

Memorandum

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peter.zeidenberg@arentfox.com**Date:** October 2, 2015, 2015**To:** Louis Uccellini, Director, National Weather Service**From:** Peter Zeidenberg, Esq.**Re:** Notice of Proposed Disciplinary Action Against Sherry Chen

NOAA's Proposed Disciplinary Action ("PDA") against Sherry Chen is premised on a number of key misunderstandings of fact. This response will establish that Ms. Chen i) never received *any* training regarding IT security in connection with accessing the NID website, and consequently was never advised or warned that all NOAA visitors to the NID website must use their own, individual user name and password; ii) never was instructed that she was not to provide data to her former boss and NOAA employee Tom Adams, and the information that she did provide Mr. Adams was public and non-proprietary; iii) never misused the NID database – the data contained within the NID was made available to NOAA employees to use in connection with their work, and Ms. Chen reasonably believed that the data contained in it might be of use to her in doing her job; she never shared the data with anyone, nor did she ever remove it from her work computer; and v) never misled investigators. At the end of her seven-hour long, interview, Ms. Chen provided investigators a hand-written statement that was a full and accurate accounting of all of Ms. Chen's actions.

I. OVERVIEW

Before engaging in a point-by-point rebuttal, it is critical to understand the factual context within which the conduct at issue must be considered.

A. NOAA Never Provided Any IT Training to Staff Regarding Accessing the National Inventory of Dams Website.

The PDA recites at considerable length the number of NOAA Information Technology (IT) Security trainings Ms. Chen attended. PDA, p. 2.¹ Yet the PDA fails to recognize that the IT trainings identified all pertained to NOAA's IT System; the training had nothing to do with the National Inventory of Dams (NID), which is an Army Corps of Engineers (ACE) run website. None of these trainings had anything to do with the NID, nor did they i) explain the necessity for obtaining one's own username and password before accessing the NID or ii) warn that accessing the database with a colleague's password would subject the user to termination.

This utter lack of training of the Wilmington office regarding the NID is incontrovertible. Interviews conducted by investigators of NOAA staff make clear that not only was there no training regarding the NID, the staff was operating under the belief that it was perfectly acceptable to share office passwords to access the NID. The PDA fails to acknowledge the documented custom and practice in the Wilmington Office of NOAA for employees to share website passwords, a practice described in detail by Ray Davis and condoned by management.

Ray Davis was a colleague of Ms. Chen's at the Wilmington Office and was the "focal point" for the NID password in the office. Ray Davis Interview Notes,

¹ Curiously, the PDA also includes a lengthy excerpt from the Government Agency Non-Disclosure Agreement associated with the NID. PDA, p. 3. This excerpt is apropos of nothing, since there has been no suggestion that Ms. Chen ever shared any information from the NID with anyone. *See* Report of Digital Forensic Activity, PDA Ex. 1 at Ex. I ("Forensic Report"), p. 2 ("No evidence of the file being renamed or further disseminated was found.").

attached as Ex. 1 (“Davis Notes”), p. 504. Davis was in charge of the NID password and, as he told investigators, he believed that he was free to share the passwords with his colleagues. Davis Notes, p. 501. Indeed, Davis told investigators that he “thought there was a communal NID password and . . . thought it was acceptable to share a password within an agency.” FBI Interview of Ray Davis, PDA Ex. 3 (“Davis MOI”), p 1.

Davis kept the password to the NID in a binder labeled “DAM BREAK” that the entire office could access. Davis Notes, p. 501. To the best of his memory, Davis thought that he provided his NID password to others, besides Ms. Chen. Davis Notes, p. 501. Davis also told the investigators that although he was the “focal point” for the NID password, in his opinion he had “not done [a] good job at training others” on the office protocols concerning the use of passwords. Davis Notes, p. 504. Davis advised investigators that “management” was aware that the office passwords were made available for the entire office to share. Davis Notes, pp. 501, 503.

Not only did management never instruct the office to refrain from sharing passwords – much less warn that a failure to comply could result in termination of employment – it was fully aware and condoned the sharing of office passwords. Trent Schade, Hydrologist-in-Charge, identified for investigators “a binder that contained multiple usernames and passwords to IT systems utilized by individuals within the office. The binder was labeled “coffee fund,” and was located in the operations desk for the office. Schade ROI, PDA Ex. 1, p. 3.

In a follow-on interview of Davis, conducted on February 5, 2015, Davis again told investigators that he “thought there was a communal NID password” and believed that he had shared that password with at least three NOAA employees besides Ms. Chen.² Davis MOI, pp. 1-2. During this follow-on interview, Davis told investigators that despite the fact that he had, on June 13, 2013, told S/A Lieberman, the lead case agent for this investigation, that the Dam Break binder contained the NID password and was available to the entire Wilmington office, no one within management or Department of Commerce (DOC) Security advised that

² During his initial interview, Davis identified a fourth possible person that he may have shared his NID password with. Davis Notes, p. 501.

the binder should be removed. *Thus, the Dam Break binder remained available to the entire office for the entire one year, eight month time period between June, 2013 and February 5, 2015, with the full knowledge of Department of Commerce Security Agents.*

Even after Mr. Davis was interviewed about his handling of the NID password, he changed his username and password and *once again put this password in the “dam break” binder for the entire office to access.* Davis MOI, p. 2. Davis told investigators that he thought had circulated to the entire office, via email, the NID password for each Wilmington employee to use. *Id.*

Brian Astifan, the acting Water Management Chief of the U.S. Army Corps of Engineers (ACE) confirmed that no training had been provided to Ms. Chen or her colleagues in the Wilmington office of NOAA regarding the NID. Astifan told investigators that he had “no recollection of any training provided by USACE regarding the National Inventory of Dams database to the Wilmington (NWS) office employees. In approximately Spring of 2012, USACE provided a day-long training seminar at the NWS Wilmington office, but it would not have addressed the NID.” FBI Interview of Brian Astifan, attached as Ex. 2, p. 1.

Given that the Water Management Chief of the ACE was unaware of any training that was provided on the NID to Wilmington personnel, and the person in charge of training others in the use of office passwords was under the impression that passwords could be shared within the office, it cannot be appropriate or fair to discipline those within the office that relied upon this custom and practice.

Moreover, the fact that DOC Security Officers did not immediately remove the Dam Break binder which contained the NID password as soon as they were advised of its existence during Davis’ interview on June 11, 2013, suggests that even Security was unclear on password protocols. Instead, the binder remained where it always was, available to the entire office, until February, 2015, until the eve of Ms. Chen’s scheduled trial date.

Finally, the assertion that Ms. Chen “continued to ask Mr. Davis for his individual username and password and stated that [she] needed them immediately” (PDA, p. 3) is without any basis in fact. Mr. Davis specifically told investigators that he did

not remember Ms. Chen being “pushy” regarding her request and, indeed, did not even recall if she approached him or if Davis approached her. Davis Notes, p. 505.

B. The National Inventory of Dams (NID) Database Does Not Contain Confidential Data.

The PDA makes a number of representations about the NID database that seem to suggest that the data contained on the NID is highly sensitive. PDA, pp. 2-3. In fact, the NID contains virtually no information that is not otherwise publicly available.

The NID contains a total of 70 fields of data. Of these, 64 fields are available to virtually anyone who requests a username and password, regardless of whether the requestor is a government employee or has an “official” need for the information. Any schoolchild, anywhere in the world, doing a report on dams could request – and would be granted – a username and password without any background check required. The remaining six fields of data, which are not available to the public, are for the following: i) downstream hazard potential; ii) nearest city; iii) distance to nearest city; iv) condition assessment; v) condition assessment detail; and vi) condition assessment date. Of these six fields, the first three – downstream hazard potential, nearest community and community distance – are available on other public websites.³ The three remaining fields – condition assessment, condition assessment detail, and condition assessment date – are not only non-sensitive, they are largely non-existent: the NID contains no information whatsoever for over 75% of these remaining fields – the data fields are entirely blank.

Ray Davis confirmed to investigators that this data was not in any way sensitive, telling them that he did not “think any of [the data] was sens[itive and] . . . certainly nothing Secret/Top Secret.” Davis Notes, p. 500. Davis observed, correctly, that the data was probably all available on “Google.” Davis Notes, p.

³ These three fields are available on the National Performance of Dams website (NPDP.Stanford.edu). This same data is also available on Mapcruzin.com. No passwords or usernames are required to access either of these websites. They are available to anyone with an internet connection.

502. Having all of the data in one place, such as the NID, simply makes it easier to find. Davis Notes, p. 502.

Thus, any suggestion that the NID contains highly sensitive material is simply false.⁴

C. The Information on the NID was Relevant to Ms. Chen's Job.

Ms. Chen was responsible for responsible for forecasting flooding in the Ohio River Valley. It was entirely logical and reasonable for her to assume that the NID would contain information that was relevant to her job in predicting flooding. Her colleague, Ray Davis, confirmed this to investigators. He advised the investigators that Ms. Chen “really has need to get [the] data,” and while it was not needed for a specific project it would clearly be helpful to her. Davis Notes, p. 502. Further, Davis noted that the data on the NID would be “important to [the] modeling” that Ms. Chen was required to do. Davis Notes, pp. 503-04.

Moreover, the data that Ms. Chen downloaded pertained to dams located in Ohio – the region which Ms. Chen was responsible for HEC-RAS modeling.⁵

⁴ The U.S. government protects sensitive information by classifying it as Top Secret, Secret, Confidential or For Official Use; *none* of the information contained in the NID is restricted in any way.

⁵ Gary Brunner, Senior Hydraulic Engineer at ACE, advised in a telephone interview on February 6, 2015, that he helped train Ms. Chen on the river forecasting model on which she later worked, and that her job responsibilities required her to gather the best available information regarding terrain, levees and dams to make the best possible river forecasting model for the ACE and the NWS. He advised that Ms. Chen had to balance between reservoir releases to limit flooding, but not overtop the dam. Mr. Brunner advised that while he personally never used the NID database, he understood conceptually the information that it contained, and would never suggest that the database would not have been of use to Ms. Chen in performing her job. According to Mr. Brunner, it was not at all unreasonable for Ms. Chen to think that there would have been useful information contained in the NID that would have been helpful to her in performing her job.

D. Deborah Lee's Suspicions of Ms. Chen Were Based on Ignorance and Racial Profiling.

Ms. Lee's suspicions of Ms. Chen were apparently triggered by two facts: first, the fact that Ms. Chen is Chinese-American. In her May 24, 2012 email to DOC Security, Ms. Lee noted in the second sentence that "She is a citizen *but a Chinese national*." Lee email to Joanne Rutledge, May 24, 2012, PDA Ex. 1 at Ex. B.⁶ Obviously, Ms. Chen's place of birth was of critical importance to Ms. Lee. Second, Ms. Lee was apparently alarmed that Ms. Chen was inquiring about water control manuals which, Ms. Lee claimed, "are not publicly available." PDA, p. 6. Ms. Lee is wrong. In fact, Ms. Chen had recalled, correctly, that at least some water control manuals are indeed publicly available. For example, the state of Missouri, where Ms. Chen had previously worked, makes its Water Control Manuals available on-line. These two concerns – one based on Ms. Chen's national origin, one based on an erroneous factual understanding – are what triggered this entire investigation and a nightmare for Ms. Chen that is still ongoing.

E. The Information Ms. Chen Provided to Tom Adams Was Publicly Available.

Tom Adams was a Development and Operations Hydrologist (GS-14) at NOAA for almost 25 years, 19 of which he spent at Ohio River Forecast Center (OHRFC), until he retired in February, 2013.⁷ While at NOAA, Mr. Adams led the project Ms. Chen was working on – the development and implementation of the Ohio River Community HEC-RAS Model. Together, Mr. Adams, Ms. Chen, and other members of their team, had written a paper presented at a scientific conference and which was subsequently published in the conference proceedings. The paper presented a description of the model and some preliminary results. By the time Mr. Adams left the OHRFC, additional cross-section and forecast data were

⁶ Of course, this is incorrect. Ms. Chen is a United States citizen. She is not a "Chinese national"; she is a naturalized American citizen.

⁷ Mr. Adams is currently working at a NOAA/NWS facility for the University Corporation for Atmospheric Research (UCAR) at the NOAA/NWS National Water Center on the University of Alabama in Tuscaloosa.

available which he believed would show improved results due to model improvements and additional model calibrations.⁸

The data Mr. Adams requested consisted of USGS observed data and model simulated data. The USGS data was all publicly available on the internet. By getting the data from Ms. Chen, Mr. Adams would not have to then pair-up the model simulated data with the USGS observed data. The request created no additional work for Ms. Chen, and none of the data requested could be construed as non-public information. Moreover, no non-public data was sought or provided.⁹

As a general matter, no data the NWS uses or generates is “proprietary” and none is considered sensitive or confidential.¹⁰ There was no pre-existing policy at the OHRFC to refuse to fill such data requests. On the contrary, the staff was encouraged to fill all data requests in the spirit of cooperation and openness. The

⁸ Mr. Adams was planning to submit this paper to the American Society of Civil Engineers Journal of Hydraulics.

⁹ The data requested consisted of observed USGS river stage (water level) data and simulated Ohio River Community HEC-RAS Model river stage (water level) data at hourly time steps. This USGS data is freely available and downloadable over the internet. Aggregating it in the form that Ms. Chen had available to her was simply a time-saving convenience. Data requests from researchers, academics and scientists come to River Forecast Centers (RFCs) routinely and are filled without question. The only reason that there would be a delay in filling the data requests would be if the RFC were particularly busy with forecast operations or some other activity.

OHRFC had set up on its website a page that explained the Ohio River HEC-RAS model, and contained a link to the paper that Ms. Chen and Mr. Adams wrote: <http://www.erh.noaa.gov/er/ohrfc/The%20Ohio%20River%20Community%20HEC-RAS%20model.pdf>. Requests by researchers for the supporting data for this and other papers were routinely fulfilled by the Wilmington office.

¹⁰ The only exception to this would be if a NWS office were using data obtained from an outside source that was proprietary, such as numerical weather prediction model data obtained from another country or from, for example, a private hydropower facility. The data Mr. Adams requested did not fall into any of these categories.

reason Trent Schade sent the email to Mr. Adams requesting that his “requests for data or code go through [him]” (which he cc'ed the OHRFC staff on) (Schade email to Adams, Apr. 16, 2013, attached as Ex. 3) was due to a personality conflict between Mr. Schade and Mr. Adams; it was *not* because of any office policy or protocol.

F. Ms. Chen Provided Truthful and Candid Information to the Investigators.

Ms. Chen’s interrogation by government agents was a harrowing experience. Two agents showed up at Ms. Chen’s place of work without any advance warning. They questioned her in a closed office, without her having the opportunity to consult her calendar or emails, much less an attorney. The agents never told her why they were there, what the investigation concerned, or even that she was the focus of it. This was a critical omission, because Ms. Chen had no idea or reason to know what was important to the investigation – which dates, which emails, which interactions – and which were peripheral. For example, had Ms. Chen known that it was critical to know the date she last traveled to China, it would have been a simple matter to look that up. Instead, out of a misguided attempt to be helpful, Ms. Chen said that the last time she had visited China was the previous year, in May, 2011, when, in actuality, she had last visited China in May, 2012. That type of error – of forgetting a date, a name, or the precise sequence of events – is to be expected in any lengthy interview, particularly when the interviewee has no idea what the investigation is about and, therefore, what information is likely to be material.

And this interview was extraordinarily lengthy. Ms. Chen came to work at 7:00 a.m. on June 11, 2013. She had not had breakfast that morning. At 11:05 a.m., Agents Andrew Lieberman and Michael Benedict of the DOC Office of Security began their interrogation of Ms. Chen. At no time did they offer her food, water or an opportunity to take a break. She was not offered an opportunity to use a bathroom for more than five and one-half hours. The agents advised her, in response to her question, that she did not need an attorney. They proceeded to question her for more seven hours, until 6:00 p.m., without respite, about events that had occurred more than one year previously and about which Ms. Chen had had no reason ever to think about or consider since that time.

Despite not reviewing her emails, her calendar, or her travel documents, by the end of the interview, Ms. Chen provided to the government a five-page hand-written document that was entirely accurate. PDA Ex. 1 at Ex. F (“Chen hand-written statement”). This completely accurate rendition was not the result of any accusation by the agents that they did not believe Ms. Chen’s previous account was completely truthful, or that they had contrary information. No such representations were ever made. *See* Interview of Sherry Chen, attached as Ex. 4 (“Chen MOI”). Rather, it was simply the result of Ms. Chen talking through the sequence of events, and having the opportunity to refresh her recollection once she was offered to print out her email exchange with Mr. Jiao.

G. Ms. Chen’s Efforts to Provide Publicly Available Information to Mr. Jiao Was an Example of Exemplary Conduct That Furthered the Mission of the NWS.

The National Weather Service Mission Statement states, in relevant part, that “NWS data and products form a national information database and infrastructure which can be used by other governmental agencies, the private sector, the public, and the global community.”

Indeed, Trent Schade, Ms. Chen’s supervisor, when questioned by investigators about Ms. Chen’s efforts to respond to Mr. Jiao’s queries, commended Ms. Chen for being conscientious in handling the request for information. When asked if Ms. Chen had violated a policy, protocol or process in how she handled Mr. Jiao’s request, Schade stated that “*what she did was consistent with what a good performer would do: continue to follow up. If ACE can’t share the information, we need to say that. In that case I hope she would make sure the request is being handled. If a data request comes in[,] don’t let it go. Talk to ACE [and] put the two parties together and ensure it’s handled.*” Interview of Trent Schade attached as Ex. 5, pp. 0045-0046 (emphasis supplied).

Ms. Chen believed in this Mission Statement to her core. When she received an inquiry from a former colleague about how dam repairs were financed in the U.S., and how these costs were shared between federal and local governments, and did not know the answer herself, she thought it was incumbent upon her to at least try and get the answers. It should go without saying that this information could hardly

be considered proprietary, sensitive or confidential. Indeed, by its very nature, this is a request for how public money is spent in the United States – it is the essence of public information. Ms. Chen merely sought to locate and identify this public information for Mr. Jiao.¹¹

It would be difficult to imagine how Ms. Chen could have acted in a more transparent or aboveboard fashion:

- She advised her supervisor, Trent Schade, that she had gotten a request for information and outlined the questions, in detail, that Mr. Jiao had asked about, and then explained that the “[NID] has dam storage info but it is by dams or states *and only available to government users. Where to get some general info for public?*” Chen email to Schade, May 11, 2012, PDA Ex. 17 (emphasis supplied).
- She sent Mr. Jiao information from publicly available U.S. government websites, i.e., the Federal Energy Regulatory Commission website; University Council on Water Resources website; U.S. Army Corp of Engineers – all of these websites are available to literally anyone in the world with an internet connection, without any restrictions. Chen email to Mr. Jiao, May 29, 2012, PDA Ex. 1 at Ex. L.
- At the conclusion of her email to Mr. Jiao, she told him that he should try the main number for operations at Water Management at COE, and then provided the phone number for that office so that he could ask any further questions he might have directly. Chen email to Mr. Jiao, May 29, 2012.

¹¹It appears, unfortunately, that it is necessary to note that there is no ban or restriction of any kind that would prohibit or bar a NOAA employee such as Ms. Chen from communicating with anyone in China. It is undisputed that that Ms. Chen never provided sensitive, confidential or proprietary – much less classified – information to *anyone*. Thus, the pages spent recounting Ms. Chen’s communications with a former colleague in China are indeed puzzling.

- According to Ms. Lee, Ms. Chen told her directly that the request she was attempting to follow up on *came from a former colleague in China*. Lee email to Rutledge, May 24, 2012, PDA Ex. 1 at Ex. B.

This conduct would be unimaginable had Ms. Chen been attempting to do anything in an underhanded or clandestine manner.

In sum, Ms. Chen pointed Mr. Jiao to nothing other than publicly available information that is provided on U.S. government websites. She never provided to Mr. Jiao any information from the NID.

II. REASONS FOR TERMINATION

Reason 1: Conduct Demonstrating Untrustworthiness

Specifications 1 and 2 concern the sending of publicly available data by Ms. Chen to Tom Adams. You allege that Ms. Chen acted in contravention of an April 16, 2013 email from Trent Schade, Ms. Chen's supervisor, when she provided otherwise publicly available data to Tom Adams.

First and foremost, it is undisputed that no NWS, NOAA or DOC policy or code of conduct prohibited Ms. Chen from sharing the public data that she shared with Mr. Adams. Indeed, by fulfilling this request, Ms. Chen was helping to further the mission of the NWS. *See*

<http://www.nws.noaa.gov/directives/sym/pd00112curr.pdf> (NWS Policy Directive 1.2) ("NWS makes data in its possession available to the public *without restriction*, to the extent practical within resource constraints."); According to NOAA's own website:

The National Weather Service (NWS) strives to use the latest technologies available to disseminate climate, water, and weather information in gridded, graphical, and text form. *NWS policy is the NWS suite of information is to be disseminated in various formats and media (see below) appropriate to the needs of customers in an equitable and open manner.* The NWS vision for communicating information to users is to:

- *Make a wide range of information readily available to a diverse user community*
- *Disseminate all NWS information nationwide*
- *Disseminate broad user community-specific information as a subset of NWS information*
- Deliver critical information to the public, the hazards community, and other users

NWS relies on the substantial contribution of our partners in the public and private sectors to further disseminate and communicate products and information.

[Http://www.nws.noaa.gov/os/disemys.shtml](http://www.nws.noaa.gov/os/disemys.shtml)) (emphasis supplied).

Although the Wilmington NWS office was copied on the April 16, 2013 email to which you refer, this email was sent *from* Mr. Schade *to* Mr. Adams – it was *not* directed to the NWS office in general or Ms. Chen in particular. This email stated, in its entirety: “Tom, Please send your requests for data or code through me. Thanks, Trent.” Schade email, Ex. 3.

Mr. Schade did not subsequently forward this email to the office with an admonition that no data should be sent to any member of the public without Mr. Schade’s approval. Nor did Mr. Schade circulate a new office policy or protocol that would apply to such future requests.¹² It was simply an informal, one sentence email exchange between former colleagues in which the NWS office was copied.

April 16, 2013 – the date the email from Mr. Schade to Mr. Adams was sent – was Ms. Chen’s first day of work after three and one-half days off. Approximately 80

¹² As noted above, any attempt by Mr. Schade to restrict the release of NWS data would have violated preexisting NOAA and NWS mission statements. *See* <http://www.nws.noaa.gov/directives/sym/pd00112curr.pdf> (NWS Policy Directive 1.2) (“NWS makes data in its possession available to the public *without restriction*, to the extent practical within resource constraints.”) Emphasis supplied.

emails had accumulated in her in-box while she was on leave. There was simply nothing about this email that would have caught her attention: it was addressed to Tom Adams, not to her; it was not flagged as “important” in any way; nor did Mr. Schade later forward the email to the staff, with an admonition or instruction about new policies going forward regarding data requests. There was simply nothing about this email that caught Ms. Chen’s attention, and she did not see it when it was sent.

One month later, Ms. Chen sent to Tom Adams data he requested regarding hourly river flow data. This is information that the NWS routinely provides to any member of the public that requests it. Mr. Adams did not get special treatment, nor was he provided data that would not have been provided to any member of the public that requested it.

Ms. Chen’s statement to Mr. Adams that she would not tell anyone about his data request was simply a clumsy attempt to avoid a personality conflict between two former colleagues – Schade and Adams – who did not get along and did not like one another.

Finally, even assuming that the sharing of public information to Tom Adams was some sort of violation – something that we do not concede – at worst it could be considered no more than a single instance of misconduct. In no way could this incident be viewed as demonstrating a pattern or practice that would establish an employee as “untrustworthy.” One, isolated mistake does not constitute a pattern. Even viewed in the worst light possible, this should be viewed as no more than a single, isolated mistake that occurred within a career of outstanding government service.

Reason 2: Misrepresentation

You allege that Ms. Chen was being untruthful when she told Agent Lieberman that she did not recall ever seeing the April 16, 2013 email from Mr. Schade to Mr. Adams, and only became aware of it after being advised of it by a colleague, Jim Noel. Ms. Chen was being completely truthful when she spoke with investigators. She did not see the April 16, 2013 email from Mr. Schade to Mr. Adams, and has a clear recollection of learning about this email *after* she sent the data to Mr. Adams, when she had a conversation about it with Mr. Noel.

Ms. Chen had been off work on April 13, 14 and 15, and was on the 12:00 p.m. to 10:00 p.m. shift on April 16. Thus, three and one-half days of emails and attachments had accumulated in Ms. Chen's in-box when she showed up for work on April 16. It is hardly surprising that a single email – never recirculated or highlighted in any fashion – might have escaped her notice.

The “evidence” you cite to the contrary consists of the agent's hand-written notes from a telephonic interview conducted with Jim Noel on September 27, 2013. *See* Noel Interview Notes, attached as Ex. 6, p. 514. Clearly, this interview was not conducted in a fashion designed to best elicit reliable and accurate information – the agents did not even bother to travel to the NOAA office to interview Mr. Noel in person. There is no reason to think Mr. Noel would have had any appreciation for the critical importance of a single, off-hand, informal conversation that he had had months earlier with a colleague. There was simply no reason for him to have recalled that event.¹³ A conflict in memories between two colleagues about a conversation that occurred in passing months previously cannot be said to provide a sufficient basis for terminating an employee with a previously unblemished record of outstanding performance.

Moreover, it defies commonsense that Ms. Chen would have falsely claimed to have had a conversation with Mr. Noel if she had not done so. Had she wanted to deceive, Ms. Chen could have simply claimed that she never read or even heard about the Trent Schade email, and never suggested that she learned about it from a colleague whom the investigators would undoubtedly seek out to question.

The allegation that Ms. Chen falsely claimed that this conversation occurred in order to avoid “personal exposure to disciplinary action, legal action or other adverse consequences” is without any basis. There was no legal or disciplinary action that she would have been subject to for providing Mr. Adams with publicly available information. Doing so violated no office rule, policy or protocol. There

¹³ It would not have been the first time in this case that witnesses forgot entirely about events they were questioned about months later. Ray Davis initially told investigators that he had no memory of ever sharing his password with Ms. Chen. It was only after he was shown a copy of the email in question that he recalled that event. *See* Davis Notes, p. 502.

was no rule – much less law or regulation – that Ms. Chen violated by providing the data to Mr. Adams. Thus, there was no motive for her to fabricate this response.

Reason 3: Misuse of a Government Database

Specifications 1 and 2 simply state that on May 10 and May 15, 2012 Ms. Chen accessed the NID and downloaded a file from it, and that her “Government position did not require [her] to download the file from the NID at that time.”

You further state that Ms. Chen “misused a Federal Government Database” because, you claim, Ms. Chen’s “duties and responsibilities as a Hydologist did not require [her] to access the NID and download either of the documents [she] downloaded in May 2012.”

Ms. Chen, along with the rest of the Wilmington office, received training on the NID when it was rolled out in 2009. At no point in that training, or in any other training, was Ms. Chen – or, for that matter, anyone else in the Wilmington office – advised that accessing the NID when not “required” to do so would lead to termination of employment. (Of course, had such a warning ever been given, it would be virtually unimaginable that anyone would *ever* take the risk of accessing the NID database – no reasonable person one would consider risking their career if it was later determined that their accessing of the data was not “*required*.”)

The data in the NID was compiled by the ACE and disseminated to NOAA so that persons such as Ms. Chen could help further the mission of the NWS. There is no policy or regulation that she and her colleague could not access the NID as their discretion and judgment dictated. The claim that Ms. Chen needed “authorization from USACE or [her] supervisor to access the NID” is, once again, without any basis. There is no regulation, rule, protocol or procedure that has been identified that would support the contention that NWS employees were prohibited from accessing the NID absent pre-approval from USACE or a supervisor. If such a requirement existed, it was never published to Wilmington employees, and Ms. Chen had no notice of it.

Ms. Chen’s perusal of the NID was triggered by her conversation with Mr. Jiao. Then, when she accessed the NID and saw that the data was restricted to

government users, she immediately recognized that she could not share this data with Mr. Jiao.¹⁴

This was the first time in years that Ms. Chen had been on the NID website. She perused the information for Ohio – the geographic area she was responsible for forecasting – and downloaded that data onto her work computer. Five days later, on May 15, Ms. Chen downloaded the identical document again. Ms. Chen reasonably believed that this data would be helpful to her in performing her duties as a hydrologist responsible for forecasting flooding in the Ohio River Valley.¹⁵

Moreover, as noted above, Ms. Chen was never advised or warned that it was improper to share Mr. Davis' password. Indeed, Mr. Davis and, for that matter, Wilmington Management – was unaware of this prohibition. Management knew that Mr. Davis made an office password to the NID available in a binder that the entire office could access.

Reason 4: Lack of Candor

You cite nine instances where Ms. Chen was allegedly not candid with Agent Lieberman during her interview. These specifications ignore the nature of the interrogation conducted of Ms. Chen. Ms. Chen was questioned, repeatedly, by two agents, for a total of seven hours. She did not have the opportunity to refresh her recollection by first reviewing the relevant emails. Nor was she told the nature of the investigation, or what it was the government was investigating. As a result, Ms. Chen initially made several misstatements as she tried her best to provide the agents with correct information. All of these misstatements were subsequently corrected in Ms. Chen's hand-written statement that she provided investigators at the conclusion of her interview. Thus, these specifications are without factual basis.

¹⁴ She said this explicitly in her email to Mr. Schade (“National Inventory of Dams (NID) has dam storage info but it is by dams or states and only available to government users. Where to get some general info for public?”) See PDA Ex. 17.

¹⁵ Ray Davis, her colleague, and Gary Brunner, the person who trained Ms. Chen on the HEC-RAS model, have both stated that it would have been logical to believe that this data would be of use to Ms. Chen in performing her job.

Specification 1: You claim that Ms. Chen lacked candor when she responded to S/A Lieberman's "question asking whether anyone asked [her] for information", and claim that she omitted telling the agent "that Mr. Jiao asked [her] for information about U.S. dams while [she] was in Beijing."

S/A Lieberman's MOI of his interview with Ms. Chen completely refutes this specification. S/A Lieberman reported that he asked Ms. Chen:

Did anyone internationally ask you for information regarding locks and dams? CHEN said "yeah, my colleague. I didn't have the information to provide." Chen said she wondered if there was anything online she could provide and that her colleague was "working at the Water Institute in China" and "wanted to know how we manage projects." CHEN said "I don't really know that" so she asked Debbie Lee who said to go online. CHEN then said she told her colleague you can get the information publically on the website.

Chen MOI, p. 0009.

Ms. Chen went on to immediately explain that she asked Debbie Lee for assistance, and then directed her former colleague to get the information on publicly available websites. Chen MOI, p. 0009.

Ms. Chen's responses to these questions were accurate in every respect.

Specification 2: You claim that Ms. Chen was not candid because, in response to S/A Lieberman's question about the name of the individual in China who requested information about locks and dams, she stated "Umm, he was one class above me; I haven't seen him in ten years; let me think about it."

This specification completely ignores the fact that S/A Lieberman "asked CHEN to provide the name of the individual and the email he sent her. CHEN said she would provide it." Chen MOI, p. 0016. Ms. Chen then described the individual as being about 56 years old, and as a Deputy Director, and wrote his name "on a sticky note which she handed to S/A Lieberman. CHEN said his name in English is Jiao Yong and that she would provide [the agents] with the email she sent." Chen MOI, p. 0017. She then voluntarily provided Agent Lieberman with the

emails in question, which the government did not have at the time. Chen MOI, p. 0022. Ms. Chen then wrote out a hand-written statement, totaling five-pages, which again identified Mr. Jiao by name. Chen hand-written statement, p. 1.

Thus, the suggestion that Ms. Chen was not being candid with Agent Lieberman regarding Mr. Jiao's name is wholly without basis. On the contrary, Ms. Chen identified Mr. Jiao by name, she wrote his name on a sticky pad, and then she voluntarily provided Agent Lieberman with emails from her personal email account to Mr. Jiao – emails that the government did not have in their possession previously. It would be difficult to imagine how Ms. Chen could have been any more candid or forthcoming.

Specification 3: You cite as an example of Ms. Chen's lack of candor the fact that she claimed that she had sent Mr. Jiao only one email, when, in fact, she sent him three emails.

This allegation is without any basis in fact. At no point during her interview did Ms. Chen ever represent that she only sent a single email to Mr. Jiao. And, moreover, the suggestion that the precise number of emails sent by Ms. Chen – whether one, two, or three – was somehow of critical importance to S/A Lieberman is fanciful. Even if the precise number of emails sent were, for some reason, a critically important fact, this was never conveyed to Ms. Chen. Had it been, Ms. Chen would have simply turned over the emails – as she later did – rather than try and guess more than a year later at the precise number.

To be clear, it was Ms. Chen who volunteered the fact that her email exchange with Mr. Jiao was available on her personal email account, and it was she who, without being asked, volunteered to print them out for S/A Lieberman. Chen MOI, p. 0022. There has been no suggestion that there were any additional emails. Even if Ms. Chen *had* incorrectly recalled, one year later, the exact number of emails she sent to Mr. Jiao – something that she did not, in fact, do – this could hardly be deemed a lack of candor. The emails speak for themselves. Had Ms. Chen not wished to be cooperative, she did not have to volunteer them to the agents. She had nothing to hide, and she wished to be fully cooperative, and she gave the agents the entirety of the email exchange, which consisted of *two* substantive

emails. Any suggestion that her account in this regard was lacking in candor lacks any basis in fact.

Specification 4: You allege that Ms. Chen was not being candid with Agent Lieberman when she initially stated that she had not used Ray Davis' password to access the NID.

Ms. Chen did not, initially, have any recollection of having used Mr. Davis' password when she was first asked about it. The event had occurred more than one year prior and was, in Ms. Chen's mind, unimportant. She had forgotten all about it. And the agents never indicated that her possible use of a colleague's password was the focus of their investigation. It simply escaped her mind, until S/A Lieberman refreshed her recollection by showing her the email from Ray Davis.

It can hardly be suggested that this is an unlikely explanation when *the exact thing happened when Ray Davis was interviewed by Agent Lieberman*. After Mr. Davis told investigators that he had "been letting others use" his password, and that he had made that password – as well as others – available in a binder for everyone to access, he was asked if Ms. Chen had requested from him a user name or password? Mr. Davis responded, "I don't think so." Davis Notes, p. 502. It was only after S/A Lieberman refreshed his recollection by showing Mr. Davis the email he had sent to Ms. Chen with his password for the NID, that he recalled the event, noting that it had occurred more than one year ago. Davis Notes, p. 502.

Once the agents refreshed Ms. Chen's recollection by sharing with her the email sent by Mr. Davis, her memory was refreshed, and Ms. Chen accurately recounted what had occurred with Mr. Davis: She explained that when she had last accessed the NID database, no password was needed, and, not knowing why a password was now needed, she "asked Ray if he knew anything about the requirement. He said he had one [password] and would email the link and login. . . . I used the link and login Ray sent to me." Chen hand-written statement, p. 2.

The fact that Ms. Chen did not immediately recall using Mr. Davis' password is no more surprising than the fact that Mr. Davis and Mr. Schade did not initially recall

this event, either.¹⁶ What is surprising is the fact that Ms. Chen is being treated so differently than Mr. Schade and Mr. Davis.¹⁷

Specification 5: You allege that Ms. Chen exhibited a lack of candor when she “responded to S/A Lieberman’s question regarding whether [she] provided information from the NID to anyone in China” because she “omitted that [she] logged into the NID using Mr. Davis’ individual credentials and password because [she] thought it would contain dam volume information and that [she] ‘clicked one or two individual documents to see if [dam] volume was there’ in response to the 2012 request from Mr. Jiao.”

Ms. Chen answered truthfully the questions that were asked of her. She was specifically asked if she shared any information from the NID with anyone in China. Her answer, which was entirely accurate, was “no.” Her answer was fully responsive and completely accurate. The suggestion that Ms. Chen was not candid when she truthfully responded to one question because she did not volunteer information responsive to another, unrelated question is bizarre.

¹⁶ Ray Davis and Ms. Chen were not the only interviewees who failed to recall these events until their memories were refreshed by reviewing relevant emails. Trent Schade, the Hydrologist-in-Charge, also displayed a faulty memory when questioned by investigators. When asked initially if he recalled Ms. Chen “making a request for public information when she returned from her trip” to China, Schade replied in the negative. Schade ROI, p. 2. It was only after being shown a copy of Ms. Chen’s email to him requesting information that he recalled the event. Id. Yet there has been no suggestion that Mr. Schade exhibited a “lack of candor” by this response. While Mr. Schade and Mr. Davis are given the benefit of the doubt when they claim a faulty memory, only Ms. Chen is singled out for termination of employment for demonstrating a “lack of candor” for displaying an identical lapse in memory.

¹⁷ Upon information and belief, Mr. Davis has not been accused or disciplined for a lack of candor for failing to initially recall sharing his password with Ms. Chen. Nor has Mr. Davis been disciplined for sharing his password with Ms. Chen. This disparity in treatment cannot be ignored.

Moreover, Ms. Chen did, in fact, explain to the agents that after returning from China, she accessed the NID to see if relevant, public information was available regarding dam volume and capacity, but later saw that the data was not public and could not be shared. Chen MOI, p. 0012. Further, when “S/A Lieberman asked CHEN: When you returned back from China, did you look at the NID regarding the request you received in China? CHEN said ‘I looked and realized it was not public so I went to Debbie.’” Chen MOI, p. 0015. This response was direct, truthful, and fully candid. Any contention that these responses were not candid is without a factual basis.

Specifications 6 & 7: You allege that Ms. Chen lacked candor when she denied downloading information from the NID, and that she contradicted this denial when she “later admitted that [she] downloaded documents from the NID ‘to see if [dam] volume [wa]s in it in response to Mr. Jiao’s request.’”

These specifications are without merit. Ms. Chen, unsurprisingly, did not recall when she was questioned in 2013 that more than a year earlier she had downloaded the same document, on two separate occasions in May, 2012. This should hardly be surprising. The forensic report regarding this cyber-activity reflects that Ms. Chen downloaded the same document – containing dam information for Ohio – on two occasions – May 10 and May 15, 2012. According to this same report, Ms. Chen never accessed these documents after downloading them. Nor were the documents “renamed or further disseminated.” Forensic Report, p. 2. In other words, Ms. Chen downloaded the identical document twice, onto her work computer, and never accessed them again, never renamed them, and never transferred them to anyone or any other device.

These were documents that Ms. Chen initially downloaded because she thought they might contain information that would be helpful to her in doing her job. There has been no suggestion that Mr. Jiao had any particular interest in dams or levees in Ohio. Ms. Chen downloaded them *not* for Mr. Jiao but for herself. She literally had no reason to ever think about these documents again – she had not looked at them for more than one year.

The allegation that Ms. Chen “later admitted that [she] downloaded documents from the NID ‘to see if [dam] volume [wa]s in it in response to Mr. Jiao’s request’”

is false. Ms. Chen admitted no such thing. What Ms. Chen told S/A Lieberman is that she initially perused the NID because she thought it might have public information that was responsive to Mr. Jiao's request; she *never* said that the Ohio document she downloaded had anything to do with Mr. Jiao. In fact, Ms. Chen downloaded that document, twice, because she thought it might be helpful to her in doing her job. Chen MOI, p. 0020; Chen hand-written statement, p. 2 ("I was not familiar with the new site since I hadn't gotten on for a long time. So I went thru and saw that you need to click each individual one to see the the information since they were not the same from one to another. *This was just for my own curious[ity] as some info were related to the HEC-RAS model I am develop[ing].*").

It is the case that Ms. Chen initially associated the downloading of the document from the NID with a webinar. This memory was not accurate. However, Ms. Chen told S/A Lieberman, and provided in her written statement a completely accurate recounting of the sequence of events: after speaking with Mr. Jiao and returning to work, Ms. Chen looked at the NID thinking it might have publically available information that she could share. When she saw that it did not, she sought the assistance of Debbie Lee. In the meantime, while on the NID, Ms. Chen thought the data for Ohio might be of help to her in performing her duties, and she downloaded a single document from Ohio, which she never returned to again.

Ms. Chen's recounting was candid, truthful and completely accurate. Terminating Ms. Chen because she did not immediately recall this precise sequence of events more than one year later, without first being provided the relevant documentation necessary to refresh her recollection, would be an abuse of discretion.

Specification 8: You allege that Ms. Chen lacked candor when she indicated said that she downloaded the documents in question in 2011 rather than in 2012, and that the download was not done in response to the request she received from Mr. Jiao. These allegations are without basis.

Ms. Chen, when first asked when these events occurred, stated "it was the last time I visited my parents; I *think* 2011; May 2011." Chen MOI, p. 0010 (emphasis supplied). Ms. Chen correctly pegged these events to the last time she had been to China, which was to visit her elderly parents. When first asked about the date,

without any calendar, emails, travel documents or diary to consult, Ms. Chen incorrectly said she thought it was May, 2011 when, in actuality, it was in May, 2012. It defies commonsense to think Ms. Chen would intentionally try to mislead federal agents about when she had last visited China. It would be hard to imagine any facts easier to determine definitively than the dates of one's international travel – information available on any number of databases, as well as stamped on Ms. Chen's own passport. There is simply no reason to believe that this was an intentional falsehood, and not an innocent misrecollection that could happen to anyone in these circumstances, particularly where S/A Lieberman never indicated that the date of this travel was critical. Had Ms. Chen been advised that the date of her last travel to China was important, she obviously would have consulted her emails or other travel documents before indicating that she "thought" she had travelled in 2011. Indeed, the emails she printed out and volunteered to S/A Lieberman definitively identified the relevant dates of travel. It defies commonsense to think that Ms. Chen would have lied about her dates of travel during her interview and then volunteer emails that the government did not otherwise have that contradicted that timeline.

It is not true that Ms. Chen omitted mentioning that she downloaded the documents from the NID "in response to the request you received in China about dam volume." As noted above, Ms. Chen accessed the NID initially because of the request from Mr. Jiao, but, once she saw that the information was restricted, she consulted with Deborah Lee. The downloads were for her own, professional use; they were not for Mr. Jiao. Thus, there was no omission. Ms. Chen's answer was completely accurate.

Specification 9: You allege that Ms. Chen was not candid when she told S/A Lieberman that she did not download the documents from the NID for Mr. Jiao. You also cite the fact that Ms. Chen told S/A Lieberman that "I told [Mr. Jiao] that the information was not available."

Both of these responses were completely accurate. In her email to Mr. Jiao, dated May 29, 2012, Ms. Chen sent Mr. Jiao a link to the NID that is available to the public, and noted, "*However, this data base is only for government users and non-government users are not able to directly download any data from this site.*" Thus,

Ms. Chen's statement to S/A Lieberman that she "told [Jiao] that the information was not available" was completely truthful and accurate.

Finally, Ms. Chen did not download the information for Mr. Jiao. As outlined above, Ms. Chen downloaded the information because she thought it would be of help to her job in forecasting river flooding. Had Ms. Chen downloaded the data in question for Mr. Jiao, then it defies reason and commonsense that she never sent it to Mr. Jiao. Yet the forensic analysis of Ms. Chen's computer makes clear that although she downloaded the data in May, 2012, between that date and the date she was interviewed more than one year later, she never accessed, much less transferred, these documents to anyone. Had she wanted to provide them to Mr. Jiao, obviously she would and could have done so. The fact that she did not do so belies any suggestion that her intent in downloading them was to provide them to Mr. Jiao.

This specification, therefore, lacks any factual basis.

III. PENALTY

You state that because of "the extent of [Ms. Chen's] misconduct," the "appropriate" punishment is removal. This conclusion is astonishing, given the "misconduct" at issue. Ms. Chen stands accused, essentially, of:

- Borrowing a colleague's password to access the NID; yet neither Ms. Chen nor the person who provided her his password, Ray Davis, was aware that sharing passwords office-wide was prohibited, and the password to the NID was available to the entire office – a fact well-known to office management and, indeed, to DOC security who permitted the password to remain in a binder available to the entire office *for one year and eight months* after learning of its existence – from June, 2013 until February, 2015. Moreover, no training was ever provided to Ms. Chen or, for that matter, anyone else in the Wilmington Office that accessing the NID without one's own password would lead to one's termination of employment.
- Providing publicly available data to a former colleague, an act that not only did not violate any pre-existing rule, regulation or protocol, it

actually advanced the mission of NOAA, by providing public NWS data to the private sector. Ms. Chen never saw the email from Trent Schade to Tom Adams asking Mr. Adams to route data requests through him but, even if she had, it is unimaginable that her sending public information to Mr. Adams would constitute a firing offense or, indeed, could even be deemed insubordinate where the email was not directed to her own conduct – it was directed to Mr. Adams.

- Not being candid with investigators, despite the fact that Ms. Chen patiently answered questions for seven hours without respite and without being provided food, water or a break, and provided investigators a hand-written statement that answered every question truthfully and accurately.

5 U.S.C. § 2302 (Prohibited personnel practices) which prohibits anyone with “authority to take, direct others to take, recommend, or approve any personnel action” from “discriminate[ing] for or against any employee . . . on the basis of race” 5 U.S.C. § 2302(b)(1)(A). Here, it is impossible to view the disparate treatment of Ms. Chen and Ray Davis and not see evidence of discrimination. Mr. Davis admitted to investigators that he gave Ms. Chen his password so that she could access the NID. Thus, he has admitted to aiding and abetting Ms. Chen in this alleged “misconduct.” Indeed, given that Mr. Davis was in charge of the NID password, his conduct was arguably more egregious than Ms. Chen’s; it was Mr. Davis who should have immediately advised Ms. Chen that her request was inappropriate and that she needed to obtain her own username and password. Had he done so, nothing that followed would have transpired. Instead, Mr. Davis provided Ms. Chen his username and password for her to use. *Yet only Ms. Chen is being disciplined for “Misuse of a Federal Government Database.”*

In addition, Mr. Davis initially told investigators that he never shared his password. It was only when he was confronted with his email to Ms. Chen containing his username and password that he recalled sharing this with her. *Yet only Ms. Chen is being disciplined for “Lack of Candor.”*

Not only is Mr. Davis not being terminated for engaging in the identical conduct that Ms. Chen is alleged to have engaged in, *Mr. Davis has not been disciplined in any fashion whatsoever.* It should be clear from this submission that we agree that

Mr. Davis is undeserving of any discipline – at worst he misunderstood the rules concerning the sharing of office passwords, and he clearly suffered a memory lapse when being questioned by investigators. But it is inconceivable that Ms. Chen should be terminated for engaging in the identical conduct. The differentiator between these two individuals is both clear and unavoidable: Ms. Chen is Chinese-American, and Mr. Davis is not. There is no other, discernible distinction that would account for such disparate treatment: NOAA seeks to terminate Ms. Chen’s employment; *Mr. Davis is subject to no discipline at all, for engaging in the identical conduct.*

The Department of Commerce’s own Department Administrative Orders (DAO), states that in determining the appropriate penalty, a determination should be made about the “nature of the offense, its seriousness and consequences.” DAO 202-751. Here, the nature of the offenses simply cannot be deemed “serious.” Ms. Chen’s use of a colleague’s password to access the NID was wholly innocent and, in light of the lack of training, completely understandable and, indeed, should have been foreseeable to management, upon whom it was incumbent to provide appropriate training. The consequences were non-existent. The information downloaded from the NID was not only innocuous and non-sensitive, it remained untouched and unviewed on Ms. Chen’s work computer. Likewise, the data that was shared with Mr. Adams was public and non-proprietary. Its sharing not only had no negative impact on the office’s mission, sharing this data was fully consistent with the mission statement and ethos of the NWS “to make [] information available to external users.”

Finally, the allegation of “lack of candor” is specious; Ms. Chen concluded her marathon interview by providing investigators with a hand-written statement that was completely accurate and truthful. Whatever confusion existed initially about the timing and sequence of events was clarified. Thus, there was no negative impact on the investigation since by the conclusion of the interview the agents had a complete and accurate recounting of all of the relevant events.¹⁸

¹⁸ There has been no suggestion made there were any material omissions, mistakes or false statements made in Ms. Chen’s hand-written statement.

The Administrative Orders also dictate that the following factors should be considered when determining the appropriate penalty:

- *Possibility of genuine misunderstanding.* There can be no doubt that there was a genuine misunderstanding on the rules that applied to sharing of office passwords; as described by both Ray Davis and Trent Schade, the office passwords were made available to the entire Wilmington office in a binder; no training was provided to suggest that this was improper. Moreover, there was no specific guidance given that would have put Ms. Chen on notice that sharing public information when requested by members of the public was prohibited. Finally, there can be no question that there were multiple misunderstandings during the interview of Ms. Chen regarding the dates and sequences of events. As the interview with Mr. Davis should make clear, surprise interviews conducted without notice or time to prepare makes errors of this type all but inevitable. Once Ms. Chen had the opportunity to review her emails and relevant documentary evidence, her recounting of these events – which had occurred more than one year previously and were of trivial consequence in Ms. Chen’s mind – was completely accurate.
- *Culpabilities of others.* Clearly, the “culpability” of Mr. Davis must be considered. Had he not provided Ms. Chen his password to use, none of what transpired later could have occurred. Mr. Davis, who admitted that he had failed in training the staff adequately in the use of office passwords, is at least as culpable as Ms. Chen. The fact that he has not faced any discipline for this conduct dictates that Ms. Chen cannot be treated any differently.
- *Other mitigating or extenuating circumstances.* The NID does not contain proprietary or sensitive data, and, in any event, Ms. Chen never shared any data from it with anyone. It remained on her work computer at all times. The data that she shared with Tom Adams was public and non-proprietary. Its release did not harm or in any way compromise the NWS’ mission.

Meanwhile, the factors concerning Ms. Chen's years of employment all weigh heavily in her favor:

- *Length of Service.* Ms. Chen has been with the National Weather Service, NOAA for over eight years (since March 2007). In that time period, she was never disciplined for any infraction of any kind.
- *Quality of Work History/Past Contributions.* The claim in your letter that Ms. Chen's work history was merely "satisfactory" is misleading. Ms. Chen's position was graded on a "Satisfactory/Unsatisfactory" basis. In order to understand how she performed relative to her peers, one must look at the comments in her Performance Review Plan. These comments make clear that Ms. Chen has been recognized as an "ideal" and "outstanding employee" by her supervisors for her diligent work and contributions to the agency. Trent Schade, Ms. Chen's supervisor, told investigators that Ms. Chen was a "great performer all ways around." Schade 302, attached as Ex. 7, pp. 356-7. In her FY 2011 performance appraisal, Mr. Craig Hunter, the Hydrologist-in Charge (HIC) at OHRFC, stated that

Ms. Chen has consistently exceeded expectations for her work at the Ohio RFC. She continued to provide a very high level of service and support to the 14 WFOs in the OHRFC service area; other cooperating water agencies throughout the region; and to the public. She provided outstanding support to the USACE during the historic flooding at the junction of the Ohio and Mississippi this past spring, a direct result of her dedicated work to calibrate and implement HEC-RAS model for the entire length of the Ohio River. In addition, she has successfully met expectations for operational forecasting. Throughout this period, Ms. Chen has worked diligently to help ensure that only the highest level of service was provided to our customers.

Chen 2011 Performance Appraisal, attached as Ex. 8, p. 269.

Trent Schade, the new HIC at OHRFC, one day before Ms. Chen was indicted, noted

Ms. Chen continues to meet and exceed all critical elements of her performance plan. [] Ms. Chen contributes significant proficiency in daily operational forecasting. She demonstrates a thorough knowledge of the Ohio River Basin, and an exceptional knowledge of the Ohio River. ... Ms. Chen shines in the procedure development area. She contributes here beyond her grade level. She is the OHRFC lead in dynamic river modeling. Her skills here have led to significant improvement in forecast capabilities in the Ohio River and its tributaries. [] Ms. Chen conducts herself with a professional attitude. She fully engages in discussions in a respectful and positive way.

It is simply inaccurate to say that the foregoing describes “satisfactory” job performance. Ms. Chen’s job performance has been nothing short of outstanding throughout her career.

Chen FY 2012 Performance Appraisal, attached as Ex.9.

- *Past Contribution.* The HEC-RAS model developed by Ms. Chen has been widely used by federal, local agencies, universities and local communities. She received a national level recognition for the development and implementation into operations of the model used to produce lifesaving river forecasts for the Ohio and Mississippi Rivers during 2011 record flooding.
- *Past Disciplinary Record.* Ms. Chen has never previously been subject of any disciplinary action of any kind. Her record is unblemished.

IV. Conclusion

Ms. Chen is not deserving of any discipline in this matter, much less the most draconian one proposed: termination of employment. She violated no policy of which she had any reason to be aware, and did nothing that compromised any aspect of the mission of the NWS. Her conduct at all times was fully transparent. Moreover, she has had a lengthy service of exemplary service to the NWS, without a single infraction of any kind on her record.

The fact that her colleague, Ray Davis, engaged in essentially the identical conduct and faces no discipline of any kind – much less termination of his employment – makes this injustice all the more glaring.

It is impossible to imagine that this case would have progressed as it had if Ms. Chen had, for example, been Canadian-American, or French-American. Ms. Lee singled out Ms. Chen and questioned her loyalty on the basis of her having been born in China, ignoring the fact that Ms. Chen is and has been a loyal American for two decades. And DOC investigators similarly treated Ms. Chen as a criminal, without first determining whether she had committed any crimes.

Ms. Chen has already suffered greatly and without any justification. She was arrested and charged criminally for offenses that she did not commit. She has had her reputation unfairly sullied. And she lost four months of wages because the DOC suspended her without pay during the pendency of her criminal case. It would be wholly unjust for her to suffer any additional punishment.

On behalf of Ms. Chen, we respectfully request that the DOC withdraw its Proposed Disciplinary Action, and permit Ms. Chen to go back to the job that she loves.