Findings.

In particular, the Explanation following Sections II.1 and III.4 of ITSSD's new FOIA Request and Section II.3 of the accompanying Addendum discuss how the Agency, thus far, has failed to disclose information about the criteria that EPA, EPA-established federal advisory committees had actually employed in screening and selecting individual peer reviewers and composing external peer review panels. EPA also has failed to disclose information about the procedures EPA, EPA-established federal advisory committees had actually employed in identifying and resolving apparent and actual conflicts-of-interest, lack of peer reviewer independence/bias, and peer review panel balance issues. Furthermore, these portions of ITSSD's new FOIA Request discuss how EPA has failed to publicly release full and summary versions of final peer review reports prepared by its three EPA-established federal advisory committees and external peer review panels. For the most part, all that is publicly accessible are HICCAC, ASCERAC and CESLAC federal advisory committee meeting minutes and draft reports.

Only EPA's comprehensive disclosure of the specific records requested in Sections II.1 and III.4 of ITSSD's new FOIA Request would contribute to public understanding of these critical government operations and activities.

b. *EPA Still Needs to Disclose Many Specific Records That Would Reveal Whether EPA Satisfied its Level-Two IQA Obligations*

The Explanation following Sections II.2 and III.4 of ITSSD's new FOIA Request and Sections II.2-II.3 of the accompanying Addendum discuss the administrative guidance relevant to the second level of EPA's IQA legal obligations. In particular, these portions of the ITSSD's new FOIA Request describe how EPA, to date, has not disclosed many *specific* records that explain how it had validated the IQA compliance of the twenty-three (23) third party (DOC-NOAA¹⁹, DOE,²⁰ DOI-USGS,²¹ NASA,²² DOT²³ USDA²⁴ (USGCRP)), NRC²⁵, IPCC,²⁶ ACIA²⁷)-developed and peer reviewed HISAs (containing computer models and datasets and applications thereof) the EPA-TSD designated as "core reference documents" that directly supported the Administrator's CAA Section 202(a) Findings, which EPA had endorsed, adopted and disseminated as its own.

For example, in its response to public comments submitted in regard to EPA's Proposed CAA Section 202(a)(1) Findings, EPA referred stakeholders to Section III.A of its Final Endangerment Findings entitled, "The Science on Which the Decisions Are Based". The Final Endangerment Findings provided a *general* explanation of EPA's "rationale on the approach to the scientific literature and [its] discussion that it was [neither] necessary nor logical for EPA to conduct an additional and separate review of the underlying climate data and research."²⁸ EPA set forth two general justifications for its circumvention of the key IQA scientific peer review obligations to which it was subject with respect to third party-developed and peer reviewed HISAs. First, the Agency argued that it need not separately peer review the major assessments of the USGCRP, IPCC and NRC which supported the Administrator's CAA Section 202(a)(1) Findings because the "international scientific community" which had produced those assessments had arrived at (*political*) consensus conclusions regarding their findings.²⁹ Second, EPA argued that it need not separately peer review the major assessments of the USGCRP, IPCC and NRC that supported the Administrator's CAA Section 202(a)(1) Findings because of the credentials of the individual members of the international scientific community and the general credibility of the institutional peer review processes employed by the third-party organizations that had conducted the evaluations of these assessments.³⁰ In other words, according to EPA, "[t]he use of the assessment literature capitalizes on the substantial expertise and experience that went into the development of those reports."³¹

No fewer than twenty-five (25) public stakeholders had filed comments regarding the systemic information quality process, objectivity, public comment engagement, and transparency flaws that had apparently infected the peer review processes and procedures surrounding the development of the IPCC's third and fourth assessment reports.³² In response, the Agency referred interested stakeholders to the general rationale set forth in Section III.A of the Administrator's CAA Section 202(a)(1) Findings, as discussed above. In addition, EPA referred them to the "IPCC's *Principles Governing IPCC Work* (2006), IPCC's *Procedures for the Preparation, Review, Acceptance, Adoption, Approval, and Publication of IPCC Reports* (1999), and IPCC's *Guidance Notes for Lead Authors of the IPCC Fourth Assessment Report on Addressing Uncertainties* (2004),"³³ which the Agency replicated and quoted in Appendix A of "EPA's Response to Comments, Volume 1: General Approach to the Science and Other Technical Issues."³⁴

EPA endeavored to reassure stakeholders that it had "both evaluated and participated in the development and review of IPCC reports".³⁵ EPA also sought to persuade stakeholders that the U.S. government's participation via the USGCRP in such activities ensured that "the IPCC process [was]

transparent and rigorous” and that the reports were scientifically credible and legitimate because they “fairly represented] the range of scientific opinions on climate change”.³⁶ Consequently, EPA stated that it believed that “the IPCC’s procedures [were] sufficient and effective for ensuring quality, transparency, and consideration of multiple and diverse perspectives”.³⁷ The Agency reasoned that, because

“[the]...*studies...supporting...the [IPCC] assessment reports EPA used in developing the TSD...were conducted in accordance with sound and objective scientific practices, were peer reviewed, and adhered to standards of quality based on objectivity, utility, and integrity...we find that IPCC’s information quality process is consistent with EPA’s *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency.*”³⁸*

The Explanation following Sections II.2 and III.4 of ITSSD’s new FOIA Request and Sections II.1-II.2 of the accompanying Addendum reveal that this EPA statement, however, failed to discuss how and by whom the supporting IPCC studies had been peer reviewed, and how and why the peer review of these specific supporting studies had been IQA compliant. Furthermore, the Explanation following Section III.4 of ITSSD’s new FOIA Request discusses why EPA’s failure to disclose records validating how its participation in IPCC peer review processes and procedures constituted sufficient ‘testing’ of those data quality control management systems to satisfy IQA HISA requirements raised serious additional questions. As Section II.2 of the accompanying Addendum reveals, an IPCC-commissioned 2010 Inter-Academy Council (“IAC”) Report identified systemic flaws in various IPCC processes and procedures surrounding the validation of IPCC’s Third and Fourth Assessment Reports. It also reveals that the IPCC Review Committee selection process had not adequately considered whether four (4) of twelve (12) IPCC Review Committee members had apparent, if not, actual conflicts-of-interest, and if so, how to address and disclose them.

The Explanation following Section II.2 of ITSSD’s new FOIA Request and Sections II.1-II.2 of the accompanying Addendum, reveal that EPA had endorsed, adopted and used (relied upon) three IPCC Fourth Assessment Reports, including the computer models, datasets and other studies incorporated therein, as primary support for the Administrator’s CAA Section 202(a)(1) Findings. Therefore, it was critical for the Agency to have produced records demonstrating that it had validated the IQA compliance of those assessments. To date, EPA has not produced any specific records validating such third party IQA compliance.

EPA also endeavored to generally reassure stakeholders that the data quality processes and procedures “used by USGCRP/CCSP in developing their assessment reports [was] robust, transparent, and objective.”³⁹ It did so by referring interested stakeholders to the “*Guidelines for Producing CCSP Synthesis and Assessment Products (2004)*,...a CCSP memo on *Clarification of Review and Clearance Process for CCSP Synthesis and Assessment Products, (2007)*, and...*Guidance to Agency Leads Regarding the Preparation of CCSP Synthesis and Assessment Products (2006)*,⁴⁰ which EPA replicated and set forth in Appendix B of “EPA’s Response to Comments, Volume 1: General Approach to the Science and Other Technical Issues.”⁴¹ In addition, EPA referred interested stakeholders to the USGCRP/CCSP administrative guidelines to which each ‘lead’ development agency’ was expected to adhere, “to ensure that each assessment report complied

with the Information Quality Act (IQA) and was fully responsive to all comments received from the public and expert review.”⁴² According to such guidelines, the transmittal memorandum should “indicate[] that *‘the product was prepared in compliance with CCSP’s Guidelines for Producing Synthesis and Assessment Products, the Information Quality Act (Section 515) and [LEAD AGENCY’S] corresponding IQA guidelines; and the Federal Advisory Committee Act [when applicable]’*” (brackets and emphasis in original).⁴³ The guidelines also provide that the transmittal memorandum should be accompanied by “authors’ responses to the peer reviewer comments, as required by OMB’s Information Quality Bulletin for Peer Review, as well as [by] descriptions of how the authors addressed the public comments and lead agency’s review comments.”⁴⁴

The Explanation following Section II.2 of ITSSD’s new FOIA Request and Sections II.1-II.2 of the accompanying Addendum discuss how EPA had endorsed, adopted and used sixteen (16) USGCRP/CCSP assessments as primary support for the Administrator’s CAA Section 202(a)(1) Findings. Furthermore, the Explanation following Section III.4 of ITSSD’s new FOIA Request discusses why EPA’s failure to disclose records validating how its participation in USGCRP/CCSP peer review processes and procedures constituted sufficient ‘testing’ of those data quality control management systems to satisfy IQA HISA requirements raised serious additional questions. However, there is evidence strongly suggesting that USGCRP/CCSP’s IQA certification process was vulnerable to manipulation and that participating federal agency (e.g., DOC-NOAA⁴⁵ and DOI-USGS, as well as, EPA) peer review processes and procedures had been compromised due to unidentified and unresolved apparent or actual conflicts-of-interest involving certain peer reviewers who had also contributed to the development of the HISAs subject to peer review.

Therefore, it was critical for the Agency to have produced records demonstrating that it had validated the IQA compliance of the other ‘lead’ development agency assessments. To date, EPA has not produced records validating the IQA compliance of other agencies’ transmittal memoranda and peer review reports containing author responses to peer reviewer, agency and public comments. EPA points only to the brief *pro forma* certifications of IQA compliance contained within each of the HISAs that other federal agencies, like EPA, had developed and submitted to the CCSP Committee.

Only EPA’s disclosure of the specific records requested in Sections II.2 and III.4 of ITSSD’s new FOIA Request would contribute to public understanding of these critical government operations and activities.

c. *EPA Still Needs to Disclose Many Specific Records That Would Reveal Whether EPA Satisfied its Level-Three IQA Obligations*

The Explanation following Sections II.3 and III.4 of ITSSD’s new FOIA Request and Section III.1 of the accompanying Addendum discuss the administrative guidance relevant to the third level of EPA’s IQA legal obligations. In particular, these portions of the ITSSD’s new FOIA Request describe how EPA, to date, also has not disclosed many specific records substantiating the IQA compliance of the interagency peer review of the EPA-developed TSD⁴⁶ which summarized and synthesized twenty-eight (28) HISAs (containing computer models and datasets and applications thereof) designated as “core reference documents” supporting the Administrator’s CAA Section

202(a) Findings. These portions of ITSSD's new FOIA Request further discuss how EPA-TSD's summaries and syntheses of these HISAs had transformed the EPA-TSD, itself, from influential scientific information into a HISA, consistent with the reported findings of the EPA Office of Inspector General. As a result, EPA's IQA-related records disclosure requirements had substantially increased.

A number of commenters had argued that, "EPA's external peer-review process was inadequate because the federal expert reviewers [of the EPA-TSD] were involved with developing the IPCC and CCSP reports upon which the endangerment finding is based and therefore not objective."⁴⁷ Sections II.3 and III.4 of ITSSD's new FOIA Request identifies those records that EPA still must disclose to demonstrate how the interagency peer review of the HISAs summarized and synthesized in the EPA-TSD, including all computer models and datasets incorporated therein, had satisfied IQA statutory and administrative requirements. The discussion contained in the Explanation following Section II.3 of ITSSD's new FOIA Request corroborates these commenters' conflict-of-interest concerns.

Additionally, at least five (5) interested stakeholders had argued that the EPA-TSD had failed to meet EPA IQA-implementing guideline requirements because EPA had failed to demonstrate how it had validated the "baseline assumptions" it used to draw conclusions about the impacts of "climate change pressures" on physical and biological systems.⁴⁸ Others had argued that the EPA-TSD had failed to meet EPA IQA-implementing guideline requirements because EPA had failed to "explain how [it had] determined the probabilities assigned to climate science and impacts conclusions from the assessment literature."⁴⁹ Still, other commenters had claimed that the interagency peer review of the EPA-TSD summarized and synthesized HISAs did not comply with EPA IQA-implementing guidelines because EPA had failed to "identif[y] sources of uncertainty in the climate impacts and models described in the TSD."⁵⁰

In response to all three sets of comments, EPA referred to Section 1.5⁵¹ of "EPA's Response to Comments, Volume 1: General Approach to the Science and Other Technical Issues."⁵² In response to the latter two sets of comments, EPA referred to "the same likelihood and probability terminology assigned to climate science findings by the IPCC and USGCRP/CCSP."⁵³ In addition, it referred stakeholders to the ranges of uncertainty in the "assumptions about future concentrations of GHGs and aerosols in the various scenarios considered by the IPCC and the differing climate sensitivities of the various climate models used in the simulations."⁵⁴ EPA rationalized that its reference to the USGCRP/CCSP and IPCC reports upon which the Administrator's CAA Section 202(a)(1) Findings had relied had been transparent and would enable the reproducibility of such information by third parties. However, EPA has yet to disclose records revealing how it had validated the reproducibility of the assumptions, theories and extrapolations underlying the computer models and datasets supporting such HISAs.⁵⁵

Only EPA's comprehensive disclosure of the specific records requested in Sections II.3 and III.4 of ITSSD's new FOIA Request would contribute to public understanding of these critical government operations and activities.

- d. *EPA Still Needs to Disclose Many Specific Records That Would Reveal Whether EPA Satisfied its Level-Four IQA Obligations*

Institute for Trade, Standards and Sustainable Development (ITSSD)
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Princeton Junction, New Jersey USA 08550
(609) 658-7417
www.itssd.org

The Explanation following Sections II.4 and III.4 of ITSSD's new FOIA Request discusses the statutory and administrative guidance relevant to the fourth level of EPA's IQA legal obligations. In addition, the Explanation following Section II.4 of ITSSD's new FOIA Request and Section II.3 of the accompanying Addendum also discuss how EPA, to date, has not disclosed many specific records substantiating the IQA compliance of the method chosen by EPA and third parties (other federal agencies, interagency entities (USGCRP/CCSP), NRC and IPCC) for addressing public stakeholder IQA requests for correction ("RFCs")/reconsideration ("RFRs"). Such statutory and administrative guidance obliged EPA

to ensure that stakeholders could secure an adequate technical review of the complex scientific and econometric modeling, datasets and underlying theories, assumptions, extrapolations, judgments, etc. contained in the twenty-eight (28) HISAs the EPA-TSD had designated as "core reference documents" supporting the Administrator's CAA Section 202(a)(1) Findings.

These portions of ITSSD's new FOIA Request reveal, however, that EPA and other 'lead' development federal agencies participating in the USGCRP/CCSP had not provided separately for such an administrative review mechanism. Instead, they had treated stakeholder RFC/RFRs as if they were public comments submitted during an APA notice and comment period. Since the interim drafts of USGCRP/CCSP HISAs to be reviewed under APA procedures had typically been "released solely for the purpose of *pre-dissemination* peer review under applicable information quality guidelines," the federal register notices never triggered application of the IQA, and consequently, no distinct technical IQA Section 515(b)(2)(B) administrative review proceeding was ever proffered. These portions of ITSSD's new FOIA Request, furthermore, indicate that EPA, to date, has failed to provide records substantiating how this chosen mechanism satisfied IQA administrative review due process requirements.

Only EPA's comprehensive disclosure of the specific records requested in Sections II.4 and III.4 of ITSSD's new FOIA Request would contribute to public understanding of these critical government operations and activities.

In sum, the records ITSSD has requested, once disclosed, will be "meaningfully informative about government operations or activities",⁵⁶ namely, the carefully defined multilayered process of scientific peer review to which EPA was obliged to strictly adhere in order to ensure the quality, integrity and reliability of the EPA and third-party-generated climate science-related HISAs. Since the requested records are *not* "already in the public domain, in either a duplicative or a substantially identical form," EPA's disclosure of them would add much new information to the public's understanding of key government operations or activities.⁵⁷ Consequently, "the disclosure of such information is "likely to contribute to an increased public's understanding of those operations and activities."⁵⁸

Therefore, EPA should find that ITSSD's new FOIA Request satisfies the second factor of the six-factor fee waiver test.

Factor 3: Disclosure of the Requested Information 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 (40 C.F.R. §2.107(l)(2)(iii))

Disclosure of the records ITSSD identified and requested in Sections II.1-II.4 and III.4 of its new FOIA Request “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 40 C.F.R. §2.107(l)(2)(iii).⁵⁹

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.⁶⁰ In this regard, ITSSD wishes to make clear to EPA that, 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 discussion of Factor 3 below.

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

ITSSD, led by its professional staff and members of its Board of Advisors, shall first organize the information EPA discloses in response to this request, and then employ its editorial skills for purposes of converting such raw materials into distinct works by compiling, analyzing, editing and explaining the disclosed records in an understandable manner.

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 op-eds, letters to the editor, interviews,⁶¹ press releases,⁶² blog posts,⁶³ ITSSD website postings,⁶⁴ documentaries,⁶⁵ peer reviewed professional law and science journal articles,⁶⁶ scholarly reports and studies, congressional briefings,⁶⁷ testimony, conferences, symposia⁶⁸ 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.⁶⁹

ITSSD would be pleased to further elaborate about its plans to disseminate the requested information, once disclosed, to a broad public audience, as they continue to evolve and new opportunities present themselves.

Indeed, ITSSD has already commenced its dissemination of information about its previously filed EPA and DOC-NOAA FOIA Requests and Clarifications and the documented research findings and analyses contained therein to a broad public audience.

On May 22, 2014, ITSSD issued a press release online announcing the commencement of its national “[FOIA education campaign](#)” to ensure that federal agency peer review science processes

adequately validate the climate science underlying EPA's 2009 CAA Section 202(a)(1) Findings, consistent with the Information Quality Act. The press release, posted in the 'News' section of ITSSD's website [homepage](#), quickly attracted the attention and interest of the internet media, nonprofit civil society organizations, and at least one political action committee. Later that same day, it resulted in an interview/article published by the Washington, DC-based [Daily Caller](#) news organization that was disseminated on the internet, facebook and twitter to a broad public audience. This article was thereafter reproduced and/or referenced on the websites and blogs operated by a number of nonprofit and for-profit organizations in the scientific, academic, civil society and grassroots communities.⁷⁰

For example, the *Daily Caller* article was referenced, among other places, in the [Atlas Network Blog](#) operated by the Atlas Economic Research Foundation. Atlas is "a nonprofit organization connecting a global network of more than 400 free-market organizations in over 80 countries⁷¹ to the ideas and resources needed to advance the cause of liberty."⁷² One hundred (100) of these organizations are located in sixty-four (64) municipalities in thirty-six (36) U.S. states and territories, in addition to the District of Columbia.⁷³ Atlas is obviously interested in sharing information about ITSSD's national FOIA education campaign, and particularly, about EPA's compliance with the Information Quality Act. The organizations that comprise the Atlas network have members throughout the U.S. and in other countries that are capable of and interested in distributing the information that ITSSD disseminates to their members, either directly or indirectly, through their own websites, blogs, email lists, newsletters, symposia and media channels of distribution. ITSSD specifically intends to utilize this considerable resource, along with other nonprofit civil society organizations with which it has a working relationship,⁷⁴ as part of its overall effort to disseminate the information, once disclosed by EPA to a broad public audience.

By May 24, 2014, the ITSSD press release had inspired a well-recognized energy and environment-focused [grassroots journalist](#) to prepare two versions of an article that were published online by [RedState.com](#) and [CanadaFreePress.com](#). These articles were subsequently disseminated broadly on the internet, facebook and twitter and posted in one or more versions on other websites with their own broad distribution networks,⁷⁵ as well as on at least one cattle industry website.⁷⁶

On May 30, 2014, an op-ed article coauthored by ITSSD's CEO and a colleague with in-depth knowledge of the FOIA and Information Quality Act was published in the [Washington Times](#). An [unedited version](#) of this article also appears on the ITSSD website. Such article was subsequently disseminated online and via facebook and twitter to a broad public audience, which included, for example, a domestic regulatory policy shop, a social networking site for energy, electronics and medical industry professionals, a California science and educational nonprofit institute, an Asia law and policy blog and, at least, eleven domestic and foreign online newspapers.⁷⁷

On June 3, 2014, ITSSD released online a [white paper](#) which examined the relationship between recently approved congressional science appropriations, EPA, NOAA and other federal agencies' peer review science practices subject to the Information Quality Act, and EPA greenhouse gas emissions regulations. This white paper was posted to the website of one [broad policy-focused](#) nonprofit civil society organization, and served as the impetus for another nonprofit civil society organization to prepare its own article explaining the subject matter of the ITSSD whitepaper. While

each of these organizations possesses extensive online, facebook and twitter distribution networks,⁷⁸ the work of the second organization focuses more in the [scholarly academic community](#).

On June 10, 2014 ITSSD's CEO was interviewed for a [Washington Examiner](#) article that had addressed *inter alia* the likely peer review practices employed by [EPA](#) and its [SAB](#) for purposes of validating the scientific studies supporting the EPA/US Army Corps of Engineers' [proposed regulation](#) expanding the definition of 'US navigable waters' under the Clean Water Act. This article was widely distributed to a broad public online audience and was posted to a number of websites some of which had their own extensive online, facebook and twitter distribution networks of their own.⁷⁹

On June 23, 2014, ITSSD's CEO prepared and the *Los Alamos Monitor Online* published an [op-ed article](#) in response to a [disparaging op-ed](#) previously published by such medium on June 11, 2014. The June 11 op-ed, which had been prepared by a former candidate for the Los Alamos County Council (New Mexico), criticized the author of and the organizations discussed within the above-mentioned *RedState.com* article. As of this writing, ITSSD's responsive op-ed has been posted to the website of at least one nonprofit [civil society organization](#).

Furthermore, during March – June 2014, ITSSD staff presented briefings and/or otherwise personally provided information to various members of the scientific and academic communities, the American Bar Association Section of Administrative Law and Regulatory Practice, and to several congressional committees regarding ITSSD's IQA-focused national FOIA education campaign, the Information Quality Act and the research findings and analyses contained in ITSSD's FOIA Requests and Clarifications. These congressional committees see the need for greater government transparency and agree with the principle that, “[s]uccessful application of science in public policy depends on the integrity of the scientific process both to ensure the validity of the information itself and to engender public trust in Government.”⁸⁰ They include, *inter alia*, the House Committee on Science, Space and Technology,⁸¹ the House Committee on Oversight and Government Reform, and the Senate Committee on Environment and Public Works.

During the week of June 23, 2014, ITSSD's CEO was interviewed about its new Information Quality Act-focused FOIA Request by one independent journalist in the process of writing an article on behalf of several online media sources. ITSSD's CEO also was approached by other journalists from well-known energy, environment and policy journals that will discuss ITSSD's new FOIA Request and accompanying Addendum and the research findings contained therein. In addition, ITSSD was invited by another well-known environmental journalist to coauthor an article discussing the relationship between EPA's record of adherence to Information Quality Act peer review standards, H.R.4012 – the Secret Science Reform Act of 2014, EPA's 2009 GHG Endangerment Findings, and the recent passed H.R. 4660 - The FY 2015 Commerce, Justice, Science Appropriations Act. Each of these articles is likely to be released sometime during the week of June 30, 2014.

As previously discussed, ITSSD specifically intends to use all of the methods described above to disseminate the requested information, once disclosed by EPA, to a broad public audience in an understandable form. While ITSSD has described each of the methods it plans to use to disseminate

the particular requested information once it has been disclosed, including by naming three specific newspapers and three congressional committees with which ITSSD already has had professional contacts,⁸² it is unable to and need not, at this time, present any more details about its dissemination plans. Nevertheless, ITSSD wishes to reassure EPA that its ongoing efforts to clearly explain to a broad public audience information about ITSSD's national FOIA education campaign and the complex research findings and analyses contained in its previously filed EPA and DOC-NOAA FOIA Requests and Clarifications, sufficiently demonstrate ITSSD's specific intent and ability to effectively disseminate such information.⁸³

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

ITSSD, led by its professional staff and the members of its [credentialed Board of Advisors](#), is capable of comprehending, compiling, analyzing/processing, editing, explaining and disseminating the requested information once disclosed by EPA to a broad public audience in a clear and understandable manner. Prior and recent work performed by ITSSD professional staff and members of its Board of Advisors demonstrates these capabilities. The following examples illustrate the particular skills such persons previously 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.⁸⁴

ITSSD professional staff and Board of Advisors members 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 members of the ITSSD Advisory Board currently serve or have served as adjunct and/or tenured faculty at the Georgetown University School of Medicine and Georgetown University's McCourt School of Public Policy, Arizona State University College of Law and Arizona State University School of Life Sciences and Tuskegee University, Catholic University of America, University of Georgia and Princeton University. 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, and also represented EPA's Office of Research and Development in a number of working groups responsible for drafting regulations.

During 2009, 2011 and 2012, members of ITSSD's professional staff and/or Board of Advisors have 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.⁸⁵ 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.⁸⁶ 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.⁸⁷ During 2013, at least one member participated in public seminars discussing the potential impact of climate change on public health.⁸⁸ 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,⁸⁹ while at least one member of the ITSSD Board of Advisors has served as editor-in-chief of several prestigious peer reviewed scientific journals.⁹⁰ 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.⁹¹ 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,⁹² the European Parliament⁹³ and the New York-based Burton Foundation.⁹⁴

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 would be pleased to provide EPA with operable weblinks to all documents describing or otherwise referencing these activities, should EPA seek to review them at a later time.

These prior examples sufficiently demonstrate that ITSSD professional staff and members of its Board of Advisors are capable generally of successfully conveying complex and sometimes voluminous information in clear and understandable terms to a broad public audience. They also sufficiently demonstrate that ITSSD is capable of utilizing the skills, expertise and experience possessed by its professional staff and the members of its Board of Advisors to comprehend, compile, analyze/process, edit, explain and disseminate the requested information, once disclosed by EPA, to a broad public audience in a clear and understandable manner. 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."⁹⁵

- 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 EPA, 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. The “Library”, “Programs”, “News & Media Archive”, “References” and “Testimonials” sections of ITSSD’s website 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.

The broad and diverse public audience ITSSD has identified as the intended recipient of the to-be disseminated EPA information represents a reasonably large segment of the public; the intended audience does not constitute a limited subset of persons.⁹⁶ At least one court has ruled that a public audience consisting, alone, of scholars could constitute a broad enough public audience for such purposes. In *Carney v U.S. Dept. of Justice*,⁹⁷ the Second Circuit Court of Appeals 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].”⁹⁸ 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,⁹⁹ 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.”¹⁰⁰

Unlike, in *Carney*, where the requester had specifically intended to disseminate the disclosed agency records *exclusively* via the publication of scholarly articles, however, ITSSD specifically intends to disseminate disclosed EPA 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 EPA records to a broad public audience.

Lastly, ITSSD readily concedes it is not likely that all members of the public, especially those who support EPA’s aggressive regulatory agenda, will be interested in ITSSD’s dissemination of EPA’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 EPA’s peer review of the climate science supporting the Administrator’s endangerment and cause or contribute findings. 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.¹⁰¹

In sum, ITSSD has demonstrated that it specifically intends to and is capable of disseminating the requested records to a broad public audience in understandable form, once it has been disclosed by EPA, and then compiled, analyzed/processed, edited and explained by ITSSD's professional staff and members of its Board of Advisors. Therefore, EPA should find that ITSSD's new FOIA Request satisfies factor 3 of the six-factor fee waiver test.

Factor 4: Disclosure of the Requested Information is Likely to Contribute ‘Significantly’ to Public Understanding of Government Operations or Activities (40 C.F.R. §2.107(l)(2)(iv))

Disclosure of the four categories of EPA peer review records clearly identified in ITSSD's new FOIA Request will “contribute significantly to public understanding” of the peer review practices and procedures actually engaged in by EPA to ensure the quality, integrity and reliability of EPA and third-party developed and peer-reviewed climate science-related highly influential scientific assessments (“HISAs”), in conformance with the Information Quality Act and relevant OMB and EPA IQA-implementing guidelines. EPA's Administrator had primarily relied upon such HISAs in reaching positive GHG endangerment and cause of contribute findings, promulgating economically significant national climate change regulations controlling mobile and stationary source GHG emissions, and proposing new energy-generation facility performance standards. Disclosure of the requested records also will “contribute significantly to public understanding” of the scientific and statistical data and modeling information and the testing thereof that underlies each such climate science-related HISA.¹⁰²

To date, a broad public continues to be uncertain about the scientific evidence underlying the Administrator's CAA Section 202(a)(1) Findings. In particular, a broad public audience questions EPA representations regarding the causal links allegedly established between: 1) the observed elevated emissions of anthropogenic sources of each of the six ‘well-mixed’ GHGs the Administrator has identified as being present in the ambient air at unprecedented levels; 2) non-natural anthropogenic climate change; and 3) the projected impacts of these two factors on public health and welfare in the United States. The uncertainty surrounding the Administrator's conclusions in this regard are compounded by the fact that such gases are currently being emitted in China at higher levels than in the United States,¹⁰³ and GHG emissions from all BRICS nations are projected to be significantly higher than those in the United States by 2050.¹⁰⁴

EPA's website states that “a large number of commenters [had] expressed doubt about the anthropogenic origins of the recent increase in CO₂.”¹⁰⁵ In response to said commenters, EPA stated that it had “re-examined the scientific literature, which finds that the anthropogenic emissions are *the* root cause of the increase in CO₂ concentrations over the past century” (emphasis added), and that, “[a]s stated in CCSP (2007) ‘[t]he cause of the recent increase in atmospheric CO₂ is confirmed *beyond a reasonable doubt*’” (emphasis added).¹⁰⁶ In addition, the Administrator's CAA Section 202(a)(1) Findings stated that,

“In this final action, the Administrator finds that the air pollution is the combined mix of six key directly-emitted, long-lived and well-mixed greenhouse gases (henceforth “well-mixed greenhouse gases”), *which together, constitute the root cause of human-induced climate change and the resulting impacts on public health and welfare.* These six greenhouse gases are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride” (emphasis added).¹⁰⁷

However, the DOC-NOAA-generated USGCRP/CCSP report (SAP2.2/CCSP(2007))¹⁰⁸ which serves as the source of such statement, and which suffers from IQA infirmities,¹⁰⁹ is not expressly listed as a “core reference document” in the EPA-TSD accompanying the Administrator’s CAA Section 202(a)(1) Findings.¹¹⁰ Instead, such report was indirectly incorporated by reference into another DOC-NOAA-developed USGCRP/CCSP report (commonly referred to as the second U.S. national climate assessment (USGCRP/GCCI/2009))¹¹¹ which DOC-NOAA had designated as a HISA and the EPA-TSD expressly listed as a “core reference document”.¹¹² EPA has not made publicly available any information concerning the source of this EPA publicly disseminated statement, the climate science underlying it, or the IQA-compliant measures EPA had employed to validate the accuracy of the assessment. As a result, a broad public audience continues to harbor reasonable doubt about not only the veracity of EPA’s statement, but also the validity of the foundational climate science underlying it.

In addition, DOC-NOAA developed another report (SAP5.2/CCSP(2009))¹¹³ devoted entirely to discussing how the many scientific uncertainties surrounding climate change may be addressed. After noting that “not all quantities are empirical,”¹¹⁴ the report proceeds to describe two types of scientific uncertainty: “‘uncertainty about the value of empirical quantities’ and ‘uncertainty about model functional form’”.¹¹⁵ According to the report, the IPCC deals with these two types of uncertainty, in part, by focusing on “*subjective probabilities*” (emphasis added).¹¹⁶ “[T]wo key attributes that [IPCC] argue[s] are important in any judgment about climate change [are]: the amount of evidence available to support the judgment being made and the degree of consensus within the scientific community about that judgment.”¹¹⁷

Although the EPA-TSD does not expressly list the DOC-NOAA-developed SAP5.2/CCSP(2009) as a “core reference document” upon which the Administrator’s CAA Section 202(a)(1) Findings “primarily” and “heavily” relied, it nevertheless designates the DOC-NOAA-developed USGCRP/GCCI/2009 which references it¹¹⁸ as such a document.¹¹⁹ Significantly, the latter report cites the former report as support for the following statement:

“When it is considered necessary to express a range of possible outcomes and identify the likelihood of particular impacts, this report takes a plain-language approach to expressing the expert judgment of the author team based on the *best available evidence*. For example, an outcome termed ‘likely’ has at least a two-thirds chance of occurring; an outcome termed ‘very likely,’ at least a 90 percent chance.” (emphasis added).¹²⁰

It is notable that DOC-NOAA’s second national climate assessment (USGCRP/GCCI/2009) expressly referenced SAP5.2/CCSP(2009) in the *first* of its five-hundred sixty-nine (569) footnotes.

In addition, the quoted language above employs the term “best available evidence” rather than the term “best available science” or “best available scientific evidence”. This strongly suggests that EPA’s indirect endorsement and use of the DOC-NOAA-developed SAP5.2/CCSP(2009) incorporated by reference within (USGCRP/GCCI/2009) which the EPA-TSD designated as a “core reference document”, did not likely comply with EPA’s highest, most rigorous and least discretionary peer review, conflict-of-interest and transparency standards applicable to HISAs.¹²¹ In other words, had EPA complied with the IQA’s least discretionary HISA peer review standards when validating DOC-NOAA science, it would not likely have been possible for the Administrator’s CAA Section 202(a)(1) Findings to have relied largely on *other than* causality-based scientific evidence (i.e., correlation-based-scientific evidence) or on *no* scientific evidence at all (i.e., on policy-based considerations¹²²), and thus, upon DOC-NOAA’s embrace of the precautionary principle.¹²³ However, EPA has not disclosed this important information in any publicly available and accessible source or medium. As a result, a broad public audience has remained in a state of uncertainty and misunderstanding concerning the foundations of the third-party developed climate science that EPA’s peer review process had validated which informed the Administrator’s positive CAA Section 202(a)(1) Findings. Indeed, EPA has yet to disclose to a broad public audience information capable of clarifying whether the climate science-related peer review process the Agency had undertaken led to Administrator Findings that were based on science-based policy rather than policy-based science.¹²⁴

Disclosing the peer review practices and procedures EPA actually had undertaken to ensure the quality, integrity and reliability of the scientific and statistical data and modeling information and the testing thereof that served as the foundation for the EPA- and third party-developed climate science evidence the Administrator relied upon will significantly improve the public’s understanding of these critical government operations and activities. In addition, it also will enhance public understanding of the ostensibly causal scientific relationship EPA has established between the anthropogenic sources of GHG emissions, non-natural climate change and their adverse effects on public health and welfare.

EPA has stated that its “mission is to protect human health and to safeguard the natural environment--air, water, and land--upon which life depends.”¹²⁵ EPA also has stated that it is,

“committed to identifying and responding to the challenges that a changing climate poses to human health and the environment. Scientific evidence demonstrates that the climate is changing in unprecedented ways. These changes can pose significant challenges to the EPA's ability to fulfill its mission. The EPA must therefore adapt to climate change if it is to continue fulfilling its statutory, regulatory and programmatic requirements, chief among these protection of human health and the environment.”¹²⁶

Disclosure of information demonstrating the peer review practices and procedures EPA actually employed to ensure the quality, integrity, objectivity and, hence, reliability of Agency and third party-developed climate science-related HISAs upon which the Administrator’s CAA Section 202(a)(1) Findings had relied will significantly contribute to public understanding of how EPA-evaluated and validated science had ultimately been used in government decision-making in fulfillment of EPA’s statutory and administrative responsibilities and its important Agency mission.

The public's uncertainties surrounding the peer review practices EPA employed to validate scientific bases of the evidence underlying the Administrator's CAA Section 202(a)(1) Findings are further exacerbated by the such Findings' discussion of the scientific uncertainties endemic to current climate science generally. These uncertainties, some of which are significant, include those relating to: 1) "the current magnitude of black carbon's climate forcing effect";¹²⁷ 2) "temperature records prior to 1600 A.D.";¹²⁸ 3) the "inherent uncertainty in the direction, magnitude, and/or rate of certain future climate change impacts";¹²⁹ 4) "the potential indirect effects on public health associated with changes due to increases in UV-B radiation exposure, such as UV-B radiation-related skin cancers, that may be associated with reductions in ambient levels of ground level [ozone]" attributable to continued anthropogenic emissions of the six identified GHGs;¹³⁰ 5) "the actual magnitude of any overall benefit...[of] increased temperature and increased carbon dioxide levels" and "the combined effects of elevated carbon dioxide and climate change on pests, weeds, and disease";¹³¹ 6) "how human-induced climate change may affect the intensity and frequency of extreme weather events such as droughts and heavy storms";¹³² the "response to carbon dioxide...of the many horticultural crops (e.g., tomatoes, onions, fruits), which make up roughly 40 percent of total crop value in the United States";¹³³ 7) "the adverse impacts of climate change on irrigation water requirements";¹³⁴ and 8) whether benefits of increased yields for certain crops will be outweighed by the "adverse impacts of climate change on crop yield, such as the increasing risk of extreme weather events".¹³⁵

Due to all of these scientific uncertainties and EPA's failure to disclose many peer review records, a broad public audience lacks confidence that the Administrator could have legitimately reached the conclusions the CAA Section 202(a)(1) Findings had expressed in terms of "beyond a reasonable doubt" – i.e., "[t]he cause of the recent increase in atmospheric CO₂ is *confirmed beyond a reasonable doubt*" (emphasis added). Absent disclosure of EPA peer review records demonstrating the Agency's validation of the foundational observational science underlying the Administrator's Findings, a broad public audience will be unable to accept the projections of potential future health and environmental risks and benefits engendered by the economic activities in which society continues to engage. Granted, EPA has posted many documents to an Agency website that endeavors to catalogue the Administrative Procedure Act public notices and comments that EPA utilized, in part, to vet the EPA and third party-developed assessments that supported the Administrator's CAA Section 202(a)(2)(1) Findings.¹³⁶ However, as ITSSD's new FOIA Request reveals, such website does not provide publicly available and accessible information demonstrating, especially, how EPA had: 1) actually validated rather than merely verified third party peer review processes with respect to such HISAs; 2) established the nature and extent of any causal or correlative relationships between elevated emissions of anthropogenic sources of specifically identified GHGs, non-natural climate change; and 3) substantiated the adverse impact of such emissions and climate change on public health and welfare. Nor does the website provide any access to the climate science literature underlying the Administrator's findings.

In addition, no single EPA or other website known to this Requester provides publicly available and accessible information dedicated to explaining the IQA-compliant peer review practices EPA had actually employed to carefully evaluate and validate the mostly third party-developed science reports and assessments that supported the Administrator's CAA Section 202(a)(1) Findings and EPA's subsequent climate change-related rulemakings. No EPA website even discusses the interplay

between IQA, OMB and EPA peer review standards, including those relating to conflict-of-interest, objectivity/bias and transparency; nor does any EPA website or response to comments document address more than the pro forma peer review guidelines of the third party organizations that developed the HISAs upon which the Administrator's Findings had primarily relied. The disclosure of this information, as emphasized both above and in ITSSD's new FOIA Request, is vital, if not, indispensable to promoting public trust and confidence in EPA's ability to ensure the quality, integrity, objectivity, and thus, reliability of the climate science that undergirds other federal agency operations and activities, especially economically significant national rulemakings.

Given the current absence of this information from the administrative record, once EPA discloses and ITSSD disseminates it to a reasonably broad public audience, the public is likely to have a much deeper understanding of and appreciation for these government agency peer review processes and practices (i.e., government operations and activities) than would have been possible had such disclosure not occurred at all. In other words, the "public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, will be enhanced by the disclosure to a significant extent."¹³⁷

Thus, EPA should conclude that ITSSD's new FOIA Request satisfies factor 4 of the six-factor fee waiver test.

Factor 5: The Requester Does Not Have a Commercial Interest That Would Be Furthered by the Requested Disclosure (40 C.F.R. § 2.107(l)(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."¹³⁸ 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, 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 in which EPA had engaged to ensure the quality, integrity and reliability of the EPA- and third-party-generated climate science-related HISAs upon which the Administrator primarily relied in reaching positive endangerment and cause or contribute findings and promulgating economically significant national mobile and stationary source GHG emissions control regulations and proposed energy-generating facility performance standards. These government operations or activities entail particular EPA peer review practices and procedures that the Agency had actually utilized, free from outside group influence,¹³⁹ consistent with the clearly defined multilayered statutory and administrative standards to which EPA remains subject.

As noted above, ITSSD's interest in securing EPA's disclosure of the requested records is to employ the professional capacities of ITSSD staff and Board of Advisors to inform and explain to a reasonably broad public audience how EPA analyzed and validated these HISAs, including the scientific and statistical data and modeling information and the testing thereof underlying them, which EPA "disseminated" to the public as the bases for EPA's subsequent national regulatory actions bearing significant potential economic repercussions. The public interest is herein engendered because such government operations and activities will directly and indirectly have 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."¹⁴⁰

The comprehensive disclosure by EPA 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. 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 quality, integrity and reliability of U.S. federal government climate science. 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, EPA'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,¹⁴¹ 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. 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).¹⁴²

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.¹⁴³ 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.¹⁴⁴

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.”¹⁴⁵ And, since the U.S. FOIA was enacted in 1966, “many countries [have] [...] follow[ed] the FOIA model on access to government.”¹⁴⁶ 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.”*¹⁴⁷

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.”¹⁴⁸

There is a relative lack of experience in many such countries regarding the proper administration of the FOIA laws there enacted. Therefore, ITSSD intends also to use its new FOIA Request and this ITSSD FOIA Fee Waiver Request, in addition to ITSSD’s forthcoming compilation, analysis, editing, explanation and dissemination of the requested records once disclosed by EPA 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 Americas¹⁴⁹ 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”,¹⁵⁰ no adoption of such laws in the Middle East outside of Israel, and only the slow progress of such initiatives in Africa.¹⁵¹ 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.”¹⁵²

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.”¹⁵³

ITSSD’s compilation, analysis, explanation and dissemination of the requested records once disclosed by EPA, therefore, would serve the very useful purpose of continuing public awareness, both in the United States and beyond, about U.S. federal government transparency on very important all-encompassing environmental 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.”¹⁵⁴ In support of its findings, UNESCO cited Principle 10 of the 1992 *Rio Declaration on Environment and Development*¹⁵⁵ 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)*.¹⁵⁶

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.”¹⁵⁷

ITSSD seeks comprehensive EPA 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 in and beyond the United States about the quality, integrity and reliability of the foundations of EPA and other federal agency (e.g., DOC-NOAA, DOI-USGS, etc.) climate science research and observations that EPA adopted, endorsed and disseminated as its own, and which informed the EPA Administrator’s CAA Section 202(a)(1) Findings. 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 affecting 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 EPA peer review practices (governmental operations and activities) the Agency employed to validate the climate science the Agency used as support for its Final CAA Section 202(a)(1) Findings. 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.¹⁵⁸ 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 EPA 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 EPA 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.¹⁵⁹ Therefore EPA should conclude that ITSSD's new FOIA Request satisfies factor 5 of the of six-factor fee waiver test.

Factor 6: The Public Interest in Disclosure is Greater in Magnitude Than That of Any Identified Commercial Interest in Disclosure; Therefore, Disclosure of the Requested Information is Not “Primarily in the Commercial Interest of the Requester (40 C.F.R. § 2.107(l)(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 new FOIA Request or this new FOIA 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 EPA fee waiver regulations obviously contemplate that a requester could “put the records to a commercial use” once they have been disclosed by the agency.¹⁶⁰ However, such regulations also provide that a fee waiver is justified where the public interest standard [paragraph 40 C.F.R. §2.107(l)(1)(i)] is satisfied and the public interest is greater than any identified commercial interest in disclosure.”¹⁶¹ 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 DC Circuit jurisprudence. In *Campbell v. U.S. Department of Justice*,¹⁶² the DC 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,¹⁶³ 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.¹⁶⁴

“[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.”¹⁶⁵

Considering, in the abstract, that any requested records EPA would disclose could potentially be put to varied uses, ITSSD has set forth in exhaustive detail above its purposes for securing such information.¹⁶⁶ EPA'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."¹⁶⁷

Under the present circumstances, ITSSD's described purposes for seeking EPA 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."¹⁶⁸ Therefore, EPA should conclude that ITSSD's new FOIA Request satisfies factor 6 of the six-factor fee waiver test.

In sum, EPA should grant ITSSD's new FOIA Fee Waiver Request because ITSSD has satisfactorily demonstrated, consistent with 40 C.F.R. §2.107(l)(1), 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."¹⁶⁹

END

ENDNOTES

¹ See 40 C.F.R. §2.107(l)(1).

² See also 40 CFR Sec. 2.107(c)(1)(ii) (identifying acceptable fees to be charged to educational institutions).

³ ITSSD is organized and operated *inter alia* to conduct and publish science law and policy-related research, analysis and commentary on various domestic and international environmental and trade issues. In fulfilling its charitable mission, ITSSD does not intend to promote any particular product or industry. Rather, it endeavors to provide a thorough, informed and balanced analysis of regulatory science, economic and law and policy issues and their impact on a broad public audience. The records requested pursuant to the ITSSD EPA FOIA Requests are integral to ongoing ITSSD research concerning the implementation of government (legislative, regulatory and judicial) transparency and accountability mechanisms related to science and science policy, the aim of which is to educate the public and Congress about the relationship between sustainable development and principles of good administrative governance. See Office of Management and Budget, *The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 FR 10012, 10013-10014 (March 27, 1987), available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/foia_fee_schedule_1987.pdf. These guidelines advise federal agencies to evaluate requests on an individual basis and to consider whether requesters can demonstrate that: 1) the request is from an institution that is within the category; 2) the institution has a program of scholarly research; and 3) the documents sought are in furtherance of the institution's program of scholarly research and not for a commercial purpose. *Id.*, at 10014. ITSSD's scholarly approach examines ostensibly impartial, unbiased and objective scientific methodologies used as the basis for regulation to ascertain how they might affect free markets, property rights and the rule of law, considering both the costs and the benefits to the public of a cleaner and healthier environment. ITSSD has published a number of peer-reviewed analyses, including as book chapters, as articles appearing in law reviews, law journals, economic journals, policy journals and as panel presentation materials in domestic and international conferences, all of which are available online at the ITSSD website.

⁴ See 40 C.F.R. §2.107(e).

⁵ *Id.*

⁶ See Institute for Trade, Standards and Sustainable Development, *New ITSSD FOIA Request Filed With EPA-HQ* (June 30, 2014), available at: <http://nebula.wsimg.com/e155ee64b03ea37237297cdbab7a2854?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

⁷ See 132 Cong. Rec. S. 14298 (statement of Sen. Leahy).

⁸ 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.

⁹ *Id.*

¹⁰ See *Better Gov't Ass'n v. Department of State*, 780 F. 2d 86, 90.

¹¹ See Institute for Trade, Standards and Sustainable Development, *New ITSSD FOIA Request Filed With EPA-HQ* (June 30, 2014), *supra*.

¹² See Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-154 (2000), §515, codified at 44 U.S.C. § 3516 note, available at: <http://www.gpo.gov/fdsys/pkg/PLAW-106publ554/pdf/PLAW-106publ554.pdf>; <http://codes.lp.findlaw.com/uscode/44/35/U/3516/notes>.

¹³ See Office of Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* ("OMB IQA Guidelines") 67 FR 8452 (Feb. 22, 2002), available at: <http://www.whitehouse.gov/sites/default/files/omb/fedreg/reproducible2.pdf>; See Office of Management and Budget, *Final Information Quality Bulletin for Peer Review* ("OMB-PRB") (Dec. 16, 2004), available at: <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.

¹⁴ See United States Environmental Protection Agency, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008 ("EPA IQA Guidelines") (Oct. 2002) at §6.2, available at: http://www.epa.gov/quality/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf; United States Environmental Protection Agency, *Peer Review Handbook* (3rd ed.), EPA/100/B-06/002 (2006) ("EPA-PRH(2006)") at §2.2.4, available at: <http://www.epa.gov/oamcinc1/1200015/handbook.pdf>; United States Environmental Protection Agency, *Peer Review Policy and Memorandum* ("EPA-PRP&M") (Jan. 31, 2006) at p. 1, available at:

http://www.epa.gov/peerreview/pdfs/peer_review_policy_and_memo.pdf. See also United States Environmental Protection Agency, *Peer Review Handbook (3rd ed.)*, EPA/100/B-06/002 (6/29/12) (“EPA-PRH(2012)”) at Modified Figures 1 and 3, available at: http://www.epa.gov/peerreview/pdfs/peer_review_handbook_2012.pdf; http://www.epa.gov/peerreview/pdfs/Modified_Figures_1_and_3.pdf.

¹⁵ United States Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 FR 66496 (Dec. 15, 2009), available at: <http://www.gpo.gov/fdsys/pkg/FR-2009-12-15/pdf/E9-29537.pdf>.

¹⁶ See 40 CFR Part 2.107(l)(2)(i), *supra* (explaining the first of four fee waiver requirements identified in EPA’s fee waiver regulation).

¹⁷ Section II.3 of the Addendum to ITSSD’s new FOIA Request discusses how an interagency panel also may have peer reviewed the studies supporting one of the two EPA-developed HISAs the EPA-TSD designated as a “core reference document”.

¹⁸ There are two EPA-developed USGCRP/CCSP HISAs designated as “core reference documents” that **directly** supported the Administrator’s CAA Section 202(a)(1) Findings. They include: SAP4.6/CCSP(2008b) and SAP4.1/CCSP(2009b). See New ITSSD FOIA Request at Appendix 2: “EPA-TSD Table 1.1 ‘Core Reference Documents.’” A third EPA-developed USGCRP/CCSP HISA was not designated as a “core reference document” - SAP 4.4/CCSP(2008). It **indirectly** supported the Administrator’s CAA Section 202(a) Findings as the result of being incorporated by reference into *Global Climate Change Impacts in the United States* (USGCRP/GCCI/2009), a DOC-NOAA-developed HISA designated as a “core reference document”. See New ITSSD FOIA Request at Appendix 3: *EPA-TSD ‘Core Reference Documents’ and Assessments ‘Incorporated By Reference’ Therein’*.

¹⁹ There are seven (7) DOC-NOAA-developed HISAs designated as “core reference documents” **directly** supporting the Administrator’s CAA Section 202(a) Findings. They include: *State of the Climate in 2008*; *Global Climate Change Impacts in the United States* (USGCRP/GCCI/2009); SAP1.1/CCSP(2006); SAP1.3/CCSP(2008g); SAP2.4/CCSP(2008h); SAP3.2/CCSP(2008d); SAP 3.3/CCSP(2008i). See New ITSSD FOIA Request at Appendix 2: “EPA-TSD Table 1.1 ‘Core Reference Documents.’” In addition, there are three DOC-NOAA-developed HISAs not designated as “core reference documents”. These HISAs **indirectly** supported the Administrator’s CAA Section 202(a) Findings as the result of being incorporated by reference into *Global Climate Change Impacts in the United States* (USGCRP/GCCI/2009), a DOC-NOAA-developed HISA designated as a “core reference document. They include: SAP2.2/CCSP(2007); SAP5.2/CCSP(2009); SAP 5.3/CCSP(2008). See New ITSSD FOIA Request at Appendix 3: *EPA-TSD ‘Core Reference Documents’ and Assessments ‘Incorporated By Reference’ Therein’*.

²⁰ There are three (3) DOE-developed HISAs designated as “core reference documents” that **directly** supported the Administrator’s CAA Section 202(a) Findings. They include: SAP2.1a/CCSP(2007b); SAP3.1/CCSP(2008c); SAP4.5/CCSP(2007a). See New ITSSD FOIA Request at Appendix 2: “EPA-TSD Table 1.1 ‘Core Reference Documents.’”

²¹ There are three (3) DOI-USGS-developed HISAs designated as “core reference documents” that **directly** supported the Administrator’s CAA Section 202(a) Findings. They include: SAP1.2/CCSP(2009c); SAP3.4/CCSP(2008a); SAP4.2/CCSP(2009d). See New ITSSD FOIA Request at Appendix 2: “EPA-TSD Table 1.1 ‘Core Reference Documents.’”

²² There is one (1) NASA-developed HISA designated as a “core reference document” that **directly** supported the Administrator’s CAA Section 202(a) Findings: SAP 2.3/CCSP(2009a). In addition, there is one (1) NASA -developed HISA not designated as a “core reference document”: SAP 5.1/CCSP(2008). This HISA **indirectly** supported the Administrator’s CAA Section 202(a) Findings as the result of being incorporated by reference into *Global Climate Change Impacts in the United States* (USGCRP/GCCI/2009), a DOC-NOAA-developed HISA designated as a “core reference document.

²³ There is one (1) DOT-developed HISA designated as a “core reference document” that **directly** supported the Administrator’s CAA Section 202(a) Findings: SAP4.7/CCSP(2008f).

²⁴ There is one (1) USDA-developed HISA designated as a “core reference document” that **directly** supported the Administrator’s CAA Section 202(a) Findings: SAP4.3/CCSP(2008e).

²⁵ There are four (4) NRC/NAS-developed HISAs designated as “core reference documents” that **directly** supported the Administrator’s CAA Section 202(a) Findings. They include: *Climate Change Science: An Analysis of Some Key Questions* (2001a); *Radiative Forcing of Climate Change: Expanding the Concept and Addressing Uncertainties* (2005);

Surface Temperature Reconstructions for the Last 2,000 Years (2006); *The Potential Impacts of Climate Change on U.S. Transportation* (2008).

²⁶ There are three (3) IPCC-developed HISAs designated as “core reference documents” that **directly** supported the Administrator’s CAA Section 202(a) Findings. They include: *Climate Change 2007: The Physical Science Basis*, Contribution of Working Group I to the Fourth Assessment Report (IPCC2007a); *Climate Change 2007: Impacts, Adaptation and Vulnerability*, Contribution of Working Group II to the Fourth Assessment Report (IPCC2007b); *Climate Change 2007: Mitigation of Climate Change*, Contribution of Working Group III to the Fourth Assessment Report (IPCC2007c).

²⁷ There is one (1) Arctic Council-developed HISA designated as a “core reference document” that **directly** supported the Administrator’s CAA Section 202(a) Findings: Arctic Council Climate Impact Assessment (ACIA2004).

²⁸ See United States Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: EPA’s Response to Public Comments, Volume 1: General Approach to the Science and Other Technical Issues (“RTCs Vol. 1”)* (April 17, 2009), Response (1-4), available at: <http://www.epa.gov/climatechange/endangerment/comments/volume1.html>. “The commenters argue that the assessment reports do not represent the best available science for a number of reasons, including inappropriate review process, failure to meet information quality guidelines, etc. Commenter 3567.1 states that for the Proposed Findings, EPA should have commissioned a body of independent scientists, engineers, and statisticians to evaluate the data, methods, and conclusions of the most important research.” *Id.* at Comment (1-4). See also Comments (1-6) and (1-7) and EPA responses thereto.

²⁹ “Third, these assessments are comprehensive in their coverage of the greenhouse gas and climate change problem, and address the different stages of the emissions-to-potential-harm chain necessary for the endangerment analysis. In so doing, they evaluate the findings of numerous individual peer-reviewed studies in order to draw more general and overarching conclusions about the state of science. *The USGCRP, IPCC, and NRC assessments synthesize literally thousands of individual studies and convey the consensus conclusions on what the body of scientific literature tells us*” (emphasis added). See United States Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 FR 66496, 66511 (Dec. 15, 2009), at Sec. III.A, available at: <http://www.gpo.gov/fdsys/pkg/FR-2009-12-15/pdf/E9-29537.pdf>.

³⁰ “Fourth, these assessment reports undergo a rigorous and exacting standard of peer review by the expert community, as well as rigorous levels of U.S. government review and acceptance. *Individual studies that appear in scientific journals, even if peer reviewed, do not go through as many review stages, nor are they reviewed and commented on by as many scientists. The review processes of the IPCC, USGCRP, and NRC (explained in fuller detail in the TSD and the Response to Comments document, Volume 1) provide EPA with strong assurance that this material has been well vetted by both the climate change research community and by the U.S. government.* These assessments therefore essentially represent the U.S. government’s view of the state of knowledge on greenhouse gases and climate change” (emphasis added). *Id.*

³¹ See United States Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: EPA’s Response to Public Comments, Volume 1: General Approach to the Science and Other Technical Issues (“RTCs Vol. 1”)* (April 17, 2009), Response (1-5).

³² *Id.*, at Comment (1-14).

³³ *Id.*

³⁴ *Id.* See also United States Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: EPA’s Response to Public Comments, Volume 1: General Approach to the Science and Other Technical Issues* (April 2009), at Appendix A – *IPCC Principles and Procedures*, available at: http://www.epa.gov/climatechange/Downloads/endangerment/rtc_volume_1_app_a.pdf.

³⁵ *Id.*, at Comment (1-14).

³⁶ “The U.S. Government participated fully in the development, review, and ultimate acceptance and approval of IPCC (2007). As stated on the USGCRP’s Web site: ‘When governments accept the IPCC reports and approve their Summary for Policymakers, they acknowledge the legitimacy of their scientific content’”. *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*, at Response (1-25).

⁴⁰ *Id.*

⁴¹ *Id.*, See also United States Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: EPA's Response to Public Comments, Volume 1: General Approach to the Science and Other Technical Issues* (April 17, 2009), *supra* at Appendix B - USGCRP/CCSP Procedures and Responsibilities, available at: http://www.epa.gov/climatechange/Downloads/endangerment/rtc_volume_1_app_b.pdf.

⁴² *Id.*, at Response (1-25).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See, e.g., Institute for Trade, Standards and Sustainable Development, *FOIA Request Clarification of Consolidated FOIA Request No. DOC-NOAA-2014-000714* (May 5, 2014), at Addendum, Sec. B.5.b, available at: <http://nebula.wsimg.com/c25e625aa81981536c980ec0f3307791?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>. ITSSD will replace its previously filed DOC-NOAA FOIA Request and FOIA Request Clarification with a new ITSSD DOC-NOAA FOIA Request.

⁴⁶ See United States Environmental Protection Agency, *Technical Support Document ("EPA-TSD") For Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, EPA-HQ-OAR-2009-0472-11292 (Dec. 7, 2009).

⁴⁷ See United States Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: EPA's Response to Public Comments, Volume 1: General Approach to the Science and Other Technical Issues* (April 17, 2009), *supra* at Comment (1-10).

⁴⁸ *Id.*, at Comment (1-46).

⁴⁹ *Id.*, at Comment (1-47).

⁵⁰ *Id.*, at Comment (1-48).

⁵¹ Section 1.5 of EPA's Response to Comments Volume 1 is entitled, "1.5 Information Quality Act Requirements for Independent Assessment".

⁵² *Id.*, at Responses (1-46), (1-47), (1-48).

⁵³ *Id.*, at Response (1-47).

⁵⁴ *Id.*, at Response (1-48).

⁵⁵ *Id.*, at Responses (1-47), (1-48).

⁵⁶ See 40 C.F.R. § 2.107(l)(2)(ii).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See 40 C.F.R. § 2.107(l)(2)(iii).

⁶⁰ 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)".

⁶¹ ITSSD's CEO has had two interviews with Washington DC media since the commencement of ITSSD's IQA-focused FOIA national education campaign.

⁶² See discussion, *infra*. ITSSD also intends to utilize press release services to disseminate the information disclosed by EPA in response to ITSSD's new FOIA Request. See e.g., *Reviews of the Best Press Release Services*, No.1Reviews.com, available at: <http://press-release-services.no1reviews.com/>.

⁶³ At least one Asia law and policy blog has posted the Washington Times op-ed coauthored by ITSSD's CEO. See endnotes accompanying discussion *infra*.

⁶⁴ The ITSSD website contains an entire section focusing on international regulatory transparency that will be devoted, in part, to explaining and disseminating to a broad public audience, in an understandable and accessible form, the information ITSSD obtains from EPA in response to ITSSD's new FOIA Request.

⁶⁵ The ITSSD is currently in discussion with one well-known producer of environmental and natural resource-focused documentaries who intends to prepare a documentary focusing on the peer review processes performed by EPA and other federal agencies to validate the externally developed studies such agencies rely on as the basis for their economically significant regulations.

⁶⁶ The ITSSD is currently in discussion with at least one or more law and science journals interested in publishing an article focusing on the subject matter of the FOIA requests ITSSD previously filed and will file anew with EPA, NOAA and other federal agencies.

⁶⁷ See discussion, *infra*.

⁶⁸ The ITSSD is currently in discussion with several universities interested in hosting a symposium that would focus on the subjects of government regulatory transparency and scientific quality, objectivity and integrity.

⁶⁹ For example, a Google search in quotations of the “Institute for Trade, Standards and Sustainable Development” will yield 93,000 hits, a Google search in quotations of the now-archived “ITSSD Journal” will yield 10,800 hits, and a Google search in quotations of ITSSD President “Lawrence A. Kogan” will yield 131,000 hits. *Cf. Monaghan v. Federal Bureau of Investigation*, 506 Fed. Appx. 596, 598 (9th Cir. 2013); 2013 U.S. App. LEXIS 1895 (2013) (“The FBI explains in its response that Monaghan’s sub-blog is not easily accessible through general searches conducted on common search engines. Monaghan does not dispute this, nor does he provide any information regarding the website traffic or number of hits that either his sub-blog or the 911blogger.com website attract. Given these uncertainties, Monaghan fails to establish that any information put on his sub-blog will reach the public and contribute to a “public understanding” of government activities.”).

⁷⁰ For example, a Google search of this *Daily Caller* article yields approximately 7,000 results, which included postings by the [Daily Surge](#), the [Matt Wash Blog](#), [Freedom Outpost.com](#), [BarbWire.com](#) and other conservative media organization websites participating as members of the [Liberty Alliance](#), and websites posting their posts of this Daily Caller article, and [Climate Depot](#) (“a special project of the Committee for a Constructive Tomorrow (CFACT) and...the most comprehensive [information center](#) on climate news and the related issues of environment and energy”). In addition, this article was posted on the websites of several nonprofit civil society organizations whose mission is to educate the public on climate change science and other public policy matters, such as [Land and Water USA.com](#), and the UK-based [Global Warming Policy Foundation](#). The *Daily Caller* interview/article also inspired the nonprofit [National Association of Scholars](#) to prepare its own article describing the object of ITSSD’s national FOIA education campaign. Furthermore, the *Daily Caller* interview/article was posted on the website of [ALIPAC](#), a conservative [political action committee](#), and on the social networking site consisting of members of the [natural gas vehicle owner community](#).

⁷¹ The following is a brief representation of the countries, regions and cities outside the United States that are represented by organizations participating in the Atlas Economic Research Foundation’s global network to which ITSSD specifically intends to disseminate the information disclosed by EPA, once analyzed: 1) [North America](#) – (Canada) Calgary-Alberta, Edmonton-Alberta, Halifax-Nova Scotia, Kingston, Vancouver-British Columbia, Ottawa-Ontario, Montreal-Quebec; 2) [Europe](#) – (Norway) Oslo; (Sweden) Stockholm; (Finland) Helsinki; (Denmark) Copenhagen; (Iceland) Reykjavik, Gardabaer; (Estonia) Tallinn; (Poland) Warsaw, Lodz, Katowice, Gliwice, Krakow; (Germany) Berlin, Potsdam, Freiburg, Bayreuth; (Netherlands) Amsterdam, Den Haag; (Belgium) Brussels, Leuven; (Czech Republic) Prague; (Austria) Vienna; (Slovakia) Bratislava; (Hungary) Veszprem; (United Kingdom) London; (France) Paris, Sevres; (Switzerland) Zurich, Lausanne, Vevey; (Lichtenstein) Maruen, Vaduz; (Italy) Rome, Torino; (Spain) Madrid, Navarra, Pamplona; (Portugal) Lisbon; (Romania) Bucarest, Cluj-Napoca; (Slovenia) Ljubljana; (Croatia) Zagreb, Rijeka; (Bosnia & Herzegovina) Tuzla, Zenica; (Serbia) Belgrade, Zemun; (Albania) Tirana; (Macedonia) Tetovo, Skopje; (Bulgaria) Sophia; (Greece) Athens, Glyfada; 3) [South America](#) – (Chile) Temuco and Santiago; (Argentina) Rosario, Tucuman, Buenos Aires, Cordoba, and Mar de Plata; (Colombia) Bogota; (Peru) Cusco, Lima, Iquitos; (Brazil) Belo Horizonte-Minas Gerais, Sao Paulo, Rio de Janeiro, Porto Alegre; (Bolivia) Co Chabama, Santa Cruz; (Uruguay) Montevideo; (Paraguay) Ascuncion; (Ecuador) Guayaquil-Guayas; (Venezuela) Caracas; 4) [Central America](#) - (Costa Rica) San Jose; (El Salvador) San Salvador, La Libertad; (Nicaragua) Managua, Villa Fonte; (Mexico) Mexico City, Monterrey, D.F. Mexico, Queretaro-QRO; (Panama) Panama City; (Honduras) San Pedro Sula; (Guatemala) Guatemala City; 5) [Caribbean](#) – (Dominican Republic – Santa Domingo, Distrito Nacional; (Bahamas) Nassau; 6) [Africa](#) – (South Africa) Capetown, Johannesburg, Bryanston; (Ivory Coast) Abidjan; (Zambia) Kitwe; (Ghana) Achimota-Accra, Kumasi; (Nigeria) Lago State; (Ethiopia) Addis Ababa; (Mozambique) Maputo; (Burkino Faso) Ouagadougou; 7) [Middle East](#) – (Egypt) Cairo; (Israel) Tel Aviv, Mevaseret-Zion; (Iraq) Baghdad; (Turkey) Ankara, Istanbul; (Tunisia) Tunis; (Morocco) Rabat; 8) [Caucasus](#) – (Armenia); (Georgia) Tblisi; 9) [Central Asia/Eurasia](#) – (Russian Federation) Moscow, St. Petersburg; (Afghanistan) Kabul; (Azerbaijan) Baku; (Kyrgyzstan) Bishkek; (Kazakhstan) Almaty; (Tajikistan) Dushanbe; 10) [South Asia](#) – (India) New Delhi, Bangalore, Elamkulam-Kochi Kerala; (Pakistan) Islamabad, La Hore; (Nepal) Shantinagar-Katmandu, Morang; 11) [East Asia](#) – (Japan) Tokyo; (South Korea) Seoul; (North Korea); (China) Beijing, Shanghai, Hong Kong; (Mongolia) Ulaanbaatar Sukhbaatar; (Indonesia) Jakarta; (Malaysia) Kuala Lumpur,

Shah Alam Selangor; (Philippines) Quezon City, Makati City; 12) Oceania – (Australia) Adelaide, Sydney, Melbourne, St. Leonards, Subiaco-Western Australia; (New Zealand) Wellington.

⁷² See Atlas Economic Research Foundation website, *Home Page* (last referenced March 31, 2014), at: <http://atlasnetwork.org/>.

⁷³ These states and municipalities include: Alabama – Birmingham; Alaska – Anchorage; Arizona – Glendale, Phoenix, Tucson; Arkansas – Little Rock; California – Claremont, Irvine, Sacramento, San Diego, San Francisco, Los Angeles; Colorado – Colorado Springs, Golden; Delaware – Wilmington; Florida – Miami, Naples, Tallahassee; Georgia – Atlanta; Idaho – Boise; Illinois – Burr Ridge, Chicago, Rockford; Indiana – Indianapolis; Louisiana – New Orleans; Maryland – Germantown, Bethesda; Massachusetts – Boston; Michigan – Midland; Minnesota – Chaska, Minneapolis; Missouri – St. Louis; Montana – Bozeman; Nebraska – Omaha; Nevada – Las Vegas; New Jersey – Chatham, Princeton, Randolph; New Mexico – Albuquerque; New York – Larchmont; North Carolina – Raleigh; North Dakota – Bismarck; Oklahoma – Oklahoma City; Oregon – Portland; Pennsylvania – Grove City, Harrisburg, Philadelphia, Villanova; Puerto Rico – San Juan; South Carolina – Clemson, Columbia; Tennessee – Memphis, Nashville; Texas – Austin, Lewisville; Virginia – Alexandria, Arlington, Fairfax, Gainesville, Herndon, Richmond; Washington – Olympia; Wisconsin – Madison, Thiensville; Wyoming – Cheyenne.

⁷⁴ *Id.*, at: <http://www.itssd.org/links.html>.

⁷⁵ For example, a Google search of the title of the RedState.com and CanadaFreePress.com articles yields approximately 35,800 results, which included postings on a number of websites which have their considerable online, facebook and twitter distribution networks: JunkScience.com, WesternJournalism.com, CFACT.com, [The CRE.com](http://TheCRE.com), the [Berns Report](http://BernsReport.com) of GotNewswire.com, and the [Westerner Blog](http://WesternerBlog.com). Web postings from these websites were subsequently posted on downstream websites with their own distribution networks, such as the [Liberty Beacon.com](http://LibertyBeacon.com).

⁷⁶ A version of these articles was posted, for example, to the industry website of Cattlemen.com, “the leader in the internet marketing of cattle”.

⁷⁷ For example, the Washington Times op-ed article was posted to the websites of [The CRE.com](http://TheCRE.com) and the California Academy of Sciences, an [Asia law and policy blog](http://AsiaLawAndPolicyBlog.com), and, at least, eleven online newspapers: [Philadelphia Herald](http://PhiladelphiaHerald.com), [Baltimore Star](http://BaltimoreStar.com), [San Antonio Post](http://SanAntonioPost.com), [Massachusetts Sun](http://MassachusettsSun.com), [Arizona Herald](http://ArizonaHerald.com), [North Carolina Daily](http://NorthCarolinaDaily.com), [Brazil Sun](http://BrazilSun.com), [Irish Sun](http://IrishSun.com), [Perth Herald](http://PerthHerald.com), [Israel Herald](http://IsraelHerald.com) and [Arab Herald](http://ArabHerald.com), etc.

⁷⁸ For example, the ITSSD whitepaper was posted to the websites of the nonprofit Chicago-based [Heartland Institute](http://HeartlandInstitute.com) and UK-based [Global Warming Policy Foundation](http://GlobalWarmingPolicyFoundation.com). It also inspired the preparation of an explanatory article by the [National Association of Scholars](http://NationalAssociationOfScholars.com) which was subsequently posted to the WattsUpWithThat.com and [Sierra Foothill Community](http://SierraFoothillCommunity.com) websites. Thereafter, the National Association of Scholars article was posted to a discussion thread appearing on the New Zealand-based [Climate Conversation Group](http://ClimateConversationGroup.com) blog and was also summarily criticized by the owner of the blog HotWhopper.com.

⁷⁹ For example, the Washington Examiner article, including the ITSSD CEO interview, was posted to the websites and facebook and twitter accounts of [CFACT](http://CFACT.com) and [Climate Depot.com](http://ClimateDepot.com).

⁸⁰ See *Presidential Memorandum for the Heads of Executive Departments and Agencies, Scientific Integrity*, The White House (March 9, 2009), available at: <http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09>; Memorandum to the Heads of Executive Departments and Agencies, *Scientific Integrity*, Director of the Office of Science and Technology Policy (Dec. 17, 2010), available at: <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>.

⁸¹ Significantly, the U.S. House of Representatives Committee on Science, Space and Technology quoting this language in the charter to its March 31, 2011 hearing entitled, “Climate Change: Examining the Processes Used to Create Science and Policy.” See U.S. House of Representatives, Committee on Science, Space and Technology, *Hearing Charter: Climate Change: Examining the Processes Used to Create Science and Policy* (March 31, 2011), at pp. 1-2, available at: <http://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/FINAL%20Climate%20Process%20Hearing%20Charter.pdf>; “Climate Change: Examining the Processes Used to Create Science and Policy,” Hearing Before the Committee on Science, Space and Technology, U.S. House of Representatives, 112th Cong., 1st Sess., Rept. 112–09 (March 30, 2011), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg65306/pdf/CHRG-112hhrg65306.pdf>.

⁸² Cf. *Perkins v. United States Department of Veteran Affairs*, 754 F. Supp. 2d 1, 18 (D.D.C. 2010), available at: https://casetext.com/case/perkins-v-us-department-of-veterans-affairs#document_text (“Here, plaintiff identifies only one newspaper, the Federal Times, to which he intends to distribute his research, but he does not indicate that he has any

professional or personal contacts with that newspaper or a history of publishing in it that would lend credence to his statement of intention. Additionally, a comparison to *Southern Utah* and *In Defense of Animals* makes clear that plaintiff's membership in labor and civil rights organizations, and his unsupported assertion that he 'routinely' meets with 'many' congressional delegations regarding employment issues at the VA, are insufficient to demonstrate his ability to disseminate information.”).

⁸³ See *VoteHemp, Inc. v. Drug Enforcement Administration*, 237 F.Supp.2d 55, 63 (DC DC 2002), available at: http://scholar.google.com/scholar_case?case=18247584983200565391&q=VoteHemp,+Inc.+v.+Drug+Enforcement+Administration,+237+F.Supp.2d+55&hl=en&as_sdt=6.31&as_vis=1 (paraphrasing and quoting “*D.C. Technical Assistance Org.*, 85 F. Supp. 2d at 49 (holding that plaintiff's statements that it would disseminate the information it sought to its ‘various...resident councils, which in turn would distribute it to residents in their respective communities; and that...[its] executive director, has a demonstrated ability to disseminate information on [its] behalf..’ was sufficient to satisfy its burden under the public interest test. ‘In this Information Age, technology has made it possible for almost anyone to fulfill this requirement.’”)).

⁸⁴ 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)).

⁸⁵ See “The Need for Regulatory Science Transparency at the EPA”, Statement of A. Alan Moghissi, PhD, President, Institute for Regulatory Science, *Fostering Quality Science at EPA: Perspectives on Common Sense Reform* (Part I and Part II), Hearing Before the Committee on Science, Space, and Technology, Subcommittee on Energy and Environment, U.S. House of Representatives 112th Cong. (1st and 2nd Sessions) (Nov. 30, 2011), available at: https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/113011_Moghissi.pdf. See also A. Alan Moghissi, Dennis K. McBride, Roger R. Stough, and Michael S. Swetnam, *Regulatory Sunshine: Application of Best Available Science Concept and Metrics for Evaluation of Science Claims to Regulatory Transparency*, International Center for Regulatory Science, George Mason University and Potomac Institute for Policy Studies (2012), available at: http://www.nars.org/Documents/Regulatory_Sunshine.pdf; A. Alan Moghissi and Misti Ault Anderson, *Independent Peer Review of Regulatory Science Information*, Institute for Regulatory Science (June 2011), available at: <http://www.nars.org/Documents/Reg-Sci-Peer-Review-ManualFINAL.doc>; Institute for Regulatory Science, *Manual for Independent Peer Reviews and Independent Scientific Assessments* (2009), available at: <http://www.nars.org/Documents/RSI-MTAPR.doc>.

⁸⁶ See “Written Testimony of Gary E. Marchant, J.D., M.P.P., Ph.D, Lincoln Professor of Emerging Technologies, Law & Ethics Faculty Director, Center for Law, Science & Innovation, Sandra Day O' Connor College of Law, Arizona State University, Tempe, AZ,” at *Fostering Quality Science at EPA: Perspectives on Common Sense Reform*, Hearing Before the Committee of Science, Space and Technology, Subcommittee on Energy and Environment, U.S. House of Representatives, 112th Cong. (Nov. 30, 2011), available at: https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/113011_Marchant.pdf.

⁸⁷ See Risk Analysis Center (Institute for Regulatory Science and Potomac Institute for Policy Studies), *Response of the Risk Analysis Center to the Office of Management and Budget's Proposed Risk Assessment Bulletin* (2006), available at: http://www.whitehouse.gov/sites/default/files/omb/infocore/comments_rab/rac.pdf.

⁸⁸ See Potomac Institute for Policy Studies, *Climate Change and Human Health: Prospects for the Future*, CReST Bold Ideas Seminar, Introduction by Dennis K. McBride, (Sept. 13, 2013), available at: <http://www.potomac institute.org/bold-ideas-seminar-series/2661-crest-bold-ideas-seminar-climate-change-and-human-health-prospects-for-the-future.html> and <http://www.potomac institute.org/attachments/article/2661/Colwell24Feb2014.pdf>.

⁸⁹ See, e.g., A. Alan Moghissi, Michael Swetnam, Betty R. Love and Sorin R. Straja, *Best Available Science: Fundamental Metrics for Evaluation of Scientific Claims*, Potomac Institute Press (2010), available at: <http://www.amazon.com/Best-Available-Science-Fundamental-Evaluation/dp/0615298192>; A. Alan Moghissi, Betty R. Love and Sorin R. Straja, *Peer Review and Scientific Assessment: A Handbook for Funding Organizations, Regulatory Agencies and Editors*, Institute for Regulatory Science (2013), available at: <http://www.amazon.com/Peer-Review->

[Scientific-Assessment-Organizations/dp/148205888X](#); Alan Moghissi, PhD, Michael S. Swetnam, Matthew Amin and Conner McNulty, *Ruckelshaus Effect*, Synesis: A Journal of Science, Technology, Ethics & Policy (Potomac Institute Press 2012), available at: http://www.synesisjournal.com/vol3_g/2012_Moghissi_G6-13_abstract.html and http://www.synesisjournal.com/vol3_g/Moghissi_2012_G6-13.pdf.

⁹⁰ 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*.

⁹¹ 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) (SSRN), available at: http://www.lexxion.de/pdf/ejrr/12-16-12.04.438_ejrr_2013_04.pdf010.pdf. See also Evergreen Magazine, *The EPA Has a Political Agenda that Doesn't Have Much of Anything To Do With Science - A Conversation with Dr. Alan Moghissi, One of America's Finest and Most Outspoken Scientists*, Evergreen Foundation (Fall 2012) at pp. 5-13, available at: http://www.esipri.org/Library/Evergreen_2012.pdf.

⁹² See European Parliamentary Research Service, Consumers and Public Health External Relations Publications, *Impact of a Potential EU-US FTA (TTIP) on Consumer Protection and Food Safety - Analysis* (March 25, 2014), available at: <http://epthinktank.eu/2014/03/25/impact-of-a-potential-eu-us-fta-ttip-on-consumer-protection-and-food-safety/>.

⁹³ See United States Mission to the European Union, *Article Alert March 2014 – Economic Issues*, available at: http://useu.usmission.gov/aa_march_2014.html; Embassy of the United States, Brussels, Belgium, *Article Alert of March 1, 2014 - EU Issues*, available at: <http://uspolicy.belgium.usembassy.gov/article-alert/article-alert-march-1-2014>.

⁹⁴ 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*”).

⁹⁵ 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 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.*

⁹⁶ 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’”).

⁹⁷ 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.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *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.*

¹⁰¹ 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>.

¹⁰² See 40 C.F.R. §2.107(l)(2)(iv).

¹⁰³ 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, 66516, 66499, 66539 (Dec. 15, 2009).

¹⁰⁴ See Virginie Marchal, Rob Dellink, Detlef van Vuuren, Christa Clapp, Jean Château, Eliza Lanzi, Bertrand Magné and Jasper van Vliet, *OECD Environmental Outlook to 2050 – Chapter 3: Climate Change* (Nov. 2011 Pre-Release Version), at pp. 10-15, available at: <http://www.oecd.org/env/cc/49082173.pdf>.

¹⁰⁵ See United States Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act EPA's Response to Public Comments, Volume 2: Validity of Observed and Measured Data, at Response 2-2*, EPA website (last visited March 31, 2014), at: <http://www.epa.gov/climatechange/endangerment/comments/volume2.html>.

¹⁰⁶ *Id.*

¹⁰⁷ 74 FR 66496, 66516.

¹⁰⁸ See U.S. Climate Change Science Program, *Synthesis and Assessment Product 2.2 - The First State of the Carbon Cycle Report (SOCCR) The North American Carbon Budget and Implications for the Global Carbon Cycle* (Nov. 2007) (CCSP 2007) (Anthony W. King, Lisa Dilling, Gregory P. Zimmerman, David M. Fairman, Richard A. Houghton, Gregg Marland, Adam Z. Rose, and Thomas J. Wilbanks (eds.)), at p. 22, available at: <http://library.globalchange.gov/products/assessments/sap-2-2-the-north-american-carbon-budget-and-implications-for-the-global-carbon-cycle>.

¹⁰⁹ See Institute for Trade, Standards and Sustainable Development, *ITSSD FOIA Request Clarification - Request # DOC-NOAA-2014-000714* (5-5-15), at Addendum, Sec. B.4.b, pp. 26-27, available at: <http://nebula.wsimg.com/c25e625aa81981536c980ec0f3307791?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹¹⁰ To recall, the significance of a "core reference document" lies in the "primary" and "heavy" reliance that the Administrator places upon it. See EPA-TSD, *supra* at pp. 6-7.

¹¹¹ See United States Global Change Research Program, *Global Climate Change Impacts in the United States* (Thomas R. Karl, Jerry M. Melillo, and Thomas C. Peterson (eds.)) (Cambridge Univ. Press 2009), *supra*.

¹¹² See EPA-TSD, *supra* at Table 1.1, p.7.

¹¹³ See United States Global Research Program, *Best Practice Approaches for Characterizing, Communicating, and Incorporating Scientific Uncertainty in Climate Decision Making - Synthetic Assessment Product 5.2* (Jan. 2009), available at: <http://downloads.globalchange.gov/sap/sap5-2/sap5-2-final-report-all.pdf>.

¹¹⁴ *Id.*, at p. 22.

¹¹⁵ *Id.*

¹¹⁶ “In a personalist or Bayesian framework, it is perfectly appropriate to say, based on a subjective interpretation of polling data, results from focus group discussions, and one’s own reading of the political climate, ‘I think there is an 80 percent chance that Jones will win the next congressional election in this district’. However, because it involves the outcome of a single unique future event, such a statement has no meaning in a frequentist framework. In the face of large amounts of data on a repeating event, and a belief that the process being considered is stationary, the subjectivist probability should reduce to the same value as the classical probability... A number of researchers have applied these alternative formulations to the challenge of characterizing climate change uncertainty and there is no final consensus on the best approach. However, so long as one carefully specifies the question to be addressed, our judgment is that all four boxes in Figure 1.1 can be appropriately handled through the use of subjective probability, allowing a wide range or a multiple set of plausible distributions to represent the high levels of uncertainty, and retaining the axioms of probability.” *Id.*, at p. 20.

¹¹⁷ *Id.*, at pp. 20-21. SAP 5.2, furthermore states the following: “Subjective probabilities seem clearly appropriate for addressing the established cases across the top of this matrix [‘established but incomplete’ and ‘well established’]. There is more debate about the most appropriate methods for dealing with the others [i.e., the bottom of the matrix - ‘speculative’ and ‘competing explanations’]. A variety of approaches exist, such as belief functions, certainty factors, second order probabilities, and fuzzy sets and fuzzy logic, that attempt to quantify the degree of belief in a set of subjective probability judgments Each of these approaches provides an alternative calculus that relaxes the axioms of probability. In particular, they try to capture the idea that one can gain or lose confidence in one of a mutually exclusive set of events without necessarily gaining or losing confidence in the other events.” *Id.*, at p. 21.

¹¹⁸ See United States Global Change Research Program, *Global Climate Change Impacts in the United States* (Thomas R. Karl, Jerry M. Melillo, and Thomas C. Peterson (eds.)) (Cambridge Univ. Press 2009), *supra* at p8, fn1, p. 165.

¹¹⁹ See EPA-TSD, *supra* at Table 1.1, p. 7.

¹²⁰ See United States Global Change Research Program, *Global Climate Change Impacts in the United States* (Thomas R. Karl, Jerry M. Melillo, and Thomas C. Peterson (eds.)) (Cambridge Univ. Press 2009), *supra* at p8 and fn1, citing “...1 CCSP, 2009: *Best Practice Approaches for Characterizing, Communicating, and Incorporating Scientific Uncertainty in Decisionmaking*. [Morgan, G., H. Dowlatabadi, M. Henrion, D. Keith, R. Lempert, S. McBrid, M. Small, and T. Wilbanks (eds.)]. Synthesis and Assessment Product 5.2. National Oceanic and Atmospheric Administration, Washington DC”. *Id.*, at p. 165.

¹²¹ See EPA IQA Guidelines, *supra* at Sec. 6.4, pp. 22 and 26; EPA-PRH, *supra* at Appendix D - Examples Of Peer Review Charges, p. D-11. See also NOAA IQA Guidelines, *supra*, at Part II (“Some assessments of risk to humans and the environment, such as tornado or hurricane warnings, use best available science conducted in accordance with sound and objective scientific practices...”) *Id.*

¹²² “1. To the degree that the agency action is based on science, NOAA will use (a) the best available science and supporting studies (including peer-reviewed science and supporting studies when available), conducted in accordance with sound and objective scientific practices, and (b) data collected by accepted methods or best available methods” (emphasis added). See NOAA IQA Guidelines, *supra*, at Part II.

¹²³ “The ‘precautionary principle’ is another decision strategy often proposed for use in the face of high uncertainty. There are many different notions of what this approach does and does not entail. In some forms, it incorporates ideas of resilient or adaptive policy. In some forms, it can also be shown to be entirely constant with a decision analytic problem framing. Precaution is often in the eye of the beholder. Thus, for example, some have argued that while the European Union has been more precautionary with respect to CO2 emissions in promoting the wide adoption of fuel efficient diesel automobiles, the United States has been more precautionary with respect to health effects of fine particulate air pollution, stalling the adoption of diesel automobiles until it was possible to substantially reduce their particulate emissions.” See U.S. Climate Change Science Program and the Subcommittee on Global Change Research, *Synthesis and Assessment Product 5.2 (SAP5.2/CCSP(2009) - Best Practice Approaches for Characterizing, Communicating, and*

Incorporating Scientific Uncertainty in Decisionmaking, National Oceanic and Atmospheric Administration (2009), at pp. 16-17, available at: <http://downloads.globalchange.gov/sap/sap5-2/sap5-2-final-report-all.pdf>.

¹²⁴ 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) (SSRN), *supra* at p. 501 (“Because the PP lowers the evidentiary standard of proof, it has the potential to affect the practice of science. *The risk is that the PP does not promote ‘science-based policy’, but rather, ‘policy-based science’.* Negative study results do not support policymaking, while positive results make a study (and the researchers who conducted it) politically relevant. If researchers are sensitive to such attention, they may be inclined to select a methodology that is more likely to generate a positive result”) (emphasis added). *Id.*

¹²⁵ See United States Environmental Protection Agency, *EPA’s Region 6 Office - About Us*, EPA Region 6 website (last visited March 31, 2014), available at: <http://www.epa.gov/region6/water/aboutus.htm>.

¹²⁶ See United States Environmental Protection Agency, *U.S. Environmental Protection Agency Policy Statement on Climate-Change Adaptation* (June 2, 2011), available at: <http://www.epa.gov/climatechange/Downloads/impacts-adaptation/adaptation-statement.pdf>. The EPA has more recently stated that, “[s]cientific evidence demonstrates that the climate is changing at an increasingly rapid rate, outside the range to which society has adapted in the past. These changes can pose significant challenges to the EPA’s ability to fulfill its mission.” See United States Environmental Protection Agency Office of Water, *Draft Climate Change Adaptation Implementation Plan* (Sept. 2013), at Preface, available at: <http://epa.gov/climatechange/Downloads/impacts-adaptation/office-of-water-plan.pdf>.

¹²⁷ 74 FR 66496, 66518, fn 24.

¹²⁸ *Id.*, at 66523.

¹²⁹ *Id.*, at 66524.

¹³⁰ *Id.*, at 66528.

¹³¹ *Id.*, at 66531.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*, at 66535.

¹³⁶ See United States Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act* (last visited April 1, 2014), available at: <http://www.epa.gov/climatechange/endangerment/>.

¹³⁷ See 40 C.F.R. §2.107(l)(2)(iv), *supra*. See also *Citizens for Responsibility and Ethics in Washington v. United States Department of Education*, 593 F. Supp. 2d 261, 270-271 (D.D.C. 2009), available at: <http://www.courtlistener.com/dcd/cToa/citizens-for-responsibility-v-us-dept-of-educ/> (“...The 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.” *Judicial Watch, Inc. v. Gen. Servs.Admin.*, 2000 U.S. Dist. LEXIS 22872, 2000 WL 35538030, at 11 (D.D.C. 2000); see also *McClellan [Ecological Seepage Situation v. C Carlucci US]* 835 F.2d [1282,] at 1285 [(9th Cir. 1987)]. 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. *Id.* Here, the plaintiff has satisfied its burden by specifying, through reference to the administrative record alone, how disclosure of the requested documents will significantly contribute to the public’s understanding of government operations. See Am. Compl., Ex. G at 6 (explaining that “[t]he records CREW seeks in items 2 and 3 will likely contribute significantly to the public’s understanding of the extent to which publishers were in contact with [the defendant]...during the Reading First development and grant process”). *Id.*

¹³⁸ See 40 C.F.R. §2.107(l)(3)(i), *supra*.

¹³⁹ 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].”

¹⁴⁰ 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.

¹⁴¹ See Institute for Trade, Standards and Sustainable Development, *International Regulatory Cooperation*, ITSSD website, available at:

<http://nebula.wsimg.com/374d8ac5bb729af7b75740edb1e11c98?AccessKeyId=39A2DC689E4CA87C906D&disposition=n=0&alloworigin=1>.

¹⁴² 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>. “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.*, at Table 2, p. 10.

¹⁴³ 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>.

¹⁴⁴ 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/>.

¹⁴⁵ 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)).

¹⁴⁶ 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.

¹⁴⁷ 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.

¹⁴⁸ *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.

¹⁴⁹ 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/>.

¹⁵⁰ *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/>.

¹⁵¹ *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/>; 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/>.

¹⁵² 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.

¹⁵³ 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>.

¹⁵⁴ 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.

¹⁵⁵ “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).

¹⁵⁶ “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>.

¹⁵⁷ *Id.*

¹⁵⁸ ITSSD also was not paid to prepare its previously filed EPA FOIA Request, Clarifications and Fee Waiver Request and Clarification.

¹⁵⁹ See 40 C.F.R. § 2.107(l)(3)(i), *supra*.

¹⁶⁰ See 40 C.F.R. § 2.107(l)(3)(ii); 40 C.F.R. § 2.107(b)(1).

¹⁶¹ See 40 C.F.R. § 2.107(l)(3)(ii).

¹⁶² See *Campbell v. U.S. Department of Justice*, 164 F.3d 20 (DC Cir. 1998).

¹⁶³ See *National Treasury Employees Union v. Griffin*, 811 F.2d 644 (D.C.Cir.1987).

¹⁶⁴ 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.”).

¹⁶⁵ *Id.*

¹⁶⁶ 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.*

¹⁶⁷ *Id.*

¹⁶⁸ See 40 C.F.R. § 2.107(l)(3)(ii), *supra*.

¹⁶⁹ See 40 C.F.R. § 2.107(l)(1).