



August 14, 2014

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Page | 1

**FREEDOM OF INFORMATION ACT APPEAL**  
**APPEAL OF DENIAL OF FEE WAIVER REQUEST**  
**FOIA REQUEST #EPA-HQ-2014-008026**

The nonprofit Institute for Trade, Standards and Sustainable Development (“ITSSD”) hereby appeals the Environmental Protection Agency (“EPA”)’s July 15, 2014 denial of its request to have fees waived or substantially reduced for a Request filed under the Freedom of Information Act (“FOIA”), dated June 30, 2014. ITSSD’s FOIA Request seeks records substantiating EPA’s validation of the scientific assessments supporting the Administrator’s Clean Air Act Section 202(a)(1) Findings in conformance with the Information Quality Act (Section 515, Public Law 106-554, 114 Stat. 2763A-153-154 (2000); 44 U.S.C. §3516, note). (See attached ITSSD FOIA Request No. EPA-HQ-2014-008026, Ex. 1).

ITSSD filed under separate cover with Larry Gottesman, National FOIA Officer within EPA’s Office of Environmental Information (EPA-OEI), a detailed Fee Waiver Request, dated June 30, 2014, relating to the FOIA Request (See attached ITSSD Fee Waiver Request relating to FOIA Request No. EPA-HQ-2014-008026, Ex. 2).

ITSSD appeals for the following reasons.

**I.**  
**PROCEEDINGS BELOW**

This appeal involves one FOIA Request,<sup>1</sup> sent by electronic mail to EPA’s FOIA office at <hq.foia@epa.gov>, and seeking described records at specified offices in EPA-HQ and particular EPA regions:<sup>2</sup>

*“This FOIA Request seeks disclosure of all ‘EPA climate science-related peer review files’ (hereinafter referred to as ‘EPA Peer Review Records’ and defined in Section III of this FOIA Request) created, transmitted, stored and/or archived from January 1, 2005 through December 31, 2011, substantiating the specific measures EPA had taken, consistent with the highest 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 EPA IQA-implementing guidelines, to ensure the quality, integrity and reliability of all EPA-*

*and third-party- developed and peer reviewed climate science-related assessments and reports upon which the Administrator primarily relied in reaching its 2009 positive Greenhouse Gas (“GHG”) Endangerment and Cause or Contribute Findings under Clean Air Act (“CAA”) Sec. 202(a)(1).<sup>3</sup>*

FOIA Request No. EPA-HQ-2014-00826 thereafter identifies and describes as falling with the scope of this paragraph, “four different categories of records the comprehensive disclosure of which ITSSD seeks pursuant to this FOIA Request:

1. EPA Records Category #1: *Records focusing on EPA-developed and reviewed HISAs supporting EPA GHG Endangerment Findings*
  - a. All EPA peer review records created, transmitted, stored and/or archived from January 1, 2005 through December 31, 2011, disclosing information regarding specific measures EPA had taken to ensure that EPA-developed and *internally* peer reviewed HISAs supporting the EPA Administrator’s 2009 CAA Sec. 202(a)(1) Findings had satisfied U.S. IQA HISA peer review standards;
  - b. All EPA peer review records created, transmitted, stored and/or archived from January 1, 2005 through December 31, 2011, disclosing information regarding specific measures EPA had taken to ensure that EPA-developed and *externally* peer reviewed HISAs supporting the EPA Administrator’s 2009 CAA Sec. 202(a)(1) Findings had satisfied U.S. IQA HISA peer review standards; *and*
  - c. All EPA peer review records created, transmitted, stored and/or archived from January 1, 2005 through December 31, 2011, disclosing information about the specific entities and persons that/who had developed and conducted internal and external peer reviews of EPA-developed HISAs supporting the EPA Administrator’s CAA Sec. 202(a)(1) Findings.
  
2. EPA Records Category #2: *Records focusing on third-parties’ review of third party-developed HISAs which the EPA Administrator had embraced, adopted and disseminated as its own, in support of EPA’s GHG Endangerment Findings*
  - a. All EPA peer review records created, transmitted, stored and/or archived from January 1, 2005 through December 31, 2011, disclosing information regarding specific measures EPA had taken to ensure that third-party-developed and *internally* peer reviewed HISAs supporting the EPA Administrator’s 2009 CAA Sec. 202(a)(1) Findings had satisfied U.S. IQA HISA peer review standards;
  - b. All EPA peer review records created, transmitted, stored and/or archived from January 1, 2005 through December 31, 2011, disclosing

- information regarding specific measures EPA had taken to ensure that third-party-developed and *externally* peer reviewed HISAs supporting the EPA Administrator's 2009 CAA Sec. 202(a)(1) Findings had satisfied U.S. IQA HISA peer review standards; *and*
- c. All EPA peer review records created, transmitted, stored and/or archived from January 1, 2005 through December 31, 2011, disclosing information about the specific entities and persons that/who had developed and conducted internal and external peer reviews of third party-developed HISAs supporting the EPA Administrator's CAA Sec. 202(a)(1) Findings.
3. EPA Records Category #3: Records focusing on an interagency panel's review of the EPA-developed summary and synthesis of the combined twenty-eight HISAs designated as "core reference documents" supporting EPA's GHG Endangerment Findings
    - a. All EPA peer review records created, transmitted, stored and/or archived from January 1, 2005 and December 31, 2011, disclosing information regarding the specific measures EPA had taken to ensure that EPA's synthesized combination of the summaries of twenty-eight individual HISAs designated as "core reference documents" by the Technical Summary Document accompanying the EPA Administrator's 2009 CAA Section 202(a)(1) Findings, which also included the EPA Administrator's judgment of endangerment based thereupon, had been properly and rigorously peer reviewed as a separate HISA in satisfaction of U.S. IQA HISA peer review standards.
  4. EPA Records Category #4: Records focusing on EPA and third party administrative mechanisms employed to ensure that affected persons may seek and obtain correction or reconsideration of scientific information EPA and such third parties had disseminated in violation of OMB Guidelines
    - a. All EPA peer review records created, transmitted, stored and/or archived from January 1, 2005 through December 31, 2011, disclosing information substantiating how EPA had ensured and validated, respectively, the IQA compliance of the administrative mechanisms EPA and third parties had employed to ensure that affected persons may seek and obtain correction or reconsideration of scientific information EPA and third parties had disseminated in violation of OMB Guidelines (i.e., the public notice and comment periods provided pursuant to the Administrative Procedure Act to review the draft and final versions of the EPA Administrator's CAA Sec. 202(a)(1) Findings)."

ITSSD's FOIA Request thereafter identifies and describes for disclosure specific records falling within each of these four categories.<sup>4</sup>

EPA's Office of Air and Radiation ("EPA-OAR") responded to this Request in an electronically transmitted email correspondence dated, July 22, 2014, seeking clarification of the scope of ITSSD's FOIA Request. According to EPA-OAR's correspondence, the ITSSD FOIA Request

"does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them. Pursuant to 40 C.F.R. 2.102(c), we would like to provide you the opportunity to clarify the records you are seeking so EPA can process your request [...] In an effort to assist you in clarifying this FOIA request, we encourage you to consider whether the below paragraph (excerpted from page 5 of the request) adequately summarizes your FOIA request [...] If you agree that this paragraph covers the documents you are seeking, please respond in the affirmative and EPA will begin to process your FOIA request."

(See EPA-OAR Response to FOIA Request No. EPA-HQ-2014-008026, dated July 22, 2014, attached (Ex. 3))

ITSSD affirmatively responded to this EPA-OAR's request for clarification in an electronically transmitted email correspondence dated, July 25, 2014, in the manner noted above. (See attached Clarification of ITSSD FOIA Request EPA-HQ-2014-00826, (Ex. 4.))

One week prior to EPA-OAR's July 22 correspondence, EPA-OEI denied ITSSD's request for a fee waiver via an electronically transmitted email correspondence dated, July 15, 2014. It stated, without explanation, the following:

"We have reviewed your fee waiver justification and based on the information you provided, we are denying your request for a fee waiver. You have not expressed a specific intent to disseminate the information to the general public."

Furthermore, notwithstanding the failure of EPA-OEI's letter of denial to evaluate any other aspects of ITSSD's fee waiver request, it stated that,

"[s]hould you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107 (I) in your appeal."

EPA has, in effect, indirectly imposed on ITSSD the illogical, if not, unreasonable burden of appealing a decision that EPA has not yet made with respect to such other factors which, if denied on appeal, will leave ITSSD without any recourse for administrative redress.

(See EPA-OEI Denial of Fee Waiver Request - Request Number EPA-HQ-2014-008026, (Ex. 5))

In a letter correspondence dated August 1, 2014, EPA determined that it would finally respond to ITSSD's request, but would do so, only if ITSSD provides EPA with "assurance to pay the [estimated] \$27,020.00 [search and duplication] fee *in advance* of processing your request" (emphasis added). EPA "also estimate[d] that to fully process the request as written would take 1 year, with an estimated completion date of August 1, 2015." Furthermore, EPA provided ITSSD with three different options for narrowing its request in exchange for the imposition of lesser fees and shortened request processing times.

(See EPA Payment Assurance Correspondence, Freedom of Information Act Request EPA-HQ-2014-008026, (Ex. 6)).

ITSSD responded to EPA's correspondence on August 7, 2014. It noted how EPA had failed to identify, consistent with applicable EPA FOIA regulations, that the estimates it provided reflected only partial disclosure of the ultimate fees to be assessed, and requested that EPA provide an itemization of the costs it had estimated for each of the disclosure/pricing options offered to enable ITSSD to make a "truly informed decision" concerning which, if any, of the options it might prefer.

(See ITSSD Response to EPA Payment Assurance Correspondence, Freedom of Information Act Request EPA-HQ-2014-008026, (Ex. 7))

## II. EPA'S DENIAL OF ITSSD'S FEE WAIVER REQUEST

### A. EPA's Denial of ITSSD's Fee Waiver Request Fails Procedurally Because It Was Not Reasonably Calculated to Put ITSSD on Notice as to the Deficiencies in its Case

The EPA-OEI correspondence clearly constitutes an adverse determination. EPA has denied ITSSD's request for a fee waiver on the grounds that "[y]ou have not expressed a specific intent to disseminate the information to the general public." (<sup>5</sup>)

*Presumably*, this statement of fee waiver denial refers to factor three of the six-factor fee waiver test of 40 C.F.R. §2.107(l)(2)(iii), which concerns "[w]hether disclosure of the requested information will contribute to [...]the understanding of a reasonably broad audience of persons interested in the subject..."<sup>6</sup> Said provision also generally advises requesters that their "expertise in the subject area and ability *and intention to effectively convey information to the public will be considered*" (emphasis added).<sup>7</sup>

As herein noted, EPA's elliptic statement of fee waiver denial actually betrays a more complex legal standard featuring various 'terms of art' as sub-elements, and thus, is tantamount to no explanation at all. For example, with respect to which of the terms within the phrase "intention to effectively convey information to the public" has EPA deemed ITSSD's case deficient? Reasonable persons may only guess what EPA has in mind. Is it ITSSD's specific "intention" to convey EPA records

disclosures to the public? Its financial, intellectual and/or social capacity and/or ability to “effectively” convey EPA records disclosures to the public? Its intention, ability and/or capacity to convey EPA records disclosures to a “reasonably broad public audience”?

EPA’s failure to cite in its denial letter any particular element or point for which it seeks additional information or clarification from ITSSD violates the agency’s legal obligation to ensure that the denial letter was “reasonably calculated to put the requester on notice as to the deficiencies in the requester’s case.”<sup>8</sup> Furthermore, EPA’s failure to include any such particular reference in its denial letter, which is treated as part of the administrative record, will preclude a court of law, on judicial review, from considering it anew.<sup>9</sup> Indeed, the administrative record that exists before EPA at the time of this administrative appeal is limited to the initial FOIA request, the agency’s response and any subsequent materials related to the administrative appeal.<sup>10</sup>

B. EPA’s Denial of ITSSD’s Fee Waiver Request Contravenes the Intent of Congress’ FOIA Amendments

The FOIA provides that an agency “shall” waive or reduce its fees “if disclosure of the 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 is not primarily in the commercial interest of the requester.”<sup>11</sup> Courts have held that FOIA’s fee waiver provision is to “be liberally construed in favor of waivers for noncommercial requesters.”<sup>12</sup> The District of Columbia Circuit Court of Appeals, in particular, has noted that,

“The legislative history discussed in *McClellan supra*, *National Security Archive v. U.S. Dept. of Defense*, 880 F.2d 1381 (D.C.Cir.1989), cert. denied, 494 U.S. 1029, 110 S.Ct. 1478, 108 L.Ed.2d 615 (1990), and other cases demonstrates that Congress intended independent researchers, journalists, and public interest watchdog groups to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society. Moreover, in the 1986 amendments to FOIA, Congress ensured that *when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information* in a way that contributes to public understanding of the operations of government agencies, no fee attaches to their request” (emphasis added)<sup>13</sup>

Furthermore, the D.C. Circuit has found that the objective of the fee-waiver was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.”<sup>14</sup>

C. EPA’s Sole Basis for Denying ITSSD’s Fee Waiver Request Fails on the Merits

As noted above, on July 15, 2014, EPA-OEI denied ITSSD's request for a fee waiver on the grounds that "[y]ou have not expressed a specific intent to disseminate the information to the general public." (See EPA-OEI Denial of Fee Waiver Request - Request Number EPA-HQ-2014-008026, (Ex. 5)). EPA failed to reference the specific provision(s) within either the FOIA statute or the applicable EPA FOIA regulations (40 C.F.R. Sec. 2.107(l)(2)(i)-(iv)) upon which it based its fee waiver denial. EPA-OEI also did not provide *any other basis* for its fee waiver denial. EPA-OEI neither discussed nor otherwise responded to ITSSD's detailed presentation of its satisfaction of the remaining five fee waiver factors set forth in these EPA FOIA regulations. Its fee waiver denial letter stated only the following: "Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA regulations located at 40 C.F.R. [Section] 2.107(l) in your appeal." (See EPA-OEI Denial of Fee Waiver Request - Request Number EPA-HQ-2014-008026, (Ex. 5)).

ITSSD logically surmises that EPA-OEI's denial of its FOIA request rests exclusively on its conclusion that ITSSD has not satisfied the requirements of factor three of the six-factor fee waiver test - 40 C.F.R. Sec. 2.107(l)(2)(iii), but, as ITSSD will show below, EPA-OEI's conclusion is without foundation and fails on the merits.

The applicable EPA FOIA Regulation provision (40 C.F.R. Sec. 2.107(l)(2)(iii)) provides that,

"The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to 'public understanding'. The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered..."<sup>15</sup>

ITSSD recognizes that this provision requires ITSSD to demonstrate an actual ability, and not merely, an intent to disseminate information. This means that, as a FOIA requester, ITSSD must provide specific details, not conclusory allegations, of its intent and ability to disseminate the requested information to the general public to enable the agency to make an informed decision as to whether the fee waiver is appropriate.<sup>16</sup>

As page 14 of ITSSD's Fee Waiver Request (Ex. 2) shows, ITSSD clearly expressed the capability and intent to disseminate the EPA records requested, once disclosed, to a broad public audience:

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

communication and outreach. The ITSSD website and blogs are quite easily accessible on the web, as are ITSSD publications.”

In support of this statement, pages 14-15 of ITSSD’s Fee Waiver Request, which are incorporated by reference herein, provided explicit evidence of then current ITSSD communication efforts to promote public understanding of the complex subject matter discussed in its FOIA request. For example, ITSSD provided EPA with evidence of its website launch via press release of a national ‘[FOIA education campaign](#)’ focused on alerting the public of the need for federal agencies to adequately peer review highly influential scientific assessments underlying economically significant rules, such as those supporting EPA’s 2009 Clean Air Act Section 202(a)(1) GHG Endangerment Findings, consistent with the standards imposed by Information Quality Act (“IQA”) and relevant OMB and EPA IQA-implementing guidelines.

Furthermore, pages 15-16 of ITSSD’s Fee Waiver Request, which are incorporated by reference herein, provided explicit evidence of the media attention that such press release had generated, including references to the specific media outlets and other organizations whose journalists, commentators and/or bloggers had published and disseminated articles and blogs describing to the public the subject matter of ITSSD’s recast 145-page FOIA request (Ex. 1), the Information Quality Act (“IQA”)-focus of said request, and the legal and scientific significance of the EPA records to be disclosed. To recall, ITSSD’s Fee Waiver Request discussed how articles had been published by the following journalists and/or media outlets:

- 1) by the [Daily Caller](#) Foundation (5/22/14, Wash., DC) – which article had been posted online *inter alia* to [Facebook.com](#), [National Association of Scholars](#), [Climate Depot.com](#), [Daily Surge](#), [Freedom Outpost.com](#), [BarbWire.com](#), [Liberty Unyielding.com](#), [Conservative News.com](#), [Land and Water USA.com](#), [AtlasNetwork.org](#) (of the Atlas Economic Research Foundation), the [Global Warming Policy Foundation](#) (UK), [CNGchat.com](#), [ALIPAC](#) and [Maricopa County AZ Republican Committee \(MCRC\) Briefs](#);
- 2) by energy & environmental freelance journalist Marita Noon for: a) [RedState.com](#) (5/26/14, Arlington, VA), b) [CanadaFreePress.com](#) (5/26/14, Toronto, CN), c) [CFACT.com](#) (5/27/14 – Wash., DC), d) the [Daily Times](#) (5/28/14 - Farmington, New Mexico), d) [WesternJournalism.com](#) (5/30/14 – Anthem, AZ), – which articles had been posted online *inter alia* to [CattleRange.com](#), [Facebook.com](#), [Twitter](#), [JunkScience.com](#), [Center for Regulatory Effectiveness](#) (CRE.com), [Berns Report](#), [The Westerner Blog](#), [GlobalClimateScam.com](#) (Minnesota Majority) and [LibertyBeacon.com](#); and
- 3) by the [Washington Examiner](#) (6/10/14 – Wash., DC), and posted online *inter alia* to [CFACT.com](#), [ClimateDepot.com](#), [Tumblr.com](#), [Twitter.com](#), [Office of Medical & Scientific Justice](#).

And, to recall, pages 15-16 of ITSSD's Fee Waiver Request, incorporated by reference herein, discussed how three media outlets had invited ITSSD staff and colleagues to submit authored articles for the purpose of educating a broad public audience about its EPA-related FOIA activities:

- 1) (with Colleague Rick Otis) for the [Washington Times](#) (5/29/14 – Wash., DC), and [Asia Law Portal](#), and posted online *inter alia* to [Center for Regulatory Effectiveness](#) (CRE.com), [Philadelphia Herald](#), [Baltimore Star](#), [San Antonio Post](#), [Massachusetts Sun](#), [Arizona Herald](#), [North Carolina Daily](#), [Brazil Sun](#), [Irish Sun](#), [Perth Herald](#), [Israel Herald](#), [Arab Herald](#), [Trinidad Times](#), and [Zimbabwe Star](#); and
- 2) for the [Los Alamos Monitor Online](#) (6/21/14 – Los Alamos, NM).

Furthermore, to recall, pages 15-16 of ITSSD's Fee Waiver Request, incorporated by reference herein, discussed how ITSSD had released online via its website a white paper which examined the relationship between recently approved congressional science appropriations, EPA, NOAA and other federal agencies' Information Quality Act-noncompliant peer review science practices, EPA's 2009 Clean Air Act GHG Endangerment Findings and subsequent economically significant GHG emissions regulations:

- 1) on the [ITSSD Website](#) (6/3/14 – Princeton, NJ), and written about by the [National Association of Scholars](#), and/or posted online *inter alia* to the [Heartland Institute](#), [WattsUpWithThat?.com](#), [Global Warming Policy Foundation](#) (UK), [Sierra Foothill Commentary](#), [Climate Conversation Group](#) (NZ) and [HotWhopper.com](#) (AU).

ITSSD subsequently shared this document with professional staff at the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, unaware that the House had just adopted floor amendments on H.R. 4660 – The FY 2015 Commerce, Justice, Science Appropriations Act.

Moreover, to recall, page 16 of ITSSD's Fee Waiver Request, incorporated by reference herein, discussed how, during March – June 2014, ITSSD staff presented briefings and/or otherwise personally provided information to various members of the scientific and academic communities, the American Bar Association Section of Administrative Law and Regulatory Practice, the U.S. House of Representatives, Committees on Science, Space and Technology and Oversight and Government Reform, and the U.S. Senate Committee on Environment and Public Works, all in an effort to educate their professional staffs about the significance of the subject matter ITSSD addressed in its EPA FOIA request. While ITSSD's Fee Waiver Request did not contain evidence of ITSSD's ability and intent to convey related complex concepts by written means to members of Congress at the time it was filed on June 30, 2014, ITSSD now wishes to provide EPA's Office of General Counsel with such non-confidential information. On May 27, 2014, ITSSD prepared and submitted to House Science Committee professional staff a list of questions and reference documentation to assist them in supporting committee members scheduled to convene a hearing on May 29, 2014, entitled, "[Examining the UN Intergovernmental Panel on Climate Change Process](#)."

At this stage of EPA's administrative process, ITSSD also would be pleased to submit, for the public record, additional evidence of its express intent and ability to broadly and publicly disseminate records that EPA chooses to prospectively disclose in response to ITSSD's FOIA request.

Since ITSSD's June 30, 2014 filing of its recast FOIA request, five additional articles have been published by the following journalists and/or media outlets interested in the Information Quality Act-focus of ITSSD's FOIA efforts:

- 1) by [Inside Washington Publishers](#), [InsideEPA](#), [InsideEPA's Clean Energy Report](#), [InsideDefense](#), [Inside US Trade](#) (6/30/14) and posted online *inter alia* to the [Global Warming Policy Foundation](#) (UK), [The Science & Environmental Policy Project](#) (p. 15), and [WattsUpWithThat?.com](#);
- 2) by [National Association of Scholars](#) (7/10/14) and posted online *inter alia* to [MillCreek.VillageSoup.com](#) (Mill Creek, WA), [WattsUpWithThat?.com](#), [Facebook.com](#) and [HotWhopper.com](#);
- 3) by investigative reporter [Kevin Mooney](#) (7/24/14) and posted online *inter alia* to [Liberty Alliance.com](#), and [Pinterest.com](#);
- 4) by investigative reporter Kevin Mooney for [American Spectator](#) (7/30/14) and posted online *inter alia* to [Freedom of the Press Foundation](#), [MothersAgainstWindTurbines.com](#), and [TinyLetter.com](#);
- 5) by [The Science & Environmental Policy Project](#) (7/19/14) and posted online *inter alia* to [WattsUpWithThat?.com](#), [SpeakUpAmerica.com](#), and [ASME Environmental Engineering Newsletter](#); and
- 6) by [Daily Caller](#) Foundation (8/14/14 - Wash., DC) and posted online *inter alia* to [BarbWire.com](#), [Facebook.com](#), [Daily Surge.com](#), [LegalPlanet.com](#), [GotNewswire.com](#), [Twitter.com](#), [Government Secrets](#), and [LockerDome.com](#).

In addition, since the June 30, 2014 filing of its Fee Waiver Request, four media outlets invited ITSSD staff and colleagues to submit authored articles for the purpose of educating a broad public audience about its IQA-focused FOIA activities, and ITSSD staff took the initiative to craft a fifth writing in response to a relevant op-ed appearing in a fifth media outlet:

1. (with colleague Paul Driessen) for [Townhall.com](#) (7/1/14), [CanadaFreePress.com](#) (7/2/14), [Heartland Institute](#) (7/2/14), [WesternJournalism.com](#) (7/7/14), , posted online *inter alia* to [DLMReport.com](#), [The Science & Environmental Policy Project](#) (p. 15), [WattsUpWithThat?.com](#) and [JunkScience.com](#), [IceAgeNow.com](#), [EnterStageRight.com](#) and [EnergyforAmerica.com](#).

- 2) for [Wall Street Journal](#) (7/16/14) in response to an [Op-ed](#).
- 3) for [Asia Law Portal](#) (7/23/14).
- 4) (with Colleague Rick Otis) for [CanadaFreePress.com](#) (7/26/14), posted online *inter alia* to [Heartland Institute](#), [Twitter.com](#), [MyTechLab.com](#), [Law and Water USA.com](#), [The Conservative Papers.com](#), [WorldNewsUpdate.com](#) and [GotNewsWire.com](#).
- 5) for [World Coal.com](#) (7/28/14), posted online *inter alia* to [The Carbon Capture Report](#) (Univ. of Illinois).

Furthermore, since the June 30, 2014 filing of its Fee Waiver Request, an ITSSD professional staff member attended the Heartland Institute's 9<sup>th</sup> Climate Change Conference convened in Las Vegas, NV where he liaised with more than six-hundred attendees from around the world. During several panels' Q&A sessions, said staff member engaged in discussion with panelists about ITSSD's IQA-focused FOIA request and EPA's failure to validate its endangerment finding climate science in conformance with the IQA. Said staff member's presence and perspective were mentioned briefly by [Vice.com](#) article authored about the event.

Moreover, since the June 30, 2014 filing of its Fee Waiver Request, ITSSD prepared and submitted public comments to EPA, in response to a June 18, 2014 Federal Register notice soliciting public comments with respect to [EPA's proposed rule on GHG emissions standards for existing power plants](#) (Docket No. EPA-HQ-OAR-2013-0602). [ITSSD's detailed and annotated public comments, which are now part of the "public record"](#), were filed with EPA on August 13, 2014. These comments refer to the proposed regulation as EPA's "Proposed Power Plant Rule." They focus on Sections II.A1-3 of said proposed rule which cite the "major" climate assessments and computer modeling applications, including those supporting the EPA Administrator's 2009 Clean Air Act Section 202(a)(1) GHG Endangerment Findings and DOC-NOAA's Third National Climate Assessment, and their associated findings, as *the* scientific foundation for EPA's Proposed Power Plant Rule. In particular, ITSSD's detailed and annotated comments provide powerful and compelling evidence of EPA's commission of *serious Information Quality Act peer review violations* with respect to its validation of these assessments, involving institutional conflicts-of-interest, subject matter bias, lack of intellectual independence, and peer review panel imbalance. ITSSD's comments conclude that "EPA is legally precluded from relying on [these] climate assessments and computer modeling applications [...] as the scientific foundation for its Proposed Power Plant Rule, since EPA & DOC-NOAA failed to validate such science in conformance with the Information Quality Act (44 U.S.C. 3516 note) and relevant binding OMB and EPA IQA-implementing administrative guidance."

Moreover, ITSSD plans to develop a working paper, for which it already has secured a commitment of publication from at least one Washington, DC-based legal publisher. The paper will discuss the legal obligations the Information Quality Act and relevant binding administrative guidance imposes upon federal agencies when they adopt, endorse, use and publicly disseminate agency- and third party-developed scientific assessments as the basis for rulemakings, specific instances where EPA,

in particular, has failed to satisfy those obligations, and the public policy implications resulting from such noncompliance. This paper should be published and released during the fourth quarter of 2014. ITSSD also is in the course of discussion with legal and environmental publishers concerning the publication of an article that would discuss the international significance of Information Quality Act obligations with respect to crossborder treatment of scientific assessments used by administrative agencies as the basis for environment, health and safety regulations incident to the current Transatlantic Trade and Investment Partnership (“TTIP”) negotiations in fulfillment of the administration’s “international regulatory cooperation” initiative.

Based on all of the above evidence, it is clear that ITSSD has identified at this early stage, to the best of its ability, a number of specific media outlets and contacts that ITSSD intends to and is capable of working with to secure publication of media-developed and ITSSD-developed materials, articles, op-eds, blog entries, etc., which would explain and discuss, in an understandable manner catering to a broad public audience, the Information Quality Act-focused records that EPA would disclose in response to ITSSD’s FOIA request. Consistent with current jurisprudence within and beyond the D.C. Federal Circuit, such information should be sufficient to demonstrate ITSSD’s “firm intention to publish” and ability to otherwise disseminate information about the subject of its FOIA request, and for EPA to grant a fee waiver.<sup>17</sup>

In addition to all of the evidence discussed above, *including newly submitted evidence* not previously reviewed by EPA-OEI, pages 17-18 of ITSSD’s Fee Waiver Request, incorporated by reference herein, provide further evidence of ITSSD’s specific technical and intellectual capability “to understand, process, and disseminate the information” to a reasonably broad public audience. Therein, ITSSD provided multiple examples illustrating the particular educational expertise and skills possessed by ITSSD professional staff and Board of Advisors members, which were previously and are currently utilized to successfully convey important information about complex scientific and legal processes to members of the public, journalists, the academic and scientific communities, Congress, and Executive Branch policymakers operating at the agency and interagency levels. ITSSD’s Fee Waiver Request did explicitly describe the backgrounds of or provide hyperlinks to the resumes/cvs of ITSSD’s staff and Board of Advisors, but such information is readily available in the [“About Us”](#) section of the ITSSD website and in the publicly available documents such individuals had submitted to such bodies or had otherwise published, which information is contained in footnote #s 85-94 incorporated within ITSSD’s Fee Waiver Request, and herein incorporated by reference.

For EPA Office of General Counsel’s ease of reference, ITSSD will hereafter reproduce the relevant paragraphs of ITSSD’s Fee Waiver Request annotated with the names of relevant ITSSD staff and Board of Advisors members:

First relevant paragraph:

“For example, several members of the ITSSD Advisory Board currently serve or have served as adjunct and/or tenured faculty or as researchers at the Georgetown University School of Medicine [*Moghissi* and *McBride*; *visiting, Kogan*] and

Georgetown University's McCourt School of Public Policy [*McBride*], Arizona State University College of Law and Arizona State University School of Life Sciences [*Marchant*] and Tuskegee University [*Prakash*], Catholic University of America [*Kelly*], University of Georgia [*McBride*] and Princeton University [*Zaidi*]. One such member also had previously managed the Bioenvironmental/Radiological program at EPA's National Environmental Research Center and Health and Environmental Risk Analysis Program [*Moghissi*], and also represented EPA's Office of Research and Development in a number of working groups responsible for drafting regulations [*Moghissi*].”

At this point in the EPA administrative process, ITSSD wishes to add further evidence of an ITSSD professional staff's experience serving as an adjunct faculty member at “Seton Hall University, School of International Relations and Diplomacy (*Kogan*).” This staff member also has served as a panelist at numerous governmental, academic, industry and civil society conferences addressing various public audiences regarding complex regulatory science and related legal issues.<sup>18</sup>

Second relevant paragraph:

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

transatlantic trade negotiations was recognized by this administration, the European Parliament and the New York-based Burton Foundation. [*Kogan*]

Third relevant paragraph:

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

Consequently, consistent with applicable case law, ITSSD has sufficiently demonstrated it “is able to understand, process, and disseminate the [complex and voluminous] information” EPA chooses to disclose in response to ITSSD’s FOIA request by explaining how the backgrounds of its staff and members of its Board of Advisors qualify them “to perform the analysis necessary to effectively disseminate the information”<sup>19</sup> once disclosed by EPA. Having “proffered a list of dissemination mechanisms and expressed intent to disseminate the information”, and “amply showed a capacity to disseminate information generally,” ITSSD need not “have a history of disseminating information derived from FOIA requests to be entitled to a fee waiver.”<sup>20</sup>

Aside from the evidence proffered above in satisfaction of factor 3 of the six-factor fee waiver test, pages 18-20 of ITSSD’s Fee Waiver Request, incorporated by reference herein, provide further evidence of ITSSD’s specific intent and ability to disseminate such information to a “reasonably broad public audience.” Page 19 of ITSSD’s Fee Waiver Request identifies the broad public audience to which ITSSD specially intends to disseminate the requested information:

“This audience consists of journalists, individual members of the public, farmers, ranchers, fisherman, nonprofit civil society organizations, for-profit civil society organizations such as trade associations, individual members of industry, members of the Bar, other professional associations, federal policy-makers, executive branch officials, members of Congress and congressional committee (professional) staffs, and members of the academic, scientific and scholarly communities.”

Page 19 also notes how, consistent with District of Columbia precedent, the “broad and diverse public audience ITSSD has identified as the intended recipient of the to-be disseminated EPA information represents a reasonably large segment of the public; the intended audience does not constitute a limited subset of persons.”<sup>21</sup> It emphasizes how the Second Circuit Court of Appeals, in the case of *Carney v U.S. Dept. of Justice*,<sup>22</sup> had

“found that a requester’s dissemination of federal agency-disclosed information may satisfy factor 3 of the six-factor FOIA fee waiver test even if the public dissemination assumes the form of scholarly publications. According to the Court the dissemination of scholarly publications ‘often is of great benefit to the public at large’, although it may ‘not reach a general audience’, given ‘the important role of academe in our democracy...[especially where the] evidence in the administrative record [reflects]...that very little has been written regarding [the subject].’<sup>23</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>24</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’” (emphasis added).<sup>25</sup>

ITSSD’s Fee Waiver Request contrasted the current situation with the factual scenario in *Carney*, “where the requester had specifically intended to disseminate the disclosed agency records exclusively via the publication of scholarly articles.” Unlike in *Carney*, “ITSSD specifically intends to disseminate disclosed EPA records through various means and media, including, but not limited to, publication of scholarly articles, and to a broad public audience that includes, but is more diverse than, the scholarly and academic communities.” ITSSD supported this statement by referencing the variation of published articles noted above discussing the subject matter of ITSSD’s IQA-focused FOIA request that, following their publication, had been posted by third parties to a number of different websites, blogs and other online venues. In addition, ITSSD supported this statement by noting the diversity of the public audience (persons, public and private institutions and venues that had recognized ITSSD’s previously published works, as indicated by the entries set forth in the “Library”, “Programs”, “News & Media Archive”, “References” and “Testimonials” sections of ITSSD’s website. As ITSSD’s Fee Waiver Request states, these portions of the ITSSD website “clearly evidenc[e] the broad and diversified public audience, to date, to which ITSSD publications, white papers, press releases, media interviews, public debates, and public symposia and conference materials have been disseminated...”

Indeed, the [ITSSD website](#) has been partially redesigned since the June 30, 2014 filing of ITSSD’s Fee Waiver Request to provide the public and the media with simple access to the ITSSD’s EPA FOIA requests and the accompanying exchange of EPA and ITSSD correspondences. These documents are now accessible via the “[ITSSD Portal to EPA FOIAs](#)” located on the website homepage. In addition, the redesigned ITSSD website provides easy access to detailed information about [FOIA](#), the [Information Quality Act](#) and [regulatory transparency](#) more generally. The ITSSD website also provides easy access to these three different types of third party reporting:

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

Lastly, pages 19-20 of ITSSD’s Fee Waiver Request concedes that, while it is certain that not

“all members of the public, especially those who support EPA’s aggressive regulatory agenda, will be interested in ITSSD’s dissemination of EPA’s disclosed peer review records, once compiled, analyzed/processed, edited and explained [...] ITSSD is confident that there remains a sizeable group of American voters that will be interested in hearing about the facts behind EPA’s peer review of the climate science supporting the Administrator’s endangerment and cause or contribute findings.”

In support of the proposition that a sizeable portion of voters would be interested in such reporting, ITSSD’s Fee Waiver Request cites surveys “strongly suggest[ing] that such a public audience likely consists of no less than one-third of all American voters and, potentially, more than two-thirds of the electorate.”<sup>26</sup> ITSSD also wishes to bring to the attention of EPA’s Office of General Counsel that these results generally comport with and are complimentary to the results of two recent surveys conducted by the U.K.-based market research firm Ipsos MORI (released in 2014) and by the U.S.-based Pew Research Center (released in 2013). The Ipsos MORI survey found with respect to the environment, that 32 percent (% - approximately one third) of all Americans surveyed do not believe that “the climate change we are currently seeing is largely the result of human activity.”<sup>27</sup> Meanwhile, the Pew Research Center survey found that 40 percent of all Americans surveyed do not believe that global climate change poses a major threat to their country, “making Americans among the least concerned about this issue of the 39 publics surveyed.”<sup>28</sup> All told, these surveys strongly suggest that a considerable portion of the American electorate remains uncertain about the causes of and risks posed by anthropogenic climate change, and would be interested in receiving information ITSSD would disseminate, once disclosed by EPA, revealing whether EPA had peer reviewed the major scientific assessments supporting the Administrator’s 2009 Clean Air Act GHG Endangerment Findings in conformance with the Information Quality Act.

Where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, and has adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public, at least one court has held that the group had met the dissemination prong of the public interest test.<sup>29</sup> Consistent therewith, ITSSD has demonstrated that it specifically intends to and is capable of disseminating the requested records to a broad public audience in an understandable form

through various media, once they have been disclosed by EPA, and then compiled, analyzed/processed, edited and explained by ITSSD's professional staff and members of its Board of Advisors. Therefore, EPA should find that ITSSD's new FOIA Request satisfies factor 3 of the six-factor fee waiver test, and that EPA-OEI's previous denial of ITSSD's Fee Waiver request had been made in error.

**III.**  
**ITSSD'S FEE WAIVER REQUEST OTHERWISE SATISFIES**  
**ALL OF THE REMAINING FACTORS OF**  
**40 C.F.R. §2.107(l)(2)-(3)**

As previously discussed, EPA-OEI did not review whether ITSSD's Fee Waiver Request had satisfied any of the other five factors of the six-factor fee waiver test set forth in EPA FOIA regulations. Nevertheless, as the relevant sections of ITSSD's Fee Waiver Request which are herein incorporated by reference show, ITSSD's Fee Waiver Request meets all of the of the remaining factors of 40 C.F.R. §2.107(l)(2)-(3).

A. ITSSD Incorporates By Reference That Section of its Fee Waiver Request Substantiating its Satisfaction of the Factor Set Forth in 40 C.F.R. §2.107(l)(2)(i).

Pages 4-7 of ITSSD's Fee Waiver Request, herein incorporated by reference, establish that the subject of the requested records concern identifiable operations or activities of the Federal Government, with a connection that is direct and clear, consistent with 40 C.F.R. §2.107(l)(2)(i). The discussion that follows is only a summary of the detailed analysis that ITSSD's Fee Waiver Request provides, and therefore direct reference should be made to the original fee waiver request.

These pages of ITSSD's Fee Waiver Request describe how EPA, a federal agency, was obliged by statute and administrative guidance to document for the administrative record and for the public how it had undertaken each of a number of specifically identified congressionally-directed government activities and operations. In all, this section of ITSSD's Fee Waiver Request explains that EPA was subject to four levels of distinct IQA obligations that required its conducting key government activities and operations. The subject of the specific records identified and discussed in Sections I, II.1-II.4 and III.4 of ITSSD's new FOIA Request, as described in detail in the Explanations that followed such sections and Sections II.1-II.3 and III.1 of the accompanying Addendum relates to and concerns identifiable government operations and activities, with a connection that is direct and clear, involving routine peer review science and administrative review processes and procedures applicable to highly influential scientific assessments ("HISAs") supporting major government actions.

B. ITSSD Incorporates By Reference That Section of its Detailed Fee Waiver Request Substantiating its Satisfaction of the Factor Set Forth in 40 C.F.R. §2.107(l)(2)(ii).

Pages 7-13 of ITSSD's Fee Waiver Request, herein incorporated by reference, establish that disclosure of the requested records is likely to contribute to public understanding of government operations or activities, consistent with 40 C.F.R. §2.107(l)(2)(ii)). The discussion that follows is

only a summary of the detailed analysis that ITSSD's Fee Waiver Request provides, and therefore direct reference should be made to the original fee waiver request.

The administrative record reflects, however, that EPA had merely summarily accounted to the American public for how it had complied with each of its four levels of IQA legal obligations. EPA still needs to disclose many specific records that would reveal whether EPA had satisfied its level-one IQA obligations. Pages 7-9 of ITSSD's Fee Waiver Request describe how EPA has not disclosed, to date, many of the records identified in Sections II.1 and III.4 of ITSSD's new FOIA Request and Section II.3 of the accompanying Addendum. The requested records seek substantiation of how EPA had validated the IQA compliance of peer reviews performed by three Agency-established ad hoc federal advisory committees.

EPA still needs to disclose many specific records that would reveal whether EPA satisfied its level-two IQA obligations, consistent with the relevant administrative guidance described in Sections II.2 and III.4 of ITSSD's new FOIA Request and Sections II.2-II.3 of the accompanying Addendum. Pages 8-11 explain that, once disclosed, these specific records would explain how EPA had validated the IQA compliance of the twenty-three (23) third party (federal agency, interagency and foreign entity)-developed and peer reviewed HISAs (containing computer models and datasets and applications thereof) the EPA-TSD designated as "core reference documents" that directly supported the Administrator's CAA Section 202(a) Findings, which EPA had endorsed, adopted and disseminated as its own. To date, EPA has not produced records validating the IQA compliance of other agencies' transmittal memoranda and peer review reports containing author responses to peer reviewer, agency and public comments. EPA points only to the brief pro forma certifications of IQA compliance contained within each of the HISAs that other federal agencies, like EPA, had developed and submitted to the CCSP Committee.

EPA still needs to disclose many specific records that would reveal whether EPA satisfied its level-three IQA obligations. Pages 11-12 discuss how EPA, to date, has not disclosed many specific records substantiating the IQA compliance of the interagency peer review of the EPA-developed TSD which summarized and synthesized twenty-eight (28) HISAs (containing computer models and datasets and applications thereof) designated as "core reference documents" supporting the Administrator's CAA Section 202(a) Findings. These records must be disclosed consistent with the administrative guidance set forth in Sections II.3 and III.4 of ITSSD's new FOIA Request and Section III.1 of the accompanying Addendum. In particular, EPA has yet to disclose records revealing how it had validated the reproducibility of the assumptions, theories and extrapolations underlying the computer models and datasets supporting such HISAs.

EPA still needs to disclose many specific records that would reveal whether EPA satisfied its level-four IQA obligations. EPA, to date, has not disclosed many specific records substantiating the IQA compliance of the method chosen by EPA and third parties (other federal agencies, interagency entities) for addressing public stakeholder IQA requests for correction ("RFCs")/reconsideration ("RFRs"). Such statutory and administrative guidance, as described in Sections II.4 and III.4 of ITSSD's new FOIA Request, obliged EPA to ensure that stakeholders could secure an adequate technical review of the complex scientific and econometric modeling, datasets and underlying theories, assumptions, extrapolations, judgments, etc. contained in the twenty-eight (28) HISAs the

EPA-TSD had designated as “core reference documents” supporting the Administrator’s CAA Section 202(a)(1) Findings. The administrative record reflects that EPA and other ‘lead’ development federal agencies participating in the USGCRP/CCSP had not provided separately for such an administrative review mechanism. Instead, they had treated stakeholder RFC/RFRs as if they were public comments submitted during an APA notice and comment period.

Only EPA’s comprehensive disclosure of the specific records requested in the Sections of ITSSD’s FOIA Request noted above would contribute to public understanding of these critical government operations and activities. The records ITSSD has requested, once disclosed, will be “meaningfully informative about government operations or activities”. Such operations or activities engender the carefully defined multilayered process of scientific peer review to which EPA was obliged to strictly adhere in order to ensure the quality, integrity and reliability of the EPA and third-party-generated climate science-related HISAs. Since the requested records are not “already in the public domain, in either a duplicative or a substantially identical form,” EPA’s disclosure of them would add much new information to the public’s understanding of key government operations or activities. Consequently, “the disclosure of such information is “likely to contribute to an increased public’s understanding of those operations and activities.”

C. ITSSD Incorporates By Reference That Section of its Fee Waiver Request Substantiating its Satisfaction of the Factor Set Forth in 40 C.F.R. §2.107(l)(2)(iv).

Pages 20-24 of ITSSD’s Fee Waiver Request, herein incorporated by reference, establishes that disclosure of the four categories of clearly identified EPA peer review records requested is likely to contribute ‘significantly’ to public understanding of government operations or activities, consistent with 40 C.F.R. §2.107(l)(2)(iv). The discussion that follows is only a summary of the detailed analysis that ITSSD’s Fee Waiver Request provides, and therefore direct reference should be made to the original fee waiver request.

To date, a broad public continues to be uncertain about the scientific evidence underlying the Administrator’s CAA Section 202(a)(1) Findings. It questions EPA representations regarding the causal links allegedly established between: 1) the observed elevated emissions of anthropogenic sources of each of the six ‘well-mixed’ GHGs the Administrator has identified as being present in the ambient air at unprecedented levels; 2) non-natural anthropogenic climate change; and 3) the projected impacts of these two factors on public health and welfare in the United States.

For example, EPA’s CAA Section 202(a)(1) GHG Endangerment Findings indicate and EPA has represented to public commenters 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” (emphasis added), 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*” (emphasis added). However, EPA has not reassured the public that the source of such statement, a DOC-NOAA-developed assessment not considered a “core reference document” but yet primarily relied upon by EPA, had been rigorously peer reviewed in conformance with the Information Quality Act. As a result, a broad public audience continues to harbor reasonable doubt about not only the veracity of EPA’s statement, but also the validity of the foundational climate science underlying it.

Another DOC-NOAA-developed assessment not considered a “core reference document” focused mostly on how the many scientific uncertainties surrounding climate change may be addressed, noted that “not all quantities are empirical,” and spoke of “subjective probabilities”. It also embraced the IPCC view that the degree of consensus within the scientific community about any judgment concerning climate change was as important as the evidence supporting that judgment, and employed the term “best available evidence” rather than the term “best available science” or “best available scientific evidence”. This strongly suggested that such document had not been peer reviewed consistent with NOAA’s or EPA’s highest, most rigorous and least discretionary peer review, conflict-of-interest and transparency standards applicable to HISAs. EPA has, thus far, disclosed no information in any publicly available and accessible source or medium capable of clarifying whether the climate science-related peer review process the Agency had employed led to Administrator Findings that were based on science-based policy rather than policy-based science. As a result, a broad public audience has remained in a state of uncertainty and misunderstanding concerning the foundations of the third-party developed climate science that EPA utilized as support for its Endangerment Findings.

The public’s uncertainties surrounding the EPA’s peer review practices are further exacerbated by such Findings’ discussion of the scientific uncertainties endemic to current climate science generally, which are quite significant. Absent disclosure of EPA peer review records demonstrating the Agency’s validation of the foundational observational science underlying the Administrator’s Findings, a broad public audience will be unable to accept the projections of potential future health and environmental risks and benefits engendered by the economic activities in which society continues to engage.

Furthermore, EPA’s website does not provide publicly available and accessible information demonstrating, especially, how EPA had: 1) actually validated rather than merely verified third party peer review processes with respect to such HISAs; 2) established the nature and extent of any causal or correlative relationships between elevated emissions of anthropogenic sources of specifically identified GHGs, non-natural climate change; and 3) substantiated the adverse impact of such emissions and climate change on public health and welfare. Moreover, no EPA website provides access to much of the climate science literature underlying the Administrator’s findings.

Given the current absence of such information from the administrative record, once EPA discloses and ITSSD disseminates it to a reasonably broad public audience, the public is likely to have a much deeper understanding of and appreciation for these government agency peer review processes and practices (i.e., government operations and activities) than would have been possible had such disclosure not occurred at all.

D. ITSSD Incorporates By Reference That Section of its Fee Waiver Request Substantiating its Satisfaction of the Factor Set Forth in 40 C.F.R. § 2.107(l)(3)(i).

Pages 24-29 of ITSSD’s Fee Waiver Request, herein incorporated by reference, establishes that the Requester does not have a commercial interest that would be furthered by the requested disclosure, consistent with 40 C.F.R. § 2.107(l)(3)(i). The discussion that follows is only a summary of the

detailed analysis that ITSSD's Fee Waiver Request provides, and therefore direct reference should be made to the original fee waiver request.

ITSSD is a nonprofit organization which does not have "commercial interest that would be furthered by the requested disclosure." ITSSD does not seek to benefit commercially from this information, is funded entirely by tax-deductible contributions from individuals, foundations and corporations, and neither seeks nor accepts financial support from government sources. ITSSD's non-commercial interest in obtaining the requested records is purely to provide a public service – to educate a broad public audience about the specific government operations or activities in which EPA had engaged to ensure the quality, integrity and reliability of the EPA- and third-party-generated climate science-related HISAs primarily supporting the Administrator's 2009 Endangerment Findings. These government operations or activities entail particular EPA peer review practices and procedures that the Agency had actually utilized, free from outside group influence, consistent with the Information Quality Act and relevant administrative guidance. 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. ITSSD's noncommercial public interest also is to educate a reasonably broad public audience regarding how federal agency peer review practices that do not satisfy the highest, most stringent and least discretionary of Information Quality Act standards can very well result in the issuance of economically significant regulations affecting all economic actors and citizens.

Indeed, freedom of information is considered an international human right. There is a second public purpose behind these ITSSD activities; ITSSD intends to share its forthcoming compilation, analysis, explanation and dissemination of such records with U.S. and foreign nonprofit policy research and advocacy organizations interested in learning about the laws and administrative procedures surrounding the U.S. FOIA and IQA, and in conveying such information to their public audiences to ensure that their governments become and/or remain more transparent. Public confidence in government transparency initiatives is essential if governments are to successfully conclude politically ambitious trade agreements that can achieve international regulatory cooperation, especially where scientific information is shared among governments and can as easily serve as the basis for cross-border regulations as it can for purely domestic regulations. Given many countries' lack of experience in properly administering enacted FOIA laws, ITSSD intends also to use its new FOIA Request and this ITSSD FOIA Fee Waiver Request, in addition to ITSSD's forthcoming compilation, analysis, editing, explanation and dissemination of the requested records once disclosed by EPA as a unique teaching opportunity that will benefit international civil society and the public interest within those countries in which Atlas network members are resident.

ITSSD will not earn a profit from disclosure of the requested information. As discussed above, ITSSD will instead use the responsive records to endeavor to expand the public's and Congress' knowledge and interest in EPA peer review practices (governmental operations and activities) the Agency employed to validate the climate science the Agency used as support for its Final CAA Section 202(a)(1) Findings. ITSSD is not working on behalf of, and has neither been compensated for nor otherwise paid by, any private party to prepare its new FOIA Request and this FOIA Fee Waiver Request. ITSSD also will not be working on behalf of, and will be neither compensated nor otherwise paid by, any private party to compile, analyze, explain and disseminate to the public the

requested EPA records once disclosed. Despite ITSSD's noncommercial interests in seeking disclosure of such EPA records, it is entirely conceivable that ITSSD's informed reporting of the requested records once disclosed by EPA could potentially indirectly further some ITSSD commercial, trade, or profit interests; but this is purely speculative and uncertain, and is highly unlikely at the present time.

E. ITSSD Incorporates By Reference That Section of its Fee Waiver Request Substantiating its Satisfaction of the Factor Set Forth in 40 C.F.R. § 2.107(l)(3)(ii).

Pages 29-30 of ITSSD's Fee Waiver Request, herein incorporated by reference, establish that the public interest in disclosure is greater in magnitude than that of any identified commercial interest in disclosure; therefore, disclosure of the requested information is not "primarily in the commercial interest of the requester, consistent with 40 C.F.R. § 2.107(l)(3)(ii). The discussion that follows is only a summary of the detailed analysis that ITSSD's Fee Waiver Request provides, and therefore direct reference should be made to the original fee waiver request.

The applicable EPA fee waiver regulations obviously contemplate that a requester could "put the records to a commercial use" once they have been disclosed by the agency. However, such regulations also provide that a fee waiver is justified where the public interest standard [paragraph 40 C.F.R. §2.107(l)(1)(i)] is satisfied and the public interest is greater than any identified commercial interest in disclosure." 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, if the "not primarily in the commercial interest" test is satisfied. In other words, the information requested must be disseminated in the requestor's professional capacity and 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.

According to D.C. Circuit jurisprudence, EPA's "comparison of the private and public benefits" that ITSSD may derive from its compilation, analysis, explanation and dissemination of such information in a clear and understandable manner to a reasonably broad public audience should entail "no more than a garden-variety 'weighing' inquiry."<sup>30</sup> Its purpose to identify only whether disclosure of the requested information reflects an *overriding* noncommercial interest.

Neither the administrative record nor ITSSD's behavior reflect that ITSSD will derive an intended commercial interest as the result of either seeking disclosure of EPA records pursuant to its FOIA request or by EPA granting ITSSD's request for a fee waiver under the applicable EPA FOIA regulations. Furthermore, ITSSD's website does not contain any links to commercial interests and ITSSD's charitable mission does not include business promotion.<sup>31</sup> Since the extent of any ITSSD commercial interest that has been identified is not sufficiently great in magnitude in comparison with the public interest in disclosure, ITSSD has adequately shown that the disclosure of the requested records is "*not primarily* in the commercial interests of the requester".

## V. CONCLUSION

ITSSD's fee waiver request shows not only "a connection between the material sought and a matter of genuine public concern, but...also indicate[s] that a fee waiver or reduction will primarily benefit the public."<sup>32</sup> In other words, ITSSD's Fee Waiver Request shows ITSSD has satisfactorily demonstrated, consistent with the factors set forth in 40 C.F.R. §2.107(l)(2)-(3), that it has met the requirements to be granted a waiver of fees pursuant to 40 C.F.R. §2.107(l)(1): "(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." EPA Office of General Counsel should recall that courts have held that if it is a 'close call' as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non-commercial entity should be given the benefit of the doubt and be granted the fee waiver.<sup>33</sup> In consideration thereof, EPA-OEI's denial of ITSSD's request to have its fees waived or substantially reduced should be reversed.

Lawrence A. Kogan  
CEO  
ITSSD

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<sup>1</sup> Newly filed FOIA Request No. EPA-HQ-2014-00826 was prepared by ITSSD as a special accommodation to EPA's Office of Air and Radiation and Office of General Counsel which refused to respond or deny ITSSD's previously filed FOIA request. Representatives from these offices claimed that they did not fully understand the scope of the subject matter that was the focus of ITSSD's prior FOIA Request No. EPA-HQ-2014-004938 deemed filed on March 21, 2014, which ITSSD subsequently clarified twice for their benefit on April 28, 2014 and May 16, 2014.

<sup>2</sup> See FOIA Request No. EPA-HQ-2014-00826, at Section III.1, pp. 38-39.

<sup>3</sup> *Id.*, at p. 5.

<sup>4</sup> On pages 7-11, ITSSD's FOIA request sets forth the following specific records for disclosure in EPA Records Category #1. On pages 17-21, ITSSD's FOIA request sets forth the following specific records for disclosure in EPA Records Category #2. On pages 23-27, ITSSD's FOIA request sets forth the following specific records for disclosure in EPA Records Category #3. On pages 29-30, ITSSD's FOIA request sets forth the following specific records for disclosure in EPA Records Category #4.

<sup>5</sup> FOIA Section 552(a)(4)(A)(iii) provides that, "[d]ocuments shall be furnished without any charge or at a...reduced...charge...if disclosure of the 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 is not primarily in the commercial interest of the requester." See 5 U.S.C. 552(a)(4)(A)(iii). EPA's FOIA-implementing regulations (40 C.F.R. Sec. 2.107(l)(1)) break down these requirements into six factors: 1) The subject of the requested records concern identifiable activities of the federal government, with a connection that is direct and clear (40 C.F.R. Sec. 2.107(l)(2)(i)); 2) Disclosure of the requested records is likely to contribute to public understanding of government operations or activities (40 C.F.R. Sec. 2.107(l)(2)(ii)); 3) Disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject as opposed to the individual understanding of the Requester (40 C.F.R. Sec. 2.107(l)(2)(iii)); 4) Disclosure of the requested information is likely to contribute significantly to public understanding of government operations or activities (40 C.F.R. Sec. 2.107(l)(2)(iv)); 5) The Requester does not have a commercial interest that would be furthered by the the requested disclosure (40 C.F.R. Sec. 2.107(l)(3)(i)); and 6) The public interest in disclosure is greater in magnitude than that of any identified commercial interest in

disclosure; therefore, disclosure of the requested information is not "primarily in the commercial interest of the Requester (40 C.F.R. Sec. 2.107(l)(3)(ii)).

<sup>6</sup> See 40 C.F.R. §2.107(l)(2)(iii).

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

<sup>8</sup> See *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d 53, 55, U.S. App. LEXIS 5668 at \*5 (9th Cir. 1997) (reiterating that agency's letter "must be reasonably calculated to put the requester on notice" as to reasons for the fee waiver denial).

<sup>9</sup> "On judicial review, we cannot consider new reasons offered by the agency not raised in the denial letter. *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, slip op. 649, 668 (9<sup>th</sup> Cir. 1997) (citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 631 n. 31, 65 L. Ed. 1010, 100 S. Ct. 2844 (1980)) ["The rule barring consideration of *post hoc* agency rationalizations operates where an agency has provided a particular justification for a determination at the time the determination is made, but provides a different justification for that same determination when it is later reviewed by another body."]. Taken together, these principles lead us to the following conclusion: on judicial review, the agency must stand on whatever reasons for denial it gave in the administrative proceeding. If those reasons are inadequate, and if the requesters meet their burden, then a full fee waiver is in order." *Id.*, at U.S. App. LEXIS 5668 at \*5-\*6.

<sup>10</sup> See *Larson*, 843 F.2d at 1483; *Schoenman v. FBI*, 604 F. Supp.2d 174, 188 (D.D.C. 2009) (citing, *inter alia*, *Forest Guardians*, 416 F.3d at 1177).

<sup>11</sup> See 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>12</sup> See, e.g., *Forest Guardians v. Department of Interior*, 416 F.3d 1173, 1177-78 (10th Cir. 2005); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987).

<sup>13</sup> See *Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F.Supp.2d 1226, 1232 (2003).

<sup>14</sup> See *Judicial Watch, Inc.*, 326 F.3d at 1311. See also *McClellan Ecological Seepage Situation*, 835 F.2d at 1284.

<sup>15</sup> See 40 C.F.R. Sec. 2.107(l)(2)(iii).

<sup>16</sup> See, e.g., *Judicial Watch, Inc. v. Rossoti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *Larson*, 843 F.2d at 1483 (fee waiver request properly denied where requester lacked ability to disseminate information because, *inter alia*, he failed to show contacts "with any major newspaper companies."); *Judicial Watch, Inc. v. U.S. Dept. Of Justice*, 122 F. Supp. 2d 13, 19 (D.D.C. 2000) ("requester who does not give specifics regarding a method of disseminating requested information will not meet this factor, even if the requester has the ability to disseminate information.") (citations omitted).

<sup>17</sup> Cf. *Judicial Watch*, 122 F. Supp. 2d 5, 19; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (refusing to grant waiver where requestor "did not establish a firm intention to publish the information requested" and "fails to identify any plan for a book, report, or newspaper article for which it will use the requested information.").

<sup>18</sup> See Institute for Trade, Standards and Sustainable Development, *Programs*, available at: <http://www.itssd.org/programs.html>.

<sup>19</sup> See *Perkins v. United States Department of Veteran Affairs*, 754 F. Supp. 2d 1, 9 (D.D.C. 2010), *supra* ("It is undisputed that the information plaintiff has requested is both technical and voluminous. Thus, plaintiff must demonstrate that he is able to understand, process, and disseminate the information", citing *McClellan [Ecological Seepage Situation v. C Carlucci US]* 835 F.2d [1282,]...1286 [(9<sup>th</sup> Cir. 1987)].) ITSSD may do this by explaining how the backgrounds of its staff and members of its Board of Advisors qualify them to perform the analysis necessary to effectively disseminate the information. *Perkins v. United States Department of Veteran Affairs*, 754 F. Supp. 2d at 9-10 (discussing *Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036 (D. Idaho 2004); *South Utah Wilderness Alliance v. U.S. Bureau of Land Management*, 402 F. Supp. 2d 82 (D.D.C. 2005)).

<sup>20</sup> See *Citizens for Responsibility and Ethics in Washington v. Department of Health and Human Services*, 481 F. Supp. 2d 99, 115 (DC DC 2006), available at: <https://www.courtlistener.com/dcd/domz/citizens-for-res-and-ethics-v-us-dept-of-hhs/> ("[T]he Court is not aware of a statutory requirement that a requesting party must have a history of disseminating information derived from FOIA requests to be entitled to a fee waiver. Indeed, if this were a requirement, a requesting party otherwise entitled to a fee waiver and capable of disseminating information to the public would have to pay fees associated with its initial FOIA requests until it had shown it was capable of disseminating information obtained through a FOIA request, a scenario that has no basis in FOIA or the legislative intent regarding the liberalization of fee waivers. See *McClellan*, 835 F. 2d at 1284. While the court in *Judicial Watch III* referred to the plaintiff's past dissemination of information derived from FOIA requests as one factor leading to the conclusion that the

plaintiff had fulfilled this third prong, the court never indicated that such a record was necessary to be entitled to a fee waiver. 185 F. Supp. 2d at 62. Rather...the requesting party's past dissemination of information obtained through FOIA requests was one of several factors the court considered in addition to the requester's proffered list of dissemination mechanisms and expressed intent to disseminate the information. *Id.* Such factors are considered because they illustrate the true inquiry: does the requesting party have the 'ability and intention to effectively convey' or disseminate the requested information to the public.' *VoteHemp*, 237 F. Supp. 2d at 62. (quoting *Judicial Watch III*, 185 F. Supp. 2d at 62). While there is nothing in the administrative record as to whether CREW has disseminated new information derived from a FOIA request, the record does indicate that CREW has the capacity to process and disseminate information and has done so in the past. In addition to stating the mechanisms it uses to disseminate information to the public, including reports, memoranda, and its website, which, consistent with *VoteHemp*, *Judicial Watch III*, and *D.C. Technical*, could have sufficed to fulfill this prong, Plaintiff also cited two specific examples – the Abramoff website and the campaign contribution report – show that CREW has the capacity to compile information and disseminate it to the public. *The Court cannot imagine why a requesting party would have to convince an agency that it was capable of disseminating new information or information obtained through a FOIA request when it has amply showed a capacity to disseminate information generally*") (emphasis added). *Id.*

<sup>21</sup> See *VoteHemp, Inc. v. Drug Enforcement Administration*, 237 F.Supp.2d 55, 62 (D.D.C. 2002), *supra*, referencing *D.C. Technical Assistance Org. v. U.S. Department of Housing and Urban Development*, 85 F.Supp.2d 46, 49 (DC DC 2000), *supra* ("Court must look to 'the scope of the requester's proposed dissemination – whether to a large segment of the public or a limited subset of persons...and the requester's capacity to disseminate the requested information'").

<sup>22</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>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</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>26</sup> See Lydia Saad, *In 2010, Conservatives Still Outnumber Moderates, Liberals*, Gallup Politics (June 25, 2010), available at: <http://www.gallup.com/poll/141032/2010-Conservatives-Outnumber-Moderates-Liberals.aspx> (A Gallup/USA Today polling in June 2010 revealed that 42% of those surveyed identify as conservative, 35% as moderate, while 20% identify as liberal); Pew Research Center for the People & the Press, *Voters Rate the Parties' Ideologies - Dems Viewed as Farther from Political Center than is GOP* (July 16, 2010), available at: <http://www.people-press.org/2010/07/16/voters-rate-the-parties-ideologies/> (A June 2010 Pew poll revealed that 40% of American voters identify themselves as conservatives, 36% as moderates and 22% as liberals, with a strong majority of both liberals and conservatives describing themselves as closer to the center than to the extremes); Jeffrey M. Jones, *Liberal Self-Identification Edges Up to New High in 2013*, Gallup Politics (Jan. 10, 2014), available at: <http://www.gallup.com/poll/166787/liberal-self-identification-edges-new-high-2013.aspx> (As of 2013, self-identified conservatives stand at 34%, moderates at 38%, and liberals at 23%); Art Swift, *Wyoming Residents Most Conservative, D.C. Most Liberal* (Jan. 31, 2014), available at: <http://www.gallup.com/poll/167144/wyoming-residents-conservative-liberal.aspx>.

<sup>27</sup> See Ipsos MORI, *Global Trends 2014 – Environment*, available at: <http://www.ipsosglobaltrends.com/environment.html>.

<sup>28</sup> See Pew Research Center Global Attitudes Project, *Climate Change and Financial Instability Seen as Top Global Threats - Survey Report* (June 24, 2013) at p. 1, available at: <http://www.pewglobal.org/files/2013/06/Pew-Research-Center-Global-Attitudes-Project-Global-Threats-Report-FINAL-June-24-20131.pdf>.

<sup>29</sup> See *Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036 (D. Idaho 2004).

<sup>30</sup> See *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C.Cir.1987).

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<sup>31</sup> (*Cf VoteHemp, Inc. V. DEA*, 237 F. Supp 55 (D.C. D.C. 2002) (wherein VoteHemp's website contained links to commercial interests and the requestor's mission included business promotion).

<sup>32</sup> *See National Treasury Employees Union v. Griffin*, 811 F.2d 644, 648 (D.C.Cir.1987).

<sup>33</sup> *See Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10 Cir. 2005).