



May 15, 2014

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Ms. Dana Hyland
U.S. Environmental Protection Agency
Office of Air and Radiation
Climate Change Division
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Re: Second ITSSD FOIA Request Clarification

ITSSD FOIA Request Clarification; FOIA Fee Waiver Request Clarification
FOIA (Consolidated) Request No. EPA-HQ-2014-004938

In its letter correspondence of May 9, 2014, ITSSD responded to your email correspondence of May 8, 2014. Your May 8, 2014 email correspondence stated that, “the Agency determined that your...March 21 [, 2014] request did not reasonably describe the records you are seeking in a way that would permit EPA employees to identify and locate them”. It also indicated that, “[o]n April 1, 2014, the EPA promptly contacted you to provide you with another opportunity to clarify the records you are seeking so that the Agency could process your request.”

In addition, your email correspondence of May 8, 2014 stated that, “your April 28 [,2014] clarification to FOIA request EPA-HQ-2014-004938 does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them.” Your May 8, 2014 email correspondence further stated that,

“The March 21 FOIA request and April 28 clarification do not reasonably describe the records you are seeking because of the following reasons: - The April 28 clarification does not correlate to the original FOIA request...Additionally, your request is drafted in such a complicated way that we are unable to understand the records you are seeking...Given these examples of the ambiguous and unclear descriptions of the records you are seeking, the Agency is once again requesting you provide a clarification of your March 21 FOIA request.”

ITSSD regrets that EPA has appeared perplexed regarding the focus of ITSSD’s FOIA Request Clarification, and that EPA-OAR and EPA’s Office of General Counsel are unable resolve current and future scheduling burdens and conflicts that prohibit you and your colleagues from meeting with me to resolve such perplexities.

Nevertheless, in a good faith effort to liberate EPA-OAR and EPA’s National FOIA Office from their state of confusion, ITSSD hereby responds to your request for further clarification.

ITSSD recommends, as an initial measure, that EPA-OAR and EPA's National FOIA Office focus primarily on ITSSD's April 1 FOIA Request Clarification. The preambular paragraph of ITSSD's April 1, 2014 FOIA Request Clarification clearly sets forth the scope of ITSSD's FOIA Request:

“This annotated FOIA Request Clarification seeks disclosure of all EPA records (“all EPA climate science-related peer review files”) substantiating the specific measures EPA had taken, consistent with the highest and most rigorous standards applicable to highly influential scientific assessments (“HISAs”) [fn] imposed by the Information Quality Act (“IQA”) and the Office of Management and Budget (“OMB”) [fn] and EPA [fn] IQA-implementing guidelines, to ensure the quality, integrity and reliability of EPA- and third-party-developed climate science-related assessments and reports upon which the Administrator primarily relied in reaching positive greenhouse gas (“GHG”) endangerment and cause or contribute findings under Clean Air Act Sec. 202(a)(1).”

The remainder of this Second ITSSD FOIA Request Clarification is devoted to breaking down this clearly worded statement of focus into its four constituent elements, and to further clarifying how each such element pertains to the EPA records ITSSD's FOIA Request Clarification had clearly identified.

This Second ITSSD FOIA Request Clarification, in other words, once again, identifies the following EPA records for public disclosure: 1) All EPA records pertaining to the climate science-related assessments (HISAs) upon which the EPA Administrator's CAA Section 202(a)(1) findings had primarily and heavily relied; 2) All EPA records pertaining to the Parties that had likely conducted and had statutory and administrative legal responsibility for conducting, under the IQA and relevant OMB and agency IQA-implementing guidelines, peer reviews of such HISAs; 3) All EPA records pertaining to how EPA's review of such peer reviewed HISAs had complied with the highest and most rigorous peer review, conflict-of-interest, independence, bias, and transparency standards imposed by the IQA and relevant OMB and agency IQA-implementing guidelines; and 4) All EPA records pertaining to how EPA's choice of an administrative mechanism to afford stakeholders the opportunity to seek correction or reconsideration of HISAs that EPA had disseminated in violation of the IQA and OMB and EPA IQA-implementing guidelines had satisfied EPA's statutory and administrative IQA-related obligations.

A. *EPA Records Disclosing Information About EPA and Third-Party Development of Highly Influential Scientific Assessments (“HISAs”) Supporting EPA Administrator's GHG Endangerment Findings*

Section I, Paragraph 1 of ITSSD's FOIA Request Clarification clearly identifies the specific EPA records sought:

“All international, national regional and local agency climate science-related files referring, directly or indirectly, to the substantive and procedural peer reviews conducted, managed or overseen by EPA, an EPA-established federal advisory committee(s), and/or an EPA-hired third-party contractor(s) (private parties or other

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federal agencies) of the assessments, studies and reports referenced within the EPA Technical Summary Document (“EPA-TSD”) supporting the Administrator’s GHG endangerment and cause or contribute findings, especially all climate science-related files referring directly or indirectly to assessments, studies and reports designated therein (at Table 1.1, p. 6) [fn] as “core reference documents”.[fn]

In other words, the records to be disclosed include ALL EPA records pertaining to substantive and procedural peer reviews conducted by EPA, by federal advisory committees established by EPA pursuant to the Federal Advisory Committee Act and/or by EPA-hired third party contractors of all climate science-related assessments, studies and reports that EPA’s Technical Summary Document (“EPA-TSD”) had referenced as supporting the Administrator’s CAA Section 202(a)(1) findings, especially those designated as “core reference documents”. You and your colleagues should be quite familiar with the term “climate science-related”, as set forth in Section II.2 of ITSSD’s FOIA request Clarification, since it adapts the definition of that term contained in two publicly available documents produced by the U.S. Global Change Research Program: *A Guide for Individuals and Communities* and *Climate Literacy: The Essential Principles of Climate Science*,

“Directly or indirectly to assessments, reports, studies, literature, information, files, etc. explaining observations of past, current and projected future changes in the Earth’s climate, the impacts of such climate change on humans and the environment, and approaches for adapting and mitigating such change”. [fn25]

The second footnote in the first quoted paragraph in A. above (fn12) further describes how the Administrator’s findings had relied upon “core reference documents”:

“As the EPA-TSD clearly states, “Table 1.1 lists the core reference documents for this TSD.” *See* EPA-TSD, *supra* at p. 7. Indeed, Table 1.1 is labeled “Core references *relied upon most heavily* in this document” (emphasis added). *Id.*, at Table 1.1, p. 7. “This version of the TSD, as well as previous versions of the TSD dating back to 2007, have taken the approach of *relying primarily* on these assessment reports because they 1) are very recent and represent the current state of knowledge on GHG emissions, climate change science, vulnerabilities, and potential impacts; 2) have assessed numerous individual, peer-reviewed studies in order to draw general conclusions about the state of science; 3) have been reviewed *and formally accepted*, commissioned, or in some cases authored by U.S. government agencies and individual government scientists; and 4) they reflect and convey the consensus conclusions of expert authors” (emphasis added). *Id.*, at p. 6. *See also* Appendix 1: EPA-TSD Table 1.1 “Core Reference Documents”.

Furthermore, Appendix 1: EPA-TSD Table 1.1 “Core Reference Documents” of ITSSD’s FOIA Request Clarification identifies each of the twenty-eight (28) “core reference documents” listed in EPA’s TSD. Given the extent to which the Administrator’s CAA Section 202(a)(1) findings had “heavily” and “primarily” relied upon *these* 28 “core reference documents”, EPA had been obliged to ensure that the substantive and procedural peer review of such documents had satisfied the highest and most rigorous level peer review, conflict-of-interest, independence, bias and transparency

standards applicable to HISAs imposed by the IQA and relevant OMB, EPA and other federal agency IQA-implementing guidelines (as discussed below).

Appendix 1: EPA-TSD Table 1.1 “Core Reference Documents”, moreover, identifies that U.S. Federal agencies had developed twenty (20) of the twenty-eight (28) “core reference documents listed in the EPA-TSD. EPA had developed four (4) “core reference documents, while six other federal agencies had developed the remaining sixteen (16) of twenty (20) “core reference documents”: DOC-NOAA (7); DOE (3); DOI-USGS (3); NASA (1); DOT (1); and USDA (1). Appendix 1: EPA-TSD Table 1.1 “Core Reference Documents” also identifies that third parties other than Federal agencies had developed the remaining eight (8) “core reference documents: Intergovernmental Panel on Climate Change (“IPCC”) (3); National Research Council (4); Arctic Council (1).

In addition to these federal agencies, Section I, Paragraph 1(a)(ii) and Footnote 13 of ITSSD’s FOIA Request Clarification identifies three other federal agencies that have participated in the interagency U.S. Global Change Research Program/Climate Change Science Program (“USGCRP/CCSP”). These include the National Science Foundation (“NSF”), the Smithsonian Institution, and the US Agency for International Development (“USAID”). And, Appendix 3: USGCRP/CCSP “‘Core Reference Documents’ - ‘Lead’ Agency Burdens” accompanying ITSSD’s FOIA Request Clarification also identifies the relative administrative burdens borne by federal agencies in developing the climate science-related HISAs designated as “core reference documents” that had supported the Administrator’s CAA Section 202(a)(1) findings. While NSF is not among the agencies mentioned, the administrative record reflects that NSF had assisted these ‘lead’ development agencies in their drafting of such HISAs for the USGCRP/CCSP. Section II.B.1 of the Addendum incorporated in ITSSD’s FOIA Request Clarification (pp. 17-19) also discusses the legal significance of the “core reference document” designation.

Lastly, Section I, Paragraph 1(a)(i)-(vi) of ITSSD’s FOIA Request Clarification clearly identifies for disclosure all of the peer review-related records evidencing whether EPA, an EPA-established federal advisory committee, an EPA-hired third-party contractor(s), other federal agencies, and/or interagency entities had actually developed and/or also conducted the peer review of any one or more of the twenty-eight (28) “core reference documents” listed in the EPA-TSD. Section I, Paragraph 1(a)(ii) of ITSSD’ FOIA Request Clarification specifically identifies one other federal agency that may likely have been involved in this process (DOC-NOAA), two possible executive offices that may likely have been involved in this process (Office of Management and Budget (“OMB”) and Office of Science and Technology Policy (“OSTP”)), and one interagency entity that may likely have been involved in this process (US Global Change Research Program/Climate Change Science Program (“USGCRP/CCSP”).

B. EPA Records Disclosing Information About Parties Which Had Conducted Peer Reviews of EPA-, Other Federal Agency- and Other Third-Party-Developed HISAs

As can be gleaned from A. above, EPA’s satisfaction of its IQA compliance responsibilities with respect to EPA-disseminated HISAs supporting the Administrator’s CAA Section 202(a)(1) findings depended on more than its ability to substantiate that the peer review of *EPA-developed* HISAs had

satisfied the highest and most rigorous level peer review standards applicable to HISAs imposed by the IQA and OMB, EPA and other federal agency IQA-implementing guidelines. In addition, EPA also had been legally obliged to substantiate whether the *HISAs developed by other than EPA* which the Administrator had embraced and accepted as its own (as discussed in C. below) had been peer reviewed in a manner that had satisfied the highest and most rigorous level peer review standards applicable to HISAs imposed by the IQA and OMB, EPA and other federal agency IQA-implementing guidelines.

For this reason, ITSSD's May 9, 2014 letter correspondence drafted in response to your EPA-OAR email correspondence of May 8, 2014, stated as follows:

“EPA's difficulty in responding to ITSSD's FOIA request is more likely attributable to the complex nature of the processes that EPA, and/or EPA-hired third party contractors, had, presumably, employed to scientifically support the Administrator's positive GHG endangerment and cause or contribute findings. Those findings had depended on EPA's, and/or EPA-hired third-party contractors' competent evaluation and validation (scientific peer review) of numerous climate science-related assessments designated as “highly influential scientific assessments” (“HISAs”) which had been prepared by EPA and by third parties, all of which had been subject to the highest and most rigorous level peer review, conflict-of-interest and transparency standards imposed by the Information Quality Act (“IQA”) and applicable OMB and EPA IQA-implementing guidelines.”

Indeed, Section I, Paragraph 2 of ITSSD's FOIA Request Clarification clearly identifies for disclosure all peer review-related records concerning EPA's decision to utilize federal advisory committees, third-party contractors, other federal agencies and/or interagency entities to conduct substantive peer reviews, undertake peer reviewer selection and screening and peer review panel formation with respect to the twenty-eight (28) core reference documents listed in the EPA-TSD. Section I, Paragraph 3 of ITSSD's FOIA Request Clarification clearly identifies for disclosure all peer review-related records evidencing that EPA had entered into contracts with third-parties and into agreements with other federal agencies, executive offices or interagency entities, pursuant to which such third parties, rather than EPA, had agreed to conduct, manage or oversee peer reviews on EPA's behalf of any one or more of the twenty-eight (28) “core reference documents”.

Section I, Paragraph 4 of ITSSD's FOIA Request Clarification, furthermore, clearly identifies for disclosure all EPA records evidencing the criteria EPA had employed in selecting the members of EPA-established federal advisory committees that had been charged with performing a peer review of any one or more of the twenty-eight (28) “core reference documents”. Section I, Paragraph 4 also clearly identifies for disclosure all peer review-related records evidencing the specific substantive and procedural peer review activities undertaken by third parties on EPA's behalf pursuant to such agreements with respect to the twenty-eight (28) core reference documents listed in the EPA-TSD.

Section I, Paragraphs 4-14 of ITSSD's FOIA Request Clarification, moreover, clearly identify for disclosure all EPA records evidencing the criteria that EPA-established federal advisory committees, EPA-hired third-party contractors and/or interagency entities had employed, pursuant to agreement,

in conducting substantive peer review, selecting individual peer reviewers and forming peer review panels with respect to the twenty-eight (28) “core reference documents” listed in EPA’s TSD. ITSSD is well aware of the ethical standards (including the avoidance of conflicts-of-interest and personal and institutional bias/partiality) to which EPA and EPA-established federal advisory committees had been subject in conducting the peer review of EPA-developed HISAs, as set forth in Section 3.4.5 of EPA’s Peer Review Handbook. The question that EPA is obliged to answer, but has not yet answered, is how EPA and EPA-established federal advisory committees had substantiated their compliance with these standards. Based on the limited information that EPA has thus far made publicly available, as set forth in Section II.B.1 of the Addendum accompanying ITSSD’s FOIA Request Clarification (pp. 21-23), reasonable persons would be compelled to conclude that EPA has failed to meet its legal obligations under the IQA and OMB and EPA IQA-implementing guidelines.

In addition, Section I, Paragraph 16 of ITSSD’s FOIA Request Clarification clearly identifies for disclosure all EPA records indicating that other federal agencies, other federal agency-established federal advisory committees, other federal agency-hired third-party contractors (such as National Academies of Science/National Research Council), interagency entities (such as USGCRP/CCSP), or executive offices (such as OMB, OSTP) had conducted peer review of other agency-developed HISAs upon which the Administrator’s CAA Section 202(a)(1) findings had primarily relied.

Section II, Paragraph 1(d)(ii) of ITSSD’s FOIA Request Clarification clearly identifies records for disclosure verifying that the federal agencies which had provided climate science-related assessment peer review services (substantive peer review, peer review management and/or peer review oversight) on other federal agency and other third party-developed HISAs during the period covered by ITSSD’s FOIA Request Clarification (January 1, 2005 through December 31, 2011) had included DOC-NOAA, DOE, DOI-USGS, DOT, NASA, and USDA. Since the filing of ITSSD’s FOIA Request Clarification, ITSSD has learned that personnel from the National Science Foundation’s National Corporation for Atmospheric Research (“NSF-NCAR”) also had played a major role in peer reviewing one or more of the twenty-eight 28 “core reference documents”, including IPCC assessments, as well as the IPCC’s Fourth Assessment Report.

C. *EPA Records Demonstrating Measures Taken by EPA to Ensure That EPA-, Other Federal Agency- and Other Third-Party-Developed HISAs Satisfied U.S. IQA HISA Peer Review Standards*

As noted in A. and B. above, EPA had been statutorily and administratively obliged as a matter of law to ensure that all third-party-developed HISAs upon which the Administrator’s CAA Section 202(a)(1) findings had primarily and heavily relied had satisfied the highest and most rigorous level IQA, OMB, EPA and other federal agency IQA-implementing standards applicable to HISAs. These included the HISAs developed by the IPCC and the ‘independent’ NRC, and those developed by other federal agencies under the auspices of the USGCRP/CCSP which the Administrator had accepted and embraced as its own. Section II.B.1 of the Addendum accompanying ITSSD’s FOIA Request Clarification (p. 16) clearly documents how the Administrator’s CAA Section 202(a)(1) findings had confirmed that the Administrator had accepted and embraced the findings contained in such HISAs as EPA’s own climate science:

“[T]he Administrator’s GHG endangerment and cause or contribute findings asserted that, the scientific assessments of the IPCC, the USGCRP, and the NRC were ‘the best reference materials for determining the general state of knowledge on the scientific and technical issues before the agency in making an endangerment decision.’[fn] In addition, said findings stated that, ‘*[t]hese assessments therefore essentially represent the U.S. government’s view of the state of knowledge on greenhouse gases and climate change.* For example, with regard to *government acceptance and approval of IPCC assessment reports*, the USGCRP Web site states that: ‘When governments accept the IPCC reports and approve their Summary for Policymakers, they acknowledge the legitimacy of their scientific content.’[fn] *It is the Administrator’s view that such review and acceptance by the U.S. Government lends further support for placing primary weight on these major assessments*”[fn] (italicized emphasis in original; underlined emphasis added).

The EPA Administrator’s clear and candid admission that it had accepted and embraced as its own the findings contained in these third party-developed HISAs, which it subsequently proceeded to disseminate to the public in the text of its CAA Section 202(a)(1) findings, had legal significance then, and continues to have legal significance now. EPA is legally and morally obliged to recognize such legal significance in its response to ITSSD’s FOIA Request Clarification. In particular, as the result of the Administrator’s admission, EPA had then been legally required to ensure that such HISAs had satisfied the highest and most rigorous peer review standards imposed by the IQA and OMB, EPA and other federal agency IQA-implementing guidelines. Although this legal obligation continues to this day, EPA has yet to substantiate how it had achieved compliance with these legal authorities.

The statutory and administrative legal authorities which imposed the peer review standards to which EPA continues to be subject required EPA to substantiate that it had gone above and beyond ordinary peer review standards to ensure that all substantive elements of the HISAs, and the statistical and computational modeling utilized to report observed phenomena and to develop future projections adequately supported the statements contained in those assessments, and consequently, that such HISAs had been evaluated, validated and subject to reproducibility as a matter of science. It also means that EPA is obliged to demonstrate that it had gone above and beyond ordinary peer review standards to ensure that each element of the rigorous HISA peer review process, namely, peer reviewer selection and eligibility criteria, conflicts-of-interest, independence and bias screenings, and peer review panel balancing had definitively cleared specific peer reviewers for eligibility and participation.

These legal authorities also continue to require EPA to demonstrate that it had gone above and beyond ordinary peer review standards to ensure that all apparent or actual conflicts of interest, incidences of lack of independence or individual or institutional bias had been identified and publicly disclosed. And, to the extent such conflicts-of-interest, incidences of lack of independence and individual/institutional bias had been resolved in favor of eligibility and participation, EPA is obliged to substantiate that it had ensured that such decision, as well, had been publicly disclosed during the course of the peer process, consistent with Sections 3.4.5-3.4.6 and Section 3.6.4 of EPA’s Peer Review Handbook. In addition, it also means that EPA had to go above and beyond

ordinary peer review standards to demonstrate, with respect to the HISAs that EPA and third parties had peer reviewed, that all agency communications with the individual peer reviewers ultimately selected had been transparent as concerns the peer review charge, instructions, discussions of the scientific issues, responses to peer reviewer comments, author responses, etc. In sum, Section I, Paragraphs 4-14 of ITSSD's FOIA Request Clarification clearly identify records for disclosure that seek substantiation that EPA and third party peer review managers and overseers whose work the Office of the Administrator had embraced and accepted as its own had complied with these elements of the HISA peer review process.

The high legal benchmark to which EPA had been subject did not permit EPA to accept *prima facie* the nearly identical representations tendered by such third parties stating that the climate science-related HISAs they had developed and which had been peer reviewed had satisfied the highest and most rigorous level IQA and OMB, and other federal agency IQA-implementing guideline standards applicable to HISAs. Rather, EPA had been obliged to seek some form of tangible demonstrative evidence verifying that each federal agency's certification of IQA HISA compliance accompanying the climate science-related assessments developed by such federal agency under the auspices of the USGCRP/CCSP had actually satisfied that standard.

Section I, Paragraph 16 of ITSSD's FOIA Request Clarification makes reference to such standard and to the boilerplate certification of IQA HISA compliance contained in the HISAs developed by each federal agency, including EPA, which had been delegated 'lead agency' assessment development responsibilities by the USGCRP/CCSP. Section II.B.1 of the Addendum incorporated in ITSSD's FOIA Request Clarification (pp. 19-20) discusses the legal significance of the HISA IQA compliance certifications federal agencies had submitted to the USGCRP/CCSP upon which EPA had apparently relied as evidencing such agencies' adequate peer review of the assessments they had developed.

Furthermore, the high legal benchmark to which EPA had been subject did not permit EPA to accept and rely, without more, on the *pro forma* peer review and publication approval processes and procedures allegedly employed in the peer review of the IPCC, USGCRP/CCSP and NRC HISAs that the EPA-TSD had described as "core reference documents", and which processes and procedures had been reproduced in the EPA-TSD and in the Response to Stakeholder Comments that had been previously submitted in regard to the Administrator's CAA Section 202(a)(1) findings. Section II.B.1 of the Addendum accompanying ITSSD's FOIA Request Clarification (pp. 16-17), in quoting portions of the EPA-TSD and EPA's CAA Section 202(a)(1) findings, clearly identifies, how, to-date, EPA has "offered little or no support for the EPA assertions that,

[1] 'the comprehensiveness of these assessments and their review processes... provide EPA with assurances that this material has been well vetted by both the climate change research community and by the U.S. government.' [fn];

[2] ['p]eer review and transparency are central to each of these research organizations' report development process. Given the comprehensiveness of these assessments and their review processes, these assessment reports provide EPA with assurances that this material has been well vetted by both the climate change research community and by the U.S. government.';

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[3] ‘this document relies on information that is objective, technically sound and vetted and of high integrity’ and that ‘use of these assessments complies with EPA’s information quality guidelines’.[fn]”

To reiterate, the IQA and OMB, EPA and other federal agency IQA-implementing standards referred to are those pertaining specifically to: 1) the substantive peer reviews conducted; 2) the peer reviewer selection processes employed, which include the experience, credentials and competence criteria imposed, individual peer reviewer conflict-of-interest, independence and bias screenings and peer review panel balancing undertaken; and 3) the public transparency practiced by peer review managers and overseers with respect to the charge given to peer reviewers, discussions of the scientific issues, peer reviewer comments, agency and public responses to peer reviewer comments, the draft, interim and final assessments peer reviewed, the peer review panel report issued, discussions between the agency and the peer review panel regarding agency disposition of substantial recommended changes to such HISAs, and the disclosure of ALL apparent as well as actual conflicts-of-interest, bias and lack of independence, once identified and the manner in which they had been resolved. (*See, e.g.*, OMB Peer Review Bulletin, Section III; EPA Peer Review Handbook (Foreword p. xiii, Fig. 1 (updated), Sections 1.2.10, 1.2.14, 1.4, 1.5.3(h), 1.5.9, 2.2.2, 2.2.4, 2.2.5, 2.2.17, 2.4.1, 2.4.3, 4.2, EPA Peer Review and Peer Involvement Policy Statement, p. 1).

As EPA’s IQA-implementing guidelines specifically provide, since the Administrator’s CAA Section 202(a)(1) findings had primarily and heavily relied upon the twenty-eight (28) “core reference documents” characterized as HISAs, EPA had been legally obliged to ensure that adequate external peer reviews had been conducted with respect to EPA and EPA-established federal advisory committee-developed HISAs. In addition, however, EPA also had been legally obliged to ensure that adequate external peer reviews had been conducted with respect to HISAs developed by other federal agencies and by other third parties such as the NRC and the IPCC, which the Administrator had embraced and accepted as its own. Regrettably, EPA has, thus far, failed to substantiate how its review of the peer review processes of the IPCC, USGCRP/CCSP and NRC, which had allegedly been employed to review the HISAs each third party entity had developed and/or reviewed, had satisfied EPA’s statutory and administrative law obligations.

As the administrative record reflects, and Section II.B.1 of ITSSD’s FOIA Request Clarification (pp. 19-21) explains, the peer review processes of the IPCC and of federal agencies participating in the USGCRP/CCSP had been seriously compromised. These lapses in governmental and intergovernmental processes consequently raised the threshold of evidence that EPA previously had to provide in order to demonstrate that its reliance upon such processes fulfilled its legal obligations under the IQA and OMB, EPA and other federal agency IQA-implementing guidelines. In addition, Sections II.B.4 and II.B.5 of ITSSD’s DOC-NOAA FOIA Request Clarification (<https://foiaonline.regulations.gov/foia/action/getContent?objectId=iR-hUi48QxdvsHRndoxP23jx4nBQwO8Q>) further documents and explains the numerous peer review process flaws surrounding the development of IPCC’s Fourth Assessment Report, the development of three DOC-NOAA HISAs that had been reviewed by the USGCRP/CCSP, and the development of six other DOC-NOAA HISAs which had been peer reviewed by the National Research Council of the National Academies of Science. Considering how many peer review process flaws surrounded

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the HISAs many of which had been designated as “core reference documents” upon which the EPA Administrator’s CAA Section 202(a)(a) findings had primarily and heavily relied, EPA’s failure, thus far, to demonstrate how it had ensured its IQA compliance in vetting such HISAs is quite telling.

Indeed, Section 2.2.17 of EPA’s Peer Review Handbook sets forth the high standards with which EPA had been charged to ensure EPA and third-party IQA compliance:

“Any scientific and/or technical work product that is used in Agency decision making and is considered influential scientific information or *a highly influential scientific assessment* be a candidate for peer review regardless of whether the work product is produced by the Agency or another organization. Therefore, all work products important to EPA environmental decision making that are *independently generated by other organizations (e.g., other Federal agencies, interagency groups, State and Tribal bodies, environmental groups, industry, educational institutions, international bodies)* need to be considered as candidates for peer review...It is hoped that if the other organization has the work product independently peer reviewed, the peer review will meet the intent of the Agency’s Peer Review Policy and EPA’s proposed use of the product (i.e., the peer review is basically equivalent to what EPA would do). Agency staff from the appropriate office(s) should examine closely the particulars of the peer review to ensure independence and a conscious effort to incorporate the peer reviewers’ comments into the final work product. *If there are perceived, or real, conflicts of interest, this may preclude the use of that peer review and, in those instances, another peer review would be needed*” (underlined emphasis in original; emphasis in italics added).

Furthermore, Section 2.4.2 of EPA’s Peer Review Handbook provides that,

“In principle, peer review provides the greatest credibility for influential scientific information and *highly influential scientific assessments* when it involves *well-qualified external reviewers*, is intensive in its examination, and operates through a more or less *formal and transparent process*...*Generally the more novel or complex the science or technology, the greater the cost implications of the impending decision, and the more controversial the issue, then the stronger the indication is for a more extensive and involved peer review and for external peer review* in particular. *Certain work products may clearly lend themselves to extensive external peer review; generally these will be products with large impacts (e.g., those that support Tier 1 and Tier 2 rulemakings)*...b) *Highly influential scientific assessments are expected to undergo external peer review. When time and resources allow, panels are preferable*...” (emphasis added).

Moreover, Section 2.4.3 of EPA’s Peer Review Handbook provides as follows:

“2.4.3 **What are Some Examples of External Peer Review Mechanisms?...**d) *Review by an established Federal Advisory Committee Act mechanism such as the*

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Science Advisory Board (SAB), FIFRA Scientific Advisory Panel (SAP), ORD's Board of Scientific Counselors (BOSC), or the Clean Air Scientific Advisory Committee (CASAC) - e.g., a review of a criteria document for a particular chemical risk;...f) Review by the NAS (e.g., a review of the state of current knowledge about children's health risks from pesticide exposures" (bold-faced emphasis in original; italicized emphasis added).

Finally, Section 2.5.3 of EPA's Peer Review Handbook clearly sets forth the different categories of records that fall within the scope of the records ITSSD requested in Section I, Paragraphs 4-14 of ITSSD's FOIA Request Clarification. Most of these records are currently unavailable even with respect to the HISAs developed by EPA. Section 2.5.3 provides,

"The peer review record should include all materials considered by the individual peer reviewers, the peer review report, and other input. *Such materials include, at a minimum: a) The draft work product submitted for peer review; b) Materials and information (including the charge) given to the peer reviewers; c) The peer review report, which summarizes the peer review findings and contains information about the peer reviewers (such as reviewers' names, affiliations, and a statement concerning potential conflicts and their resolution, if applicable); d) Logistical information about conduct of the peer review (such as times and locations meetings); e) A memorandum, or other written record, approved by the Decision Maker, responding to the peer review comments specifying acceptance or, where thought appropriate, rebuttal and non-acceptance. The Office should prepare a written response to the peer review report addressing each comment; f) The final work product"* (underlined emphasis in original; italicized emphasis added).

Similarly, Section 2.5.4 of EPA's Peer Review Handbook requires EPA to:

"post or provide a link to the peer review reports on the Science Inventory website (<http://cfpub.epa.gov/si/>) along with all materials related to the peer review (charge statement and Agency response). The credibility of the final work product is likely to be enhanced if the public understands how the Agency addressed the specific concerns raised by the peer reviewers...*For highly influential scientific assessments, the OMB Bulletin explicitly calls for Offices to prepare a written response to the peer review report explaining (a) the agency's agreement or disagreement with the views expressed in the report, (b) the actions that have or will be und Office believes those actions satisfy any key concerns or recommendations in the report. These responses will also be posted on the Science Inventory website"* (emphasis added).

Unfortunately, EPA has failed to publicly disclose such information, which explains why Section I, Paragraph 12 of ITSSD's FOIA Request Clarification seeks EPA's disclosure of such records.

Lastly, Section 2.5.5 of EPA's Peer Review Handbook provides that,

“If EPA relies on influential scientific information *or a highly influential scientific assessment* to support a regulatory action, *the preamble should include a discussion of how EPA implemented provisions of the OMB Bulletin*” (emphasis added).

Unfortunately, the Administrator’s CAA Section 202(a)(1) findings which constitute an agency regulatory action failed to provide such information *at all*. For this reason, ITSSD’s FOIA Request Clarification and this Second ITSSD FOIA Request Clarification seek EPA disclosure of all such records. To paraphrase ITSSD’s previously filed EPA FOIA Fee Waiver Clarification, in the absence of documentary evidence substantiating EPA IQA and OMB compliance with respect to the peer reviews conducted by EPA and third parties of EPA and third-party developed HISAs supporting the Administrator’s CAA Section 202(a)(1) findings, the public has no choice but to question the propriety of the Administrator’s findings themselves.

D. *EPA Records Disclosing Information Substantiating How the Administrative Mechanisms EPA Had Employed to Ensure that Affected Persons May Seek and Obtain Correction or Reconsideration of Scientific Information EPA Had Disseminated in Violation of OMB Guidelines Had Actually Satisfied IQA and OMB and EPA IQA-Implementing Guidelines*

Section II.B.1 of ITSSD’s FOIA Request Clarification (pp. 23-24) reflects ITSSD’s effort to secure EPA disclosure of all records demonstrating EPA’s compliance with Section 515(b)(2)(B) of the Paperwork Reduction Act – a/k/a the Information Quality Act (P.L. 106-554, Appendix C, 114 STAT. 2763A–153). In particular, it states that, “the administrative record does not reflect that EPA had substantiated how its chosen method for addressing public stakeholder IQA requests for correction (“RFCs”) of disseminated EPA climate science reports and assessments underlying EPA’s proposed Clean Air Act (“CAA”) Section 202(a)(1) findings.”

This portion of ITSSD’s FOIA Request Clarification reproduces the analyses contained in OMB’s IQA guidelines and Peer Review Bulletin and EPA’s Peer Review Handbook drawing distinctions between the Administrative Procedure Act (“APA”) notice and comment procedure and the IQA administrative mechanism intended to address stakeholder requests for correction and reconsideration of agency disseminated scientific information. Since EPA had treated as part of the APA notice and comment procedure stakeholder requests for correction and reconsideration of the EPA-developed and third party-developed HISAs which the Administrator had accepted and embraced as its own and disseminated to the public, Section II.B.1 of ITSSD’s FOIA Request Clarification seeks “disclosure of EPA records substantiating how this agency action had ensured EPA’s compliance with the relevant IQA and OMB and EPA IQA-implementing guideline requirements”.

E. *Conclusion*

As your office must be aware, “[i]nformation regarding a peer review...*is subject to release if EPA receives a Freedom of Information Act (FOIA) request*, unless the peer review information meets the criteria for an exemption under the FOIA” (emphasis added). (See Section 4.3.3 of EPA’s Peer Review Handbook).

Since ITSSD's FOIA Request Clarification had been filed and received on April 28, 2014, unless EPA seeks additional time to respond and provides notice thereof, ITSSD looks forward to receiving EPA's response thereto no later than May 28, 2014. ITSSD also looks forward to accessing its previously filed FOIA Request Clarification and this Second ITSSD FOIA Request Clarification on the FOIAonline.regulations.gov website by such time.

ITSSD trusts that this Second ITSSD FOIA Request Clarification will further assist EPA in meeting this deadline. Consequently, any further claim by EPA-OAR that ITSSD's FOIA Request Clarification does not reasonably describe the records we are seeking will be deemed to be without foundation and disingenuous.

Very truly yours,

Lawrence A. Kogan

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ITSSD