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

Re: **ITSSD FOIA Fee Waiver Request Clarification**  
**Consolidated FOIA Request No. DOC-NOAA-2014-000714**

Dear Ms. Schumacher:

Requester Institute for Trade, Standards and Sustainable Development (“ITSSD”)<sup>1</sup> is in receipt of your correspondence dated, April 1, 2014. Therein, you denied the request for a fee waiver contained in ITSSD’s previously filed DOC-NOAA FOIA requests and provided ITSSD with a reference to DOC-NOAA’s fee waiver regulations. In particular, the April 1 correspondence stated that,

“your fee waiver justification did not provide us with all the necessary information to make an informed decision as to whether or not to appropriately grant you a fee waiver for these specific records”, and that “[i]f you would like further consideration of your fee waiver request, please explain in detail how disclosure of the records requested would satisfy all the requirements for a fee waiver”.

The April 1, 2014 correspondence also offered ITSSD the opportunity to restate and clarify for the record its fee waiver justifications, consistent with the 6 (six)-factor fee waiver test set forth in 15 C.F.R., §4.11(k)(1)-(3),<sup>2</sup> if possible, by no later than April 22, 2014. Following ITSSD’s April 23<sup>rd</sup> request for additional time, your office kindly granted it until opening of business, Monday, May 5, 2014<sup>3</sup> to make such submission.

In response thereto, ITSSD hereby submits this ITSSD DOC-NOAA **FOIA Fee Waiver Request Clarification** which discusses how ITSSD satisfies Factors 1-6 of the six-factor fee waiver test set forth in 15 C.F.R. §4.11(k)(1)-(3). *In addition*, ITSSD also submits, under separate cover, a DOC-NOAA **FOIA Request Clarification** that explains more clearly the object of ITSSD’s seven (7) previously filed FOIA Requests<sup>4</sup> which have since been consolidated by your office. This FOIA Fee Waiver Request Clarification closely corresponds to the FOIA Request Clarification.

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

“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...”<sup>5</sup>

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*,<sup>6</sup> 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.”<sup>7</sup>

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.’”<sup>8</sup> If, as *Better Gov't* suggests, it is true that a federal agency cannot inappropriately wield FOIA's fee waiver provisions as an effective obstacle to prevent activist groups such as these (*which were known to utilize FOIA to monitor and challenge government activities*) from obtaining the requested information, it would be highly inappropriate for NOAA to use 15 C.F.R. Part 4.11(k)(1)-(3) as an effective obstacle to prevent ITSSD from obtaining the records it requested.

Unlike the organizations in the above-referenced case, ITSSD is primarily an educational nonprofit nongovernmental organization that takes a scholarly approach to publicly 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 with any federal, state or local government agency.

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

The ITSSD FOIA Request Clarification to which this ITSSD FOIA Fee Waiver Request Clarification corresponds makes clear that it seeks disclosure of all

DOC-NOAA records (“all DOC-NOAA climate science-related peer review files”) substantiating the specific measures DOC-NOAA had taken, consistent with the highest and most rigorous standards applicable to highly influential scientific assessments (“HISAs”) imposed by the Information Quality Act (“IQA”) and the Office of Management and Budget (“OMB”) and DOC-NOAA IQA-implementing guidelines, to ensure the quality, integrity and reliability of all DOC-NOAA- developed (in whole or in part) and/or reviewed climate science-related assessments and reports which DOC-NOAA *knew or had reason to know* the EPA Administrator would rely upon in reaching positive greenhouse gas (“GHG”) endangerment and cause or contribute findings under Clean Air Act Sec. 202(a)(1).<sup>9</sup>

ITSSD’s FOIA Request Clarification sets forth a detailed description (in Section I) of the many relevant climate science-related files that fall within the scope of said request, along with applicable definitions (in Section II), in addition to an explanatory annotated Addendum and five Appendices.

The records ITSSD requested seek substantiation of specific DOC-NOAA peer review operations and activities the agency had been obliged to undertake in fulfillment of its federal statutory<sup>10</sup> and administrative<sup>11 12</sup> mandate to ensure the quality, integrity and reliability of the DOC-NOAA-developed highly influential scientific assessments (“HISAs”) that DOC-NOAA *knew or had reason to know* would influence the EPA Administrator’s CAA Section 202(a) GHG findings. Section I of ITSSD’s FOIA Request Clarification, Section B of the Addendum and Appendices 1-3 indicate that these supporting assessments, especially those designated “core reference documents”, are listed in the EPA Technical Summary Document (“EPA-TSD”) accompanying the EPA Administrator’s findings.

The President, early in his administration, had expressed concern that public trust in Government science would be compromised unless federal agencies, including EPA, ensured the integrity of the scientific peer review process they employed in producing scientific information upon which they grounded policy decisions. As a result, in March 2009, he issued a policy memorandum setting forth principles for federal agencies, including DOC-NOAA, to follow in ensuring the integrity of agency science, which the White House Office of Science and Technology Policy’s Director subsequently reduced to implementing guidelines. Both the President’s memorandum and the OSTP Director’s several related communications refer *inter alia* to the importance of the scientific peer review process to the “[s]uccessful application of science in public policy” and “in complying with and applying relevant statutory standards” – i.e., the IQA and agency IQA-implementing guidelines.<sup>13</sup>

In response to these White House initiatives, the Under Secretary of Commerce for Oceans and Atmosphere/DOC-NOAA Administrator, during December 2011, issued Administrative Order (NAO)

202-735D. AO 202-735D established “a policy on the integrity of scientific activities that the agency conducts and uses to inform management and policy decisions”, which builds upon various legal authorities, including the Information Quality Act and applicable agency guidelines.<sup>14</sup> During the same month, DOC-NOAA also issued a procedural handbook implementing that AO which *inter alia* “addresses procedures to be followed in responding to allegations of Scientific and Research Misconduct pertaining to NOAA contracts and to external organizations and persons receiving NOAA financial assistance for scientific or research activities.”<sup>15</sup> And, by December 2012, DOC-NOAA had issued its first Fiscal Year annual report on scientific and research misconduct.<sup>16</sup>

It is gratifying to see that DOC-NOAA has since developed, adopted and employed new programs intended to further ensure the integrity of agency science. However, such recent efforts do not remedy the infirmities that beset prior DOC-NOAA peer review processes. DOC-NOAA’s peer review processes should have verified that those employed by the IPCC, USGCRP/CCSP and NRC upon which DOC-NOAA had relied in certifying that the IPCC-derived and USGCRP/CCSP facilitated DOC-NOAA-developed climate science-related assessments had satisfied the highest and most vigorous level peer review, conflict-of-interest and transparency standards applicable to HISAs, within the meaning of the IQA and the OMB and DOC-NOAA IQA implementing guidelines. DOC-NOAA *knew or had reason to know* that the EPA Administrator would primarily rely upon these assessments and their related DOC-NOAA’s IQA compliance certifications in reaching positive CAA Section 202(a)(1) GHG findings and subsequently promulgating economically significant national mobile and stationary source GHG emissions control regulations. These are the precisely the types of government operations and activities that the IQA was intended to address.

Sections I and II of ITSSD’s FOIA Request Clarification, Part B of the accompanying Addendum and Appendices 1-3 indicate that the EPA Administrator had primarily relied, in part, upon ten (10) DOC-NOAA-developed climate science-related assessments facilitated by the interagency entity known as the United States Global Change Research Program/Climate Change Science Program (“USGCRP/CCSP”). Eight (8) of these climate science-related assessments had been referred to as USGCRP/CCSP synthetic assessment products (“SAPs”). In addition, Sections I and II of ITSSD’s FOIA Request Clarification, Part B of the accompanying Addendum and Appendices 4-5 indicate that much of the climate science referenced in these USGCRP/CCSP SAPs and two (2) other DOC-NOAA-developed climate science-related assessments had been developed by the United Nations Intergovernmental Panel on Climate Change (“IPCC”). Part B of the Addendum accompanying ITSSD’s FOIA Request Clarification reveals that there was interagency agreement under the USGCRP/CCSP to classify such assessments as “highly influential scientific assessments” (“HISAs”) given their novelty, controversial nature and economic significance. It also indicates that EPA had embraced and publicly disseminated these assessments and supporting scientific literature, data and statistical models as its own, thereby subjecting the peer review process utilized by EPA and other federal agencies, including DOC-NOAA, and the third-party contractors such agencies had hired to vet them, to the highest and most rigorous level information quality standards applicable to HISAs.<sup>17</sup>

Sections I and II of ITSSD's FOIA Request Clarification, for example, seeks disclosure *inter alia* of documentation evidencing specific practices engaged in by DOC-NOAA, and/or by third parties with which DOC-NOAA had entered into agreements (and the agreements themselves), to render peer review services, including peer reviewer selection and peer review panel composition, management, oversight and review, as well as, substantive peer review of climate science-related assessments. To this end, Sections I and II of ITSSD's FOIA Request Clarification seek disclosure of DOC-NOAA and related DOC-NOAA third-party contractor (i.e., the National Research Council and USGCRP/CCSP) records demonstrating the criteria employed for purposes of peer reviewer selection and peer review panel composition, management oversight and review, including with respect to actual testing performed to ensure: against perceived and actual financial and nonfinancial conflicts-of-interest and peer reviewer bias; independence from agency, university and corporate sources; and professional credentials and relevant experience. Third parties for such purposes included the interagency USGCRP/CCSP and the National Research Council of the National Academy of Science, as well as, intergovernmental organizations, specially formed federal advisory committees and private contractors.

In addition, Sections I and II of ITSSD's FOIA Request Clarification seeks disclosure of climate science-related files containing the full and summary versions of all peer reviewer and peer review panel and federal advisory committee reports, interagency entity peer review reports, correspondences and other documents referred to in DOC-NOAA Peer Review Plans, peer review panel/federal advisory committee meeting minutes, etc. Sections I and II of ITSSD's FOIA Request Clarification also seek disclosure *inter alia* of agency records evidencing DOC-NOAA or DOC-NOAA-hired third party contractor use of adequate transparency criteria to ensure the facilitation of quality-based, focused and in-depth peer review panel discussions of the issues, provision of the rationale and supportability of the panel's findings, verification of the accuracy and clarity of the panel report, and avoidance of the repeated use of the same reviewer in multiple assessments.

Sections I and II of ITSSD's FOIA Request Clarification, furthermore, seeks disclosure of DOC-NOAA climate science-related files demonstrating, for example, the extent to which DOC-NOAA had planned to disclose and had actually disclosed to the public on its publicly accessible website clear and understandable (user-friendly) information about, *inter alia*, the substantive peer review, individual peer reviewer selection and peer review panel composition processes that DOC-NOAA, DOC-NOAA third-party contractors (i.e., the National Research Council and USGCRP/CCSP) and the IPCC (upon whose assessments DOC-NOAA had relied) had actually undertaken, the specific DOC-NOAA, DOC-NOAA-hired third-party contractor, DOC-NOAA-established federal advisory committee and IPCC (upon whose assessments DOC-NOAA had relied) peer review panel charges actually made, the contents of required peer review reports containing peer reviewer comments or summaries of peer reviewer comments produced in satisfaction of the specific peer review panel charges, and all DOC-NOAA responses to individual peer reviewer and peer review panel comments and reports.

Sections I and II of ITSSD's FOIA Request Clarification, moreover, seeks disclosure of DOC-NOAA climate science-related files demonstrating that DOC-NOAA and/or contracted third parties had actually afforded the public via DOC-NOAA's website(s), following federal register notification, an

opportunity and sufficient time to participate in DOC-NOAA's peer review process. The records requested include those *inter alia* assuring that peer reviewers had received public comments that addressed significant scientific issues with ample time to consider them in their review. In this regard, Sections I and II of ITSSD's FOIA Request Clarification and Part B of the accompanying Addendum seek disclosure of DOC-NOAA climate science-related files substantiating that DOC-NOAA's chosen method for addressing public stakeholder IQA requests for correction ("RFCs") of disseminated DOC-NOAA climate science-related assessments and reports that DOC-NOAA *knew or had reason to know* would underlie the EPA Administrator's Clean Air Act ("CAA") Section 202(a)(1) findings had been sufficiently separate from and adequate to achieve that objective and to satisfy the relevant statutory and administrative requirements of the IQA and OMB and DOC-NOAA IQA-implementing guidelines.

Lastly, Sections A and B of the Addendum accompanying ITSSD's FOIA Request Clarification provides relevant contextual information describing the administrative dynamics and legal challenges surrounding DOC-NOAA's direct and indirect undertaking of climate science-related peer review operations and activities in support of the EPA Administrator's obligations under CAA Section 202(a)(1), that DOC-NOAA FOIA officials can use in identifying and locating the records requested.

In sum, the NOAA component of DOC, a federal agency, was obliged, as a matter of statute and administrative practice and procedure, to undertake each of the operations and activities described above. Since "[t]he subject of the requested records concern identifiable operations or activities of the Federal Government, with a connection that is direct and clear"<sup>18</sup> – i.e., records pertaining to the internal and external operations of the DOC-NOAA - your offices should find that ITSSD's DOC-NOAA FOIA Request Clarification (explaining ITSSD's previously filed FOIA Requests consolidated under case file DOC-NOAA-2014-000714) 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 (15 CFR, §4.11(k)(2)(ii))**

ITSSD's FOIA Request Clarification makes abundantly clear that the EPA Administrator had heavily and primarily relied upon and embraced and disseminated as its own, eight (8) DOC-NOAA-developed SAPs and two additional DOC-NOAA-developed climate science related assessments, as the basis for reaching positive CAA Section 202(a)(1) GHG findings. These findings then served to trigger EPA's issuance of economically significant national mobile and stationary source GHG emissions control regulations. ITSSD's FOIA Request Clarification also makes abundantly clear that DOC-NOAA *knew or had reason to know* that this would occur.

Appendices 1-3 of ITSSD's FOIA Request Clarification reveal that the EPA-TSD had designated a total of twenty-eight (28) climate science-related assessments, reports and studies as "core reference documents", and that DOC-NOAA had developed six (6) of those "core reference documents" – five (5) SAPs and the second national climate assessment referred to as "GCCP". Appendices 3-5 of ITSSD's FOIA Request Clarification show that each of the DOC-NOAA-developed "core reference documents" had referenced the climate science findings of the IPCC. Part B of the Addendum

accompanying ITSSD's FOIA Request Clarification reveals that DOC-NOAA scientists had participated extensively in the development of the IPCC AR4 assessment and discusses how that such participation had been reflected in these DOC-NOAA-developed assessments. Part B of said Addendum also reveals that DOC-NOAA alone, and with other federal agencies, had formed special purpose federal advisory committees to prepare and/or undertake the peer review of one or more DOC-NOAA 'lead agency'-developed SAPs.

Relevant law and implementing administrative guidelines obliged DOC-NOAA to ensure that the ultimate peer review of all agency-developed and disseminated climate science-related assessments, whether performed by DOC-NOAA, the USGCRP/CCSP and/or the NRC, had complied fully with the highest and most rigorous level IQA and OMB and DOC-NOAA IQA-implementing peer review, conflict-of-interest and transparency standards applicable to HISAs. Relevant law and implementing administrative guidelines also obliged DOC-NOAA to provide an appropriate mechanism for the administrative review of stakeholder requests for correction of those assessments, prior to those assessments having been used by the EPA Administrator as the basis for reaching positive CAA §202(a)(1) findings and promulgating GHG emissions control regulations.

As the Addendum accompanying ITSSD's FOIA Request Clarification reveals, DOC-NOAA has not publicly disclosed in a comprehensive and organized manner information about these government operations and activities. Due to the unavailability, and inaccessibility of many such records, the public has remained uninformed and lacks a basic understanding of these critical government operations and activities and their integral role in agency science development and, ultimately, agency policymaking. Only DOC-NOAA's immediate and comprehensive disclosure of the requested records is likely to contribute to public understanding of how the scientific peer review processes undertaken by DOC-NOAA, DOC-NOAA third-party-contractors and the USGCRP/CCSP to vet the DOC-NOAA-developed HISAs in question, and the administrative mechanisms DOC-NOAA had employed to review stakeholder requests for correction of such HISAs, had actually served to ensure the integrity of those assessments which DOC-NOAA *knew or had reason to know* the EPA Administrator would rely upon, in part, as the bases for policy decisions and regulatory action.

There are various incidents of DOC-NOAA nondisclosure of relevant information concerning DOC-NOAA and DOC-NOAA hired third-party contractor (i.e., USGCRP/CCSP and NRC) peer review operations and activities surrounding the development of certain DOC-NOAA-developed SAPs and other climate science-related assessments classified as HISAs. Such nondisclosure continues to cast public doubt on the quality, integrity and reliability of those processes and to promote ongoing public misunderstanding about how those processes, if they had been properly executed, could have resulted in valid EPA Administrator CAA §202(a)(1) GHG findings.

For example, five (5) DOC-NOAA-developed SAPs and the DOC-NOAA-developed GCCI, which had been designated as "core reference documents" and classified as HISAs, contained a statement certifying that said document *prima facie* satisfied all relevant and applicable IQA and DOC-NOAA IQA-implementing guideline requirements. However, DOC-NOAA has not yet publicly disclosed how it had substantiated that each such certification of IQA HISA compliance to the CCSP Committee

and to EPA had actually been satisfied, as Section VII of the OMB Peer Review Bulletin requires. DOC-NOAA also has not yet publicly disclosed the extent to which those climate-related assessments had referenced and relied upon the scientific findings of the IPCC, the peer review processes and procedures of which had been reported to be flawed, and whether such reliance, under those circumstances, had compromised the IPCC science upon which DOC-NOAA's USGCRP certification of IQA compliance had been based. Only DOC-NOAA public disclosure of such information is likely to contribute to public understanding of the sanctity of the peer review process actually utilized to vet such assessments

In addition, for example, the administrative record reflects that SAP1.1 had been developed and reviewed by a federal advisory committee, but DOC-NOAA has not yet disclosed the identities of the committee members that had undertaken peer review of that assessment. Although the Peer Review Plan for SAP1.1 had indicated that a final peer review report evaluating SAP1.1 had been issued, DOC-NOAA, however, has not yet publicly disclosed that report, including peer reviewer comments and agency and author responses thereto. In addition, DOC-NOAA has not publicly disclosed any information about a formal 'federal advisory committee peer review 'charge', peer review procedures, peer reviewer qualification and selection criteria, author responses to said report, and public comments submitted in response to later drafts of the revised assessment announced in the federal register. DOC-NOAA also has not yet publicly disclosed any minutes of meetings held between peer reviewers and authors who had been members of a DOC-NOAA-established federal advisory committee. Only public disclosure of such information is likely to contribute to public understanding of the sanctity of the peer review process DOC-NOAA had actually utilized to vet such assessment, the role served by public participation in that process, and consequently, the quality of the climate science produced therefrom.

Similarly, for example, although the administrative record shows that DOC-NOAA had worked with other agencies under the auspices of the interagency USGCRP/CCSP to identify and select qualified peer reviewers of SAP2.2, DOC-NOAA has not yet publicly disclosed the peer reviewer qualification and selection criteria it employed for such purposes. And, although DOC-NOAA had disclosed the peer review report that had been issued and peer reviewer comments provided, DOC-NOAA has yet to disclose detailed agency responses (and rationales) or author response to those comments, or the minutes of any meetings held among the peer reviewers and between the peer reviewers and the authors. DOC-NOAA also has not publicly disclosed the stakeholder comments it had supposedly received in response to the subsequently revised draft of SAP2.2 following the public notice and comment period it had announced in the federal register. Only public disclosure of such information is likely to contribute to public understanding of the sanctity of the peer review process DOC-NOAA had actually utilized to vet such assessment, the role served by public participation in that process, and consequently, the quality of the climate science produced therefrom.

Furthermore, for example, the administrative record reflects that eleven (11) peer reviewers had evaluated the Unified Synthesis Product ("USP)/GCCl, and that a peer review report evaluating that assessment had been both prepared and issued. However, DOC-NOAA has not yet publicly disclosed the contents of this report or any information concerning the criteria that had been employed to select

the specific peer reviewers identified in the assessment. DOC-NOAA also has not yet publicly disclosed any other information about the peer review process employed to evaluate this assessment, including information regarding meetings held among peer review committee members and between the peer review committee and the authors, agency and author responses to the peer reviewer comments, and information concerning stakeholder comments DOC-NOAA had supposedly received in response to a revised UPD/GCCI during the public notice and comment period the agency had announced in the federal register. DOC-NOAA also has not yet publicly disclosed the minutes of any meetings held between peer reviewers and authors who had been members of a DOC-NOAA-established federal advisory committee. Only public disclosure of such information is likely to contribute to public understanding of the sanctity of the peer review process DOC-NOAA had actually utilized to vet such assessment, the role served by public participation in that process, and consequently, the quality of the climate science produced therefrom.

Moreover, the administrative record reflects that DOC-NOAA had entered into six (6) climate science-related agreements with the National Research Council pursuant to which the NRC had provided peer reviews of the six (6) remaining DOC-NOAA-developed SAPs. However, DOC-NOAA has not yet publicly disclosed any records that would indicate how the agency had verified that the peer review processes employed by the NRC in connection with its review of each of these SAPs had fully complied with DOC-NOAA's IQA obligations, including the obligation it owed to the USGRCP/CCSP and other federal agencies to file valid IQA compliance certifications. Nor has DOC-NOAA, as a consequence, publicly disclosed how it had assured the IQA compliance of these DOC-NOAA-developed SAPs to the EPA Administrator whose positive CAA Section 202(a)(1) findings had relied primarily upon them.

For example, the administrative record indicates that NRC had selected a separate NRC Report Review Committee to undertake the peer review of each of SAPs 1.3, 2.4, 3.2, 3.3, 5.2, and 5.3, and that NRC also had selected separate groups of second-level reviewers to review each of the individual peer review reports produced by such committees. The administrative record also reflects that perceived/possible peer reviewer and second-level reviewer independence and conflict-of-interest issues had arisen as the result of the peer reviewer selection processes that NRC had employed in connection with the peer review of each such SAP. DOC-NOAA, however, has not yet publicly disclosed records indicating that it had questioned or otherwise pursued the NRC about such issues, or that it had considered that such issues might compromise the IQA compliance of such assessments. Nor has DOC-NOAA disclosed any records that would indicate that it had broached this subject with the USGCRP/CCSP in connection with its corresponding IQA certifications, or with EPA in connection with the EPA Administrator's CAA §202(a)(1) GHG findings. Only public disclosure of such information is likely to contribute to public understanding of the sanctity of the peer review processes that NRC had employed with respect to these SAPs upon which DOC-NOAA had relied, and of the efforts DOC-NOAA had made to ensure the IQA compliance of such assessments, each with a view towards ensuring the validity of the underlying climate science in the public eye.

In addition, the administrative record reflects that although NRC peer review reports had been issued as the result of NRC Report Review Committee evaluations of SAPs 1.3, 2.4, 3.2, 3.3, 5.2, and 5.3,

DOC-NOAA has not yet publicly disclosed any agency responses provided to the peer review panel comments contained within those peer review reports or any author comments submitted in response to the reports' findings. DOC-NOAA also has not disclosed the minutes of any meetings held among NRC Report Review Committee members or between such members and the authors, especially where such authors had been members of DOC-NOAA-established federal advisory committees (e.g., in connection with SAPs 1.3, 3.3 and 5.3). Only DOC-NOAA public disclosure of such information is likely to contribute to public understanding of the sanctity of the peer review process that the NRC had utilized and upon which DOC-NOAA had relied to ensure that such assessments had been properly vetted, and were thus, IQA-compliant.

Moreover, the administrative record reflects that DOC-NOAA has not yet publicly disclosed its responses to the following substantive NRC peer review panel comments contained within each of the NRC peer review reports noted above:

- 1) author failure to compare their results to peer reviewed literature, to correct biases in observation data and to provide details about models, data and assumptions used to explain scientific uncertainties where climate science reanalysis had been employed (SAP1.3);
- 2) author failure to adequately explain the relationship between ozone and climate change and to discuss the significant uncertainties arising from the lack of available observation data that can impact future ozone and climate projections (SAP2.4);
- 3) author failure to provide details concerning the models used to explain how emissions from radiatively active species had been predicted, the statistical methods applied to determine the relative significance of emissions trends, and the differences between uncertainties in known processes and uncertainties in future emissions (SAP3.2);
- 4) author overreliance on gray literature, and author failure to sufficiently support claims of trends in extreme events, to substantiate the time period(s) used to infer or deduce a trend, to provide precise statistical analytical support for statements made, and to elaborate upon the levels of uncertainty associated with both observed and projected trends in extreme events (SAP3.3);
- 5) author failure to address all (nonscientific) audiences specified in the prospectus, and to provide an assessment of the full range of 'best practices' approaches for characterizing, incorporating and communicating uncertainty (SAP5.2); *and*
- 6) author failure to supplement the model of innovation presented with greater discussion of published research on innovation processes, to clearly distinguish its discussion of climate variability (based mostly on observations) from its discussion of climate change (based mostly on projections), and to provide adequate evidentiary support for findings and recommendations relating to water resource decision-making (SAP5.3).

Only DOC-NOAA disclosure to the public of agency responses to the substantive NRC peer review panel comments contained within each of these NRC peer review reports is likely to contribute to public understanding of the NRC peer review processes at work, as well as, to the deliberative process that DOC-NOAA had employed to arrive at the climate science conclusions ultimately reflected in its final revised versions of these assessments.

Lastly, the administrative record reflects that DOC-NOAA has not yet publicly disclosed climate science-related files substantiating that the agency's chosen method for addressing public stakeholder

IQA requests for correction (“RFCs”) of DOC-NOAA-developed and disseminated HISAs, that it *knew or had reason to know* would underlie the EPA Administrator’s CAA §202(a)(1) GHG findings, had been sufficiently separate (from public notice and comment procedures) and adequate to achieve that objective, consistent with IQA statutory and administrative requirements. Only DOC-NOAA’s disclosure of records setting forth the legal grounds supporting its denial to stakeholders of an adequate and appropriately focused administrative scientific data quality review mechanism to respond to their RFCs, is likely to contribute to public understanding of DOC-NOAA’s proper implementation of climate science-related peer review procedures in compliance with the IQA and relevant OMB and DOC-NOAA IQA-implementing guidelines.

In sum, the records ITSSD has requested, once disclosed, will be “meaningfully informative about government operations or activities”.<sup>19</sup> Such operations or activities entail the carefully defined multilayered process of scientific peer review to which DOC-NOAA had been obliged to strictly adhere in order to ensure the quality, integrity and reliability of the DOC-NOAA-developed and disseminated climate science-related HISAs that it *knew or had reason to know* the EPA Administrator would rely upon as the bases for positive CAA §202(a)(1) GHG findings. In particular, disclosure of such records will be “meaningfully informative” about how DOC-NOAA had remained responsible for the manner in which such government operations or activities” had been performed even after the agency had contracted with the NRC to peer review these HISAs on its behalf. Since the requested records are not “already in the public domain, in either a duplicative or a substantially identical form,” DOC-NOAA’s disclosure of them would add much new information to the public’s understanding of key government operations or activities.<sup>20</sup> Consequently, “the disclosure of such information is “likely to contribute to an increased public understanding of those operations and activities.”<sup>21</sup>

Thus, DOC-NOAA should find that ITSSD’s FOIA Request Clarification (recently consolidated under case file DOC-NOAA-2014-000714) satisfies factor 2 of the six-factor fee waiver test.

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

Disclosure of the records ITSSD requested, as described in ITSSD’s FOIA Request Clarification, “will contribute to the understanding of a reasonably broad audience interested in the subject”, within the meaning of 15 C.F.R. §4.11(k)(2)(iii).<sup>22</sup>

The subject of the requested records concerns the government-mandated peer review process pursuant to which DOC-NOAA had sought to ensure the quality, integrity and reliability of DOC-NOAA-developed and disseminated HISAs that the agency *knew or had reason to know*: 1) EPA would publicly embrace and disseminate as its own; and that 2) the EPA Administrator would rely upon, in part, as the primary basis in reaching positive GHG endangerment and cause or contribute findings and subsequently promulgating economically significant national mobile and stationary source GHG emissions control regulations. These requested records, once disclosed, are likely to substantiate how DOC-NOAA had synthesized, interpreted and vetted agency and IPCC science assessing the observed

and projected effects of greenhouse gases in the atmosphere and their effect on climate, which is of great interest to a reasonably broad public audience. In other words, disclosure of the records ITSSD requested will “contribute to a ‘public understanding’ of a reasonably broad audience of persons interested in the subject, as opposed to the understanding of the requester.”<sup>23</sup>

Section V of ITSSD’s previously filed FOIA Requests had reaffirmed the focus of such requests and the methods by which ITSSD specifically intends to broadly disseminate that information once disclosed:

“[D]isclosure will contribute to “public understanding,” as opposed to the understanding of the requester or a narrow segment of interested persons. ITSSD possesses the intent and capability to make the results of this request publicly available through various media. ITSSD’s professional staff and Board of Advisors shall analyze the information responsive to this request, employ their editorial skills for purposes of converting raw materials into distinct works, and share the resulting information products with the public, whether in the form of reports, studies, press releases, blog posts, or various other methods of online educational outreach. ITSSD also will distribute the analyzed information to those members of Congress possessing interest in and oversight responsibilities concerning such matters.”

In further explanation of those representations, Requester ITSSD hereby submits that it has staff and Board of Advisors members who are integrally involved and possess expertise in scientific risk assessment and risk management, scientific peer review, and/or environment, health and safety regulatory science policy and law, including knowledge and experience relating to climate science and atmospheric pollution.

For example, several ITSSD staff and/or Board of Advisors members have: 1) submitted public testimony before Congress regarding the need for regulatory science transparency to disclose the processes EPA uses in formulating regulations,<sup>24</sup> and the need for separating risk assessment, a primarily scientific undertaking, from risk management, a more policy-related undertaking;<sup>25</sup> 2) submitted public comments to the Office of Management and Budget’s (“OMB”)’s Office of Information and Regulatory Affairs (“OIRA”) in response to OMB’s prior proposal on independent peer review<sup>26</sup> and its subsequent proposed risk assessment bulletin;<sup>27</sup> 3) participated in public seminars discussing the potential impact of climate change on public health;<sup>28</sup> 4) authored books and articles setting forth metrics for evaluating scientific claims and the criteria for conducting scientific peer review and scientific assessments;<sup>29</sup> 5) served as editor-in-chief of several prestigious peer reviewed scientific journals;<sup>30</sup> 6) analyzed domestic regulatory changes resulting from modified oceans and deep seabed mining policies focused on safety and marine environmental protection concerns and the relationship of these changes to perceived U.S. international environmental treaty obligations;<sup>31</sup> and evaluated the downstream legal impacts of the federal government potentially pursuing policy-based science in lieu of science-based policy in connection with ongoing EU-US transatlantic trade negotiations.<sup>32</sup>

In addition, and in further explanation thereof, ITSSD also wishes to emphasize that its staff and Board of Advisors members also possess the intent, skills and experience to convey that information to a broad public audience in an understandable manner.

ITSSD, led by its staff and Board of Advisors members are able and specifically intend to disseminate the requested information, once produced by DOC-NOAA, to a broad public audience via: 1) their respective organizations, members and/or supporters; 2) policymakers at the local, state, federal and international levels who track and monitor the findings of intergovernmental climate science bodies and the potential impacts of elevated GHGs associated with human activities on public health and welfare in the United States and in other regions of the world; 3) members of the domestic and international academic and scientific communities; and 4) members of the news media who, in turn, will disseminate the information more broadly to the general public. In addition, public dissemination of such information will be accomplished by such persons and entities via organizational internet and blog websites, peer review-published articles, conference symposia, civil society meetings and panel presentations, and by means of news media interviews, op-eds, and letters to the editor.

In *Carney v U.S. Dept. of Justice*,<sup>33</sup> 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 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]."<sup>34</sup> 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,<sup>35</sup> 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."<sup>36</sup>

In the present case, ITSSD has the capability and intent to disseminate the requested records once disclosed, compiled, analyzed and explained to a reasonably broad audience consisting, in part, of academic scholars, policymakers, members of Congress, civil society organizations including trade associations, and individual members of society. Such dissemination will assume various forms, including scholarly publications. And, it will follow the approach ITSSD has employed to distribute information about U.S. and foreign government operations and activities obtained using *non*-FOIA-based research and development sources, which has a proven record of success. ITSSD (including its staff members and Board of Advisors members) will disseminate the requested records once disclosed, compiled, analyzed and explained via its globally recognized website and blogs, peer review publications, press releases, academic, industry, professional, governmental and civil society organization symposia and conferences, congressional briefings and testimony, and news media interviews, op-eds and letters-to-the-editor.

Based on the global response to ITSSD's prior dissemination activities, thus far, which is reflected in the "References"<sup>37</sup> and "Testimonials"<sup>38</sup> sections of the ITSSD website, ITSSD is certain that the Court in *Carney* is correct in its assessment. These sections of the ITSSD website contain the many references made by domestic and international governments, intergovernmental bodies, university & think-tank scholars, nongovernmental civil society organizations, and the media to ITSSD publications, presentations and interviews. These references reflect that a reasonably broad public audience understands the analyses and explanations of government operations and activities that ITSSD has compiled, analyzed, explained and disseminated. Finally, the ITSSD website contains a new section that is devoted to compiling, analyzing, explaining and disseminating to the broad public, in an understandable and accessible form, the information ITSSD obtains from DOC-NOAA in response to ITSSD's consolidated FOIA Requests which is further explained in ITSSD's FOIA Request Clarification.<sup>39</sup>

Moreover, ITSSD, a globally recognized nonprofit organization, is capable of disseminating, and intends to disseminate, the requested information, once disclosed, compiled, analyzed and explained to a broad public audience via linkages (affiliations) it has established with other nonprofit civil society organizations,<sup>40</sup> including the international network established by the Atlas Economic Research Foundation ("Atlas"), of which the ITSSD has long been a member. Atlas is "a nonprofit organization connecting a global network of more than 400 free-market organizations in over 80 countries to the ideas and resources needed to advance the cause of liberty."<sup>41</sup> The organizations that comprise the Atlas network have members throughout the U.S. and in other countries that are capable of compiling, analyzing, explaining and disseminating the requested information, once produced, to their members through their own websites, blogs, email lists, newsletters and media channels of distribution. ITSSD specifically intends to share this information with particular interested Atlas network members who and which are capable of disseminating and intend to disseminate the requested information among a reasonably broad public audience.

Through all of the above mechanisms, including scholarly publications, ITSSD, as Requester, has demonstrated that is capable of and specifically intends to compile, analyze, explain and disseminate the requested information, once disclosed by DOC-NOAA, to the broadest possible public audience(s) in an understandable form. Such dissemination will improve public understanding of and appreciation for DOC-NOAA's and its third-party contractors' (e.g., NRC's) climate science-related peer review practices and procedures, DOC-NOAA-developed HISAs and their underlying scientific foundations, and the climate science bases for the EPA Administrator's GHG endangerment and cause or contribute findings. Consequently, by setting forth a concrete plan or specific intent for compiling, analyzing, explaining and disseminating the requested information, once disclosed by DOC-NOAA, to the broadest possible public audience in a clear and understandable form, ITSSD has established its compliance with the third of six factors required to secure a fee waiver.<sup>42</sup>

Therefore, DOC-NOAA should find that ITSSD's FOIA Request Clarification (explaining its previously filed FOIA Requests consolidated under file DOC-NOAA-2014-000714) has satisfied factor 3 of the six-factor fee waiver test.

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

Disclosure of the records ITSSD requested will “contribute significantly to public understanding” of the peer review practices and procedures actually engaged in by DOC-NOAA and its third-party contractors to ensure the quality, integrity and reliability of DOC-NOAA-developed climate science-related highly influential scientific assessments (“HISAs”). The EPA Administrator primarily relied upon such HISAs in reaching positive GHG endangerment and cause or contribute findings and promulgating economically significant national climate change regulations controlling mobile and stationary source GHG emissions. 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.<sup>43</sup>

To date, a broad public continues to be uncertain about the scientific evidence underlying the EPA Administrator’s GHG endangerment and cause or contribute findings. In particular, a broad public has continued to question the validity of the conclusions drawn in DOC-NOAA-developed HISAs (as well as 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 which the EPA 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 DOC-NOAA climate science and the credibility of the EPA Administrator’s findings are compounded by the fact that such gases are currently being emitted in China at higher levels than in the United States,<sup>44</sup> and GHG emissions from all BRICS nations are projected to be significantly higher than those in the United States by 2050.<sup>45</sup>

EPA’s website states that EPA received “a large number of commenters express[ing] doubt about the anthropogenic origins of the recent increase in CO<sub>2</sub>.”<sup>46</sup> In response to said commentators, EPA stated that it had “re-examined the scientific literature, which finds that the anthropogenic emissions are the root cause of the increase in CO<sub>2</sub> concentrations over the past century”, and that, “[a]s stated in CCSP (2007) ‘[t]he cause of the recent increase in atmospheric CO<sub>2</sub> is confirmed beyond a reasonable doubt’”<sup>47</sup>. In addition, the EPA Administrator’s final endangerment and cause or contribute 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).<sup>48</sup>

However, the EPA-TSD accompanying the EPA Administrator’s endangerment and cause or contribute findings had not listed the DOC-NOAA-generated USGCRP/CCSP assessment

(SAP2.2/CCSP(2007))<sup>49</sup> which had served as the source of such statement as a “core reference document”.<sup>50</sup> Instead, SAP2.2 had been indirectly incorporated by reference into another DOC-NOAA-developed USGCRP/CCSP assessment (commonly referred to as the second U.S. national climate assessment or “GCCIP”)<sup>51</sup> which the EPA-TSD had expressly listed as a “core reference document”.<sup>52</sup> Neither DOC-NOAA nor EPA has yet made publicly available any information concerning either the source of this EPA publicly disseminated statement or the climate science DOC-NOAA had developed and/or analyzed which underlies it. 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 DOC-NOAA’s reporting of the foundational climate science supporting it.

In addition, DOC-NOAA had been charged with developing another assessment (SAP5.2/CCSP(2009))<sup>53</sup> devoted entirely to discussing how the many scientific uncertainties surrounding climate change may be addressed. After noting that “not all quantities are empirical,”<sup>54</sup> the report proceeds to describe two types of scientific uncertainty: “‘uncertainty about the value of empirical quantities’ and ‘uncertainty about model functional form’”.<sup>55</sup> According to SAP5.2, the IPCC deals with these two types of uncertainty, in part, by focusing on “*subjective* probabilities” (emphasis added).<sup>56</sup> “[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.”<sup>57</sup>

Although the EPA-TSD had not expressly listed the DOC-NOAA-developed SAP5.2/CCSP(2009) as a “core reference document” upon which the EPA Administrator had “primarily” and “heavily” relied, it nevertheless designated the DOC-NOAA-developed GCCIP which referenced it<sup>58</sup> as such a document.<sup>59</sup> Significantly, the GCCIP cited SAP5.2 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.”<sup>60</sup> (emphasis added).

DOC-NOAA’s GCCIP had notably referenced SAP5.2/CCSP(2009) in the *first* of its 569 footnotes. In addition, the quoted language above employed the term “best available evidence” rather than the term “best available science”<sup>61</sup> or “best available scientific evidence” or “best available scientific information”.<sup>62</sup> This strongly suggests that the EPA Administrator may not have complied with EPA’s highest and most rigorous level peer review, conflict-of-interest and transparency standards applicable to HISAs,<sup>63</sup> and also may have relied largely on *other than* scientific evidence (non-scientific evidence – policy considerations) in reaching positive GHG endangerment and cause or contribute findings.<sup>64</sup> However, neither DOC-NOAA nor EPA has yet 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 climate science that such peer review process had produced which had informed the EPA Administrator’s positive CAA §202(a) findings. Indeed, neither DOC-NOAA nor EPA has yet

disclosed to a broad public audience information capable of clarifying whether the climate science-related peer review process these agencies had undertaken had given rise to EPA Administrator findings that were based on science-based policy rather than policy-based science.

Public disclosure of the peer review practices and procedures that DOC-NOAA and its third-party-contractors had employed 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 DOC-NOAA-developed climate science-related HISAs that the agency *knew or had reason to know* the EPA Administrator would rely 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 scientific relationship that DOC-NOAA had claimed it had established between the anthropogenic sources of GHG emissions and non-natural climate change, as well as, the scientific relationship that EPA had claimed it had established between the observed occurrence of those phenomena and their adverse effects on public health and welfare.

DOC-NOAA has stated that its mission is “[t]o understand and predict changes in climate, weather, oceans, and coasts; [t]o share that knowledge and information with others; and [t]o conserve and manage coastal and marine ecosystems and resources.”<sup>65</sup> Comprehensive disclosure of information demonstrating that the peer review practices and procedures DOC-NOAA and its third party contractors had utilized had actually ensured the quality, integrity and reliability of DOC-NOAA-developed climate science-related HISAs incorporating IPCC science, which DOC-NOAA *knew or had reason to know* would serve as the basis for the EPA Administrator's CAA §202(a)(1) findings, will significantly contribute to public understanding of how DOC-NOAA had evaluated science ultimately used in agency and broader government decision-making in fulfillment of DOC-NOAA's statutory and administrative responsibilities and its important agency mission.

Public uncertainty concerning the credibility of the sources of scientific evidence underlying the EPA Administrator's CAA §202(a) GHG findings, which had been largely based on DOC-NOAA-developed HISAs, have been further exacerbated by the scientific uncertainties endemic to current climate science itself. As such EPA Administrator findings had discussed, these latter uncertainties, some of which have remained significant, include those relating to: 1) “the current magnitude of black carbon's climate forcing effect”;<sup>66</sup> 2) “temperature records prior to 1600 A.D.”;<sup>67</sup> 3) the “inherent uncertainty in the direction, magnitude, and/or rate of certain future climate change impacts”;<sup>68</sup> 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;<sup>69</sup> 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”;<sup>70</sup> 6) “how human-induced climate change may affect the intensity and frequency of extreme weather events such as droughts and heavy storms”;<sup>71</sup> 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”;<sup>72</sup> 7) “the adverse impacts of climate change on irrigation water requirements”;<sup>73</sup> 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”.<sup>74</sup>

These uncertainties collectively have contributed to a broad public’s lack of confidence in the EPA Administrator’s CAA §202(a) GHG findings which, in turn, has deprived the public of an informed understanding of the foundational science conveyed in the DOC-NOAA-developed HISAs that underlie them. As a result, a broad public has been unable to fully assess the credibility and use of that science to evaluate the health and environmental risks and benefits engendered by the economic activities in which society has continued to engage. Granted, DOC-NOAA has posted a number of documents to a particular agency website. However, that website contains *incomplete and missing* files, and otherwise provides insufficient and minimally accessible information to the public about the internal and external peer reviews performed of DOC-NOAA-developed and disseminated climate science-related HISAs.<sup>75</sup> While other DOC-NOAA websites individually provide publicly available and accessible information generally discussing the nature and extent of causal or correlative relationships that DOC-NOAA had established between elevated emissions of anthropogenic sources of specifically identified GHGs and non-natural climate change, there is no single website that relates that information to information about the scientific peer review process that undergirds all DOC-NOAA climate science that has had an impact on the regulatory process. Nor does any DOC-NOAA website relate such information to the EPA Administrator’s CAA §202(a)(2) findings.<sup>76</sup> The disclosure of this information, as emphasized above and in the ITSSD FOIA Request Clarification, is vital, if not, indispensable to promoting public confidence in the validity of DOC-NOAA-developed climate science-related HISAs and the various peer review processes that produced them.

Given the current absence and disparate presentation of this information, once DOC-NOAA has disclosed the requested records and ITSSD has compiled, analyzed, explained and disseminated them via its website and other media, a broader public audience is likely to have a much deeper understanding of and appreciation for these government operations and activities than would have been possible had such disclosure not occurred at all.<sup>77</sup> 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 significantly enhanced by the disclosure.”<sup>78</sup>

Thus, DOC-NOAA should conclude that ITSSD’s FOIA Request Clarification (explaining ITSSD’s previously filed FOIA Requests consolidated under case file DOC-NOAA-2014-000714) 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 (15 C.F.R. §4.11(k)(3)(i))**

The Institute for Trade, Standards and Sustainable Development (“ITSSD”) is a nonprofit organization that does not have a “commercial interest that would be furthered by the requested disclosure.”<sup>79</sup> As Section V of the ITSSD’s previously filed DOC-NOAA FOIA Requests had stated,

“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), 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 DOC-NOAA had engaged to ensure the quality, integrity and reliability of DOC-NOAA-developed climate science-related HISAs upon which the EPA Administrator primarily relied in reaching positive CAA §202(a)(1) findings and promulgating economically significant national mobile and stationary source GHG emissions control regulations. These government operations or activities entail the particular peer review practices and procedures that DOC-NOAA and its third-party contractors (e.g., NRC) should have utilized, free from outside group influence,<sup>80</sup> consistent with the clearly defined multilayered statutory and administrative standards to which DOC-NOAA remains subject.

As noted above, ITSSD’s interest in securing DOC-NOAA’s disclosure of the requested records is to employ the professional capacities of ITSSD staff and Board of Advisors members in service to the public. The objective is to inform and to explain to a reasonably broad U.S. and foreign public audience how DOC-NOAA and its third-party contractors (e.g., the USGCRP/CCSP and the NRC) had analyzed and vetted the scientific and statistical data and modeling information and the testing thereof underlying the DOC-NOAA-developed and HISAs as the bases for its GHG findings and subsequent significant regulatory actions. 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.”<sup>81</sup>

The comprehensive disclosure by DOC-NOAA of the requested records also will serve a secondary ITSSD noncommercial educational public interest. ITSSD intends to share its forthcoming compilation, analysis, explanation and dissemination of such records U.S. and foreign nonprofit policy research and advocacy organizations that are members of the nonprofit Atlas Economic Research Foundation's global network. These entities are interested in learning more about the laws and administrative procedures surrounding the U.S. FOIA and IQA statutes, 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 better understanding the U.S. scientific peer review process that supports 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, DOC-NOAA's comprehensive disclosure of the records ITSSD requested can significantly contribute to improving public confidence in government climate science-related operations and activities, both here and abroad. Public confidence in government transparency initiatives is essential if governments are to successfully conclude politically ambitious trade agreements the primary goal of which is to achieve international regulatory cooperation.<sup>82</sup> This is especially true 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).*<sup>83</sup>

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.<sup>84</sup> Since governments have often been less than transparent concerning their planned treatment of such arcane and obscure subject matter, only compelled disclosure of such information pursuant to FOIA will enable a broad public audience to ever learn about it.<sup>85</sup>

It is well recognized that FOIA's objective 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."<sup>86</sup> And, since the U.S. FOIA was enacted in 1966, "many countries [have] [...] follow[ed] the FOIA model on access to government."<sup>87</sup> As the nonprofit Privacy International had 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."<sup>88</sup>

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."<sup>89</sup>

Given the relative lack of experience in many such countries regarding the proper administration of the FOIA laws there enacted, ITSSD intends also to use the ITSSD FOIA Request Clarification and this FOIA Fee Waiver Request Clarification, in addition to ITSSD's forthcoming compilation, analysis, explanation and dissemination of the requested records once disclosed by DOC-NOAA as a unique teaching opportunity that will benefit international civil society and the public interest within those countries in which Atlas members are resident. The 2006 Privacy International report had revealed that, while nearly all countries in Western Europe and the Americas<sup>90</sup> 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",<sup>91</sup> no adoption of such laws in the Middle East outside of Israel, and only the slow progress of such initiatives in Africa.<sup>92</sup> As a result, the Privacy International report had 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.”<sup>93</sup>

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”) had 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.”<sup>94</sup>

ITSSD’s compilation, analysis, explanation and dissemination of the requested records once disclosed by DOC-NOAA, therefore, would serve the very useful purpose of continuing public awareness, both in the United States and beyond, about U.S. federal government transparency 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.”<sup>95</sup> In support of its findings, UNESCO cited Principle 10 of the 1992 *Rio Declaration on Environment and Development*<sup>96</sup> 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)*.<sup>97</sup>

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

“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.”<sup>98</sup>

ITSSD seeks comprehensive DOC-NOAA disclosure of the requested information to further ITSSD’s noncommercial public interest. ITSSD’s noncommercial public interest is to educate a reasonably broad public audience that includes *inter alia* fellow civil society network organizations in and beyond the United States about the validity of the climate science research and observations underlying DOC-NOAA-developed and disseminated HISAs that had informed the EPA Administrator’s positive

endangerment and cause or contribute findings and had resulted in EPA's issuance of economically significant national mobile and stationary source GHG emissions control regulations affecting all U.S. economic actors and citizens.

As Section V of the ITSSD's previously filed DOC-NOAA FOIA Requests had stated,

“ITSSD will not earn a profit from disclosure of the requested information. As discussed above, ITSSD will instead use the responsive records to expand the general public's and Congress' knowledge of and interest in [DOC-NOAA] governmental operations and activities relating to climate science.”

ITSSD is not working on behalf of, and has neither been compensated for nor otherwise paid by, any private party to prepare its previously filed DOC-NOAA FOIA Requests, or the FOIA Request Clarification (explaining those previously filed requests), or this Fee Waiver Request Clarification which accompanies it. 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 DOC-NOAA records once disclosed.

Just as with any other government policy-focused nonprofit nongovernmental organization operating in the public spotlight, including environmental protection and conservation-focused and public transparency-focused nonprofit organizations, however, it is entirely conceivable that ITSSD's informed reporting of the requested records once disclosed by DOC-NOAA could potentially indirectly further some ITSSD commercial, trade, or profit interests; but this is purely speculative and uncertain, and is highly unlikely at the present time.

Consequently, ITSSD, as Requester, has adequately demonstrated that it does not seek the requested information for a use or purpose that furthers [its] commercial, trade, or profit interests.<sup>99</sup> Therefore, DOC-NOAA should conclude that ITSSD's FOIA Request Clarification (explaining its previously filed FOIA Requests consolidated under file DOC-NOAA-2014-000714) satisfies factor 5 of the six-factor fee waiver test.

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

As previously discussed, ITSSD is not working on behalf of, and has not been paid or otherwise compensated by, any private party in connection with its previously filed DOC-NOAA FOIA Requests, its FOIA Request Clarification (explaining those previously filed requests) or with this FOIA Fee Waiver Request Clarification. 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 DOC-NOAA fee waiver regulations obviously contemplate that a requester could “put the records to a commercial use” once they have been disclosed by the agency.<sup>100</sup> However, such regulations also provide that a fee waiver is justified where “the public interest standard (paragraph (k)(1)(i) of this section) is satisfied and the public interest is greater than any identified commercial interest in disclosure.”<sup>101</sup>

For this reason, Section V of the ITSSD’s previously filed DOC-NOAA FOIA Requests had also stated that,

“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*,<sup>102</sup> 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,<sup>103</sup> 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.<sup>104</sup>

“[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.”<sup>105</sup>

Considering, in the abstract, that any requested records DOC-NOAA would disclose could potentially be put to varied uses, ITSSD, as requester, has set forth in exhaustive detail above its purposes for securing such information.<sup>106</sup> DOC-NOAA’s “comparison of the private and public benefits” that ITSSD may derive from its compilation, analysis, explanation and dissemination of such information in a clear and understandable manner to a reasonably broad public audience should entail “no more than a garden-variety ‘weighing’ inquiry.”<sup>107</sup>

Under the present circumstances, ITSSD’s described purposes for seeking DOC-NOAA disclosure of the requested information reflect an overriding *non*commercial interest. Since the extent of any

ITSSD commercial interest that has been identified is *not* sufficiently great 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”.<sup>108</sup> Therefore, DOC-NOAA should conclude that ITSSD’s FOIA Request Clarification (explaining its previously filed FOIA Requests consolidated under file DOC-NOAA-2014-000714) satisfies the sixth factor of the fee waiver test.

In sum, DOC-NOAA should grant ITSSD’s request for a FOIA fee waiver as set forth in this Fee Waiver Request Clarification, because ITSSD has satisfactorily demonstrated consistent with 15 C.F.R. §4.11(k)(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.”<sup>109</sup>

In the event, however, that EPA does not grant ITSSD’s request for a fee waiver as set forth in this Fee Waiver Request Clarification, ITSSD requests that DOC-NOAA treat it as an “educational institution” contemplated by 5 U.S.C. §552(a)(4)(A)(ii)(II) and 15 C.F.R. §4.11(b)(4),<sup>110</sup> and as thus qualifying for the reduced fee structure applicable to such entities.<sup>111</sup>

In addition, if DOC-NOAA does not grant ITSSD’s request for a fee waiver as set forth in this Fee Waiver Request Clarification, it is respectfully requested that DOC-NOAA, prior to undertaking any of the activities necessary to disclose the records requested, provide notice to ITSSD of the actual or estimate amount of the fees to be charged therefor,<sup>112</sup> and secure ITSSD’s advance approval of the anticipated total fee.<sup>113</sup>

Once again, we appreciate the opportunity to further clarify for your offices the grounds for granting ITSSD a fee waiver as set forth in this Fee Waiver Request Clarification.

Thank you for your prompt attention to this matter.

Very truly yours,

*Lawrence A. Kogan*

Lawrence A. Kogan  
CEO/President  
ITSSD

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**ENDNOTES**

<sup>1</sup> ITSSD is a globally recognized nonprofit research, analytics and educational institution based in the State of New Jersey which focuses, in part, on international and domestic environmental law and policy research and analysis in the public interest.

<sup>2</sup> See 15 CFR §4.11 *Fees*, available at: <http://www.gpo.gov/fdsys/pkg/CFR-2008-title15-vol1/pdf/CFR-2008-title15-vol1-sec4-11.pdf>.

<sup>3</sup> This extension of time was granted both verbally and via email correspondence dated April 23, 2014.

<sup>4</sup> In addition to previously filing a FOIA Request with DOC-NOAA-HQ, ITSSD also had filed FOIA Requests with 6 (six) NOAA regional collaboration teams – the NOAA Central, Great Lakes, North Atlantic, Pacific Islands, Southeast & Caribbean, and Western Regional Collaboration Teams - designated as “NOAA-CRCT”, “NOAA-GRCT”, “NOAA-PIRT”, “NOAA-NARCT”, “NOAA-SECART” and “NOAA-WRCT”.

<sup>5</sup> See 132 Cong. Rec. S. 14298 (statement of Sen. Leahy).

<sup>6</sup> 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.

<sup>7</sup> *Id.*

<sup>8</sup> 780 F. 2d 86, 90.

<sup>9</sup> 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>.

<sup>10</sup> 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.

<sup>11</sup> 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); OMB-PRB, *supra* (particularly, Preamble, pp. 23-26; Sections I-VII). “Section III requires a more rigorous form of peer review for highly influential scientific assessments...*If information is covered by Section III, an agency is required to adhere to the peer review procedures specified in Section III*” (emphasis added). *Id.*, at Preamble, p. 23.

<sup>12</sup> See United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of the Chief Information Officer & High Performance Computing and Communications, *Information Quality*, NOAA website (last visited April 4, 2014), available at: [http://www.cio.noaa.gov/services\\_programs/info\\_quality.html](http://www.cio.noaa.gov/services_programs/info_quality.html); United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of the Chief Information Officer & High Performance Computing and Communications, *Information Quality Overview* (July 30, 2010), available at: [http://www.cio.noaa.gov/services\\_programs/pdfs/IQA\\_Overview\\_7-30-10-FINAL.pdf](http://www.cio.noaa.gov/services_programs/pdfs/IQA_Overview_7-30-10-FINAL.pdf). See also United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of the Chief Information Officer & High Performance Computing and Communications, *National Oceanic and Atmospheric Administration Information Quality Guidelines* (“NOAA IQA Guidelines”) NOAA website (last visited April 4, 2014), available at: [http://www.cio.noaa.gov/services\\_programs/IQ\\_Guidelines\\_011812.html](http://www.cio.noaa.gov/services_programs/IQ_Guidelines_011812.html); United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of the Chief Information Officer & High Performance Computing and Communications, *National Oceanic and Atmospheric Administration Policy on Conflicts of Interest For Peer Review Subject to OMB's Peer Review Bulletin* (“NOAA PRB-COI”), NOAA website (last visited April 4, 2014), available at: [http://www.cio.noaa.gov/services\\_programs/NOAA\\_PRB\\_COI\\_Policy\\_110606.html](http://www.cio.noaa.gov/services_programs/NOAA_PRB_COI_Policy_110606.html); United States Department of Commerce, National Oceanic and Atmospheric Administration National Marine Fisheries Service, *National Marine Fisheries Service Policy Directive PD 04-108 - Science and Technology Policy on the Data Quality Act* (June 27, 2012) (“NMFS-STP/DQA”), available at: <http://www.nmfs.noaa.gov/op/pds/documents/04/04-108.pdf>; United States Department of Commerce, National Oceanic and Atmospheric Administration National Marine Fisheries Service, *National Marine Fisheries Service Instruction 04-108-03 - Science and Technology Information Quality Act Section 515 Pre-Dissemination Review and Documentation Guidelines* (Dec 16, 2004) (“NOAA-ST-IQA/PDR”), NOAA website (last visited April 4, 2014), available at: <http://www.nmfs.noaa.gov/op/pds/documents/04/108/04-108-03.pdf>.

<sup>13</sup> See Presidential Memorandum for the Heads of Executive Departments and Agencies, *Scientific Integrity*, The White House (March 9, 2009), at Section 1(c), available at: <http://www.whitehouse.gov/the-press-office/memorandum-heads->

[executive-departments-and-agencies-3-9-09](#). See also Memorandum to the Heads of Executive Departments and Agencies, *Scientific Integrity*, Director of the Office of Science and Technology Policy (Dec. 17, 2010), at Section I, par. 2, pp. 1-2, available at: <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>.

<sup>14</sup> See United States Department of Commerce, National Oceanic and Atmospheric Administration, *NOAA Administrative Order 202-735D* (Dec. 7, 2011), NOAA website, available at: [http://www.corporateservices.noaa.gov/ames/administrative\\_orders/chapter\\_202/202-735-D.pdf](http://www.corporateservices.noaa.gov/ames/administrative_orders/chapter_202/202-735-D.pdf).

<sup>15</sup> See United States Department of Commerce, National Oceanic and Atmospheric Administration, *Procedural Handbook for NOAA Administrative Order (NAO) 202-735D: Scientific Integrity*, (Issued: 12/07/2011; Effective 12/07/2011; Amended 05/11/2012), NOAA website, available at: [http://www.corporateservices.noaa.gov/ames/administrative\\_orders/chapter\\_202/Procedural\\_Handbook\\_NAO\\_202-735D\\_%20FINAL\\_May%202012%20Ammendment.pdf](http://www.corporateservices.noaa.gov/ames/administrative_orders/chapter_202/Procedural_Handbook_NAO_202-735D_%20FINAL_May%202012%20Ammendment.pdf).

<sup>16</sup> See United States Department of Commerce, National Oceanic and Atmospheric Administration, *FY 2012 Scientific and Research Misconduct Annual Report* (Dec. 27, 2012), NOAA website, available at: <http://nrc.noaa.gov/sites/nrc/Documents/Scientific%20Integrity/FY%202012%20Scientific%20and%20Research%20Misc%20Annual%20Report.pdf>.

<sup>17</sup> See United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of the Chief Information Officer & High Performance Computing and Communications, *National Oceanic and Atmospheric Administration Information Quality Guidelines* (“NOAA IQA Guidelines”), *supra* at Part II.

<sup>18</sup> See 15 C.F.R. Part 4.11(k)(2)(i) (explaining the first of six fee waiver requirements identified in NOAA’s fee waiver regulation).

<sup>19</sup> See 15 CFR, Part 4.11(k)(2)(ii).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See 15 C.F.R. §4.11(k)(2)(iii).

<sup>23</sup> *Id.*

<sup>24</sup> 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 112<sup>th</sup> Cong. (1<sup>st</sup> and 2<sup>nd</sup> Sessions) (Nov. 30, 2011), available at: [https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/113011\\_Moghissi.pdf](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](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>.

<sup>25</sup> 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, 112<sup>th</sup> Cong. (Nov. 30, 2011), available at: [https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/113011\\_Marchant.pdf](https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/113011_Marchant.pdf).

<sup>26</sup> See “Peer Review and Information Quality”, Letter from Sorin R. Straja, Vice President Science and Technology, Institute for Regulatory Science to Dr. Margo Schwab Office of Information and Regulatory Affairs, Office of Management and Budget (Oct. 3, 2003), available at: <http://www.whitehouse.gov/sites/default/files/omb/inforeg/2003iq/7.pdf> (providing comments on specific parts of OMB’s proposed action on independent peer review, and a copy of then “recent testimony of Dr. A. Alan Moghissi at the House of

Representatives dealing with the elevation of the Environmental Protection Agency to Department of Environmental Protection...[which] describes in detail the concept of BAS and the requirements of independent peer review.”).

<sup>27</sup> 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/inforeg/comments\\_rab/rac.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/comments_rab/rac.pdf).

<sup>28</sup> See Potomac Institute for Policy Studies, *Climate Change and Human Health: Prospects for the Future*, CREST Bold Ideas Seminar (Sept. 13, 2013), available at: <http://www.potomacinstitute.org/bold-ideas-seminar-series/2661-crest-bold-ideas-seminar-climate-change-and-human-health-prospects-for-the-future.html> and <http://www.potomacinstitute.org/attachments/article/2661/Colwell24Feb2014.pdf>.

<sup>29</sup> 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*, 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](http://www.synesisjournal.com/vol3_g/2012_Moghissi_G6-13_abstract.html) and [http://www.synesisjournal.com/vol3\\_g/Moghissi\\_2012\\_G6-13.pdf](http://www.synesisjournal.com/vol3_g/Moghissi_2012_G6-13.pdf).

<sup>30</sup> 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*.

<sup>31</sup> See Lawrence A. Kogan, *Revised U.S. Deep Seabed Mining Policy Reflects UNCLOS and Other International Environmental Law Obligations*, LexisNexis, 2013 Emerging Issues 6893 (Jan. 2013), ITSSD website, available at: <http://nebula.wsimg.com/f97bfb87d31d68c9fba55f48d125fd8a?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

<sup>32</sup> 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](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](http://www.esipri.org/Library/Evergreen_2012.pdf).

<sup>33</sup> 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.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *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.*

<sup>37</sup> *Id.*, at: <http://www.itssd.org/references.html>.

<sup>38</sup> *Id.*, at: <http://www.itssd.org/testimonials.html>.

<sup>39</sup> See Institute for Trade, Standards and Sustainable Development, *ITSSD Programs - Theme #4 International Regulatory Transparency*, ITSSD website, available at: <http://www.itssd.org/programs---itssd-theme--4.html>.

<sup>40</sup> *Id.*, at: <http://www.itssd.org/links.html>.

<sup>41</sup> See Atlas Economic Research Foundation website, *Home Page* (last referenced March 31, 2014), at: <http://atlasnetwork.org/>.

<sup>42</sup> See *Judicial Watch, Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000).

<sup>43</sup> See 15 C.F.R. Part 4.11(k)(2)(iv).

<sup>44</sup> 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).

<sup>45</sup> 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>.

<sup>46</sup> 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>.

<sup>47</sup> *Id.*

<sup>48</sup> 74 FR 66496, 66516.

<sup>49</sup> 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>.

<sup>50</sup> To recall, the significance of a “core reference document” lies in the “primary” and “heavy” reliance that the EPA Administrator had placed upon it. See EPA-TSD, *supra* at pp. 6-7.

<sup>51</sup> 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*.

<sup>52</sup> See EPA-TSD, *supra* at Table 1.1, p.7.

<sup>53</sup> 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>.

<sup>54</sup> *Id.*, at p. 22.

<sup>55</sup> *Id.*

<sup>56</sup> “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.

<sup>57</sup> *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.

<sup>58</sup> 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.

<sup>59</sup> See EPA-TSD, *supra* at Table 1.1, p. 7.

<sup>60</sup> 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.

<sup>61</sup> "Best Available Science or BAS is increasingly used to describe the level of acceptability of scientific information." See A. Alan Moghissi, *What is Best Available Science?*, Institute for Regulatory Science (2003), Attachment 1 at p. 1, in "Peer Review and Information Quality", Letter from Sorin R. Straja, Vice President Science and Technology, Institute for Regulatory Science to Dr. Margo Schwab Office of Information and Regulatory Affairs, Office of Management and Budget (Oct. 3, 2003), *supra*. "The foundation of acceptability of scientific information is independent peer review". See Statement of A. Alan Moghissi, President, Institute for Regulatory Science, Presented at the Hearings on H.R. 2138 – "Elevating the Environmental Protection Agency to Department of Environmental Protection", Before the Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs of the House Committee on Government Reform (Sept. 9, 2003), at p. 1, in "Peer Review and Information Quality", Letter from Sorin R. Straja, Vice President Science and Technology, Institute for Regulatory Science to Dr. Margo Schwab Office of Information and Regulatory Affairs, Office of Management and Budget (Oct. 3, 2003), *supra*. Therefore, "[i]nherent in the BAS concept... is independent peer review." See A. Alan Moghissi, *Fundamentals of Independent Peer Review*, Attachment 2 at p. 1, in "Peer Review and Information Quality", Letter from Sorin R. Straja, Vice President Science and Technology, Institute for Regulatory Science to Dr. Margo Schwab Office of Information and Regulatory Affairs, Office of Management and Budget (Oct. 3, 2003), *supra*.

<sup>62</sup> See, e.g., United States Department of Commerce, National Oceanic and Atmospheric Administration National Marine Fisheries Service (NMFS), Magnuson-Stevens Act Provisions; National Standard 2—Scientific Information – Final Rule, 78 FR 43066 (July 19, 2013), available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-07-19/pdf/2013-17422.pdf> (amending the guidelines for National Standard 2 (NS2) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) regarding scientific information (which, *inter alia*, include guidance on what constitutes "best scientific information available" (BSIA) for fishery conservation and management measures and provide standards for scientific peer review), consistent with the President's memo on Scientific Integrity). *Id.*

<sup>63</sup> 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.*

<sup>64</sup> "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.

<sup>65</sup> See United States Department of Commerce, National Oceanic and Atmospheric Administration Office of Program Planning and Integration, *NOAA's Mission: Science, Service, and Stewardship*, NOAA website, available at: <http://www.ppi.noaa.gov/mission/>.

<sup>66</sup> 74 FR 66496, 66518, fn 24.

<sup>67</sup> *Id.*, at 66523.

<sup>68</sup> *Id.*, at 66524.

<sup>69</sup> *Id.*, at 66528.

<sup>70</sup> *Id.*, at 66531.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, at 66535.

<sup>75</sup> See, e.g., United States Department of Commerce, National Oceanic and Atmospheric Administration, *See* United States Department of Commerce, National Oceanic and Atmospheric Administration, *Peer Review Plans*, NOAA website, available at: <http://www.cio.noaa.gov/itmanagement/prplans/>.

<sup>76</sup> 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/>.

<sup>77</sup> See *Forest Guardians v. DOI*, 416 F. 3d 1173, 1179-1180 (10<sup>th</sup> Cir. 2005) (holding that a plaintiff had satisfied the fourth prong of the six-factor FOIA fee waiver test, even though the information in question had been publicly available only in the form of various unorganized sources, because plaintiff had planned to compile the information and present it on an interactive website.); *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 36 (D.C.Cir.1999) (holding that “[T]he mere fact that material is in the public domain does not justify denying a fee waiver; only material that has met a threshold level of public dissemination will not further ‘public understanding’ within the meaning of the fee waiver provisions.”); *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 206 (D.D.C. 2009) (holding that, where “the information requested is not even in the public domain; it does not have an existing ‘threshold level of public dissemination,’ as the public currently has no access to it, accordingly current availability of the information is not a bar to the plaintiff’s fee waiver request.”).

<sup>78</sup> See 15 C.F.R. Part 4.11(k)(2)(iv).

<sup>79</sup> See 15 C.F.R. Part 4.11(k)(3)(i).

<sup>80</sup> In *Forest Guardians v. DOI*, 416 F. 3d 1173, 1179-1180 (10<sup>th</sup> 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].”

<sup>81</sup> 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](http://www.access-info.org/documents/Access_Docs/Thinking/Get_Connected/worlds_first_foia.pdf).

<sup>82</sup> See Institute for Trade, Standards and Sustainable Development, *International Regulatory Cooperation*, ITSSD website, available at: <http://nebula.wsimg.com/374d8ac5bb729af7b75740edb1e11c98?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

<sup>83</sup> 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.

<sup>84</sup> 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*, LexisNexis Emerging Issues 6893 (2013), *supra*.

<sup>85</sup> 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](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/>.

<sup>86</sup> 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)).

<sup>87</sup> 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.

<sup>88</sup> 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](http://www.freedominfo.org/documents/global_survey2006.pdf).

<sup>89</sup> *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.

<sup>90</sup> 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/>.

<sup>91</sup> *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/>.

<sup>92</sup> *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/>.

<sup>93</sup> 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.

<sup>94</sup> 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>.

<sup>95</sup> 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](http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf).

<sup>96</sup> “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).

<sup>97</sup> “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>.

<sup>98</sup> *Id.*

<sup>99</sup> See 15 C.F.R. Part 4.11(k)(3)(i); 15 C.F.R. Part 4.11(b)(1).

<sup>100</sup> See 15 C.F.R. 4.11(k)(3)(i); 15 C.F.R. 4.11(b)(1).

<sup>101</sup> *Id.*

<sup>102</sup> See *Campbell v. U.S. Department of Justice*, 164 F.3d 20 (DC Circ. 1998).

<sup>103</sup> See *National Treasury Employees Union v. Griffin*, 811 F.2d 644 (D.C.Cir.1987).

<sup>104</sup> 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.”).

<sup>105</sup> *Id.*

<sup>106</sup> 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.*

<sup>107</sup> *Id.*

<sup>108</sup> See 15 C.F.R. Part 4.11(k)(3)(ii).

<sup>109</sup> See 15 C.F.R. §4.11(k)(1)(i)-(ii).

<sup>110</sup> See also 15 C.F.R. §4.11(c)(1); 15 C.F.R. §4.11(d)(1) (identifying acceptable fees to be charged to educational institutions).

<sup>111</sup> 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](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.

<sup>112</sup> See 15 C.F.R. Part 4.11(e).

<sup>113</sup> *Id.*