



# **Summary of Public Comments and Responses for:**

## **Mandatory Greenhouse Gas Reporting Rule:**

**Confidentiality Determinations for Data Required Under the Mandatory Greenhouse Gas Reporting Rule and Amendments to Special Rules Governing Certain Information Obtained Under the Clean Air Act**

May 2011

**Response to Public Comments on the Confidentiality  
Determinations for Data Required Under the Mandatory  
Greenhouse Gas Reporting Rule and Amendments to Special  
Rules Governing Certain Information Obtained Under the  
Clean Air Act**

**U. S. Environmental Protection Agency  
Office of Atmosphere Programs  
Climate Change Division  
Washington, D.C.**

## FOREWORD

On October 30, 2009, EPA published the Mandatory Greenhouse Gas Reporting Rule for collecting information regarding greenhouse gas (GHG) emissions from a broad range of industry sectors (see 74 FR 56260). Under 40 CFR part 98 of the rule and its subsequent amendments (hereinafter referred to as Part 98), EPA will collect data from certain facilities and suppliers above specified thresholds. The data to be reported includes GHG emission information as well as other data, such as information necessary to characterize, quantify, and verify the reported emissions.

In the preamble to the final Mandatory GHG Reporting Rule, we stated our intention to identify, through a notice and comment process, Part 98 data that are ‘emission data’ and therefore, not eligible for confidential treatment (see 74 FR 56287, October 30, 2009) and on July 7, 2010 published our proposal (see 75 FR 39094; hereinafter referred to as the “July 7, 2010 CBI proposal”). This proposal included proposed confidentiality determinations for all Part 98 data elements and a proposed amendment to 40 CFR part 2, EPA’s regulation for handling confidential business information. The July 7, 2010 CBI notice proposed confidentiality status for the data elements for subparts that were included in the 2009 final Part 98 rule (see 74 FR 56260, October 30, 2009), four subparts that were finalized in July 2010 (see 75 FR 39736, July 12, 2010), and seven new subparts that had been proposed but not yet finalized as of July 7, 2010 (see 75 FR 18576, 75 FR 18608, and 75 FR 18652, April 12, 2010). The July 7, 2010 CBI proposal also covered proposed changes to the reporting requirements for some of the 2009 final Part 98 subparts (see 75 FR 18455, April, 12, 2010; and 75 FR 33950, June 15, 2010).

After the publication of the July 7, 2010 CBI proposal, EPA issued another proposed rulemaking on July 20, 2010 that proposed revisions to the descriptions of some data elements and required reporting of some new data elements (75 FR 48744; hereinafter referred to as the “July 20, 2010 revisions proposal”), which were subsequently finalized on December 17, 2010 (75 FR 79092). EPA concurrently issued a supplemental CBI proposal that proposed confidentiality determinations for the new and revised data elements included in the July 20, 2010 revisions notice (75 FR 43889, July 27, 2010; hereinafter referred to as the “supplemental CBI proposal.”)

During the 60-day public comment period, EPA received over forty comment letters in response to the July 7, 2010 CBI proposal and supplemental CBI proposal. This document provides EPA’s responses to the significant public comments regarding these proposals. The verbatim text of each comment extracted from the original comment letters is included in this document, arranged by subject. For each comment, the name and affiliation of the commenter, the document control number (DCN) assigned to the comment letter, and the number of the comment excerpt are provided. Where possible, EPA separated comments on specific topics into their respective data categories. However, in some cases, commenters made broad statements about groups of data elements from various categories or general comments on the approach that could not be easily separated by topic or data category without potentially affecting the intended meaning of the commenter’s statements. In such cases, we either repeated the comment excerpt in its entirety in each of the relevant sections of this document or referred the reader to the response to another similar comment.

EPA's responses to comments are generally provided immediately following each comment excerpt. However, in instances where several commenters raised similar or related issues, EPA has grouped these comments together and provided a single response after the first comment excerpt in the group and referenced this response in the other comment excerpts. In some cases, EPA provided responses to specific comments or groups of similar comments in the preamble to the final rulemaking. Rather than repeating those responses in this document, EPA has referenced the preamble to the final rule. In some cases, a commenter incorporated by reference the comments of another company or organization. Rather than repeat these comment excerpts for each commenter, EPA has listed the comment excerpt only once under the name of the person, company or organization who submitted the comment and including a list of commenters who indicated their support for that comment in a footnote. Copies of all comment letters submitted are available at the EPA Docket Center Public Reading Room or electronically through <http://www.regulations.gov> by searching Docket ID *EPA-HQ-OAR-2009-0924*.

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[http://www.epa.gov/climatechange/emissions/ghgrule\\_contactus.html](http://www.epa.gov/climatechange/emissions/ghgrule_contactus.html).

## TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
A. GENERAL APPROACH TO MAKING CBI DETERMINATIONS, TIMING OF CBI PROPOSALS, APPROACHES TO PUBLICATION, AND OTHER GENERAL COMMENTS.....	1
1. Approach to Making CBI Determinations.....	1
2. Scope of the CBI Proposal.....	31
3. Inputs to Emission Equations Category.....	37
4. Timing of the CBI Proposal.....	38
5. Extent to Which CEMS Can Be Used to Reduce the Number of Data Elements Disclosed to the Public.....	41
6. Time Limits on Confidentiality Determinations.....	48
7. All Data Elements Should Be Made Public.....	57
8. Need for Public Access to Part 98 Data.....	61
9. Cost of the Proposed Rule.....	78
10. Delaying Publication of Emission Data and Non-CBI Data that are Considered Sensitive By Reporters.....	81
11. Comments on Potential Anti-Trust Concerns.....	83
12. Other General Comments.....	93
B. DIRECT EMITTERS.....	99
1. Facility and Unit Identifier Information Category.....	99
2. Emissions Category.....	102
3. Calculation Methodology and Methodological Tier Category.....	115
4. Data Elements Reported for Periods of Missing Data that are Not Inputs to Emission Equations Category.....	121
5. Unit/Process Static Characteristics that are Not Inputs to Emission Equations Category.....	123
6. Unit/Process Operating Characteristics that are Not Inputs to Emission Equations Category.....	138
7. Test and Calibration Methods Category.....	149
8. Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations Categories.....	153
9. Process-Specific and Vendor Data Submitted in BAMB Extension Requests Category.....	167

## TABLE OF CONTENTS (Continued)

<b><u>Section</u></b>	<b><u>Page</u></b>
C. SUPPLIERS.....	169
1. General Comments on the Supplier Data Categories .....	169
2. Greenhouse Gases Reported Category.....	176
3. Production/Throughput Quantities and Composition Category .....	184
4. Identification Information Category .....	196
5. Unit/Process Operating Characteristics Category.....	203
6. Calculation, Test, and Calibration Methods Category.....	207
7. Periods of Missing Data That Are Not Related to Production/Throughput Category.....	208
8. Emission Factor Category.....	209
9. Amount and Composition of Materials Received Category.....	210
10. Periods of Missing Data That Are Related to Production/Throughput.....	212
11. Supplier Customer and Vendor Information Category.....	213
12. Process-Specific and Vendor Data Submitted in BMM Extension Requests Category.....	216
D. PROPOSED AMENDMENTS TO 40 CFR PART 2.....	217
APPENDIX A: LIST OF COMMENTS ON THE INPUTS TO EMISSION EQUATIONS CATEGORY .....	222
APPENDIX B: LIST OF COMMENTS FOR 40 CFR PART 98, SUBPARTS I, L, W, DD, RR, SS, UU, AND QQ.....	294
APPENDIX C: LIST OF COMMENTS ON APPROACHES TO PUBLISHING PART 98 DATA .....	327

A. GENERAL APPROACH TO MAKING CBI DETERMINATIONS, TIMING OF CBI PROPOSALS, APPROACHES TO PUBLICATION, AND OTHER GENERAL COMMENTS

1. Approach to Making CBI Determinations

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**Commenter Name: Lawrence M. Reliford III**  
**Commenter Affiliation: AMU**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0017.1**  
**Comment Excerpt Number: 1**

**Comment:** I agree with the proposed confidentiality determinations for the greenhouse data, though I'm sure some environmentalist groups would not. I think that as long as the data is being reported to the appropriate authorities, the EPA, the request by companies to maintain trade secrets should be honored. Though I do not fully believe that is full reason for the confidentiality, I think that the main goal is to get the correct data to the experts to manage. As long as companies are cooperating with the process and greenhouse emissions are being regulated properly. There are some organizations that would like to know exactly what is being emitted and how much, but I think that the separation from government and industry that exists between the EPA and organizations allows for good faith.

**Response:** EPA thanks the commenter for their input. As required by section 114(c), EPA will protect data (excluding emission data) that are determined to be CBI in this final action.

**Commenter Name: Arline M. Seeger<sup>1</sup>**  
**Commenter Affiliation: National Lime Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0023.1**  
**Comment Excerpt Number: 1**

**Comment:** Section 114(c) of the Clean Air Act precludes "emissions data" from being considered CBI, and provides that emissions data "shall be available to the public." Section 114(c), in turn, relates to records, reports or information obtained under a State Implementation Plan, a New Source Performance Standard, a hazardous air pollutant standard, a solid waste combustion standard under section 129 of the Act, or other provision of the Act. Significantly, EPA has not developed a National Ambient Air Quality Standard for GHGs, nor has it developed any other GHG standard or limitation to which section 114 applies. We believe it is therefore inappropriate for EPA to use section 114(c) – with its "emissions data" exclusion – as the benchmark to determine which GHG information must be made available to the public.

**Response:** EPA disagrees with the commenter that CAA section 114(c) does not apply to part 98 data. CAA section 114(c) applies to information obtained under section 114(a). 40 CFR Part

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<sup>1</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).



98 was developed under the authority of CAA Section 114(a)(1), which authorizes the Administrator to require emission sources, persons subject to the CAA, or persons whom the Administrator believes may have necessary information to monitor and report emissions and provide such other information the Administrator requests for the purposes of carrying out any provision of the CAA (with exception not relevant here).

**Commenter Name: William C. Herz**  
**Commenter Affiliation: The Fertilizer Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**  
**Comment Excerpt Number: 1**

**Comment:** The Fertilizer Institute (TFI) agrees with EPA's approach to provide certainty to the regulated community up front regarding what specific types of data elements in the Greenhouse Gas Reporting Rule will be afforded protection from disclosure. With the myriad of data elements captured under the Rule, an ad hoc approach could lead to inconsistent results both for the same data element in a given subpart and to similar data elements in different subparts. Also, given the Agency's confidentiality provisions are found in 40 CFR Part 2, which is a different part of the regulations than the Greenhouse Gas Reporting Rule, some facilities may be unfamiliar with the confidentiality process and, therefore, may not claim data elements as confidential when their competitors are making such claims.

**Response:** EPA thanks the commenter for their input.

**Commenter Name: Michael Bradley**  
**Commenter Affiliation: The Clean Energy Group**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0029.1**  
**Comment Excerpt Number: 1**

**Comment:** The Clean Energy Group believes EPA's approach to making confidentiality determinations is reasonable and the proposed data categories are appropriate.

**Response:** EPA thanks the commenter for their input.

**Commenter Name: Robert D. Bassette**  
**Commenter Affiliation: Council of Industrial Boiler Owners**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0064.1**  
**Comment Excerpt Number: 6**

**Comment:** Overall, we support the agency's proposal to make CBI determinations on category-specific bases. Doing so will lessen the administrative burden on EPA and will reduce the amount of paperwork necessary for companies to file along with their annual reports. EPA should adopt this same approach for non-emission input and other data. The submission of such data should not permit competitors to force reporting entities to defend the nature of this non-emission data on a case-by-case basis in an agency CBI proceeding.

**Response:** EPA thanks the commenter for their input.

**Commenter Name: David B. Calabrese**  
**Commenter Affiliation: Air Conditioning, Heating and Refrigeration Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0032.1**  
**Comment Excerpt Number: 9**

**Comment:** AHRI supports the agency's decision to make CBI determinations on a data category-specific basis. Doing so will lessen the administrative burden on EPA and will reduce the amount of paperwork necessary for companies to file along with their annual reports.

**Response:** EPA thanks the commenter for their input.

**Commenter Name: Mark A. Erman**  
**Commenter Affiliation: Pepper Hamilton LLP on behalf of Verallia**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0037.1**  
**Comment Excerpt Number: 2**

**Comment:** Verallia is extremely concerned by EPA's proposal to expansively classify various categories of information as "emissions data" or as otherwise not entitled to CBI protection on a categorical basis, thus prohibiting a business from using the protections set forth in 40 CFR Sections 2.201 through 2.215 and thereby prohibiting them from constituting CBI protection from public disclosure. As explained in the preamble to the proposed rule, EPA proposed to pre-determine that certain of the eleven "data categories" associated with annual GHG reporting are prohibited from protection as CBI. These categorical pre-determinations mistakenly ignore the importance of certain business data and abandon the careful balancing test that Congress envisioned for properly safeguarding trade secrets. Moreover, several of the categorical exclusions from CBI protection are vague and ambiguous and thus would make criminal prosecution of those who unlawfully disclose such CBI impossible.

**Response:** EPA disagrees with the commenter that our determination that the data in certain categories qualify as emission data or non-CBI is overly expansive and that EPA's approach prohibits businesses from protecting CBI from disclosure. CAA section 114(c) excludes "emission data" from CBI protection. Based on a long standing definition of the term "emission data," EPA proposed to determine by data category that certain part 98 data elements constitute "emission data" for purposes of determining GHG emissions to be reported under this part. EPA carefully construed the regulatory definition to include only those data elements necessary to determine the emission information specified in 2.301(a)(2)(i)(A) or to distinguish one source from another source as required in 2.301(a)(2)(i)(C). As with other EPA records, for data not determined to be emission data, EPA considered the confidentiality determination criteria at 40 CFR 2.208 in proposing CBI determinations. EPA offered a 60 day comment period for its proposed determinations, providing businesses the opportunity to submit information substantiating any CBI claims they may have for any part 98 data elements. EPA specifically sought comment on the proposed determination for each category, on whether the proposed categories were too broad and too narrow, and on facility specific issues that could not be addressed through the categorical approach. EPA addressed these comments in the relevant sections of the preamble to the final rule (see sections II.B.2 through II.B. 11 for direct emitters

and sections II.C.3 through II.C.13 for suppliers). We have also explained in the preamble to the final rule the significant changes since our CBI proposals. For a more information on EPA's approach to making CBI determinations including additional information regarding the commenters' assertion that EPA did not provide stakeholders with an adequate opportunity to substantiate CBI claims, please see Section II.A.2 of the preamble to the final rule. We also disagree that the categorical exclusions from CBI protection are vague and ambiguous. In the preamble to the July 7, 2010 CBI proposal, we described in great detail the data elements in each of the 22 data categories and the rationales for our proposed confidentiality determinations, whether by category or for specific data elements. In addition, we provided a list of individual data elements and their proposed determinations in two memoranda titled "Data Category Assignments for Reporting Elements to be Reported under 40 CFR Part 98 and its Amendments" and "Data Category Assignments for the Proposed New and Revised 40 CFR part 98 Data Elements Addressed in the Proposed Confidentiality Determinations for Data Required under the Mandatory Greenhouse Gas Reporting Rule: Supplemental Proposal" (see Docket EPA-HQ-OAR-2009-0924).

Similarly, we have prepared a new memorandum that lists each data element covered by this final action and shows its data category assignment and confidential status. A copy of this memorandum is available in the docket for this rulemaking (see "Final Data Category Assignments and Confidentiality Determinations for Part 98 Reporting Elements" in Docket EPA-HQ-OAR-2009-0924 and on the website, <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>).

We disagree that it would be impossible to sanction those who disclose CBI. We have clearly delineated the data that will be protected as CBI and the amendments to Part 2 finalized in this action state that "EPA shall treat information as confidential in accordance with the provisions at 40 CFR 2.211." The provisions at 40 CFR 2.211 include penalties for the wrongful disclosure of CBI.

**Commenter Name: David B. Calabrese**  
**Commenter Affiliation: Air Conditioning, Heating and Refrigeration Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0032.1**  
**Comment Excerpt Number: 2**

**Comment:** The EPA has proposed to group data elements into data categories and make confidentiality determinations by data category. This mechanism is designed to make confidentiality determination less burdensome on the agency, as well as, on data submitters so that they do not need to request CBI protection annually when submitting their reports. AHRI supports this decision to establish a data category system for determining CBI and agrees that the eleven data categories that EPA has created for suppliers are sufficient. However, AHRI believes that an ideal system would establish a framework with bright-line rules so that all elements within a category are treated the same. Under the current proposed framework, some elements within the same category are treated differently.

**Response:** EPA thanks the commenter for their input. For the reasons explained in the July 2010 CBI proposals and the preamble to the final CBI rule, we did not make category-wide

confidentiality determinations for all of the data categories. We list the final CBI determination for each Part 98 data element in the memorandum “Final Data Category Assignments and Confidentiality Determinations for Part 98 Reporting Elements” (see Docket EPA-HQ-OAR-2009-0924 and the website, <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>).

**Commenter Name: Frederick R. Harnack**

**Commenter Affiliation: United States Steel Corporation**

**Document Control Number: EPA-HQ-OAR-2009-0924-0054.1**

**Comment Excerpt Number: 1**

**Comment:** In the rule, U.S. Environmental Protection Agency (“U. S. EPA”) has made two separate and distinct proposals that should each be subject to comment on their own merits. The first proposal is that U.S. EPA has unilaterally decided that the term “emissions” can be expanded to include information that extends well beyond the established regulatory meaning of the word. U. S. EPA’s proposed rule would now include not only the nature and amount of a substance discharged, but also any secondary information that U. S. EPA deems is related to the discharge. This expansion of a currently accepted environmental term may only be properly addressed in its own separate rule-making.

The second proposal is a scheme that greatly alters the currently understood definition of confidential business information (“CBI”). CBI claims have always been the right of the regulated community. In the present proposal, U. S. EPA seeks to infringe upon that right by imposing a U. S. EPA presumptive determination of what is, or is not, important to a regulated entity. A change of this magnitude should also be subject to a separate rule making and not lumped together with the change in the definition of the term emissions. U. S. EPA is evading a full and complete public response on the issues.

**Response:** EPA disagrees with the commenter that this action expands or changes existing definitions of ‘emission data’ and ‘CBI.’ First, we did not propose any changes to the definition of emission data. As we explained in the July 7, 2010 CBI proposal, our CBI determinations were made using the definition of emission data at 40 CFR 2.301(a)(2)(i). This is the same definition for emission data has been used by EPA for over 20 years to make decisions on individual case-by-case CBI claims. EPA carefully construed this regulatory definition to include only those data elements necessary to determine the emission information specified in 2.301(a)(2)(i)(A) or to distinguish one source from another source as required in 2.301(a)(2)(i)(C). For those data categories that EPA determined did not qualify as emission data, we also did not propose any changes to the criteria used to determine which data elements are eligible for confidential treatment. As we explained in the July 7, 2010 CBI proposal, EPA used the criteria from the existing CBI regulations at 40 CFR 2.208 to determine the CBI status of each Part 98 data element.

Second, while EPA generally makes CBI determinations on a case-by-case basis in accordance with 40 CFR part 2, EPA has authority, as demonstrated by the analogous provisions of 40 CFR 2.207 (Class Determinations), to make category-based CBI determinations where it would serve a useful purpose (40 CFR 2.207(a)(3)) and the data in a category share the same characteristics and CBI status (40 CFR 2.207(a)(2)). Our primary reasons for initiating the CBI rulemaking are

to avoid unnecessary delays in publishing data that is emission data or otherwise not eligible for CBI and to reduce the burden on industry of having to prepare and submit individual CBI claims with each annual report. EPA concluded that the categorical approach, added to 40 CFR 2.301 through this action, is appropriate because there are over 1,900 data elements included under Part 98 and many share common characteristics. For a detailed explanation of how CBI determinations were made for this rulemaking, please see Section I.C. of the preamble to the July 7, 2010 CBI Proposal (75 FR 39100).

For the response to the comments that this action imposes presumptive CBI determinations and infringes of reporters rights, please see Section II.A.2 of the preamble to the final rule.

**Commenter Name: Thomas P. Diamond<sup>2</sup>**

**Commenter Affiliation: Semiconductor Industry Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**

**Comment Excerpt Number: 1**

**Comment:** With the Proposed CBI Rule, EPA would do away with the case-by-case confidentiality determination system that has been applicable to “conventional” pollutants for over three decades. In its place, EPA proposes a series of prospective confidentiality determinations for each GHG Reporting Rule data element. By employing charts and tables listing each of the 42 industrial categories subject to the GHG Reporting Rule and the numerous individual data elements within each category, EPA has fashioned its proposal to appear very detailed. In reality, however, EPA has provided no substantive explanation of how and why a specific GHG Reporting Rule data element does or does not qualify for confidential treatment. Instead, EPA adopts a superficial regulatory approach that keys off the statutory mandate prohibiting confidentiality protection for “emissions data.” EPA presumes that most data elements qualify as “emission data” without any analysis of the legal and regulatory history of this term, of the potential competitive and other harm that may result from this approach and of the available alternatives. As a result, EPA’s Proposed CBI Rule fails to accord with the Agency’s obligation for reasoned and explained decision-making.

. . . EPA’s superficial regulatory approach is particularly troublesome -- and legally impermissible -- considering that it arises in the context of extending the existing Clean Air Act regime to a whole new class of “air pollutants” that pose different and novel issues. SIA believes that EPA should withdraw its Proposed CBI Rule due to the foregoing serious legal and policy flaws and engage in a more disciplined process to determine whether it is appropriate to make advance CBI determinations for GHG-related information, and if so, then to develop a framework for doing so that analyzes the potential for competitive harm and evaluates potential solutions for avoiding it.

**Response:** We disagree with the comment that the CBI proposals did not include substantive explanations of the proposed “emission data” and CBI determinations. In the preamble to the

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<sup>2</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

July 7, 2010 CBI proposal, we described in great detail the data elements in each of the 22 data categories and the rationales for our proposed confidentiality determinations, whether by category or for specific data elements. EPA sought comment on these proposed categories and on facility specific issues and addressed these comments in the relevant sections of the preamble to the final rule (see sections II.B.2 through II.B. 11 for direct emitters and sections II.C.3 through II.C.13 for suppliers).

For the response to the comment that the approach was “legally impermissible,” see the response to comment EPA-HQ-OAR-2009-0924-0023.1, excerpt 1 and EPA-HQ-OAR-2009-0924-0054.1 excerpt 1.

**Commenter Name: Leslie S. Ritts<sup>3</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 1**

**Comment:** EPA’s perspective that the Clean Air Act requires transparency with regard to all “emissions-related” information is in error. The Clean Air Act represents a balance between protecting public health and the environment and protecting the economy. See purpose clause at Sec. 101 (b): (“The purpose(es) of this subchapter are—(1) to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its populations. . . .). 42 U.S.C. §7401(b). This balance is reflected in sections 114, 208 and 307(a) of the Clean Air Act. Although these sections state that emission data must be made available to the public, the Clean Air Act does not define emission data. However, sections 114 and 208 also provide that information gathered will be available to the public unless its disclosure would divulge methods or processes entitled to protection as trade secrets. Similar language is contained in Sec. 307. From this language, EPA stated in 1976 that the Agency was unable to conclude that the Congress intended to require public disclosure of the information which EPA must obtain from businesses in order to develop standards and perform its other emissions-related tasks. Therefore it determined that routine disclosure to the public of all that information would profoundly affect the business structure of the Nation in ways that have nothing to do with the purposes of the Clean Air Act. 41 FR 36923. NEDA/CAP agrees with the Agency’s assessment in 1976.

As a consequence EPA currently defines “emission data” at 40 CFR 2.301 (a)(2)(i)(A) as “Information *necessary to determine* the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission *which has been emitted by the source* (or of any pollutant resulting from any emission by the source), or any combination of the foregoing . . . .”.

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<sup>3</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

NEDA/CAP therefore submits that EPA’s current interpretation of emission data and the confidential treatment of this data are completely counter to the Agency’s prior interpretation. Importantly, the existing definition of emission data does not require many of the data elements that EPA suggests are emission data to be shared with the public, particularly when the interests of maintaining the confidentiality of some of that information is important to safeguard on the basis of competitiveness concerns.

**Response:** We disagree with the commenter that our interpretation of CAA section 114(c) is incorrect or inconsistent with previous interpretations. Based on a long standing definition of the term “emission data,” EPA proposed to determine by data category that certain part 98 data elements constitute “emission data” for purposes of determining GHG emissions to be reported under this part. EPA carefully construed this regulatory definition to include only those data elements necessary to determine the emission information specified in 2.301(a)(2)(i)(A) or to distinguish one source from another source as required in 2.301(a)(2)(i)(C).

We should clarify that the previous EPA statement cited in the comment above was with regard to the term “trade secret” and not the term “emission data” under the CAA. In its 1975 proposed CBI regulations, which included regulations governing information obtained under the CAA at 40 CFR 2.301, EPA interpreted the CAA to afford confidential protection to not just “trade secrets” but also other types of CBI. 40 FR 21987, 21990 (1975). EPA received a comment (Comment 61) that EPA should allow confidential treatment under the CAA only for “trade secrets” which are methods of processes. 41 FR 36902, 36923 (1976). The EPA statement referenced in the comment above was part of EPA’s response in 1976 disagreeing with this specific comment on “trade secret.” Neither the comment nor EPA’s response thereto addressed the term “emission data.” EPA continues to interpret CAA section 114(c) to afford confidential treatment to both trade secrets and confidential business information, provided such data is not emission data.

For the response to the comment regarding the interpretation of the existing definition of emission data at 40 CFR 2.301(a)(2)(i), please also see the response to comment EPA-HQ-OAR-2009-0924-0054.1 , excerpt 1 above.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 1**

**Comment:** EPA Should Construe “Emissions Data” Narrowly. At 75 Fed. Reg. 39105, EPA asks if a narrower treatment of emission data would fit legitimate legal and policy goals. In this Part 98 CBI proposal, EPA, for the first time, proposes to substantially broaden the definition of emission data after almost forty years of Clean Air Act interpretation. Congress, the Agency, and two courts have consistently construed emission data narrowly. EPA should revert to its existing construction and adjust Part 98 to fit its appropriate historical view.

. . . EPA cites three specific documents when describing how it proposed to identify CBI. The Clean Air Act § 114(c) prohibits EPA from releasing information that “if made public, would

divulge methods or processes entitled to protection as trade secrets of such person.” The only exemption Congress set for this section is that emissions data must be publicly available. Otherwise, EPA must keep as trade secret any data where the reporter can reasonably justify the public sensitivity of data necessary for EPA to carry out its mandates. EPA appropriately characterizes the nature of this statutory provision at 75 Fed. Reg. 39100.

**Regulations:** To implement the Congressional data secrecy mandate, EPA promulgated 40 CFR 2 Subpart B to document how it would evaluate emissions data and trade secrecy claims. Three critical CAA specific clauses describe what, under the CAA, EPA considers information that cannot be claimed as trade secret under the emissions data provision. § 2.301(a)(2)(i)(A) addresses the identity, amount, frequency, of air emissions as publicly available information. § 2.301(a)(2)(i)(B) addresses Agency compliance needs. § 2.301(a)(2)(i)(C) holds physical source location as publicly available information. In general, these criteria reasonably describe information EPA would require be held public as emissions data. Because GHGs are not currently regulated in the CAA, and EPA is promulgating this standard separate from any GHG regulatory initiatives, § 2.301(a)(2)(i)(B) compliance needs do not apply to the mandatory reporting rule (“MRR”). In addition, § 2.208 describes the steps a company must complete to assert a CBI claim. The § 2.208 criteria are generally accepted and are appropriate for GHG reporting, as EPA described at 75 Fed. Reg. 39100. The regulatory reporting provisions provide a reasonable basis for EPA CBI determinations.

In the response to comments document that EPA prepared for the original 40 CFR 2 Subpart B final rule (41 Fed. Reg. 36918, Appendix A, September 1, 1976), EPA addressed several important CBI concepts. In Comment 61, EPA established that a wide definition of emission data “would profoundly affect the business structure of the Nation in ways that have nothing to do with the purposes of the Clean Air Act.” (41 Fed. Reg. 36923). The current proposal, which would expose detailed business operating conditions of individual process streams, would contravene this long standing EPA policy to not unduly harm business interests. Here, releasing information beyond the annualized GHG mass emission amounts unnecessarily exposes critical competitive business information outside of the CAA actual emissions reporting needs. In Comment 52, EPA noted “that information concerning the nature of the source is emission data only ‘to the extent necessary’ to identify the source and to distinguish it from other sources.” (41 Fed. Reg. 36922) Comment 53 limits the reach of emission data to actual emissions determinations (and information required for compliance conditions not contemplated in the current Part 98). To address a potential § 2.208 data protection concern, EPA explained, in Comment 7, 8, and 9, that, while data providers should invoke CBI when submitting data to EPA, a data provider may invoke CBI privileges up until EPA or a citizen proposes to publicly disclose information.

**Response:** For the reasons stated below, EPA does not believe that this final action conflicts with any of the previous Agency statements made in response to specific comments on the 1976 proposed CBI regulations. As the commenter noted, there are three parts to the “emission data” definition at 40 CFR 2.301(a)(2)(i). In this final action, EPA relies predominantly on 40 CFR 2.301(a)(2)(i)(A) in determining which data elements qualify as “emission data” under the CAA. However, Comments 52, 53 and 61 on the 1975 proposed CBI regulations that the commenter cited did not address 40 CFR 2.301(a)(2)(i)(A). Rather, Comment 52 addressed EPA’s inclusion



of information regarding location and nature of a source in the proposed definition of “emission data,” which was finalized at 40 CFR 2.301(a)(2)(i)(C). Comment 53 addressed the part of the “emission data” definition relative to emissions subject to standards, which was finalized at 40 CFR 2.301(a)(2)(i)(B). As explained in the preamble to the July 7, 2010 CBI proposal, EPA finds that 2.301(a)(2)(i)(B) does not apply to part 98 because the GHG emissions to be reported under part 98 are not subject to emission standards. Comment 61 was on EPA’s interpretation of the term “trade secret.” Neither this comment nor EPA’s response thereto addressed “emission data.”

Although these comments did not address 40 CFR 2.301(a)(2)(i)(A), EPA’s responses thereto made clear EPA’s position that data that may otherwise be CBI may be “emission data” and required to be disclosed. For instance, EPA stated in response to Comment 52 that “it is impossible to make intelligent reference to the data concerning an emission of a substance into the air without referring also to the nature and location of the source of the emission.” 41 FR at 36922. EPA clarified in the final regulation at 40 CFR 2.301(a)(2)(i)(C) that such information include descriptions of a source’s device, installation or operation, which may be considered CBI in some cases. Similarly, in its response to Comment 53, EPA stated that “it is necessary to know how many input or out units were processed by the facility” in order to compare actual emission with allowable emissions. Such statement made clear EPA’s position that information such as number of inputs and outputs that may otherwise be considered CBI may be “emission data” in some instances and required to be disclosed.

Lastly, with respect to Comments 7, 8, 9, the commenter appears to agree with EPA’s position that the data provider may invoke CBI privileges up until EPA intends to publicly disclose the information or a citizen requests such information. In either event, EPA would determine whether such information qualifies as CBI. As explained in the preamble to the CBI proposals, EPA intends to release part 98 data that are not entitled to confidential treatment. [75 FR 39102, July 7, 2011]. EPA also anticipates receiving FOIA requests for part 98 data. EPA is therefore taking this final action to determine the confidentiality status of part 98 data.

**Commenter Name: Dave Stirpe**

**Commenter Affiliation: Alliance for Responsible Atmospheric Policy**

**Document Control Number: EPA-HQ-OAR-2009-0924-0050.1**

**Comment Excerpt Number: 3**

**Comment:** EPA claims that the 1991 Federal Register proposal (56 FR 7042) justifies the dramatic and unprecedented expansion of the “emissions data” concept that is now proposed. However, the plain language of this never-finalized proposal, that EPA now claims represents current Agency policy, suggests otherwise. The “Emission Data Fields” listed in the 1991 proposal included information required to determine location, time, frequency, quantity (concentration), pollutant(s), determination method, and dispersion information (height, direction, temperature, and velocity) of emissions. That proposal stopped short of requiring reporting of the kind of actual unit operating parameters, such as actual production rate, yield, or emission factors that the current proposal would require. The 1991 Federal Register notice does not support such a radical expansion of the definition of “emissions data.”

EPA should revisit its Congressional authority, which directs the Agency to protect trade secret and CBI data not directly related to the amount of actual emissions entering the atmosphere. The 1991 Federal Register proposal reasonably captured this balance. The Part 98 CBI proposal does not. EPA should require public disclosure of actual emissions rates and locations of manufacturing related GHG emissions, as the 1991 proposal would indicate. EPA should either require reporters to maintain other supporting information at the reporter facility site, available for EPA inspection on demand, or provide CBI protections for all other data not explicitly identified in the 1991 Federal Register proposal.

**Response:** The CBI determinations finalized in this action were made under EPA’s CBI regulations at 40 CFR part 2, subpart B, using the definition of emission data in 40 CFR 2.301(a)(2)(i). The February 21, 1991 notice is a notice of policy that is intended to provide clarification on the type of data that is considered emission data; however, the 1991 policy notice is not the basis for the decisions made in this rulemaking.

EPA disagrees with the comment that EPA should either require reporters to maintain supporting information at the reporter facility site, available for EPA inspection on demand, or provide CBI protection to all data not explicitly identified in the 1991 Federal Register proposal. As we explained in Section I.C of the July 7, 2010 CBI proposal, CAA section 114(c) requires that “[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets . . . , the administrator shall consider such record, report, or information or particular portion thereof confidential.” EPA interprets CAA section 114(c) to afford confidential treatment to both trade secrets and confidential business information, provided such data is not emission data. Data elements that do not meet the definition of emission data in 40 CFR 2.301(a)(2) were evaluated using the CBI criteria in EPA’s existing CBI regulations (see 40 CFR 2.208). Specifically, EPA evaluated each data element in accordance with the criteria specified in 40 CFR 2.208(c) (not already publicly available) and (e) (release of the data would cause substantial harm to the business’s competitive position). Only those data elements that meet these criteria are eligible for confidential treatment.

Regarding the comment that EPA should require reporters to maintain supporting information as records is beyond the scope of this action. This action determines the confidentiality status of certain data elements reported under Part 98; this action does not add or amend the reporting requirements under Part 98. The reporting requirements addressed in this rule were established under the Final Mandatory Greenhouse Gas Reporting Rule (74 FR 56260, October 30, 2010) and several subsequent amendments (see 75 FR 39736, July 12, 2010; 75 FR 57669, September 22, 2010; 75 FR 66434, October 28, 2010; 75 FR 74458, November 30, 2010; 75 FR 74774, December 1, 2010; 75 FR 75060, December 1, 2010; and 75 FR 79092, December 17, 2010). For additional information regarding these requirements, please see the preambles and comment response documents for these rulemaking (available on the following web site: <http://www.epa.gov/climatechange/emissions/notices.html>).

**Commenter Name: Scott J. DeBoer**  
**Commenter Affiliation: Micron Technology, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0063.1**  
**Comment Excerpt Number: 6**

**Comment:** We note for the record that EPA's "class determination" that purports to define certain classes of information that will be emission data in all cases (56 Fed. Reg. 7042 (February 21, 1991)) is not binding on EPA or the Company. *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C.Cir. 2000). It also does not clarify the level of detail the agency is permitted or required to reveal about a source.

**Response:** The February 21, 1991 notice is a policy statement that was intended to provide the public notice and clarification on the type of data that EPA considered "emission data" under CAA section 114(c) and the long-standing definition of this term at 40 CFR 2.301(a)(2)(i). EPA agrees with the commenter that the 1991 notice is not a final confidentiality determination by EPA for any specific record or information submitted to EPA.

**Commenter Name: Mark A. Erman**  
**Commenter Affiliation: Pepper Hamilton LLP on behalf of Verallia**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0037.1**  
**Comment Excerpt Number: 7**

**Comment:** It is dubious that EPA's CBI determination by rule is permitted at all. An administrative agency may choose categorical rulemaking over individual adjunctions "when a case fits into a genus in which the balance characteristically tips in one direction," *United States Dep't of Justice v. Reporter's Comm. For Freedom of the Press*, 489 U.S. 749, 776 (1989), or when "a particular set of facts will lead to a generally predictable application of FOIA." *Critical Mass Energy Project v. NRC*, 975 F.2d 891, 879 (D.C. Cir. 1992). There is high potential for true CBI to be swept into one of EPA's many "Not CBI" categories, and EPA has not articulated a public interest in disclosure of equation "inputs" that would justify compromising the competitive positions of the regulated community. The Supreme Court has admonished agencies in that past not to make "sweeping presumption[s]" that do not "compor[t] with common sense and probability." *United State Dept. of Justice v. Landano*, 508 U.S. 165, 175 (1993). We believe that the proposed rule, if promulgated, would fall into this category.

**Response:** The two case law cited in the comment above support this final action by EPA to make categorical confidentiality determinations through rulemaking. In the *Critical Mass* opinion referenced in the comment above, the U.S. Court of Appeals for the District of Columbia Circuit cited the U.S. Supreme Court's 1989 *Freedom* opinion (also referenced in the comment) and stated that "The Supreme Court has encouraged the development of categorical rules whenever a particular set of facts lead to a generally predictable application of FOIA." 975 F.2d at 879. EPA believes that the facts surrounding the part 98 data elements present the type of circumstance for which categorical confidentiality determination by rule is appropriate. There are over 1,900 data elements under part 98 to be reported annually by over 10,000 individual reporters. As discussed in detail in the CBI proposals, many of the data elements share similar or common characteristics, thus allowing EPA to group them and make categorical confidentiality

determinations. EPA indeed was careful not to make sweeping presumptions in the development of this categorical approach. EPA evaluated individual data elements before publishing its proposed confidentiality determinations for notice and comment. In the proposals, EPA described individual data categories, the data elements within, and the rationales for the proposed determinations, and specifically solicited comments on all these aspects in the proposals. EPA considered the comments received in taking this final action. In both the CBI proposals and this final action, EPA recognized that a categorical determination may not be appropriate for a few data elements and made individual determinations for such data elements. Further, in response to comment, EPA concluded that further evaluation of certain data elements (i.e., inputs to equations) is warranted. EPA therefore did not include confidentiality determinations for these data elements in this final action. Instead, EPA took action to defer the reporting of these data elements to allow time for the evaluation, as well as soliciting additional information necessary for the evaluation. EPA therefore believes that it has carried out this rulemaking in a manner consistent with the judicial opinions cited in the comment above.

**Commenter Name: Kevin M. Dempsey**

**Commenter Affiliation: American Iron and Steel Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**

**Comment Excerpt Number: 3**

**Comment:** The Proposed Rule would categorize the information submitted under the GHG Reporting Rule and establish binding CBI determinations without further recourse for impacted entities. This presumptive approach runs counter to the purpose of rules to protect CBI and stands in sharp contrast to the far more appropriate case-by-case method of evaluating CBI claims used in nearly every other context. Establishing binding categorical determinations would deprive companies of the opportunity to determine what information, if released publicly, would undermine their competitive position. Company managers are most familiar with their processes and the competitive edge that certain information may provide, and those determinations should not be compromised by presumptive governmental classifications of information that cannot be challenged or adjudicated before damage is done when the information is disclosed.

EPA attempts to justify the proposed categorical approach by noting that substantial agency efforts would otherwise be necessary to address CBI claims under the GHG Monitoring Rule. While that may be true, it is an unsurprising consequence of EPA's own decision to impose highly detailed, voluminous, and burdensome reporting requirements on thousands of facilities nationwide. Given the numerous CBI comments filed in response to the original GHG Monitoring Rule, EPA had full knowledge that significant agency effort would be required. That expected burden provides no reason to deny reporting entities full and appropriate analysis of all CBI claims. The Proposed Rule also attempts to justify its categorical approach by suggesting that it will alleviate burdens on reporting entities. We can assure the agency that any increased burden to reporters to make CBI claims is a small price to pay for protection of information that can undermine a company's competitive position and harm or threaten the very viability of the company. Moreover, administrative convenience for EPA is no excuse or justification for the government to place companies in that position and create the potential for lost jobs to foreign competitors who can take advantage of the public disclosure of proprietary or sensitive

information by American manufacturers. Nor can a preemptive, categorical approach adequately address the changing market and regulatory dynamics that will often drive CBI claims for information provided under the GHG Reporting Rule. Business drivers and concerns necessarily evolve over time. That is particularly true in the area of GHG regulation, which is relatively new and rapidly evolving in the United States. It is entirely inappropriate to establish set CBI rules today on the prospect of unknown or speculative future legislation and regulation. That approach undercuts administrative procedure by depriving the regulated community of the opportunity to comment on the relevance of CBI in the context of those future developments

**Response:** For the response to the comments, please see Section II.A.2 of the preamble to the final rule.

**Commenter Name: Stephen H. Bernhardt**

**Commenter Affiliation: Honeywell**

**Document Control Number: EPA-HQ-OAR-2009-0924-0019.1**

**Comment Excerpt Number: 4**

**Comment:** On page 39100, Section 114(c) records, reports or information be available to the public except for those that would divulge trade secrets. However, emission data are precluded from such CBI designation. This would then result in loss of trade secrets and would act to limit reporting or domestic operations. We believe CBI designation is required for all information that could divulge trade secrets.

**Response:** Section 114(c) of the CAA affords confidential treatment to data that are considered trade secret or confidential business information (collectively referred to as "CBI" in the July 2010 CBI proposals), but excludes all data that are emission data. In cases where the data is both a trade secret and emission data, EPA is required by CAA section 114(c) to make the data available to the public. For additional information regarding the requirements of CAA section 114(c), please see Section I.C of the July 7, 2010 CBI proposal.

**Commenter Name: Glen E. Davis**

**Commenter Affiliation: Mississippi Lime**

**Document Control Number: EPA-HQ-OAR-2009-0924-0049.2**

**Comment Excerpt Number: 11**

**Comment:** There are alternatives to meet the needs of the USEPA while protecting Mississippi Lime Company's (MLCO) legitimate interest in confidentiality. For example, MLCO has worked closely with the Missouri Department of Natural Resources (MDNR) to protect data that is somehow related to "emissions data," but is not actual "emissions data." As a result, CBI provided to the MDNR is protected against public disclosure, and confidential and non-confidential versions of submitted information (e.g., emissions inventories, emissions calculations, permit applications, final permits, etc.) are maintained in separate files at the agency. Appendix 2 [See submittal for Appendix 2 provided by commenter] summarizes the categories of information and mechanisms employed to protect confidentiality.

**Response:** CAA section 114(c), which requires that EPA make information publicly available except for CBI, precludes emission data from being protected as CBI. EPA carefully construed the definition of “emission data” to include only data elements necessary to determine the emission information specified in 2.301(a)(2)(i)(A) or to distinguish one source from another source as required in 2.301(a)(2)(i)(C). Data that is somehow related to emissions but do not meet the criteria specified above would not be considered “emission data.”

For part 98 data not considered “emission data,” EPA determined whether such data elements qualify as CBI. As we noted in Section II.A.2 of the preamble to the final rule, the approach used to make CBI determinations for this notice is essentially the same as that used to make determinations for case-by-case CBI claims. We used the existing CBI criteria at 40 CFR 2.208 to determine whether they qualified for confidential treatment. We also sought comment on facility specific issues that could not be addressed through the categorical approach and addressed those comments in the relevant sections of the preamble to the final rule (see sections II.B.2 through II.B. 11 for direct emitters and sections II.C.3 through II.C.13 for suppliers). EPA notes that this commenter may be concerned with data elements in the Inputs to Emission Equation category. EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Glen E. Davis**

**Commenter Affiliation: Mississippi Lime**

**Document Control Number: EPA-HQ-OAR-2009-0924-0049.2**

**Comment Excerpt Number: 12**

**Comment:** Mississippi Lime Company requested the following revisions:

Permit companies subject to the GHGRP to make good faith CBI designations;

Companies designating information as CBI shall produce required information marked "CBI-Highly Confidential" and shall retain originals of such records in company files for such reasonable period as the USEPA may prescribe; The USEPA shall treat information marked as CBI-Highly Confidential as confidential, and maintain its confidentiality, including exemption from FOIA requests; If the USEPA believes that any information designated CBI-Highly Confidential is not in fact confidential, the USEPA may then request the CBI designation to be withdrawn or seek permission to use the information for specific purposes or use it in redacted or aggregated information format; and if the USEPA and any company claiming CBI-Confidentiality over certain information have a dispute over the propriety of that designation, the burden shall be on the company to seek protection from a court of competent jurisdiction within sixty (60) days of notice by the USEPA that it demands removal of the CBI designation over the objection of the company.

**Response:** EPA thanks the commenter for their input. However, the approach suggested by the commenter is not a viable option. CAA section 114(c), which requires information be made publicly available except for CBI, precludes emission data from being protected as CBI. Accordingly, under the Freedom of Information Act (FOIA), EPA must release part 98 data that are emission data and data determined not to be CBI upon request. EPA does not have the authority to exempt any such data from FOIA. Please also see Section II.A.2 of the preamble to

the final rule for the reasons why EPA considers individual case-by-case determinations, as recommended by the commenter, to be unnecessary.

**Commenter Name: Keith Adams and Brian Keck**  
**Commenter Affiliation: Air Products and Chemicals, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**  
**Comment Excerpt Number: 14**

**Comment:** Air Products is concerned that the determination that certain information which is not emission data would also not be considered as CBI. This type of broad public disclosure of non-emissions data will create significant opportunity for a competitive or security disadvantage to the reporting entity and the associated industry. It is important to recognize that many of the facilities required to report under the new GHG reporting rule have not been required in the past to submit detailed emissions inventory. Many of the GHG-affected facilities and units are not major sources under Title III or Title V, and they are not subject to NSPS or NESHAP requirements.

**Response:** While we agree with the commenter that not all of data reported under Part 98 is already publicly available, we disagree that all data that is not emissions data should be considered CBI. As discussed in Section I.C of the July 7, 2010 CBI preamble, data elements that do not meet the definition of emission data in 40 CFR 2.301(a)(2) were evaluated using the CBI criteria in EPA's existing CBI regulations (see 40 CFR 2.208). Specifically, EPA evaluated each data element in accordance with the criteria specified in 40 CFR 2.208(c) (not already publicly available) and (e) (release of the data would cause substantial harm to the business's competitive position). Only those data elements that meet both of these criteria are eligible for confidential treatment. The commenter stated in their comment that data for smaller facilities may not be publicly available because smaller facilities are not subject to Title III, Title V, or other CAA regulations. We agree with the commenter that not all facilities subject to Part 98 are subject to Title III, Title V, or other CAA regulations that require emission inventory reporting. However, we note that many smaller facilities are subject to state air regulations, including permitting requirements for minor sources, which require certain level of reporting. For example, minor sources and synthetic minor sources are required to have state operating permits that list some of the same type of information included in Title V permits (e.g., number and type of process units). We note that we sought comment on facility specific issues that could not be addressed through the categorical approach and addressed those comments in the relevant sections of the preamble to the final rule (see sections II.B.2 through II.B. 11 for direct emitters and sections II.C.3 through II.C.13 for suppliers). For additional information on the approach to making CBI determinations, see Section I.C of the preamble to the July 7, 2010 CBI proposal.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.1**  
**Comment Excerpt Number: 3**

**Comment:** Section 114 requires that all data collected under it be made public except where the reporting party makes a "satisfactory showing" that their information is "entitled to protection as

trade secrets,” and, even then, encourages EPA to designate only a “particular portion” of that information as CBI. See 42 U.S.C. § 7414(c). EPA’s CBI regulations likewise set out a rigorous review process for any such claims. See 40 C.F.R. §§ 2.204 & 2.205. Although the General Counsel may determine the CBI status of entire classes of information, the rules for that process do not suggest that EPA may make a positive CBI determination without an extant confidentiality claim. See 40 C.F.R. § 2.207. Nonetheless, the proposed rule is not based upon any particular confidentiality claims. Instead, EPA wrote the rule by “assum[ing] that the reporting facilities have asserted confidentiality claims.” 75 Fed. Reg. at 39,101. EPA does not cite support for its authority to make such assumptions and that authority is unclear.

To be sure, we support EPA’s general decision to make class determinations under the reporting rule, rather than attempt to adjudicate thousands of individual CBI claims. See 75 Fed. Reg. at 39,101-102. We agree that an individualized adjudication process would be cumbersome, require inordinate staff resources, and could improperly slow down reporting rule data collection. See *id.* We question, however, whether EPA’s class determination authority is symmetrical.

The statute sets out a clear presumption that data is public unless proven otherwise based on a reporting party’s showing. See 42 U.S.C. § 7414(c). Thus, EPA can certainly determine entire classes of information to be public, see 40 CFR § 2.207, in the absence of any claim otherwise, but it may well not be able to determine entire classes of information to be private in the absence of such a showing. See 40 C.F.R. § 2.208(a) (providing that CBI determinations, including CBI class determinations, may be made only if a “business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn”).

Requiring industries to actually request that some data element be made confidential helps ensure that the agency can accurately assess market conditions, rather than simply make assumptions about them. After such a review, EPA might well conclude that it had drawn overbroad CBI categories; without reviewing direct data, it cannot reliably check its conclusions about how data might affect the industry.

To gather this market data without slowing the implementation of the rule, EPA might go forward with non-CBI class determinations “simply to make known the Agency’s position,” see 40 C.F.R. § 2.207(d), and invite business to submit class-wide confidentiality claims for each of EPA’s 22 defined data elements if they disagree. CFR 2.204(c)(2) (providing mechanism for EPA to contact businesses “to learn whether the business asserts a claim covering the information.”). Because EPA will not begin sharing reporting data with the public until the end of the first reporting year, it has time to consider such class confidentiality claims. We expect EPA to solicit public comment on any such claims. EPA should appropriately modify this approach, however, if it would materially slow emissions reporting to the public.

**Response:** The commenter expressed support for EPA’s approach to making categorical confidentiality determinations through this rulemaking. However, the commenter suggested that EPA require that reporters make CBI claims before determining any data to be CBI. In fact, the commenter seems to argue that the CAA and EPA’s regulation impose such requirement on EPA. For the following reasons, EPA believes that this approach is not legally required, nor does EPA find it appropriate.

Section 114(c) requires that EPA protect information (other than emission data) “*upon a showing satisfactory to the Administrator by any person*” that the disclosure of such information would



divulge CBI. The commenter seemed to be arguing that the required showing under section 114(c) can only be made by the reporting party and, therefore, EPA could determine that information is CBI only after the reporting party claims such information as CBI. However, the CAA defines the term “person” to also include any agency, department, or instrumentality of the United States. Pursuant to this authority under section 114(c) and the rulemaking authority under section 307, EPA determines through this rulemaking which part 98 data qualify for CBI protection.

The commenter also interpreted 40 CFR 2.208 to similarly require businesses to make CBI claims for their information (the criterion at 2.208(a)) before EPA can issue confidentiality determinations for such information. Under 40 CFR 2.208, EPA must determine that information is entitled to confidential treatment if all of the criteria in 2.208 are met. That provision, however, does not state that such determination can be made *only if* all of the criteria are met. This is reasonable in light of the fact that 2.208 applies to 40 CFR 2.207, which allows EPA to make confidentiality determination for a class of information before obtaining the information (when businesses first assert CBI claims).

As explained above, EPA is not legally required to demand CBI claims from data submitters before making confidentiality determinations. Neither does EPA find such approach appropriate in this case. The commenter suggested that EPA propose a non-CBI determination for all of the part 98 data due to the absence of any CBI claim, which would make reporters submit CBI claims for their own data that EPA must then process before making final determinations. The commenter’s suggestion simply reflects the existing procedures for case-by case determinations, thus rendering this rulemaking unnecessary. The commenter also agreed that case-by-case determinations for part 98 data would be cumbersome and would delay publication of data that is emission data or otherwise not entitled to CBI protection. Further, without proposing for comment any substantive detail of the Agency’s categorical approach, like EPA did in the July 2010 CBI proposals (e.g., the process, the proposed determinations, supporting rationales), it is highly questionable that EPA would receive comments that would help EPA finalize this categorical determination rulemaking. For the reasons stated above, EPA does not believe that the commenter’s suggested approach is appropriate for this rulemaking.

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 11**

**Comment:** Pursuant to 40 CFR 2.204 through 2.207, business information can be entitled to confidential treatment if the business has satisfactorily show that disclosure of the information is likely to cause substantial harm to the business’s competitive position. Air Products supports that this same process, which has suited EPA and industry for the past nearly 20 years, be employed to determine the confidentiality of data which must be reported under the new GHG MRR. Air Products wholeheartedly concurs with EPA’s opinion that the amount of work to assemble these confidentiality requests and then to review them and determine individual decisions is a monumental undertaking, however, the inherent sensitivity of this data and the potential adverse impacts to individual facilities, entire companies and combined industry sectors

demands that the data be given a complete and thorough evaluation. EPA recognizes in the Preamble that case-by-case determinations on an entity-specific basis would be unnecessarily burdensome for reporters, but Air Products contends that the true burden of this reporting rule lies within assembling and reporting the data that is required by this new rule, not the effort required substantiating the claims that data is business confidential. Further to this point, EPA is concerned it would not be able to make Part 98 data (determined to be emission data or non-CBI) publicly available in a timely fashion; however, EPA then notes that the Acid Rain program allows facilities to make confidentiality claims for non-emission data, and to date no such confidentiality claims have been received by EPA from industry.

**Response:** EPA disagrees with the commenter that individual case-by-case CBI claims would be a better approach to making confidentiality determinations. As we explained in the July 7, 2010 CBI proposal, our CBI determinations for this action were made using the definition of emission data at 40 CFR 2.301(a)(2)(i). This is the same definition EPA has used for over 20 years to make decisions on individual case-by-case CBI claims. For data that did not meet the definition of emission data, we used the existing criteria from the CBI regulations at 40 CFR 2.208 evaluate and determine the confidentiality of the Part 98 data elements in this action. These are the same criteria used by EPA to make determinations for individual case-by-case CBI claims. We also provided stakeholders an opportunity to comment on data elements as well as data categories that might qualify for CBI protection and made it clear that this was the opportunity for reporters to substantiate their CBI claims. For example, in Section I.E of the preamble to the July 7, 2010 CBI proposal, we stated that “this rulemaking provides the reporting businesses an opportunity to justify any confidentiality claim they may have for the data they are required to submit” and in Section II.B of the July 7, 2010 CBI preamble we specifically solicited comment on the proposed data categories, confidentiality determinations, and any “unique circumstances . . . that would warrant making subpart-specific confidentiality determinations.” Stakeholders were given a 60-day comment period to review the proposed determinations and prepare documentation substantiating any CBI claims. In response to that request, EPA received many comments on facility-specific issues, which we have addressed in this document or in the relevant sections of the preamble to the final rule. We received no specific comment or information indicating, nor do we have reason to believe, that reporting facilities would have any new or different information to substantiate their CBI claims at the time they submit data beyond that information available to them during the public comment period on the CBI proposals. We therefore do not believe that a case-by-case determination at the time of data submittal would result in a different confidentiality determination. Although no confidentiality claims have been submitted for data reported under the Acid Rain Program, we noted in the preamble to the July 7, 2010 CBI proposal (see 75 FR 39103) that Part 98 differed from the Acid Rain Program in the type of industries and number of facilities required to report. We pointed out in the preamble that electricity producers are likely to be less concerned about the disclosure of reported data than other industries because as publicly regulated entities, detailed data on their process, production, and pricing structure are already in the public domain. Furthermore, Acid Rain Program facilities make up only a small fraction the total number of Part 98 reporters. The majority of Part 98 reporters operate in competitive markets and as is clear from many of the comments we received, many industries consider at least some of the data reported under Part 98 to be sensitive (e.g., production throughput, raw material consumption, product composition). As we stated in the July 7, 2010 CBI proposal, the

large number of individual data elements to be reported (over 1,900) combined with the large number of individual reporters (more than 10,000) would likely result a very large number of individual CBI claims. The Acid Rain Program is a considerably smaller program. In 2009, the number of individual facilities subject to the Acid Rain Program was only 1,501 facilities. Because of the significant differences between the two programs, we concluded that the Acid Rain Program is a poor indicator of the number of individual CBI claims we could expect to receive for the Mandatory GHG Reporting Program.

**Commenter Name: Michael Tiller**  
**Commenter Affiliation: Compressed Gas Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0020.1**  
**Comment Excerpt Number: 5**

**Comment:** Pursuant to 40 CFR 2.204 through 2.207, business information can be entitled to confidential treatment if the business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position. CGA supports that this same process, which has suited EPA and industry for the past 20 years, be employed to determine the confidentiality of data that must be reported under the new GHG Mandatory Reporting Rule (MRR). CGA concurs with EPA's opinion that the amount of work to assemble the confidentiality requests, review them, and determine individual decisions is a monumental undertaking, however, the inherent sensitivity of this data and the potential adverse impacts to individual facilities, entire companies, and combined industry sectors demands that the data be given a complete and thorough evaluation. EPA states that "case-by-case determinations on an entity-specific basis would be unnecessarily burdensome for reporters, but CGA contends that the true burden of this reporting rule lies within assembling and reporting the data required by this new rule, not the effort required claiming the data as business confidential. Further to this point, EPA is concerned it would not be able to make Part 98 data (determined to be emission data or non-CBI) publicly available in a timely fashion; however, EPA notes that the Acid Rain Program allows facilities to make confidentiality claims for non-emission data, and to date no such confidentiality claims have been received by EPA from industry.

**Response:** For the responses to the comments regarding the need for case-by-case review of individual CBI claims and the response to the comment on the Acid Rain Program, see the response to comment EPA-HQ-OAR-2009-0924-0058.1, excerpt 11 above.

**Commenter Name: Keith Adams and Brian Keck**  
**Commenter Affiliation: Air Products and Chemicals, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**  
**Comment Excerpt Number: 12**

**Comment:** Air Products believes that any information not directly needed to calculate emissions (e.g. unit capacity, production efficiency, feedstock consumption, market share, product volumes, etc.) should be considered CBI, or, at least, the EPA should retain the ability for a reporting entity to petition for a case-by-case CBI determination.

**Response:** For the responses to the comment regarding the need for case-by-case review of individual CBI claims, see the response to comment EPA-HQ-OAR-2009-0924-0058.1, excerpt 11 above and section II.A.2 of the preamble to the final rule. For the response to the comment on unit capacity, see Section B.6 of this document.

With regards to feedstock consumption and production volumes that are not needed to calculate emissions, in this final rule, EPA has determined that data elements in the Production/Throughput that are Not Inputs to Emission Equation category and Raw Materials Consumed that are Not Inputs to Emission Equations are CBI. For more information, see Section II.B.9 of the preamble to the final rule. Only one subpart requires the reporting of production efficiency (see 40 CFR 98.416(e)(5)). EPA has made a final determination that this data element is CBI. Market share is not reported under Part 98. While we agree that market share and in certain circumstances production efficiency may be estimated using some of the data elements reported under Part 98 (e.g., production volumes and raw material consumption can be used to estimate production efficiency, and production volumes can be used to determine market share), we note that these data elements are proposed to be deferred when used as inputs in emission equations and are CBI when not used as inputs in emission equations. For addition information regarding our proposal to defer reporting of data elements in the Inputs to Emission Equations category, please see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Paul Noe**

**Commenter Affiliation: American Forest & Paper Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0034.1**

**Comment Excerpt Number: 1**

**Comment:** [W]e oppose the automatic disclosure of verification information as inconsistent both with the law and sound policy. Instead, requests for the disclosure of such data should be decided case by case as at present. We want to point out that EPA would lose nothing by accepting our position as a starting point for this massive new program. Actual emissions data would still be automatically disclosed. That would be more than enough to inform the public and the public debate, particularly in the first few years when this information would still be new to the public forum. Meanwhile, both EPA and industry could gain experience with the actual sensitivity of the verification information. That, in turn, would put EPA in a position to make a more informed decision on generic disclosure later, should it find that advisable. Meanwhile, all this information without exception would still be subject to case by case disclosure as at present. (To be consistent with the current practice for claiming CBI, EPA should incorporate the ability for companies to claim information as confidential in its electronic GHG reporting tool (e-GGRT).)

**Response:** We disagree that EPA should withhold data that is emission data or otherwise not entitled to CBI status. We also disagree that automatic disclosure of data that is emissions data or non-CBI is inconsistent with the law or policy. As we explained in the July 7, 2010 CBI proposal, our CBI determinations were made consistent with EPA's existing CBI regulations. Specifically, we used the definition of emission data at 40 CFR 2.301(a)(2)(i), which has been used by EPA for over 20 years to make decisions on individual case-by-case CBI claims. EPA carefully construed this regulatory definition to include only those data elements necessary to

determine the emission information specified in 2.301(a)(2)(i)(A) or to distinguish one source from another source as required in 2.301(a)(2)(i)(C). Under CAA section 114(c), data that are emission data as defined in 2.301(a)(2)(i) are not entitled to confidential treatment and must be release to the public. For those data categories that EPA determined did not qualify as emission data, we used the existing CBI regulations at 40 CFR 2.208 to determine the CBI status of each Part 98 data element. We therefore disagree with the commenter that EPA's approach is inconsistent with the law or undermines public policies regarding confidential business information.

For the response to the comment regarding the need for case-by-case review of individual CBI claims, see the response to comment EPA-HQ-OAR-2009-0924-0058.1, excerpt 11 above and Section II.A.2 of the preamble to the final rule.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0067.1**  
**Comment Excerpt Number: 4**

**Comment:** If controlling law allows EPA to take the FTC's concerns into account at all – which the FTC does not convincingly demonstrate – EPA should, at most, develop case-by-case confidentiality procedures, for use in specific industry classes, which might be used to shield data that truly poses antitrust concerns. These procedures should only be developed following a demonstration by that industry segment or another party that anticompetitive behavior is likely to occur, and should only apply for a limited duration as needed to address the specific anticompetitive concern. EPA may not, however, simply shield all emission equation inputs and process characteristics from all public scrutiny. The reporting rule is designed to radically improve the depth and breadth of greenhouse gas emissions information. EPA should insure that it continues to serve that crucial purpose.

**Response:** For the response to the comment regarding the need for case-by-case review of individual CBI claims, see the response to comment EPA-HQ-OAR-2009-0924-0058.1, excerpt 11 above and Section II.A.2 of the preamble to the final rule.. EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Karin Ritter<sup>4</sup>**  
**Commenter Affiliation: American Petroleum Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0066.1**  
**Comment Excerpt Number: 1**

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<sup>4</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

**Comment:** API supports the FTC recommendations, and urges EPA to strongly consider them in finalizing these issues.

“...the FTC recommends that the EPA treat data that is an input to emission equations as confidential. The FTC also recommends that the EPA delay publication of any reported data concerning plant or unit capacity or future operating status until after reporting companies receive sufficient time to apply for confidential treatment. The competitive sensitivity of this data can vary by industry, which suggests that more information is needed to make a confidentiality determination”.

These recommendations are consistent with the discussion provided in section IV of API’s September 7, 2010 comments, in which API recommended that in the final rule, EPA provide flexibility so that companies can request confidential treatment for data that must be reported under the GHGRP, but that raises unique concerns, or that is not covered by any data elements in the proposed rule.

As discussed previously, the proposed rule would require the reporting of sensitive and confidential business information that goes well beyond “emissions data” and whose disclosure would reveal sensitive competitive information. API continues to respectfully urge EPA that in the final rulemaking the definitions of data categories that are “not CBI” be structured very carefully and that EPA distinguish between what it needs in order to validate the reported data as compared to what data are “made available to the public” and provide the flexibility for companies to request specific data to be handled as confidential.

**Response:** Based on the long standing definition at 40 CFR 2.301(a)(2)(i), EPA has determined in this rule making that certain part 98 data elements constitute “emission data” for purposes of determining GHG emissions to be reported under this part. EPA has carefully construed the regulatory definition to apply to only those data elements necessary to determine the emission information specified in 2.301(a)(2)(i)(A) or to distinguish one source from another source as required in 2.301(a)(2)(i)(C). For the response to the comment regarding the need for case-by-case review of individual CBI claims, see the response to comment EPA-HQ-OAR-2009-0924-0058.1, excerpt 11 above and Section II.A.2 of the preamble to the final rule. Further, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Tom Siegrist**

**Commenter Affiliation: Koch Nitrogen Company, LLC**

**Document Control Number: EPA-HQ-OAR-2009-0924-0025.1**

**Comment Excerpt Number: 2**

**Comment:** EPA’s concern regarding the amount of work required of reporting entities in order to continue utilizing the established case-by-case approach to CBI determinations is misplaced. (75 FT 39102). EPA attempts to justify its blanket approach to determining CBI status by expressing concern over the amount of time and effort required by a reporter to prepare a confidentiality claim. A reporter would certainly consider the time, effort and costs associated

with the preparation of a specific claim and compare those against the perceived value of such a claim, and only undertake those claims that appear necessary based on that reporter's understanding of its specific business. Individual decisions regarding the need to pursue a claim of CBI should be left to the reporters, rather than precluded by terms of an inflexible policy.

**Response:** Please see Section II.A.2 of the preamble to the final rule for the response to the comment on EPA's rationale for making confidentiality determinations on a categorical basis.

**Commenter Name:** Glen E. Davis  
**Commenter Affiliation:** Mississippi Lime  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0049.2  
**Comment Excerpt Number:** 2

**Comment:** The USEPA's "Fact Sheet" concerning the CBI Proposal provides background on the pending rulemaking proposal. The Fact Sheet notes: "EPA typically makes confidentiality determinations under the Clean Air Act (CAA) on a case by case basis. Due to the large number of entities expected to report under the Mandatory Greenhouse Reporting Rule (over 10,000) and the large number of data reporting elements (over 1,500), EPA believes that case-by-case determinations would not result in a timely release of non-confidential data." Mississippi Lime Company (MLCO) respectfully suggests that any administrative convenience offered in the CBI Proposal by removing CBI protection is far out-weighted by the significant harm to compliant companies if certain data is publicly available. Moreover, the harm to industry competition and to Mississippi Lime in the marketplace is unnecessary to achieve the goals of the GHGRP.

**Response:** Please see Section II.A.2 of the preamble to the final rule for the response to the comment on EPA's rationale for making confidentiality determinations on a categorical basis.

**Commenter Name:** Caitlin Post  
**Commenter Affiliation:** Southern Company  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0027.1  
**Comment Excerpt Number:** 1

**Comment:** In its proposal, EPA asks for comment on whether it should allow sources an opportunity to continue to assert confidential business information (CBI) claims on a case-by-case basis, in addition to the blanket CBI determinations it plans to make under the new rule. Southern Company understands EPA's reasoning behind the proposal for blanket determinations. Grouping together similar data elements and providing determinations based on their similar characteristics will speed up the release of information to the public and reduce the burden on EPA and on reporters. However, Southern Company believes the right to assert a case-by-case confidentiality claim is essential because each source's circumstances are unique. In the event that Southern Company determines data required to be reported under 40 CFR Part 98 to be CBI, the Company must have the ability to request a case-by-case CBI determination from EPA. Retaining a case-by-case determination option should not preclude EPA's proposal to handle most submissions in a generic fashion.

**Response:** Please see Section II.A.2 of the preamble to the final rule for the response to this comment on why the categorical approach provided adequate opportunity for commenters to substantiate CBI claims.

**Commenter Name:** Lorraine Gershman<sup>5</sup>  
**Commenter Affiliation:** American Chemistry Council (ACC)  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0031.1  
**Comment Excerpt Number:** 12

**Comment:** We understand EPA's concern that too many CBI requests for submitted MRR data could overwhelm EPA. However, we believe it is critical that facilities still have a way to request certain data not classified as CBI for the MRR be protected as CBI. Each facility is different, and some may have information that it deems sensitive and that warrants protection.

**Response:** Please see Section II.A.2 of the preamble to the final rule for the response to this comment on why the categorical approach provided adequate opportunity for commenters to substantiate CBI claims.

**Commenter Name:** Paul Noe  
**Commenter Affiliation:** American Forest & Paper Association  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0034.1  
**Comment Excerpt Number:** 5

**Comment:** CAA §114 at the very least expresses a clear preference for case-by-case decisions on CBI status. That position also makes policy sense given the wide variety of individual settings and circumstances in which such claims may arise. Sources are really not able to anticipate in advance every single situation in which data, if released, would raise a CBI concern. The record that EPA has created supports a case by case approach and is clearly far too weak to support a generic decision in favor of disclosure. EPA attempts to justify its generic approach to denial of CBI status by pointing to the amount of work this would save reporting organizations such as the companies AF&PA represents. 75 Fed. Reg. 39102. Much as we appreciate this concern, we greatly prefer the established and legally required case by case approach in this context despite any greater work it might possibly entail.

**Response:** Contrary to the commenter's assertion, CAA section 114(c) is silent on how the Administrator makes confidentiality determinations under that provision. For a response to the comment regarding EPA's rationale for making confidentially determinations on a categorical basis, see Section II.A.2 of the preamble to the final rule. As explained in this section, we specifically sought comment on facility-specific situations in which CBI protection should be provided. We have received comments on facility-specific issues and addressed those comments in the relevant sections of this preamble. For the handful of data elements where commenters were able to demonstrate that conditions varied significantly among reporters, EPA decided not

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<sup>5</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), PPG Industries, Inc. (EPA-HQ-OAR-2009-0924-0040), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).



to make a final confidentiality determination for the particular data element in this final action. We received no specific comment or information indicating, nor do we have reason to believe, that reporting facilities would have any new or different information to substantiate their CBI claims at the time they submit data beyond that information available to them during the public comment period on the CBI proposals. We therefore do not believe that a case-by-case determination at the time of data submittal would result in a different confidentiality determination.

**Commenter Name: Kevin M. Dempsey**

**Commenter Affiliation: American Iron and Steel Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**

**Comment Excerpt Number: 10**

**Comment:** We strongly urge EPA to reconsider the proposed categorical approach and instead deal with CBI claims on a case-by-case basis consistent with the vast majority of other situations. Only a case-by-case approach has the requisite flexibility to allow the proper vetting of facility-specific issues in context. Alternately, if EPA is unwilling to eliminate the proposed categorical approach entirely, it should allow reporting entities a full opportunity to rebut any presumptive “emissions data” or CBI status assigned to specific data categories. Anything less contradicts the core purpose of the relevant CBI provisions and is inconsistent with the Administrative Procedures Act.

**Response:** EPA disagrees with the comment that the categorical approach does not allow reporting facilities the opportunity to rebut emission data and CBI determinations made in this action. As explained in Section II.A.2 of the preamble we proposed CBI determinations for Part 98 data elements and provided stakeholders as well as the general public an opportunity to comment on data elements as well as data categories that might qualify for CBI protection and made it clear that this was the opportunity for reporters to substantiate their CBI claims. Stakeholders were given a 60-day comment period to review the proposed determinations and prepare documentation substantiating any CBI claims. We consider the 60-day comment period to be more than adequate, especially in light of the 15 days businesses have under the existing CBI regulations to respond to requests for information substantiating a CBI claim (see 40 CFR 2.204(e)). During the comment period, the reporting facilities were able to consider the Agency’s proposed confidentiality determinations in preparing their CBI claims and supporting documentation; businesses do not have such insight into EPA’s likely positions when substantiating CBI claims on a case-by-case basis under the existing CBI regulations that apply to non-part 98 data. EPA considered and addressed the comments received in finalizing the confidentiality determinations in this action.

**Commenter Name: Frederick R. Harnack**

**Commenter Affiliation: United States Steel Corporation**

**Document Control Number: EPA-HQ-OAR-2009-0924-0054.1**

**Comment Excerpt Number: 3**

**Comment:** This problem is compounded by U. S. EPA’s attempt to alter the currently accepted right of regulated entities to claim CBI. U. S. EPA’s scheme to roughly categorize information

into 1) emissions not subject to CBI; 2) data that are not emissions and not subject to CBI; and 3) data that are not emissions but are subject to CBI, is arbitrary and capricious. By imposing this scheme on the regulated community, U. S. EPA would be depriving regulated entities of the right to determine which aspects of their business are proprietary, and the scheme would be tantamount to a taking, in that an object of value, CBI, would be denied to an entity on the basis of government action. U. S. EPA's contention that allowing CBI on a case-by-case basis would be burdensome to the regulated community displays a lack of understanding of the value of CBI. Market forces do not allow private enterprises to expend time and money to pursue frivolous matters. If an enterprise seeks to claim CBI, then the assumption has to be made that the enterprise sees value in the action. The fact that U. S. EPA may be burdened in the review of CBI claims should not be a factor in trying to disallow the claims.

**Response:** For the response to the comment that the categorical approach deprived regulated entities the right to determine which data elements they consider sensitive see the response to comment EPA-HQ-OAR-2009-0924-0048.1, excerpt 10.

**Commenter Name:** Leslie S. Ritts<sup>6</sup>

**Commenter Affiliation:** The National Environmental Development Association's Clean Air Project

**Document Control Number:** EPA-HQ-OAR-2009-0924-0056.1

**Comment Excerpt Number:** 19

**Comment:** NEDA/CAP appreciates EPA suggestions regarding a new process to evaluate individual company CBI requests, but, there must also be a process for rebutting and/or arbitrating such determinations. The procedures outlined in the proposal lack these features, which are currently set forth in 40 CFR §§ 2.204-205, pursuant to 5 U.S.C. § 552 of the Administrative Procedures Act. The key features of such a rebuttal/arbitration process would include: 1. Notice of request for information labeled CBI and opportunity to comment; 2. Determination regarding disposition of request for information labeled CBI; 3. Opportunity to seek judicial action regarding release of CBI material; and, 4. Penalties for release of CBI information.

**Response:** As explained in Section II.A.2 of the preamble to the final rule, EPA's categorical approach includes the following features of the existing CBI procedures noted by the commenter: an opportunity for comment; a final determination by the Agency; and judicial review of the determination. EPA would release only information under part 98 determined to be non-confidential in a final rule or by a court if such determination is challenged. With respect to the forth feature raised by the commenter, penalties for the release of CBI information, note that the amendments to Part 2 finalized in this action state that "EPA shall treat information as confidential in accordance with the provisions at 40 CFR 2.211." The provisions at 40 CFR 2.211 include penalties for the wrongful disclosure of CBI.

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<sup>6</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

**Commenter Name: Scott J. DeBoer**  
**Commenter Affiliation: Micron Technology, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0063.1**  
**Comment Excerpt Number: 8**

**Comment:** We oppose EPA's proposal to revise its confidentiality rules to eliminate case-by-case confidentiality determinations for the purpose of administrative convenience. The proposal undermines the important public policies embodied in EPA's existing confidential business information rules, the federal Trade Secrets Act, and other related laws.

**Response:** As explained in Section II.A.2 of the preamble to the final rule, EPA's categorical approach covers the key aspects of the existing CBI procedures by offering an opportunity for comment (including making and substantiating CBI claims) and judicial review of EPA's final determination before release of information. Further, as we explained in the July 7, 2010 CBI proposal, we used the existing criteria from the existing CBI regulations at 40 CFR 2.208 to determine the CBI status of each Part 98 data element. We also used the existing definition of emissions data at 40 CFR 2.301(a)(2)(i). We therefore disagree with the commenter that EPA's approach undermines public policies regarding confidential business information.

**Commenter Name: Stephen H. Bernhardt**  
**Commenter Affiliation: Honeywell**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0019.1**  
**Comment Excerpt Number: 5**

**Comment:** Pg. 39102 concludes that case-by-case confidentiality determinations would result in delays in making data available for use by public and policy makers. This means companies would be forced to share information with the public and policy makers for the sake of expediency that would be illegal for them to share directly with competitors. EPA would be enabling such a disclosure by making the reported information public.

**Response:** EPA disagrees with the commenter that this rulemaking would force companies to share information. It is part 98, not this rulemaking, that requires reporting of the data. Once submitted, the reported data are Agency records subject to FOIA. Upon such request, information must be released if determined to be "emission data" or non-CBI. It is not clear how companies can avoid such disclosure by EPA not taking this final action. The determinations made in this final action are based on the long standing regulatory definitions for "emission data" and confidentiality determination criteria at 40 CFR 2.208. Also, consistent with the existing CBI procedures, this rulemaking provides an opportunity for comment (including making and substantiating CBI claims) and judicial review of EPA's final determination before release of information. Please see Section II.A.2 of the preamble to the final rule for a more detailed discussion on EPA's categorical approach. In light of the above, there is no reason to believe that EPA's determination would be different if made at a later time. EPA therefore rejects the comment that this action would force companies to share information.

**Commenter Name: Leslie S. Ritts<sup>7</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 22**

**Comment:** EPA must continue to protect this information and only allow access for legitimate reasons by allowing the owner of the information the ability to assert a CBI claim where appropriate. EPA should make these determinations on a case-by-case basis.

**Response:** Please see Section II.A.2 of the preamble to the final rule for the response to this comment on EPA's decision not to make case-by-case confidentiality determinations.

**Commenter Name: Karin Ritter<sup>8</sup>**

**Commenter Affiliation: American Petroleum Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**

**Comment Excerpt Number: 17**

**Comment:** EPA Should Consider Allowing Flexibility For Companies To Request Specific CBI Designation.

API acknowledges that providing categorical exemptions for CBI designations would simplify the process and could, if properly designed, protect commercially sensitive information. However, it is clear that even with the best designed system there could be special unforeseen circumstances that would require CBI designation and exemption from data being made available to the public. For example, some facilities may be required to adopt a monitoring plan and EPA may request certain data collected under that plan. This data could warrant confidential treatment, but may not be expressly covered by any of the data elements in the proposed rule. These facilities should be provided an option to request a CBI designation for this data. An example for such an approach is the "Confidentiality" provision in the California mandatory greenhouse gas reporting program. Section 95106 of the California mandatory greenhouse gas reporting program states that:

“(a) emissions data submitted to the Air Resources Board (ARB) under this article is public information and shall not be designated as confidential,  
(b) any entity submit ting information to the ARB pursuant to this article may designate information that is not emissions data as confidential because it is a trade secret or otherwise exempt from public disclosure ....”

The California program includes the provision for companies to request that certain data be designated as confidential based on their individual circumstances. This is an important

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<sup>7</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

<sup>8</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

feature that should be included in the EPA program also in addition to the categorical exemption provided by EPA in the proposed rule.

**Response:** This action does not include confidentiality determinations for information that Part 98 requires facilities to maintain as records, such as the monitoring plans discussed by this commenter. This action only includes final confidentiality determinations for data elements that Part 98 requires facilities to report to EPA. We have prepared a memorandum that lists each data element covered by this final action and shows its data category assignment and confidential status. A copy of this memorandum is available in the docket for this rulemaking (see “Final Data Category Assignments and Confidentiality Determinations for Part 98 Reporting Elements” in Docket EPA-HQ-OAR-2009-0924 and on the website, <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>).

If EPA requests copies of any records, then the facility may make a CBI claim at the time those records are submitted to the Agency. EPA will review each such claim individually either at the time the data is submitted or when a public request for the data is received.

**Commenter Name: Mark A. Erman**

**Commenter Affiliation: Pepper Hamilton LLP on behalf of Verallia**

**Document Control Number: EPA-HQ-OAR-2009-0924-0037.1**

**Comment Excerpt Number: 3**

**Comment:** EPA’s 1975 preamble (40 Fed. Reg. 21987, May 20, 1975) adopted an approach that struck a more reasoned balance than proposed here between private business interests in protecting proprietary information and public interest in disclosure: “EPA has given considerable attention to the question of whether the quoted phrases [“trade secrets or secret processes”] were intended to restrict confidential treatment to only such information as would disclose details of manufacturing methods or physical or chemical processes carried on by a business, or whether instead the phrase is a term of art encompassing other types of data which in many cases businesses regard as confidential, such as operating costs, profits and losses, details of transactions with others, plans for capital investment, marketing information, proposed new products, input and output rates, and similar information. In the proposed rule, the latter approach would be taken. EPA has noted that the meager legislative history concerning these provisions (like that concerning the similar language in section 308 of the Federal Water Pollution Control Act (FWPCA)) tends to indicate that Congress contemplated confidential treatment of all “trade secrets” or “proprietary data” except emission data. EPA has not been able to conclude that Congress intended either the Clean Air Act or the FWPCA to compel automatic disclosure of the vast amount of closely-held business information, production of which EPA may require under those statutes. Certainly the legislative histories give no indication that the drafters considered this possibility. Moreover, it is not apparent how automatic public availability of this information would further the overall purposes of either Act.... Finally, many business would oppose EPA requests for information in they knew that EPA would immediately make it available to the public; this could seriously hamper EPA programs by requiring diversion the Agency’s resources to time-consuming and expensive efforts to compel the firms to provide the information by use of court process.” 40 Fed. Reg. at 21990.

**Response:** EPA disagrees with the commenter that this action represents a change to EPA previous CBI policies. As we explained in the July 7, 2010 CBI proposal, our CBI determinations were made using the existing CBI regulations that have been in use since 1975. We used the definition of emission data at 40 CFR 2.301(a)(2)(i) to determine which data elements are emission data. EPA carefully construed this regulatory definition to include only those data elements necessary to determine the emission information specified in 2.301(a)(2)(i)(A) or to distinguish one source from another source as required in 2.301(a)(2)(i)(C). For those data categories that EPA determined did not qualify as emission data, we used the existing criteria at 40 CFR 2.208 to determine which data elements are eligible for confidential treatment. The definition of emission data at 40 CFR 2.301(a)(2) and the criteria in 40 CFR 2.208 have been used by EPA for over 20 years to make decisions on individual case-by-case CBI claims.

Regarding the comment questioning how public availability of the data furthers the overall purposes of the act, Part 98 data, except for the data found to be CBI in this final action, is critical to furthering public understanding of the sources of GHG emissions and to enabling stakeholder participation in the critique and analysis of any future GHG rulemaking. The data will enable the public to track trends in GHG emissions from industries and facilities over time and, in the future, enable the public to assess the effectiveness of policies and regulations. We also consider public access important because it promotes public confidence in the accuracy and reliability of the data.

## 2. Scope of the CBI Proposal

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**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 5**

**Comment:** Some subparts to 40 CFR Part 98 have not been finalized, yet the EPA has proposed confidentiality determinations for data elements in these subparts. Mexichem is subject to Subpart L of 40 CFR Part 98. Subpart L was proposed in the April 10, 2009 Federal Register and then again in the April 12, 2010 Federal Register and has not yet been published as a final rule. Comments on the April 12, 2010 proposed rule were due by June 11, 2010. The proposed confidentiality rule was signed by Administrator Jackson on June 28, 2010. Mexichem questions whether the EPA had time to sufficiently analyze comments on the April 12, 2010 proposed rule, define the data elements that would be required to be reported under Subpart L, and properly incorporate them into the proposed confidentiality rule. Mexichem believes that it and other commenters on the April 12, 2010 rule have raised significant concerns and these could result in changes to the data required to be reported under the final rule. Mexichem requests that the EPA reconsider making proposed confidentiality determinations for data contained in subparts that are not yet finalized.

**Response:** EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ. For

additional information regarding EPA's decision not to finalize the determinations for these subparts in this action, see Section II.A.3 of the preamble to the final rule. For informational purposes, we have provided a list of the comments we received on the proposed confidentiality determinations for each of these subparts in Appendix B of this document.

**Commenter Name: Thomas P. Diamond<sup>9</sup>**

**Commenter Affiliation: Semiconductor Industry Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**

**Comment Excerpt Number: 3**

**Comment:** SIA would note that EPA has yet to finalize the GHG Reporting Rule for our industry sector [subpart I], and therefore, we are hampered in our ability to comment and offer more finely nuanced solutions to address our particular concerns.

[T]he fact that EPA has not yet finalized its GHG re-proposal severely hampers SIA's ability to comment on the Proposed CBI Rule, as we are not dealing with a "final" emissions calculation, but instead presuming what the emissions calculation might be based on the Re-proposed Rule, coupled with dialogue on the Re-proposed Rule that has occurred with EPA. In such circumstances, the public is denied the opportunity to participate fully in the rulemaking as required by the Administrative Procedure Act. See 5 U.S.C. 553(c).

**Response** EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ. For additional information regarding EPA's decision not to finalize the determinations for these subparts in this action, see Section II.A.3 of the preamble to the final rule. For informational purposes, we have provided a list of the comments we received on the proposed confidentiality determinations for each of these subparts in Appendix B of this document.

**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 4**

**Comment:** Some of the data that Mexichem would be required to report, if made available to the public, would be detrimental to our competitiveness. Subpart L is not finalized yet (a reason to wait to finalize confidentiality determinations), but as proposed, Mexichem would be required to report information that it deems confidential.

**Response:** EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ. For additional information regarding EPA's decision not to finalize the determinations for these subparts in this action, see Section II.A.3 of the preamble to the final rule. For informational

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<sup>9</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

purposes, we have provided a list of the comments we received on the proposed confidentiality determinations for each of these subparts in Appendix B of this document.

**Commenter Name: Karin Ritter<sup>10</sup>**

**Commenter Affiliation: American Petroleum Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**

**Comment Excerpt Number: 15**

**Comment: EPA Must Not Issue Confidentiality Determinations For Any Data Elements in Subpart W Without An Additional Opportunity For Public Participation, After Subpart W is Finalized.**

EPA recently issued a proposed rule setting forth the data required by Subpart W, Petroleum and Natural Gas Systems. 75 Fed. Reg. 18608 (April 12, 2010). EPA acknowledges that the data elements in this subpart, "when finalized, may not be exactly the same as those in the proposed subparts." 75 Fed. Reg. at 39099. EPA nonetheless states that it expects "that any revised or refined data element in the relevant final subpart would still logically fall into the same or another data category that is addressed in this action and would therefore be covered by the confidentiality determination for that data category." *Id.*

API respectfully objects to this approach and believes that before EPA finalizes confidentiality determinations for any data elements for Subpart W, EPA must wait until Subpart W is finalized and then allow another opportunity for public review and comment. A failure to do so would be a violation of the Administrative Procedure Act (APA) and the Clean Air Act. "Given the strictures of notice- and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former." *Env'tl. Integrity Project v. EPA*, 425 F.3d 992,996 (D.C. Cir. 2005); *see also, e.g., National Mining Ass'n v. Mine Safety and Health Admin.*, 116 F.3d 520,531 (D.C. Cir. 1997) (rejecting an agency argument that final rules that changed longstanding preshift examination requirement for miners could be a logical outgrowth of a proposal that left that aspect of the rules unchanged).

The data elements required under Subpart W are highly technical and any change to these requirements may establish data elements that raise very different confidentiality concerns, even if the final data elements are themselves similar to the proposed data elements. As such, the confidentiality determinations for the final data elements will not likely be a "logical outgrowth" of the proposed confidentiality determinations. Until EPA decides how it intends to revise the requirements of Subpart W and, in turn, what confidentiality determinations EPA proposes to assign them, the public will not have a fair opportunity to present any confidentiality claims they may have for the data. EPA cannot finalize confidentiality determinations for data elements that are not themselves final and which have not been subject to public notice and comment, because they will not be a logical outgrowth of the proposed rule. This rule exists because the public "must be able to trust an agency's representations about which particular aspects of its proposal

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<sup>10</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).



are up for consideration." *Env'tl. Integrity Project.*, 425 F.3d at 998. In *Environmental Integrity Project v. EPA*, EPA argued that it met its notice-and-comment obligations "because its final interpretation was also mentioned (albeit negatively) in the Agency's proposal." *Id.* The D.C. Circuit emphatically rejected this argument:

"However, this argument proves too much. If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration. A contrary rule would allow an agency to reject innumerable alternatives in its Notice of Proposed Rulemaking only to justify *any* final rule it might be able to devise by whimsically picking and choosing within the four corners of a lengthy "notice." *Id.* (internal citations and quotations omitted). Courts will strike down that agency action that seeks to "use the rulemaking process to pull a surprise switcheroo on regulated entities." *Id.*

Notably, under EPA's proposed amendment to 40 CFR 2.301, EPA would be able to immediately release Part 98 data that are determined to be emission data or non-CBI upon finalizing the confidentiality status of these data. 75 Fed. Reg. at 39103. It would be improper if not illegal for EPA to finalize the confidentiality determinations for new or revised data elements for Subpart W without any opportunity for the reporting businesses to justify any confidentiality claims they may have. In accordance with 40 C.F.R. part 2, subpart B, EPA generally makes case-by-case confidentiality determinations on submitted data when an entity submitting data makes a claim of confidentiality. To the extent that EPA might finalize confidentiality determinations for new or revised data elements, not presented in the proposed rule, the affected businesses may not have an opportunity to present their claims before the confidentiality of the data is compromised. For this reason and to avoid a violation of the APA and the CAA, API urges that after EPA finalize the data elements for Subpart W, EPA provide another opportunity for public comment on the agency's proposed confidentiality determinations for those data elements.

**Response:** EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ. For additional information regarding EPA's decision not to finalize the determinations for these subparts in this action, see Section II.A.3 of the preamble to the final rule. For informational purposes, we have provided a list of the comments we received on the proposed confidentiality determinations for each of these subparts in Appendix B of this document.

**Commenter Name:** Karin Ritter<sup>11</sup>

**Commenter Affiliation:** American Petroleum Institute

**Document Control Number:** EPA-HQ-OAR-2009-0924-0057.1

**Comment Excerpt Number:** 18

**Comment:** EPA must not issue final confidentiality determinations for the elements in Subpart RR because this section of the MRR is not itself final. After Subpart RR is issued in final form,

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<sup>11</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

EPA must provide an opportunity for public comment on the confidentiality of its data elements. A failure to do so would be a violation of the APA and the CAA.

**Response:** EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ. For additional information regarding EPA's decision not to finalize the determinations for these subparts in this action, see Section II.A.3 of the preamble to the final rule. For informational purposes, we have provided a list of the comments we received on the proposed confidentiality determinations for each of these subparts in Appendix B of this document.

**Commenter Name: Bryan Brendle**

**Commenter Affiliation: Portland Cement Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0045.1**

**Comment Excerpt Number: 5**

**Comment:** PCA appreciates the opportunity to work with EPA to clarify CBI exemptions and requirements pursuant to MRR. However, EPA has complicated these attempted clarifications and therefore undermined transparency by initiating supplemental rulemakings focusing on technical corrections to the final rule. In order to assure compliance with the final MRR while adequately protecting cement manufacturers' interests in CBI, Portland Cement Association (PCA) requests flexibility to submit comments on the final MRR as such information becomes available, not only with respect to the CBI issue, but also proposed technical corrections (See 75 FR 48744). Cement manufacturers have a long history of tracking their GHG emissions and have already complied with implementation requirements pursuant to various regional and state programs.

**Response:** Please see Section II.A.3 of the preamble to the final rule for the response to the comment regarding EPA's decision to make finalized CBI determinations in this action for the 24 new data elements included in the three amendment notices (see 75 FR 57669, September 22, 2010; 75 FR 66434, October 28, 2010; and 75 FR 79092, December 17, 2010). We disagree with the commenter that the revisions notices complicated or undermined transparency. In the July 7, 2010 CBI proposal we proposed CBI determinations for the proposed changes to the reporting requirements included in the notice "Technical Corrections, Clarifying, and Other Amendments to Certain Provisions of the Greenhouse Gas Reporting Rule" (75 FR 33950, June 16, 2010) and "Reporting of Corporate Parent, NAICS Code, and Co-generation Information (75 FR 18455, April 12, 2010). In the July 27, 2010 supplemental CBI proposal, we proposed CBI determinations for the new and revised data elements included in the notice "Proposed Revisions to Certain Provisions of the Mandatory Greenhouse Gas Reporting Rule" (75 FR 48744, August 11, 2010).

For each CBI action, we provided a detailed list of the affected data elements and their proposed determinations in a memorandum to the docket (for the July 7, 2010 CBI proposal see "Data Category Assignments for Reporting Elements to be Reported under 40 CFR Part 98 and its Amendments" and for the July 27, 2010 supplemental CBI proposal "Data Category Assignments for the Proposed New and Revised 40 CFR part 98 Data Elements Addressed in the Proposed Confidentiality Determinations for Data Required under the Mandatory Greenhouse

Gas Reporting Rule: Supplemental Proposal” both of which are listed under the Docket EPA-HQ-OAR-2009-0924)).

**Commenter Name: Kevin M. Dempsey**  
**Commenter Affiliation: American Iron and Steel Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**  
**Comment Excerpt Number: 9**

**Comment:** EPA’s proposal that the categories automatically address new or revised data elements from changes to the GHG Reporting Rule would circumvent impacted entities' CBI rights. For example, EPA recently proposed replacing the definition of Argon-Oxygen Decarburization Vessel under Subpart Q of the reporting rule to include all decarburization vessels, including vacuum degassers. The manner in which these vessels are operated is considered by the industry to be CBI because the process is used to add value and provide proprietary characteristics and a competitive advantage for steel products. However, the proposed de facto categorization for CBI would offer no opportunity for companies to make CBI claims for processes or data added to the reporting rule after the fact.

**Response:** For any future changes to the requirements, including the addition of new Part 98 subparts and revisions to existing subparts, EPA intends to propose and finalize confidentiality determinations for any new or revised data elements using the same approach of proposal with opportunity to comment used in this action.

The changes to subpart Q noted by the commenter were proposed prior to the publication of the CBI proposal (see 75 FR 33950, June 15, 2010). EPA proposed confidentiality determinations for these data elements in the July 7, 2010 CBI proposal. Although these changes were not finalized until October 2010 (see 75 FR 66434, October 28, 2010), the commenter was aware of the proposed changes to subpart Q and was therefore able to comment on the proposed confidentiality determinations for data elements required to be reported for decarburization vessels.

EPA notes that some of the data elements required to be reported for decarburization vessels are in the Inputs to Emission Equation category. EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Frederick R. Harnack**  
**Commenter Affiliation: United States Steel Corporation**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0054.1**  
**Comment Excerpt Number: 4**

**Comment:** The current proposal seeks to extend the CBI scheme to include all changes that may be proposed in future technical amendments to the GHG Monitoring Rule. In effect, the regulated community would lose the ability to comment on future amendments that may directly effect business confidential information. This aspect of the proposed rule would impose a

stranglehold on future public comment. An example of this would be the recent amendment to Subpart Q of the GHG Monitoring Rule that includes vacuum degassing in GHG calculations. There are aspects of vacuum degassing that are propriety to U. S. Steel. If the CBI scheme were now in effect, this propriety information could be deemed open to public distribution by U. S. EPA.

**Response:** This action only includes final CBI determinations for certain data elements that must be reported to EPA under Part 98. We have prepared a memorandum that lists each data element covered by this final action and shows its data category assignment and confidentiality status. A copy of this memorandum is available in the docket for this rulemaking (see “Final Data Category Assignments and Confidentiality Determinations for Part 98 Reporting Elements” in Docket EPA-HQ-OAR-2009-0924 and on the website, <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>).

The revisions to the vacuum degassing requirements in subpart Q noted by the commenter were proposed prior to the publication of the CBI proposal (see 75 FR 33950, June 15, 2010). EPA proposed confidentiality determinations for these data elements in the July 7, 2010 CBI proposal. Although these changes were not finalized until October 2010 (see 75 FR 66434, October 28, 2010), the commenter was aware of the proposed changes to subpart Q and was therefore able to comment on the proposed confidentiality determinations for data elements required to be reported under subpart Q. Furthermore, many of the data elements required to be reported under subpart Q are in the Inputs to Emission Equation category and EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

For any future changes to the Part 98 reporting requirements, including the addition of new Part 98 subparts and revisions to existing subparts, EPA intends to propose and finalize confidentiality determinations for any new or revised data elements using the same approach of proposal with opportunity to comment used in this action.

### 3. Inputs to Emission Equations Category

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EPA received many comments from industry and other stakeholders regarding our proposed determination that data elements in the Inputs to Emission Equations category are emission data, as defined in 40 CFR 2.301(a)(2)(i) and therefore, are ineligible for confidential treatment. EPA decided not to finalize the determination for this category and has proposed to defer reporting of the data elements in this category (see 75 FR 81338, December 27, 2010 and 75 FR 81350, December 27, 2010 for additional information regarding the deferral of reporting requirements). We also published a “Call for Information: Information on Inputs to Emission Equations under the Mandatory Reporting of Greenhouse Gases Rule” that solicits additional information to help with our continuing deliberations (see 75 FR 81366, December 27, 2010. We are therefore not responding to comments on the Inputs to Emission Equations category at this time. A list of the comments we received is provided in Appendix A at the end of the document. For additional information regarding our decision to not finalize a determination for this category, see Section II.A.4 of the preamble to the final rule.

#### 4. Timing of the CBI Proposal

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**Commenter Name:** Arline M. Seeger<sup>12</sup>

**Commenter Affiliation:** National Lime Association

**Document Control Number:** EPA-HQ-OAR-2009-0924-0023.1

**Comment Excerpt Number:** 5

**Comment:** EPA's bifurcation of the GHGRR rulemaking in such a way that the CBI issue was postponed until after other elements of the rule were set in place have significantly harmed the industry. Certainly, NLA would have raised additional objections to the level of throughput data required to be used in the emission calculations if we had known that EPA was considering making such a wide range of data publicly available. This hide-the-ball approach is especially problematic in light of EPA's failure to conduct any outreach to alert small businesses that EPA was contemplating eliminating this long held procedural safeguard, problematic in light of EPA's failure to conduct any outreach to alert small businesses that EPA was contemplating eliminating this long held procedural safeguard.

**Response:** We disagree that commenters did not have sufficient notice regarding the type of data eligible for confidential treatment at the time of the part 98 proposal. We stated in the preamble to the April 10, 2009 proposal that "emission data collected under CAA sections 114 and 208 cannot be considered CBI" (see 74 FR 16463, April 10, 2009). EPA's CBI regulations define emission data at 40 CFR 2.301; EPA used this definition to determine which Part 98 data elements are emission data and therefore not eligible for confidential treatment pursuant to CAA section 114(c). For data that do not meet the definition of emission data, EPA considered the confidentiality determination criteria at 40 CFR 2.208 to make the CBI determinations. Both the emission data definition at 40 CFR 2.301 and the confidentiality determination criteria at 40 CFR 2.208 have been part of EPA's CBI regulations since the regulations were first promulgated in 1976.

EPA also disagrees that additional outreach was necessary for this rulemaking. As confirmed by the numerous comments on CBI we received in response to the April 10, 2010 proposal, reporters were aware of the Clean Air Act requirements regarding emission data and the CBI regulations at 40 CFR 2, subpart B at least 15 months prior the publication of the July 2010 CBI proposals. We also stated in the preamble to the final Part 98 rule our intention to initiative a separate rulemaking to make CBI and emission data determinations for data collected under Part 98 (74 FR 56287, October 30, 2009). Since we had already made public our intention to establish those data elements that are "emissions data" and therefore will not be afforded the protections of CBI through a notice and comment process in the preamble to the final rule published in October 2009, EPA disagrees that additional outreach to stakeholders was necessary.

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<sup>12</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

EPA also disagrees that the approach taken eliminates a “long held procedural safeguard”. As explained in detail in Section II.A.2 of the preamble to the final rule, we used the same definition of emission data (40 CFR 2.301(a)(2)(i)) and the same CBI criteria (40 CFR 2.208) used by other EPA programs for over 20 years.

Regarding the comment on throughput data, EPA has proposed to defer reporting of these data elements when they are used as Inputs to Emission Equations. See section II.A.4 of the preamble to the final rule for more information on this proposal. Where throughput data are not used to calculate GHG emissions (e.g., where CEMS are used instead of a calculation method), such data elements are assigned to the Production/Throughput Data that are Not Input to Emission Equations category. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data that are Not Inputs to Emission Equations category are CBI. See section for II.B.9 of the preamble to the final rule for more information on this decision.

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 4**

**Comment:** DuPont raised confidentiality concerns in our comments on the proposed rulemaking for mandatory GHG reporting, both in our general comments and with respect to specific source categories. [FOOTNOTE: DuPont Company, “Comments on EPA’s Proposed Rule for Mandatory Reporting of Greenhouse Gases,” Docket EPA-HQ-OAR 2008-0508, June 9, 2009]. However, EPA did not address confidentiality issues substantially during development of the MRR. Rather, the Agency decided to address confidentiality long after the deadline for regulated entities to implement their compliance plans. Had DuPont recognized the expansive CBI position that EPA would take, we would have recognized the need for more extensive and focused comments on this topic and may well have taken different positions in our comments on the proposed MRR in other aspects, as well. Had we been given any indication of this onerous and excessive CBI position at the time of promulgation of the MRR, we may have made different decisions with regard to our compliance approaches for our proprietary manufacturing processes. However, the decision process would have entailed a choice between two disastrous options: either spending many tens of millions of dollars to install hundreds of instruments company-wide (e.g., continuous emissions monitors) or using company records and existing fuel instrumentation at the risk of losing our proprietary position in a number of manufacturing processes core to our company. All this with a backdrop of an American economy that is desperately trying to recover from an extended deep recession.

**Response:** For the response to this the comment, please see the response to comment EPA-HQ-OAR-2009-0924-0023.1, excerpt 5.

**Commenter Name: Lorraine Gershman<sup>13</sup>**

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 1**

**Comment:** ACC recognizes that EPA was under tremendous pressure and very tight Congressional deadlines to propose and finalize a MRR for GHG emissions. We acknowledge and appreciate all the work that has gone into this rulemaking to date. However, we are concerned that EPA issued this CBI proposal after it proposed and finalized the substantive reporting rule. At the time EPA proposed the MRR requirements, the regulated community had no idea how EPA would handle CBI. ACC's comments on the proposed substantive rule expressed our concern about the protection of CBI, based on the unprecedented and substantial amount of data EPA proposed to require for submittal to the Agency. See Appendix A [of the ACC comment letter] for excerpts from ACC's previous MRR comments relating to CBI. Without knowing what the final rule would require or how EPA would protect data and information for which CBI protection may be claimed, ACC was unable to consider, let alone include in our comments of the proposed MRR, specific alternatives to the submittal of all of that data and information. For example, in lieu of reporting sensitive data such as raw material inputs that could expose trade secrets to the public, those commenting on the rule might have suggested and agreed to third-party audits, or to install continuous emission monitoring systems (CEMS) for those processes that are amenable to CEMS. Unfortunately, at the time comments were submitted on the MRR, the regulated community did not know then what it knows now. As a result, the industry has been disadvantaged by EPA's finalization of the substantive reporting rule before publication of its proposal on CBI.

**Response:** For the response to this the comment, please see the response to comment EPA-HQ-OAR-2009-0924-0023.1, excerpt 5.

**Commenter Name: Kevin M. Dempsey**

**Commenter Affiliation: American Iron and Steel Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**

**Comment Excerpt Number: 11**

**Comment:** AISI objects to the timing of this proposal. When EPA issued the proposed and then final Mandatory GHG Reporting Rule, there was no indication that CBI would be compromised in a subsequent rule, such as that which is now proposed. Had we been aware of this change in policy and procedure, we would have submitted more critical comments on the equations delineated for iron and steel processes or proposed alternatives because of the potentially sensitive nature of the data in the equations included in the reporting rule. EPA's new proposal for categorical CBI classification of those data deprives reporting entities of their opportunity and legal right to comment on those equations at this time. In addition, we supported EPA's decision for agency verification of emissions data as an alternative to third-party verification.

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<sup>13</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), PPG Industries, Inc. (EPA-HQ-OAR-2009-0924-0040), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

However, had we known that EPA verification would result in the disclosure of information the industry considers to be CBI, we would have considered third-party verification as a preferred alternative to protect CBI.

**Response:** For the response to this the comment, please see the response to comment EPA-HQ-OAR-2009-0924-0023.1, excerpt 5.

5. Extent to Which CEMS Can Be Used to Reduce the Number of Data Elements Disclosed to the Public

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**Commenter Name: William C. Herz**

**Commenter Affiliation: The Fertilizer Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 13**

**Comment:** EPA's determination that all inputs to emission equations are emission data adversely impacts those utilizing emission equations. EPA's conclusion that all inputs to emission equations are emission data prejudices those that are relying on equations in lieu of continuous monitoring systems (CEMS) to provide data responsive to the Greenhouse Gas Reporting Rule. EPA recognizes this in the preamble to the proposal: Many subparts allow facilities to choose between using CEMS and using source-category specific GHG calculation procedures. This action proposes that for direct emitting facilities, inputs to emissions calculation equations are "emissions data" and would be released. However, if a facility chooses to use a CEMS to determine CO<sub>2</sub> emissions from a particular process, then emissions are directly measured, and the facility would have no reported data elements that are inputs to CO<sub>2</sub> emissions equations. 75 Fed. Reg. at 39,109. Continuing on, and relevant to The Fertilizer Institute's (TFI) members in the ammonia manufacturing source category (Subpart G), EPA correctly notes: "For example, all ammonia production facilities must report the amount of feedstock used; however, under the proposed determinations, this data would be treated as confidential only for facilities using CEMS. For facilities that do not use CEMS, the feedstock data would not be eligible for confidential treatment since it is used as inputs to the mass balance equations provided in 40 CFR part 98, subpart G and would be considered "emissions data." Id. This is truly an arbitrary result.

EPA's Greenhouse Gas Reporting Rule allows sources in the ammonia manufacturing source category to use either CEMS or equations; however, use of CEMS result in the reported feedstock amount being held as confidential by EPA, yet a similar source not having CEMS and relying on equations is afforded no similar protection from disclosure for this reported amount. Taking this arbitrary result a step further, a source may have a continuous monitoring system on one ammonia manufacturing line and the reported feedstock amount will be held as confidential by EPA, yet the same source may not have such a system on another ammonia manufacturing line and the reported feedstock amount will not be withheld from disclosure solely because an equation is used to calculate the emissions. The end result of this is that EPA is prejudicing sources that do not have CEMS already installed on their equipment because the data collection is occurring in 2010 and sources did not become aware of EPA's position regarding what constitutes emission data until July 7, 2010 with the publication of the Greenhouse Gas



Reporting Rule CBI proposal. It is impossible for a source wanting to avoid public disclosure of its feedstock amount or other variables to install a CEMS in 2010 to avoid disclosure of such variables.

**Response:** EPA recognizes that many sources did not elect to use CEMS during the 2010 reporting period and therefore would not be able to use CEMS to mitigate their CBI concerns for the 2010 reporting year. However, as noted Section II.A.4 of this preamble, EPA is addressing these concerns through a separate process. These comments relate to data elements in the Inputs to Emission Equations category, as the use of CEMS reduces the number of data elements necessary to be used as inputs to emission calculations. EPA has published an Interim Final Rule that defers reporting of data elements in the Inputs to Emission Equation data category in the near term (75 FR 81338, December 27, 2010) and a proposal to defer reporting of these data elements until 2014 (75 FR 81350, December 27, 2010). EPA also issued a notice announcing a call for information soliciting additional information so that EPA can adequately evaluate additional monitoring and verification approaches that would not use sensitive data elements as Inputs to Emission Equations (75 FR 81366, December 27, 2010).

**Commenter Name: Tom Siegrist**

**Commenter Affiliation: Koch Nitrogen Company, LLC**

**Document Control Number: EPA-HQ-OAR-2009-0924-0025.1**

**Comment Excerpt Number: 4**

**Comment:** EPA's suggestion that the use of continuous monitoring systems (CEMs) might relieve industry concerns regarding making data available to the public fails to address data confidentiality concerns for the 2010 reporting year. (75 FR 39109) EPA correctly notes that, in many cases, the use of CEMs could reduce the number of data parameters required to be reported under this proposal. Some subparts allow facilities to choose between using a CEMs and using source-category specific GHG calculation procedures. Under EPA's proposal, the choice to use a CEMS to determine CO<sub>2</sub> emissions from a process would eliminate the need to report inputs to CO<sub>2</sub> emission calculations. Prior to EPA's publication of this proposal, however, it's very unlikely that a facility would have factored this consideration into any decision regarding the installation of a CEMs, since EPA had not previously made known its intent to make public all inputs to GHG emission calculations. If EPA intends to offer facilities an opportunity to install a CEMs and thereby avoid making business-critical inputs to emission calculations public, then EPA should delay implementation of its proposed confidentiality determination approach for at least one year to allow facilities time to purchase and install CEMs with that objective in mind. Implementation of the proposed confidentiality determination approach for the 2010 reporting year would preclude any confidentiality-related benefits of such an approach.

**Response:** For the response to the comment, please see the response to comment EPA-HQ-OAR-2009-0924-0024.1, excerpt 13.

**Commenter Name: Tom Siegrist**

**Commenter Affiliation: Koch Nitrogen Company, LLC**

**Document Control Number: EPA-HQ-OAR-2009-0924-0025.1**

**Comment Excerpt Number: 5**

**Comment:** EPA’s suggestion that the use of continuous monitoring systems (CEMs) might relieve industry concerns regarding making data available to the public unfairly penalizes facilities that use an EPA-approved emission calculation methodology, rather than a CEMs, for reporting purposes. (75 FR 39109) As opposed to CEMs facilities, EPA’s proposal would require that “non-CEMs” facilities report production rates, fuel consumption, and other business-sensitive data despite the fact that they would also be following EPA-approved emission calculation methodologies. This approach would place such facilities at a competitive disadvantage with other domestic producers that utilize CEMs to measure GHG emissions and with virtually all overseas competitors who have no GHG reporting obligations in the US. Furthermore, EPA’s proposed approach would put competitive pressure on “non-CEMs” sources to adopt CEMs, even though EPA has correctly been reluctant to require CEMs at some sources because of their cost.

**Response:** For the response to the comment, please see the response to comment EPA-HQ-OAR-2009-0924-0024.1, excerpt 13.

**Commenter Name: Paul Noe**

**Commenter Affiliation: American Forest & Paper Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0034.1**

**Comment Excerpt Number: 3**

**Comment:** As EPA acknowledges under this proposal, see 75 Fed. Reg. 39109, sources that measure their emissions directly with CEMs would not have to disclose any information about their industrial operations, while there would essentially be no limit to the disclosure that might be required of sources that compute their emissions from industrial inputs. AF&PA believes EPA cannot justify this discrimination. It would put sources in the second category at a severe competitive disadvantage. Moreover, it would put great competitive pressure on these sources to adopt CEMS, even though EPA has been properly reluctant to require CEMS of smaller sources because they are expensive and cannot be justified on cost-effectiveness grounds.

**Response:** For the response to the comment, please see the response to comment EPA-HQ-OAR-2009-0924-0024.1, excerpt 13.

**Commenter Affiliation: Mississippi Lime**

**Document Control Number: EPA-HQ-OAR-2009-0924-0049.2**

**Comment Excerpt Number: 5**

**Comment:** Mississippi Lime Company (MLCO) is required to supply extensive categories of data and calculations. Part 98.196(a) concerns data reporting requirements if a CEMS is utilized and allows more CBI protection; 98.196(b) regards data reporting requirements if a CEMS is NOT used, but lacks significant CBI protection. The reason for this dichotomy is unclear. Furthermore, this distinction was not made with sufficient notice to permit MLCO to consider the option of installing CEMS to avoid the critical threat release of its CBI now poses.

**Response:** For the response to the comment, please see the response to comment EPA-HQ-OAR-2009-0924-0024.1, excerpt 13.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 15**

**Comment:** EPA proposes that, in lieu of reporting extensive amounts of CBI, that reporters could utilize continuous emissions monitoring systems (“CEMS”) on process vents. A CEMS approach may be appropriate for some emissions sources reporting in some source categories, such as fuel combustion under Subpart C. Products of combustion, such as carbon dioxide, nitrous oxide, and methane) can be readily detected by commonly available CEMS systems. Some reporting categories only require monitoring of a very few emissions points. Recognizing this case-by-case applicability, EPA appropriately allowed CEMS as a compliance [option] for . . . Subpart C. . . EPA should also recognize that Subpart L reporters emit a wide variety of materials from a large number of locations within an affected source. A single Subpart L affected source may emit GHGs from dozens of stack emission points and thousands of equipment components. Subpart L affected sources emit a wide variety of compounds, many of which are not detected by currently available CEMS. Calibration standards exist for some, but not all, of the fluorinated GHGs expected to be emitted from Subpart L sources. EPA proposed the § 98.124 scoping test requirement, recognizing that a fluorochemical manufacturer cannot accurately report GHG emissions without characterizing all of the locations where such emissions may occur. Fluorochemical manufacturing units present equipment manufacturers a challenging operating environment, where extreme process stream acidity is prevalent. Hydrofluoric acid is a necessary raw material, and hydrochloric acid is a necessary co-product, in fluorochemical manufacturing. Equipment manufacturers design very high performance equipment specifically to survive in the standard fluorochemical environment, and charge significant premiums for the high performance materials and designs required. Given the Subpart L complexity, a reporter cannot justify spending \$250,000 per stack to install, and \$100,000 per stack per year to operate, a CEMS that may not detect all of the required compounds and may not survive the process environment. Subpart L reporters have no viable CEMS options to support reporting. Reporters under other subparts may operate under similar constraints.

**Response:** Currently, 20 of the 34 Part 98 subparts for direct emitters provide an option to use CEMS for determining CO<sub>2</sub> emissions. A CEMS option for other GHGs, such as CH<sub>4</sub>, SF<sub>6</sub>, and fluorinated GHGs, is not currently included in Part 98. EPA agrees with the commenter that CEMS may not be technically practicable at this time for all sources covered by the reporting rule, and therefore would not be an option in all circumstances where a reporter is concerned about the public disclosure of data they consider sensitive. These comments relate to data elements in the Inputs to Emission Equations category, as the use of CEMS reduces the number of data elements necessary to be used as inputs to emission calculations. As noted Section II.A.4 of this preamble, EPA is addressing these concerns through a separate process. EPA has published an Interim Final Rule that defers reporting of data elements in the Inputs to Emission Equation data category in the near term (75 FR 81338, December 27, 2010) and a proposal to

defer reporting of these data elements until 2014 (75 FR 81350, December 27, 2010). EPA also issued a notice announcing a call for information soliciting additional information so that EPA can adequately evaluate additional monitoring and verification approaches that would not use sensitive data elements as Inputs to Emission Equations (75 FR 81366, December 27, 2010). Note that EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ. For additional information regarding EPA's decision not to finalize the determinations for these subparts in this action, see Section II.A.3 of the preamble to the final rule.

**Commenter Name: Dave Stirpe**

**Commenter Affiliation: Alliance for Responsible Atmospheric Policy**

**Document Control Number: EPA-HQ-OAR-2009-0924-0050.1**

**Comment Excerpt Number: 6**

**Comment:** On page 39101 of the proposed rule, EPA states that continuous emissions monitors (CEMS) may provide an option for reporters to streamline the volume of information that must be reported in the Part 98 system. CEMS may be a viable option for source categories emitting products of combustion (carbon dioxide, nitrous oxide, methane) or process related carbon dioxide from a few stacks. However, they are simply not an option for the fluorochemical industry since instruments necessary to monitor these emissions do not currently exist in the market.

Fluorochemistry necessarily involves handling significant quantities of hydrofluoric and hydrochloric acid as well as a variety of halocarbon compounds, and as a result most fluorochemical process vent streams are highly corrosive. Because fluorochemical manufacturing is a multi-step process, and fluorocarbon CEMS would be required to accurately detect a wide variety of materials. The analytical standards market supplies calibration standards for a small fraction of the potential materials emitted from fluorochemical manufacturing facilities. Without appropriate laboratory standards, the industry cannot determine which compounds can be detected by available instruments. Because the industry cannot determine if a fluorinated GHG CEMS would detect the required materials, it has not attempted to specify a heavy duty CEMS system that would survive the harsh operating conditions such an instrument would be required to withstand. In summary, a CEMS compliance option for subpart L, O, or OO reporters does not exist at this time. While we understand that a CEMS option may help reporters in some source categories, the fluorochemical category reporters must rely on the typical actual emissions reporting system based on tested and/or calculated emissions determinations.

**Response:** For the response to the comment, please see the response to comment EPA-HQ-OAR-2009-0924-0035.1, excerpt 15. CEMS is not applicable to subpart OO because subpart OO requires the reporting of the supply of fluorinated GHGs and nitrous oxide to the economy and not the amount GHGs emitted by the facility.

**Commenter Name: Leslie S. Ritts<sup>14</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 6**

**Comment:** The proposed determinations ignore whether the option of continuous emissions monitoring (CEMs) is feasible or not or even existed at the time the MRR Rule became effective. Only the last three sets of data, so long as they are not inputs into emission equations, are proposed to be protected as confidential business information. How confusing, if the same information cannot be protected if it is used to calculate emissions. EPA rationalizes this result because it points out that the agency offered sources the choice of how they would quantify emissions a year ago under each Part 98 industry subpart, and hence many sources could protect CBI if they used continuous emissions monitoring instead of emission factors and mass balances. This is true for acid rain sources which are required to use [CEMS], and as noted earlier, whose input information is not CBI. But EPA's determination to make such emission equation inputs concerning raw material consumed and other throughput information was not evident at the time when such a choice between monitoring and using emission equations to compute GHGs needed to be made for most covered industries.

Moreover, the choice between CEMs and mass balances/emission factor equations does not make it any more technically or economically feasible to use instrumental GHG monitoring. Therefore, EPA's statements regarding a choice that sources could have made as a basis for protecting CBI so that process information is not publically available is quite arbitrary and unreasonable, particularly given EPA's lack of attention to the CBI subject and the feasibility concerns it recognized when the agency promulgated Part 98. See, e.g., discussion in GHG MRR Final Rule Preamble at 74 Fed. Reg. 56,260 at 56,280. [footnote: As we pointed out earlier in these comments, Part 98 recordkeeping requirements were predicated on existing monitoring that did not require the installation of new monitoring, which EPA determined was not necessary. EPA's explanation for allowing businesses a choice now is capricious.] These choices do not diminish the fact that in many cases, production/throughput data, raw material data, and other process parameters that are used in calculation emissions can be sensitive business information and should be afforded CBI protections.

**Response:** For the response to the comments on use CEMS, please see the response to comment EPA-HQ-OAR-2009-0924-0035.1, excerpt 15.

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 18**

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<sup>14</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

**Comment:** In the case of Subpart L, there are only two acceptable methodologies, mass balance and emission factor, for calculating GHG emissions from the production of fluorinated GHGs. Recognizing that under the proposed CBI determination rule all mass balance inputs would be “emission data” and publicly disclosed, then this methodology is effectively eliminated from consideration for the reasons noted above. The only other alternative, then, to the emission factor calculation method for Subpart L is use of a CEMS. The problem with this approach is the substantial cost and technical challenge necessary to develop, prototype and manufacture a CEMS capable of accurately and consistently measuring incredibly low concentrations of F-GHGs in a process vent or flue stack streams at widely-varying velocities and very low flow rates. Furthermore, Air Products estimates it would take 3 – 5 years to complete the required research, engineering and production for such a NF<sub>3</sub> CEMS. The cost for R&D is unknown at this point, but we estimate the cost to retrofit our NF<sub>3</sub> production processes with F-GHG CEMS would exceed \$4 million in capital investment (purchase, installation and commissioning, and spares) and more than \$1 million per year in operation, maintenance and calibration costs.

**Response:** For the response to the comment, please see the response to comment EPA-HQ-OAR-2009-0924-0035.1, excerpt 15.

**Commenter Name: Kevin M. Dempsey**  
**Commenter Affiliation: American Iron and Steel Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**  
**Comment Excerpt Number: 6**

**Comment:** While two other reporting options exist under Subpart Q, those options do nothing to cure the serious and immediate business confidentiality problems the Proposed Rule would create. Since the Reporting Rule has already been effective for more than eight months, sources have already committed to particular reporting approaches for 2010. They cannot change that decision to retrospectively eliminate the CBI concerns that the Proposed Rule would create. AISI, its members, and many others highlighted the CBI concerns presented by the GHG Reporting Rule and urged resolution of those concerns before Part 98 was finalized. They should not be penalized due to the agency’s decision to defer resolution of those issues until well after implementation of the Reporting Rule was underway.

**Response:** For the response to the comment, please see the response to comment EPA-HQ-OAR-2009-0924-0035.1, excerpt 15.

**Commenter Name: Kevin M. Dempsey**  
**Commenter Affiliation: American Iron and Steel Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**  
**Comment Excerpt Number: 8**

**Comment:** While two other reporting options exist under Subpart Q, those options do nothing to cure the serious and immediate business confidentiality problems the Proposed Rule would create. Since the Reporting Rule has already been effective for more than eight months, sources have already committed to particular reporting approaches for 2010. They cannot change that decision to retrospectively eliminate the CBI concerns that the Proposed Rule would create.

AISI, its members, and many others highlighted the CBI concerns presented by the GHG Reporting Rule and urged resolution of those concerns before Part 98 was finalized. They should not be penalized due to the agency's decision to defer resolution of those issues until well after implementation of the Reporting Rule was underway.

**Response:** For the response to the comment, please see the response to comment EPA-HQ-OAR-2009-0924-0024.1, excerpt 13.

## 6. Time Limits on Confidentiality Determinations

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**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**

**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**

**Document Control Number: EPA-HQ-OAR-2009-0924-0053.2**

**Comment Excerpt Number: 6**

**Comment:** We recognize the difficulties that EPA may face in determining when confidential information should be declassified. The Clean Air Act, however, squarely places the burden on the business to show that the public interest in disclosure and transparency is outweighed by a “substantial” risk of competitive harm, and these principles should first and foremost guide EPA’s decision in determining the duration of information’s confidentiality status.

As an initial matter, to clarify its authority to declassify confidential data, we are pleased that EPA has made an affirmative statement in the regulatory text that information initially entitled to confidential treatment may lose this status with the passage of time if its disclosure would no longer present a substantial risk of harm or EPA otherwise determines that it is not entitled to confidential treatment. See 75 Fed. Reg. at 39,132 (proposed 40 C.F.R. §2.301(d)(4)).

To these ends, EPA should establish a process by which it will determine the duration of the confidential status of each type of information. In evaluating any of these and other approaches, EPA must be guided by certain considerations. First, EPA must be wary of burdening itself and the public with responding to industry challenges regarding the duration of confidentiality status. Imposing an onerous burden on the public and EPA would fly in the face of the statute’s requirement that the burden be on the reporter to show demonstrate that the information constitutes confidential business information. To these ends, EPA should, as much as possible, make any determinations on an industry-and/or category-specific basis. That is, it should not be sufficient that one reporter make a showing of a risk of substantial harm to its individual interests. Rather, EPA should require that the showing must be made for each reporter in the industry. (The advantages of this approach are explained more fully below.) Finally, we suggest that each determination made pursuant to these proposed approaches be valid for only a certain amount of time – for instance one year – and that, absent an additional, satisfactory showing, the information would then be declassified. Such a requirement would be completely consistent with the overriding interest in public disclosure of this information. [Footnote: Even national security information is declassified as time passes. See EO 12958. The commercial concerns driving CBI determinations here provide far less justification for permanent confidentiality.]

One approach would be for EPA, after the conclusion of this rulemaking, to issue guidance that states that the confidential status of information would automatically lapse after two years of

being submitted to EPA, unless a satisfactory showing is made by a reporter. While the confidentiality status of information will necessarily be industry-and/or category-specific, two years is a more than reasonable presumption given the rate at which the market moves, and it provides ample notice of EPA's determination to both reporters and the public. [Footnote: Indeed, two years may be conservative, given that in certain industries, data that may cause a business competitive harm upon submission may be irrelevant just weeks or months later. Therefore, we urge EPA to consider an even shorter time frame of, for instance, one year. The disadvantage of a shorter timeframe, however, would be the potential of an increased burden on all stakeholders and EPA itself of responding to these requests.] At that point, EPA would make the information publicly available, unless it receives a request to extend the duration of the confidentiality determination.

While this request could certainly be submitted by a single reporter or a collective group of reporters, EPA should only approve an extension of the confidentiality status on the basis that disclosure of that class of information would harm the competitive interests of the reporters in the industry as a whole, as opposed to only the reporters(s) filing the petitions. Such an industry-wide and/or category-specific determination would serve three purposes. First, it would avoid EPA receiving and responding to requests of the same substance from several different reporters. Second, it would ease the burden on industry as only one request would be necessary to cover all reporters. Third, if the requests and subsequent extension of confidentiality status could be determined on a reporter-by-reporter basis, those reporters that have the resources to file such a request could receive an unfair competitive business advantage in comparison to others in the same industry, for whose confidentiality status of would have otherwise lapsed. We do not think that notice and comment pursuant to the requirements of section 307(d) of the Clean Air Act would be required with regard to the receipt and issuance of a determination on these requests. However, given the importance of public disclosure in the framework of the Clean Air Act, EPA should provide ample notice to the public that such a request has been filed and an opportunity for informed comment by stakeholders. [Footnote: We recognize that, in certain situations, making the request for such an extension publicly available would itself present a substantial risk of competitive harm. Therefore, EPA should make as much of the request publicly available as is possible and protect only those parts of the request it determines necessary. Again, in making this determination, EPA must be guided by the principle underlying section 114 that public disclosure and transparency is favored.]

A second approach would be for EPA to finalize this rulemaking (including its statement that the confidential status of information may be lost as a result of the passage of time) and to then issue industry-and/or category-specific guidance documents indicating when EPA believes that information would lose its confidential treatment. This approach has the advantage of allowing EPA to make industry-and/or category-specific determinations as to the duration of the confidentiality status of information, while putting stakeholders on notice of EPA's expected determination. A disadvantage of this approach would be that EPA and the public may be in the position of responding to several different industry responses to this guidance. In addition, another potential disadvantage is that any such industry-specific guidance could be considered a re-interpretation of the finalized rulemaking and thus arguably subject to the notice and comment procedures to be binding. [Footnote: See *Paralyzed Veterans of America*, 117 F.3d at 586.]



A third approach would be for EPA, after the conclusion of this rulemaking, to conduct a notice and comment rulemaking process to make industry-and/or category-specific determinations regarding the duration of the confidentiality status. The advantage of this process is two-fold. First, it would provide a notice and opportunity for comment for all stakeholders. Second, the final regulations would be binding and hence would reduce the uncertainty with regard to the status and timing of public disclosure of information. There are, however, two potential disadvantages, however. One is the burden upon EPA and all interested in stakeholders in responding to the proposed rulemaking. The second is that arguably if EPA wished to modify and duration determinations in the future, it would be probably required to do so through another notice and comment procedure. [Footnote: See *id.*] We would also like to note that EPA is likely well within its authority to include to these industry-and/or category-specific confidentiality determinations in the regulatory text of the mandatory monitoring and reporting rule upon finalization of this rulemaking, as EPA has specifically requested comment and information on this issue. [Footnote: See *Env't Integrity Project v. EPA*, 425 F.3d 992, 996-98 (describing when a final rule constitutes a “logical outgrowth” of the rule as proposed).]

In sum, EPA has the authority to allow the confidential status of information to lapse upon the passage of time, unless it can be shown by reporters to EPA’s satisfaction that the disclosure of such information on an industry-wide basis would result in substantial competitive harm. Indeed, EPA is arguably required to remove CBI status where information’s commercial sensitivity diminishes over time. Therefore, EPA should develop a procedure to make such durational confidentiality determinations. While we have suggested various procedures, we do not suggest that these are by any means the only – or even the optimal – approaches available to EPA. We look forward to continue working with EPA to chart a correct and effective path regarding the duration of confidentiality determinations.

**Response:** We do not agree that EPA should develop a new process to determine the duration of the confidential status of each type of information. The amendments to Part 2 regulations finalized in this action already contain procedures for modifications to confidentiality determinations made for Part 98 data. The commenter did not provide any reasons or arguments as to why the procedures included in this final action would be insufficient.

We requested comment on whether there were any particular Part 98 data elements that would become less sensitive over time, the amount of time after which they would no longer be sensitive, and the reason for the change in the sensitivity of the data elements. The commenter suggested that confidential treatment should expire after two or even one year. However, the commenter did not provide specific information or facts explaining how market or other conditions would change so that any particular data elements would no longer satisfy the criteria for confidential treatment. Therefore, the comment does not provide sufficient basis for EPA to limit the determinations made for any particular data element in this action to the time period suggested by the commenter. We note that other CBI determinations made by EPA are generally not time limited. Further, the amendments to Part 2 regulations finalized in this contain procedures for modifications to confidentiality determinations made for Part 98 data because of changes in applicable law or changed facts.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.2**  
**Comment Excerpt Number: 5**

**Comment:** EPA solicits comment on “whether, for data reporting elements that are proposed . . . to be entitled to confidential treatment, the confidential treatment of such data should be time limited.” 75 Fed. Reg. at 39,106. We fully support EPA’s development of a process by which information loses its confidentiality status as a function of the passage of time because disclosure would no longer present a competitive risk to the reporter. This section first clarifies that EPA has ample authority to determine that information is no longer entitled to confidential treatment once disclosure would not cause substantial competitive harm. We then suggest various procedures through which EPA could determine that information has lost its confidentiality status and thus must be disclosed to the public.

(a) EPA’s Authority to Determine that Information Loses Its Confidential Status as a Function of Time

Section 114 of the Clean Air Act and EPA’s own regulations clearly provide EPA with authority to determine – and, arguably, require that – the confidential status of information expires as a function of the passage of time. Section 114 of the Clean Air Act clearly favors transparency and public disclosure of information submitted by a reporter. It therefore appropriately places the onus on the reporter to show that considerations of competitive harm override those important public interests: “Any records, reports or information obtained under subsection (a) of this section shall be available to the public, except upon a satisfactory showing to the Administrator by any person that records, reports, or information or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets.” 42 U.S.C. § 7414(c) (emphasis added). By making public availability of data mandatory, unless it constitutes a “trade secret,” this section demonstrates that EPA is to favor public disclosure of information submitted by reporters in its regulations. See Nat’l Resources Def. Council v. EPA, 494 F.2d 519, 523 (2nd Cir. 1974) (noting that in cases of potential overlap between the demands of confidentiality and public disclosure “in all such cases public disclosure would prevail”) (citing 42 U.S.C. § 1857c-9(c) (transferred to 42 U.S.C. § 7414(c)). That the public interest in disclosure of information and transparency is favored is shorn up by the fact that the Clean Air Act places the onus squarely on the reporter to show “satisfactorily” that such information is entitled to confidential treatment. 42 U.S.C. § 7414(c).

EPA’s regulations properly reflect the requirements of and policy determinations underlying section 114(c). [Footnote: See generally 40 C.F.R. §§ 2.201-2.08.] Specifically, EPA’s regulations require that “the business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business’s competitive position.” 40 C.F.R. § 2.208(e)(1). [Footnote: As a general matter, we emphasize that the required showing is one of “substantial harm.” 40 C.F.R. § 2.208(e)(1). Therefore, a showing of any or even some harm does not warrant confidential treatment of information. This requirement applies unless the information has been “voluntarily submitted,” 40 C.F.R. § 2.208(e)(2), an exception not relevant here.] In addition, EPA’s regulations correctly reflect the principle that public availability is to be favored in the event of a conflict between the public interest in transparency and harm to a

business's competitive position. See 40 C.F.R. § 2.202(d) ("If two or more sections containing special rules apply to the particular information in question, and the applicable sections prescribe conflicting special rules for the treatment of information, the rule which provides greater or wider availability to the public of the information shall govern.").

Given these considerations, EPA no doubt has authority to determine that the requirements of 40 C.F.R. § 2.208 must be met on an ongoing basis, with the burden resting on the reporter to demonstrate such. See generally 40 C.F.R. § 2.201 et seq. [Footnote: "Agency interpretations of their own regulations [are] afforded deference by federal reviewing courts . . . and are sustained unless plainly erroneous or inconsistent with the regulation." *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997)] That is, if at any point EPA determines that public disclosure of the information will not cause "substantial harm to the business's competitive position," then EPA should determine that the information has lost its confidentiality status and must be made available to the public. [Footnote: As an initial matter, the Clean Air Act does not define "trade secret[s]" that are entitled to confidential treatment. Thus EPA has authority to provide a reasonable interpretation of this term, see, e.g., *Chevron U.S.A. Inc. v. Nat'l Resources Defense Council*, 467 U.S. 837, 842-843 (1984), as it has in 40 C.F.R. § 2.208. While we focus here on the requirement that disclosure would cause substantial harm, we believe that EPA has the authority to determine that all of the requirements set forth in 40 C.F.R. § 2.208 apply on an ongoing basis. Therefore, failure to meet any one of those criteria at any point in time would cause information to lose its confidentiality status.] EPA's current regulations already provide for such "declassification" of confidential information. 40 C.F.R. § 2.208(a) provides that, as a condition of receiving confidentiality treatment for information, "[t]he business has asserted a business confidentiality claim which has not expired by its terms, nor been waived or withdrawn." 40 C.F.R. § 2.208(a) (emphasis added). A "business confidentiality claim" is a claim that "business information is entitled to confidentially treatment for reasons of business confidentiality [.]" 40 C.F.R. § 2.201(h). When the circumstances a business cites to justify confidentiality cease to exist – such as risk of competitive harm – certainly the claim has "expired by its terms." See *id.* For this reason, 40 C.F.R. § 2.204(b)(1) provides that EPA may terminate or modify the confidential status of the information because of, among other reasons, "newly-discovered or changed facts," 40 C.F.R. § 2.205(h). The passage of time and attendant, lessened competitive risks from public disclosure would be such a "changed fact" warranting the declassification of confidential data. In addition, when approving a claim of confidentiality, the regulations provide that EPA "shall determine whether or not the information is entitled to confidential treatment for the benefit of the business that asserted the claim, and the period of any such entitlement (e.g., until a certain date, until the occurrence of a specified event, or permanently)[.]" 40 C.F.R. § 2.205(d)(2).

Of particular relevance to this rulemaking is EPA's regulation governing "Class Determinations" of the confidentiality status of information. 40 C.F.R. § 2.207. In prescribing the confidentiality status of classes of information – as EPA is doing here – the regulation provides that EPA may state that the information in such class satisfies one or more of the substantive criteria for confidentiality status "during a certain period, but will be ineligible for confidential treatment thereafter." 40 C.F.R. § 2.207(c)(5).

Finally, such an interpretation is consistent with case law construing other statutes. See *Env'tl Def. Fund v. EPA, et al.*, 598 F.2d 62, 79 n.66 (D.C. Cir. 1978) (describing that some industrial information is “often a trade secret at first”). In *Public Citizen Health Research Group v. FDA*, 539 F. Supp. 1320 (D. D.C. 1982) [Footnote: *Rev'd, Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (remanding the case for further consideration of whether the information at contained trade secrets.)], researchers sought access, under the Freedom of Information Act (“FOIA”), to clinical test information. *Id.* at 1326 (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974)). FOIA exempts business information from public disclosure if releasing the information would “cause substantial harm” to the business’s “competitive position.” *Id.* at 1326 (citations and quotations omitted). Confirming the FDA’s determination that some of the requested information was confidential, the court stated: “[W]hile it has ruled that certain items are trade secret or confidential commercial information at this point in the industry’s development, they could conceivably lose that protected status over time. For example . . . the disclosure of certain commercial information may no longer be likely to result in substantial competitive injury [.]” *Id.* at 1330. The Clean Air Act and EPA’s regulations similarly seek to prevent injury to a business’s competitive advantage. The court’s rationale, therefore, should apply here: If disclosure no longer poses a risk to that advantage, then the information should lose its confidential status. [Footnote: Section 114 of the Clean Air Act specifies that “trade secrets” are entitled to protection pursuant to the provisions of 18 U.S.C. § 1905. 42 U.S.C. § 7414(c). Expiration of the confidentiality status of information upon the failure to meet any of the substantive criteria warranting treatment of the information as a “trade secret” is consistent with the case law construing 18 U.S.C. § 1905. See *Fed. Trade Comm’n v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 973 (1980) (noting that a determination of the trade secret status of information was not yet ripe because “[g]iven the rapid pace of technological change today’s trade secret easily can become tomorrow’s common knowledge”) and *Interco., Inc. v. Federal Trade Commission*, 490 F. Supp. 39, 44 (D.C. Cir. 1979) (finding that “to the extent that such documents contain confidential business and financial information, their age is such... that their disclosure will not cause any significant competitive injury and, in any event, is ‘expedient in the public interest.’”)] In sum, EPA is well within its authority to interpret the Clean Air Act and its own regulations as requiring that the criteria for a claim of CBI be met on an ongoing basis, and that the information can lose its confidentiality status once disclosure will no longer present a “substantial” risk of competitive harm.

**Response:** We agree that data would no longer qualify for confidential treatment if circumstances or facts change, such that data no longer satisfy the criteria at 40 CFR 2.208. For this reason, we requested comment on whether there were any particular Part 98 data elements that would become less sensitive over time, the amount of time after which they would no longer be sensitive, and the reason for the change in the sensitivity of the data elements. However, EPA did not receive information that would provide sufficient basis for EPA to limit the determinations made in this action for any particular data elements to a specific period of time.

The regulations at 40 CFR 2.205(h) (modifications of prior determinations), include procedures for changes to determinations “because of change in the applicable law, newly-discovered or changed facts, or because the earlier determination was clearly erroneous.” The amendments to

Part 2 regulations finalized in this action also contain procedures for modifications to confidentiality determinations made for Part 98 data.

**Commenter Name: Vickie Patton**  
**Commenter Affiliation: Environmental Defense Fund**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0047.1**  
**Comment Excerpt Number: 8**

**Comment:** The Duration of Information Deemed Confidential Should Be Limited: The information categorically determined to be confidential may not warrant indefinite confidentiality treatment. We urge EPA to place a temporal limitation on the duration that information is withheld from public disclosure. See 75 Fed. Reg. at 39,106.

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0053.2 , excerpt 6 above for the response to this comment.

**Commenter Name: Ray Niemiec**  
**Commenter Affiliation: Texas Instruments Incorporated**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**  
**Comment Excerpt Number: 15**

**Comment:** TI strongly believes that CBI status should not be time limited. Once a CBI determination is made, all data included in such information should forever remain CBI. For example, TI has developed processes for leading edge technologies in the past that are now currently applied to the manufacture of new products (i.e. “trailing technology”) that use older technology. TI intends to continue this idea of applying older but useful processes to new products. If CBI associated with such older processes becomes non-CBI, then TI could lose its competitive position with respect to such new products. Specifically, TI uses leading edge digital processing technology on its most advanced production nodes. This technology is generally applied to analog technology 5-10 years later. Divulging information on an “old” DSP technology may seem harmless, but when applied to analog production processing can prove to be CBI at a much later date.

If EPA decides to adopt a time limitation on considering data as CBI, EPA should adopt an approach consistent with duration of patent or copyright protection. Patents are protected for 20 years under 35 U.S.C.A. 154 and copyrights in works created by TI are protected for 120 years from creation under 17 U.S.C.A 302.

**Response:** Please see Section II.A.8 of the preamble to the final rule for the response to this comment.

**Commenter Name: Robert A. Reich**  
**Commenter Affiliation: DuPont Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0030**  
**Comment Excerpt Number: 8**

**Comment:** EPA solicited comments on whether the confidential treatment of CBI should be time limited. [FOOTNOTE: 75 Federal Register, p39106, column 2]. CBI is sensitive information that would remain relevant and valuable for business espionage even years after it is collected. DuPont urges that CBI remain classified as CBI for the life of the reporting entity.

**Response:** Please see Section II.A.8 of the preamble to the final rule for the response to this comment.

**Commenter Name: Robert A. Reich**  
**Commenter Affiliation: DuPont Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0030**  
**Comment Excerpt Number: 14**

**Comment:** We are also concerned that EPA has indicated that the Agency is considering release of confidential information after some time limit. CBI is sensitive information that would remain relevant and valuable for business espionage even years after it is collected. DuPont urges that CBI remain classified as CBI for the life of the reporting entity.

**Response:** Please see Section II.A.8 of the preamble to the final rule for the response to this comment.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.2**  
**Comment Excerpt Number: 11**

**Comment:** EPA may, nonetheless, classify some supplier data as CBI. If it does so, EPA should still, consistent with its reporting rule and section 114 mandates, work to ensure that this data becomes public as rapidly and usefully as possible.

**Response:** Please see Section II.A.8 of the preamble to the final rule for the response to this comment.

**Commenter Name: Lorraine Gershman<sup>15</sup>**  
**Commenter Affiliation: American Chemistry Council (ACC)**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**  
**Comment Excerpt Number: 10**

**Comment:** ACC supports the aggregation of data, but objects to the future disaggregation of the same data. EPA solicited comments on the option of having EPA provide aggregate emission data and then releasing the disaggregated data sometime in the future (three to five years). In many cases, ACC member company facilities produce the same product at a relatively steady

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<sup>15</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), PPG Industries, Inc. (EPA-HQ-OAR-2009-0924-0040), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

rate for a number of years, and releasing process-specific information even five years in the future would expose CBI.

**Response:** Please see Section II.A.8 of the preamble to the final rule for the response to this comment.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 4**

**Comment:** EPA must resist any attempt to request publication of disaggregated data, even years after the reporting year has passed. Fluorochemical industry marketing trends play out over long time frames, and competitors value market, process, and production data even after five or ten years. EPA correctly proposes to shield Subpart OO and QQ disaggregated market data as CBI.

**Response:** Please see Section II.A.8 of the preamble to the final rule for the response to this comment regarding time limits on CBI for subpart OO data elements. EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ. For additional information regarding EPA's decision not to finalize the determinations for these subparts in this action, see Section II.A.3 of the preamble to the final rule.

**Commenter Name: Dave Stirpe**

**Commenter Affiliation: Alliance for Responsible Atmospheric Policy**

**Document Control Number: EPA-HQ-OAR-2009-0924-0050.1**

**Comment Excerpt Number: 9**

**Comment:** EPA must resist any attempt to request publication of disaggregated data, even years after the reporting year has passed. Fluorochemical industry trends play out over long time frames. Competitors value market, process, and production data even after five or ten years. EPA correctly proposes to shield Subpart OO and QQ disaggregated market data as CBI.

**Response:** Please see Section II.A.8 of the preamble to the final rule for the response to this comment regarding time limits on CBI for subpart OO data elements. EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ. For additional information regarding EPA's decision not to finalize the determinations for these subparts in this action, see Section II.A.3 of the preamble to the final rule.

**Commenter Name: Robert D. Bassette**

**Commenter Affiliation: Council of Industrial Boiler Owners**

**Document Control Number: EPA-HQ-OAR-2009-0924-0064.1**

**Comment Excerpt Number: 4**

**Comment:** The lapse of time does not diminish the sensitivity of this data [input data used in emission equations and the calculations themselves; throughput information and fuel use rates; composition of emissions from individual process byproduct streams fed to combustion units; capacity of process heaters; type of fuel utilized in process heaters; and the calculation methodology utilized] to a company's market position. There is no time after which this data could be released that would avoid these potential competitive harms or antitrust concerns. Given these concerns, we believe that the confidential treatment of non-emission input and other data should not be time limited.

**Response:** Please see Section II.A.8 of the preamble to the final rule for the response to this comment.

**Commenter Name:** Craig H. Segall, Helen Silver, and Meleah Geertsma  
**Commenter Affiliation:** Clean Air Task Force, Natural Resources Defence Council  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0018.1  
**Comment Excerpt Number:** 4

**Comment:** Because fluorinated gases are powerful global warming agents, with global warming potentials tens or hundreds of times that of carbon dioxide, we do not support shielding this information from public view. . . . To the extent that the data cannot be made wholly public, EPA should still work for disclosure. First, EPA should recognize that market conditions change quickly. Data that may cause a business competitive harm now may be of no moment just weeks or months later. If there is no competitive harm, then there is no warrant for confidentiality [See 40 C.F.R. 2.208(e)]. EPA should determine, based on the market for fluorinated gases, how long product data should be shielded, and limit its confidentiality determination to that period.

**Response:** Please see Section II.A.8 of the preamble to the final rule for the response to this comment.

## 7. All Data Elements Should Be Made Public

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**Commenter Name:** Michael Bradley  
**Commenter Affiliation:** The Clean Energy Group  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0029.1  
**Comment Excerpt Number:** 2

**Comment:** The Clean Energy Group supports increasing public access to all data, similar to what has been available for the electric sector for many years. The electric sector currently reports emissions, fuel use, and electric production data to several government agencies, including EPA and the Department of Energy's Energy Information Administration.

**Response:** EPA thanks the commenter for their input. However, as explained in Section I.C of the July 7, 2010 CBI proposal, CAA section 114(c) requires that "[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would



divulge methods or processes entitled to protection as trade secrets . . . , the administrator shall consider such record, report, or information or particular portion thereof confidential.” EPA interprets CAA section 114(c) to afford confidential treatment to both trade secrets and confidential business information, provided such data is not emission data. For data elements that are not emission data, we used the criteria at 40 CFR 2.208 to determine whether data are eligible for confidential treatment.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defence Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0018.1**  
**Comment Excerpt Number: 3**

**Comment:** To the extent EPA nonetheless determines that any reporting rule data elements are not emission data, EPA should still be guided by the principles of its reporting rule mandate as it applies its confidentiality regulations, see 40 CFR 2.208 (substantive criteria for use in these determinations). It should classify most data as non-confidential, report as much data as possible by using aggregation and other techniques to obviate any competitive harm, and aggressively work to declassify information as soon as it can no longer “cause substantial harm to a business’s competitive position,” (providing that EPA may define a class of information as confidential initially but provide that it “will be ineligible for confidential treatment thereafter.”).

**Response:** EPA thanks the commenter for their input. As discussed in Section I.C of the July 7, 2010 CBI proposal, we used . For the data categories that are not considered emission data, EPA evaluated whether release of the data is likely to cause substantial harm to the business’s competitive position. *See* 40 CFR 2.208(e)(1). EPA also considered whether the data are already publicly available or reasonably obtainable by a non-governmental entity. *See* 40 CFR 2.208(c). If EPA found that the data in a given category meet the criteria at 40 CFR 2.208, EPA determined that such data are CBI under CAA section 114(c). EPA determined that the data in a given category are not CBI if the data fail to satisfy the criteria at 40 CFR 2.208. In the July CBI proposals, we described in detail the data elements in each data category and the rationales for our proposed confidentiality determinations, whether by category or for specific data elements. In the preamble to this final rule, we have explained our final determinations, including the significant changes made since proposal and our rationale for those changes.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.2**  
**Comment Excerpt Number: 1**

**Comment:** Both the Clean Air Act and Congress’s specific mandate to create the reporting rule require that EPA make reporting data readily publicly available. Section 114(c) of CAA precludes “emission data” from being considered confidential and requires that such data be available to the public. *See* 42 U.S.C. § 7414(c); *see also* 42 U.S.C. § 7542(c) (same requirement for mobile source emissions). This term is defined by regulation to include, “with reference to any source of emission of any substance into the air”: “Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air

quality) of any emissions which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing.”40 C.F.R. § 2.301(a)(2)(i)(A); see also id. § 2.301(a)(2)(i)(B) (including information needed to determine compliance with applicable standards and limitations); id. § 3.301(a)(2)(i)(C) (including descriptions of the location and nature of the source).

Since 1991, EPA has also provided a lengthy, non-exclusive list of specific data types that fall into this category. [Footnote: See 56 Fed. Reg. 7,042 (Feb. 21, 1991).] Under that guidance, emissions data includes information on the type and origin of emissions, emission rates, release frequency and duration, emission concentration and density, and emission estimation methods. [Footnote: See 56 Fed. Reg. at 7,042-43.] “These data are emission data and are releasable upon request.” [Footnote: See id. at 7,043.]

Case law on section 114 also supports broad disclosure of reporting rule data. Most notably, *RSR Corp. v. EPA*, 588 F. Supp. 1251 (D. Tex. 1984), emphasizes that emission data determinations supported by substantial records will be upheld. In that case, the court remanded a determination which was a “bare conclusion” that a particular data element was emission data based upon a “meager record” contrasting that determination with one supported by the agency’s “discussion of alternative methods of identifying or measuring pollutants, with a comparison of their capabilities, advantages and disadvantages” to which the court would have deferred. *Id.* at 1255-56. In developing the reporting rule, EPA has compiled just such a detailed, thorough decision making record to demonstrate that the reporting methods offered under the final rule are necessary to calculate source emissions. The technical support documents for the reporting rule stretch to thousands of pages and carefully demonstrate why EPA has selected its methods. On this record, data collected to comply with EPA’s methods is plainly emission data. See also *Sherwin-Williams Co. v. Spitzer*, 2005 WL 2128938 (N.D.N.Y., Aug. 24, 2005) (stating that emission data is “just not eligible” for confidentiality protections).

Even if a given data element is not emission data, the Clean Air Act still strongly favors disclosure. Section 114 of the Act provides that “[a]ny records, reports or information obtained” under section 114 “shall be available to the public.” 42 U.S.C. § 7414(c). Information may be withheld only upon “a showing satisfactory to the Administrator” that a specific data element would “if made public ... divulge methods or processes entitled to protection as trade secrets.” *Id.* The Act, then, presumes disclosure, with a narrow exception for true trade secrets, available only upon a “satisfactory showing” by the emitter.

The reporting rule builds upon this foundation. Congress charged EPA with publishing the final reporting rule “not later than June 26, 2009, and to begin implementation to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States, as required by Public Law 110-161.” [Footnote: Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524, 729 (March 11, 2009) (citing Fiscal Year 2008 Consolidated Appropriations Act, Pub. L. No.110-161, 121 Stat. 1844, 2128 (Dec. 26, 2007).] This sweeping mandate was designed to develop data which can be used in many contexts, and necessarily implies that the data will not be confidential. As EPA explained in the preamble to the final reporting rule:

“EPA is promulgating the rule to gather GHG information to assist EPA in assessing how to address GHG emissions and climate change under the Clean Air Act. However, we expect that the information will prove useful for other purposes as well. For example, using the rich data set provided by this rulemaking, EPA, States and the public will be able to track emission trends from industries and facilities within industries over time, particularly in response to policies and potential regulations. The data collected by this rule will also improve the U.S. government’s ability to formulate climate policies, and to assess which industries might be affected, and how these industries might be affected by potential policies. Finally, EPA’s experience with other reporting programs is that such programs raise awareness of emissions among reporters and other stakeholders, and thus contribute to efforts to identify and implement emission reduction opportunities. These data can also be coupled with efforts at the local, State and Federal levels to assist corporations and facilities in determining their GHG footprints and identifying opportunities to reduce emissions (e.g., through energy audits or other forms of assistance).”<sup>74</sup> Fed. Reg. 56,265 (Oct. 30, 2009); see also 75 Fed. Reg. 39,736, 39,755-56 (July 12, 2010) (stating that “A mandatory reporting system will benefit the public by increased transparency of facility emissions data” and that “[b]enefits to industry of GHG emissions monitoring include the value of having independent, verifiable data to present to the public to demonstrate appropriate environmental stewardship, and a better understanding of their emission levels and sources to identify opportunities to reduce emissions.”); 75 Fed. Reg. 18,608 (Apr. 12, 2010) (recognizing similar benefits). Shielding reporting rule data would defeat these purposes. Public access is critical: Even if EPA retains access to confidential information, without sharing that data with the public, EPA will lose the benefit of public critique and analysis which will substantially improve rulemakings and allow regulated entities to interact meaningfully with the agency. . . . The reporting rule’s own broad transparency mandate, then, overlaps with and strengthens the Clean Air Act’s already strong disclosure requirements. EPA thus should take every opportunity to make reporting rule data public.

**Response:** We agree that Part 98 data that meets the definition of emission data is not eligible for confidential treatment. However, we disagree with the comment that our determination that certain Part 98 data are CBI defeats the purposes of Part 98, the Clean Air Act, or Congress’ intent in the Consolidated Appropriations. Part 98 was developed under the authority of Clean Air Act Section 114(a) (1), which authorizes the Administrator to require emission sources, persons subject to the CAA, or persons whom the Administrator believes may have necessary information to monitor and report emissions and provide such other information the Administrator requests for purposes of carrying out any provision of the CAA (with exceptions not relevant here). Section 114 (c), which applies to information collected under Section 114(a), states that “any records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets . . . , the Administrator shall consider such record, report, or information or particular part thereof confidential. . .”. . . EPA interprets CAA section 114(c) to afford confidential treatment to both trade secrets and confidential business information, provided such data is not emission data. The Consolidated Appropriations Act directed EPA to prepare a rule that requires reporting of greenhouse gas data, but is silent on what data should be publicly available (see Consolidated

Appropriations Act, 2008, Public Law 110-161, 121 Stat. 1844, 2128).

**Commenter Name: Vickie Patton**  
**Commenter Affiliation: Environmental Defense Fund**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0047.1**  
**Comment Excerpt Number: 2**

**Comment:** EPA has relied on the Clean Air Act’s long-standing and expansive information-collection authorities in carrying out its congressional mandate for a greenhouse gas emissions reporting program. See 74 Fed. Reg. at 56,264 (citing 42 U.S.C. 7414, 7542). To ensure transparency and accountability for such core information under the Clean Air Act, Congress has guaranteed the public a right to “[a]ny records, reports or information” collected under these provisions by requiring their disclosure to the public except in limited, specifically delineated circumstances. 42 U.S.C. 7414(c), 7542(c) (emphasis added); see also *New York v. EPA*, 443 F.3d 880, 88586 (D.C. Cir. 2006) (holding the customary usage of the word “any” is to give the terms it modifies expansive meaning). The capacious statutory language strongly counsels disclosure and disfavors categorical withholding of information. EPA has a legal duty to interpret the term “emissions data” expansively and, conversely, to rigorously justify on the administrative record any decision to withhold – categorically – the disclosure of information under the greenhouse gas reporting rule.

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0018.1, excerpt 3 for the response to this comment.

**Commenter Name: Vickie Patton**  
**Commenter Affiliation: Environmental Defense Fund**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0047.1**  
**Comment Excerpt Number: 3**

**Comment:** In a number of instances, EPA proposes to categorically determine that information submitted under the greenhouse gas reporting rule is confidential and must be withheld. See, e.g., 75 FR 37097 (July 7, 2010) (Table 2- Summary of Proposed Determinations for Direct Emitter Data Categories and Table 3 – Summary of Proposed Determinations for Supplier Data Categories). These categorical determinations must be rigorously justified in light of the statutory language favoring disclosure.

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0018.1, excerpt 3 for the response to this comment.

8. Need for Public Access to Part 98 Data

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**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defence Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0018.1**  
**Comment Excerpt Number: 1**

**Comment:** Public access is critical. Even if EPA retains access to confidential information, without sharing that data with the public, EPA will lose the benefit of public critique and analysis which will substantially improve rulemakings and allow regulated entities to interact meaningfully with the agency. The Clean Air Act, which provides EPA's baseline information collection authority, underlines this point. Under the Act, "emission data" is not subject to any confidentiality protections. 42 U.S.C. 7414(c); 7542(c). This term is defined by regulation to include, "with reference to any source of emission of any substance into the air". Since 1991, EPA has also provided a lengthy, non-exclusive list of specific data types that fall into this category [See 56 Fed. Reg. 7042 (Feb. 21, 1991); see also 74 Fed. Reg. at 16,463 n. 37 (citing this list)]. Under that guidance, emissions data includes information on the type and origin of emissions, emission rates, release frequency and duration, emission concentration and density, and emission estimation methods [See Fed. Reg. at 7042-43 (Ex. 3)]. EPA thus should take every opportunity to make reporting rule data public.

**Response:** EPA agrees with the commenter that public access to information collected under the CAA is important. However, the CAA and the implementing regulations in 40 CFR part 2 set limits on what information may be made public. Section 114(c) of the CAA states that "any records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets . . . , the Administrator shall consider such record, report, or information or particular part thereof confidential. . .". The CAA precludes emission data from being considered confidential. The CAA also requires EPA to protect information that is not emission data if such information divulges trade secrets. The implementing regulations define emission data at 40 CFR 2.301(a)(2)(i). The implementing regulations also provide criteria for determining whether information that is not emission data qualifies for confidential treatment (see 40 CFR 2.208). EPA used the criteria in 40 CFR 2.208 to make determinations for data elements that are not emissions data. Specifically, we focused on two criteria: (1) whether the release of the data is likely to cause substantial harm to the business's competitive position (see 40 CFR 2.208(e)(1)); and (2) whether the data are already publicly available or reasonably obtainable by a non-governmental entity (see 40 CFR 2.208(c)). For additional information regarding the determinations made for each data category, see Sections II.C.2 through II.C.12 in the July 7, 2010 CBI proposal and Sections II.B.2 through II.B.11 in the preamble to the final rule.

**Commenter Name: Vickie Patton**

**Commenter Affiliation: Environmental Defense Fund**

**Document Control Number: EPA-HQ-OAR-2009-0924-0047.1**

**Comment Excerpt Number: 5**

**Comment:** The categorical withholding of information erodes transparency and accountability. In instances in which information is withheld, EPA should expansively rely on CEMS or third party verification as alternate methods to provide accountability. EPA, for example, proposes to categorically withhold production and throughput data that are not used as inputs to calculate annual greenhouse gas emissions. Such information must be disclosed in the aggregate. See 75 FR 39116. Further, firms withholding such production or throughput data, which is pivotal to

evaluate a facility's greenhouse gas emissions intensity, should as an alternative rely on third party verification to provide accountability for the aggregate data reported.

**Response:** EPA agrees with the commenter that public access to Part 98 data (except for data determined to be confidential treatment) is important. Access to this data will improve public understanding and improve stakeholders ability to evaluate new GHG polices and regulations, and ensure public confidence in the accuracy and reliability of the data. For the explanation of why EPA is not able to disclose all part 98 data elements, please see the response to comment EPA-HQ-OAR-2009-0924-0018.1, excerpt 1 above. This action does not address approaches to data verification and therefore the comments recommending CEMS and third party verification are beyond the scope of this rulemaking. The July 2010 CBI proposals proposed CBI determinations for data elements to be reported under Part 98 and did not propose any new requirements for CEMS or evaluate alternative verification methods.

**Commenter Name: Vickie Patton**

**Commenter Affiliation: Environmental Defense Fund**

**Document Control Number: EPA-HQ-OAR-2009-0924-0047.1**

**Comment Excerpt Number: 1**

**Comment:** Emissions data is the foundation of rigorous, effective, and informed air quality planning and management. In its first major greenhouse gas reporting rule proposal, EPA found that greenhouse gas emissions data is “essential” to sound policy, explaining that “[a]ccurate and timely information on GHG emissions is essential for informing some future climate change policy decisions.” 74 Fed. Reg. at 16,455. Emissions data enables policy-makers to develop, design, and assess policies: Through this rulemaking, EPA would be able to track the trend of emissions from industries and facilities within industries over time, particularly in response to policies and potential regulations. The data collected by this rule would also improve the U.S. government's ability to formulate a set of climate change policy options and to assess which industries would be affected, and how these industries would be affected by the options. 74 Fed. Reg. 16,455-56; see also *Massachusetts v. EPA*, 549 U.S. 497, 530 (2007) (“Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it.”). Effective emissions reporting programs also “raise awareness of emissions among reporters and other stakeholders, and thus contribute to efforts to identify reduction opportunities and carry them out.” 74 Fed. Reg. at 16,456. Justice Brandeis attested to the accountability benefits of such transparency when he declared: “Sunlight is said to be the best of disinfectants.” *Louis Brandeis, Other People's Money* (1914) at Ch. 5.

In two successive enactments, Congress pointedly instructed EPA to require expansive mandatory reporting of greenhouse gas emissions “for all sectors of the economy of the United States.” See Fiscal Year 2008 Consolidated Appropriations Act, Pub. L. No. 110-161, 121 Stat. 1844, 2128 (Dec. 26, 2007) & Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524, 729 (March 11, 2009). Congress thus called for a comprehensive program that encompassed not a few, not some, but rather “all” sectors of the economy. See *Trustees of Iron Workers Local 473 Pension Tr. v. Allied Prods. Corp.*, 872 F.2d 208, 213 (7th Cir. 1989) (“The common meaning of ‘all’ is 100 percent.”); *Choice Hotels Int’l, Inc. v. SM Property Mgmt., LLC*, 519 F.3d 200, 210 (4th Cir. 2008) (“all means all”).

**Response:** EPA agrees that is important to allow access to Part 98 data (except for data determined to be confidential). For an explanation of why EPA cannot allow public access to all Part 98 data, , please see the response to comment EPA-HQ-OAR-2009-0924-0018.1, excerpt 1.

**Commenter Name:** Craig H. Segall, Helen Silver, and Meleah Geertsma

**Commenter Affiliation:** Clean Air Task Force, Natural Resources Defense Council

**Document Control Number:** EPA-HQ-OAR-2009-0924-0053.2

**Comment Excerpt Number:** 2

**Comment:** We anticipate that some emitters may argue that the Clean Air Act’s transparency mandates do not extend to greenhouse gases. As Congress has explicitly directed EPA to collect and make public data on these gases, through the reporting rule, these arguments are obviously wrong. Indeed, EPA would be entirely well-justified in collecting, and sharing, greenhouse gas data even had Congress not directed the creation of the reporting rule.

Section 114 of the Clean Air Act authorizes EPA to collect an extraordinarily broad range of information for the purpose of “carrying out any provision of this chapter,” “developing or assisting in the development” of any implementation plan, emission standard, or limitation, or for determining whether any person is violating such standards or plans. 42 U.S.C. § 7414(a); see also 42 U.S.C. § 7542 (providing similar authority in the mobile source context). EPA’s authority extends to “any person” who “owns or operates any emission source,” who “manufactures emission control equipment or process equipment,” “who the Administrator believes may have information necessary for the purposes” of the section, or “who is subject to any requirement” of the Clean Air Act (other than some mobile source restrictions). 42 U.S.C. § 7414(a)(1). In turn, EPA may require these parties to “establish and maintain such records,” “make such reports,” “install, use, and maintain such monitoring equipment,” and generally monitor their practices as EPA determines. *Id.* This sweeping authority plainly authorizes EPA to collect greenhouse gas emission data.

Greenhouse gases, which are air pollutants under the Clean Air Act, see *Massachusetts v. EPA*, 549 U.S. 497, 530 (2007), fall under many categories of reportable data under Section 114. For instance, they are subject to “standards of performance under section 7411” of the Clean Air Act, and are regulated under many other “provision[s] of this chapter,” including the Prevention of Significant Deterioration program, see 42 U.S.C. §§ 7470 et seq. Indeed, the Act defines emissions standards, for which Section 114 data is collected, as including any requirements which limit “air pollutants,” a term which, again, includes greenhouse gases. See 42 U.S.C. § 7602(k). EPA can certainly collect data on these gases for the “purpose of developing or assisting in the development” of new regulatory programs, see 42 U.S.C. § 7414, and carrying out its many other Clean Air Act responsibilities. As the Supreme Court has recognized, “[c]ollaboration and research do not conflict with any thoughtful regulatory effort; they complement it.” 549 U.S. at 530.

As such, all Section 114 data on greenhouse gas emissions “shall be available to the public,” and “emission data” within this class may not ever be withheld. 42 U.S.C. § 7414(c). This policy is entirely consistent with the policy goals of the Act. Members of the public, including local

governments, investors, and public interest groups, have a vital interest in identifying polluters in their communities.

This interest is just as important for greenhouse gases as it is for other air pollutants that threaten public health, including precursors to ozone smog, hazardous air pollutants like acid gases, and mercury. Although climate change is a global problem, its effects are felt locally as changes in weather patterns, floods, fires, heatwaves, blizzards, reduced crop productivity, biodiversity losses, disease epidemics, and so on. To address these local effects, members of the public will often seek to control major local emitters. The collective impact of such local efforts can significantly reduce global warming, see *Massachusetts*, 549 U.S. at 529, and reduce emissions of locally-depositing co-pollutants, such as mercury, which are produced by burning carbon-intensive fuels like coal. These benefits serve the purposes of the Clean Air Act, but they cannot occur unless facility-specific data is publicly available.

Likewise, investors, companies, and public officials have a vital interest in public, facility-specific, information on greenhouse gas emissions. Congress, EPA, and numerous state and local jurisdictions are moving to address the climate crisis by regulating greenhouse gas emissions. To intelligently design, and respond to, proposed regulatory measures, members of the public must know how they will impact their communities. These impacts, in turn, can best be assessed with data on which facilities are the largest polluters. This information will help high-emitting facilities identify and adopt the best practices of low-emitting companies, encourage state and local authorities to reward responsible facilities, and help investors decide which companies present them with the best opportunities in a carbon-constrained market. It is also, obviously, vital to support any direct market for carbon emissions.

EPA recognizes these benefits, discussing many of them in the preamble to this rule. See 75 Fed. Reg. at 39,099. As EPA writes, greenhouse gases, like all other air pollutants, are covered by the Clean Air Act's transparency mandates, and rightly so. Global warming is a public crisis, and the public has a right to understand its sources.

**Response:** EPA agrees that Part 98 data determined to be emission data must be publicly released. Part 98 was developed under the authority of CAA Section 114(a) (1), which authorizes the Administrator to require emission sources, persons subject to the CAA, or persons whom the Administrator believes may have necessary information to monitor and report emissions and provide such other information the Administrator requests for purposes of carrying out any provision of the CAA (with exceptions not relevant here). Section 114 (c), which applies to information collected under Section 114(a), affords confidential treatment to data that are considered trade secret or confidential business information, but excludes all data that are emission data from confidential treatment.

**Commenter Name: Michael Bradley**

**Commenter Affiliation: The Clean Energy Group**

**Document Control Number: EPA-HQ-OAR-2009-0924-0029.1**

**Comment Excerpt Number: 3**

**Comment:** By fostering transparency, access to public data benefits all stakeholders, including our own industry, policy makers, communities, and environmental stakeholders. Increasing



transparency drives more reasonable policy development because informed stakeholders are better able to evaluate the most cost-effective programs and policies to achieve emissions reductions. Publicly available data also facilitates comparison to peers and identification of improvement opportunities.

**Response:** EPA agrees with the commenter that public access to Part 98 data, except for data determined to be CBI in this final action, is important because it will improve public understanding of the sources of GHGs and improve stakeholders ability to evaluate new GHG polices and regulations.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**

**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**

**Document Control Number: EPA-HQ-OAR-2009-0924-0067.1**

**Comment Excerpt Number: 3**

**Comment:** [T]he FTC comments focus entirely upon one class of harms that may arise from EPA's confidentiality determinations, without acknowledging the many benefits of open access. Congress struck the balance in favor of disclosure because transparent, readily-available, information allows the public, regulators, analysts, and advocates to comprehensively understand and control the sources of air pollution. . .

These benefits have even been clearly recognized by another market regulator, the Securities and Exchange Commission ("SEC"). The SEC's "Guidance Regarding Disclosure Related to Climate Change" recognizes that, thanks to growing controls on global warming pollution and the impact of climate change itself, greenhouse gas emissions "could have a significant effect on operating and financial decisions." Id. At 5. The SEC emphasizes that these impacts can be material to investment decisions, and that they should be disclosed when they are. Id. At 12 et seq. Investors, managers, and market regulators will make better decisions if they can readily assess companies' emissions, and their causes. Shielding this data could, as a result, lead to market failures, which can raise prices, drive risky investment decisions, and harm consumers. The public, including market participants, stands to benefit from the EPA's proposed, substantially transparent reporting system. EPA should keep these benefits in view, even as it weighs the concerns the FTC raises.

**Response:** The CAA also requires EPA to protect information, except for emission data, if such information divulges trade secrets or confidential business information. As we explained in Section I.C of the July 7, 2010 CBI proposal, we used the definition of emission data at 40 CFR 2.301(a)(2)(i) to determine which data are emission data. For data elements that are not emission data, we used the criteria at 40 CFR 2.208 to determine whether data that they are eligible for confidential treatment. This criteria includes an evaluation of the likelihood the data would to cause substantial competitive harm if made public. It does not include any evaluation of the public benefit of releasing the data.

**Commenter Name: Stephen H. Bernhardt**

**Commenter Affiliation: Honeywell**

**Document Control Number: EPA-HQ-OAR-2009-0924-0019.1**

**Comment Excerpt Number: 2**

**Comment:** The full disclosure approach suggested by EPA does, in fact, simplify things for them to administer and enhances confidence in the disclosure. What it also does is to damage the business interests of the manufacturer in the US at the expense of EPA convenience. An alternative that Honeywell would suggest is to allow companies to make emission reports and for EPA to audit as needed any information it seeks on a CBI basis. There is no need for the public to have information beyond what is entering the atmosphere. The rule cites that commenters expressed similar concerns as those mentioned above but says nothing as to EPA's consideration of these concerns. On pg 39099, EPA states that information would be valuable to policy makers, the public and industry as they improve the understanding of sources of emissions and the relationship between operating characteristics and emissions. Such disclosure would educate competitors, both current and potential, of proprietary operating know-how. Honeywell does not wish to support competitors' efforts to optimize their processes by disclosure of ours. This would serve to diminish competition at the expense of the producer that had the most success in their process engineering efforts. We would be open to CBI review of such information directly with EPA.

**Response:** Our primary reasons for initiating the CBI rulemaking are to avoid unnecessary delays in publishing data that is emission data or otherwise not eligible for CBI protection and to reduce the burden on industry of having to prepare and submit individual CBI claims with each annual report. As we explained in the July 7, 2010 CBI proposal, the CAA precludes emission data from being considered CBI. This applies to all emission data including emission data that is sensitive or proprietary. However, non-emission data that is likely to cause substantial competitive harm to the reporter must be held as confidential. Our CBI determinations for non-emission data were made by applying the criteria from our existing CBI regulations at 40 CFR 2.208. Specifically, for data elements that were not emission data, we considered the criteria at 40 CFR 2.208(e) (i.e., whether the public availability of the data would cause substantial harm to the reporter) and used all information available to us in our deliberations, including information previously submitted in response to the April 12, 2009 Mandatory GHG Reporting Rule proposal and information provided in comments submitted in response to the CBI proposals. We sought comment on our proposed determinations and have responded to those comments in this final rule (see Sections II.B through II.D of the preamble to the final rule).

EPA also disagrees with the commenter's statement that emissions are the only information of interest to the public and that public access to Part 98 data is not necessary. Part 98 data, except for the data found to be CBI in this final action, is critical to furthering public understanding of the sources of GHG emissions and to enabling stakeholder participation in the critique and analysis of any future GHG rulemaking. The data will enable the public to track trends in GHG emissions from industries and facilities over time and, in the future, enable the public to assess the effectiveness of policies and regulations.

**Commenter Name: Michael Tiller**

**Commenter Affiliation: Compressed Gas Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0020.1**

**Comment Excerpt Number: 6**

**Comment:** EPA states that “Comparisons of facility-specific data will improve our understanding of the factors that influence GHG emission rates and actions facilities could in the future or already take to reduce emissions. By tracking changes in facility-specific data, EPA and other stakeholders will be able to track trends in GHG emissions from industries and facilities over time and assess responses to policies and potential regulations.” CGA member companies continually research and implement measures to reduce emissions under the auspices of resource conservation, production efficiency, cost reduction, and environmental stewardship, and not only as responses to regulatory policies and potential regulations. CGA respectfully requests that EPA provide a detailed explanation of the types of comparisons EPA intends to conduct on the GHG MRR reported data and how those comparisons will be directly or indirectly correlated to emission rate factors or facility change initiatives. EPA also states that “Data submitted by suppliers are needed by EPA and other users of the reported data to help develop policies that could affect sources under a variety of CAA provisions.” CGA respectfully requests that EPA identify what other users or stakeholders (other than EPA and the respective State environmental agencies) develop policies under the purview of the CAA and how the reported data would be used to develop those policies. EPA discusses the feasibility and effectiveness of different GHG control strategies as an example for potential data use. “These may include regulatory and nonregulatory strategies and technologies for preventing or reducing air pollutants, such as energy conservation, end-use efficiency, and fuel- or raw-material switching.” These appear to be EPA-driven initiatives and strategies, which would not be available for these EPA uses if submitted and controlled as CBI.

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 above for the response to this comment. We are not at this time making decisions regarding the formats of data that will be available to the public in the publishing tool. However, we plan to share data (except for data determined to be CBI) with the public. We consider publication of the data to be important to furthering public understanding of the sources of GHG emissions and to enabling stakeholder participation in the critique and analysis of any future GHG rulemaking.

**Commenter Name:** Ray Niemiec

**Commenter Affiliation:** Texas Instruments Incorporated

**Document Control Number:** EPA-HQ-OAR-2009-0924-0038.1

**Comment Excerpt Number:** 9

**Comment:** While TI disagrees that “[i]nformation on unit characteristics and operations are valuable to policy makers, the public, and industry . . .” any such person may individually request from TI any related non-CBI or attempt to obtain certain CBI by following appropriate TI procedures and signing appropriate agreements with TI such as a Non-Disclosure Agreement. EPA, however, should not by rule substitute longstanding safeguards against the release of CBI merely in the vague and unsupported interest of regulatory transparency.

**Response:** EPA disagrees that the approach taken would “substitute longstanding safeguards against the release of CBI merely in the vague and unsupported interest of regulatory transparency.” As explained in detail in Section II.A.2 of the preamble to the final rule, we used the definition of emission data (40 CFR 2.301(a)(2)(i)) and the same CBI criteria (40 CFR 2.208)

used by other EPA programs for over 20 years. Please see the response to comment EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 above for an explanation of why public access to Part 98 data, except for data determined to be CBI, is important.

**Commenter Name: Ray Niemiec**

**Commenter Affiliation: Texas Instruments Incorporated**

**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**

**Comment Excerpt Number: 3**

**Comment:** EPA has given no indication as to why CBI would be “useful information” to the public, or why EPA would want to make CBI available to the public above and beyond non-CBI emission data, as more specifically described in our comments below. TI strongly believes that the only publicly “useful information” regarding GHG emissions is non-CBI data showing actual GHG emissions, which will be made publicly available. Based on TI’s review of its own CBI required to be reported under the MRR, TI can identify no CBI that would in any way be “useful information” to the public. On the contrary, such information would only be useful to TI’s competitors who wish to eliminate or narrow TI’s competitive advantage in several areas of the semiconductor industry sector. Releasing CBI to the public in any form – information that would never otherwise be publicly available or obtainable in any form – would likely cause substantial harm to TI’s competitive position.

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 above for the response to this comment.

**Commenter Name: William C. Herz**

**Commenter Affiliation: The Fertilizer Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 3**

**Comment:** EPA’s discussion neither acknowledges nor weighs the significant economic costs associated with forcing disclosure of trade secret information that harms competition. This is especially the case where EPA’s determination would require disclosure of valuable trade secrets to foreign competitors that are not subject to the same disclosure obligations. Nowhere does EPA account for such costs or weigh those against a carefully considered value that might accrue to the public through such disclosure. This applies especially with respect to the disclosure of underlying input data for emissions calculations. For example, EPA must articulate what value is gained by requiring disclosure of input data in addition to the calculation methods and equations themselves. In comparison to direction measurement of emissions through monitors (where no underlying data except the nature of the monitor used is disclosed), it is not apparent what purpose is served by requiring disclosure of input data or how that could outweigh competitive harm.

**Response:** As we explained in the July 7, 2010 CBI proposal, the CAA precludes emission data from being considered CBI. This applies to all emission data including emission data that is sensitive or proprietary. Our CBI determinations for non-emission data were made by applying the criteria from our existing CBI regulations at 40 CFR 2.208. Specifically, for data elements

that were not emission data, we considered the criteria at 40 CFR 2.208(e) (i.e., whether the data is already publicly available and whether public availability of the data would be likely to cause substantial harm to the business's competitive position). . Regarding the comments on inputs, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Tom Siegrist**

**Commenter Affiliation: Koch Nitrogen Company, LLC**

**Document Control Number: EPA-HQ-OAR-2009-0924-0025.1**

**Comment Excerpt Number: 3**

**Comment:** EPA's apparent sense of urgency regarding a perceived need to make unit-specific and facility-specific emissions data available for policy or program formulation is misguided. (75 FR 39102) It's generally understood that GHG emissions have no local or, in all likelihood, regional impacts. Furthermore, it's highly unlikely that a change in emissions from a specific source or facility from one year to the next would be a critical factor in determining the specifics of a GHG policy or program at a state, regional, or national level. Collection of emissions data without inadvertently disadvantaging domestic reporting organizations should be the focus of the reporting program. Critical policy/program decisions should be driven by conclusions drawn from examination of the collected data as a whole, viewed over a time period consistent with the potential development of any projected impacts.

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 above for the response to this comment.

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 5**

**Comment:** EPA provides very little explanation of the value of releasing information of a business sensitive nature to the public. We do not believe there is sufficient value to the public being given access to data other than the site GHG emissions (aggregated by type), facility location, ownership information, and source categories. EPA's justification for release of other information in the July 7, 2010, notice was limited to statements such as: "Information on unit characteristics and operations are valuable to policy makers, the public, and industry because they improve our understanding of the sources of emissions and the relationship between process operating characteristics and emissions." [FOOTNOTE: 75 Federal Register p39099, column 3] "Data submitted by suppliers are needed by EPA and other users of the reported data to help develop policies that could affect sources under a variety of CAA provisions." [FOOTNOTE: Ibid, p39099, column 3] These generic assertions do little to demonstrate value for public release of information that the manufacturer or supplier would deem sensitive. Further, such statements generally do not distinguish the value of Agency personnel having access to this information vs. the public value of the public having such access. The statements above and the few others in the Federal Register notice perhaps make a case for Agency personnel obtaining

such data, but by no means describe any significant value for members of the public obtaining such data. While we see little additional value to the public in the release of this kind of information, there is tremendous private value to be gained from such access (i.e., unfairly obtained competitive value). EPA should weigh the public value of public access to each type of information it is considering releasing to the public against the potential financial harm to the owners of such information due to loss of competitive information developed through years of effort and expense. Before releasing valuable private information of questionable public value EPA should consider the public cost of lost jobs and lost exports that may accompany such release of information.

**Response:** As we explained in the July 7, 2010 CBI proposal, the CAA precludes emission data from being considered CBI. Our CBI determinations for non-emission data were made by applying the criteria from our existing CBI regulations at 40 CFR 2.208. Specifically, for data elements that were not emission data, we considered the criteria at 40 CFR 2.208(e) (i.e., whether the public availability of the data would cause substantial harm to the reporter). These criteria do not include any evaluation of the public benefit of releasing the data.

EPA disagrees that it did not provide sufficient rationale for the determinations made in this action. In the preamble to the July 7, 2010 CBI proposal, we described in great detail the data elements in each of the 22 data categories and the rationales for our proposed confidentiality determinations, whether by category or for specific data elements. EPA sought comment on these proposed categories and on facility specific issues and addressed these comments in the relevant sections of the preamble to the final rule (see sections II.B.2 through II.B. 11 for direct emitters and sections II.C.3 through II.C.13 for suppliers).

**Commenter Name: Dave Stirpe**

**Commenter Affiliation: Alliance for Responsible Atmospheric Policy**

**Document Control Number: EPA-HQ-OAR-2009-0924-0050.1**

**Comment Excerpt Number: 7**

**Comment:** There is no doubt that the full disclosure approach suggested by EPA does simplify things for EPA to administer and enhances “transparency” in the disclosure to the public. However, as pointed out above, it also damages the business interests of the manufacturer in the US at the expense of EPA convenience. We believe that EPA and the public have the right to see emissions data from production facilities, but also believe that the public disclosure of the operating and production details is not necessary to promote those goals and should be protected as CBI and made available only on a need-to-know basis to EPA. Ironically, this proposal would force companies to share information with the public and policy makers for the sake of expediency that would be illegal for them to share directly with their competitors. Rather than compromising the trade secrets of American industry, the EPA should require companies to make emission reports and be subject to providing EPA with CBI information by audit when and where needed. There is no need for the public to have this information beyond what enters the atmosphere.

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 above for the response to this comment.

**Commenter Name: Leslie S. Ritts<sup>16</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 2**

**Comment:** Nor does EPA validate its assertion in this Notice of Proposed Rulemaking that the public has the need for such information or that the transparency of such emissions-related information would increase the public's confidence in the information. We believe that much of the information that will be submitted can be protected as CBI without reducing the public's understanding and awareness of the total GHGs that are being emitted by various facilities. EPA, state and local governments can use other CBI information, if necessary, to validate emission reports.

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 above for the response to this comment.

**Commenter Name: Leslie S. Ritts<sup>17</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 4**

**Comment:** We are concerned because the erosion of confidentiality for business information that this proposal represents under the Clean Air Act is startling. While the public is perhaps interested in information about GHGs emitted from nearby facilities, or wants to compare GHG data from various facilities in an industry sector, NEDA/CAP submits that especially because GHGs are not regulated under the Clean Air Act, there is an absence of a need for detailed information for purposes of evaluating compliance with standards. Even if GHGs were regulated, IPCC documents demonstrate that individual facility emissions have no direct impact on climate warming that can be measured. In light of these considerations, the 1,500 data points for which sources will be required to submit information under sections 114 and 208 of the Clean Air Act seem unnecessary, and more to the point, an arbitrary and capricious foundation for discarding protections for input data, which has generally been submitted under CBI protections. Therefore, facility specific information like that discussed in the proposed rule, and particularly the data that is input into emission equations, is not necessary to share with the public, and no reasonable basis exists for asserting that CBI protections be waived for information about facility-specific processes and inputs.

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<sup>16</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

<sup>17</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 above for the response to this comment. EPA issued the Mandatory Reporting of Greenhouse Gases Rule (74 FR 5620) in response to the FY2008 Consolidated Appropriations Act (H.R. 2764; Public Law 110–161), which requires reporting of greenhouse gas (GHG) data and other relevant information from large sources and suppliers in the United States. The purpose of the GHG Reporting Rule is to collect accurate and timely GHG data to inform future policy decisions.

The commenter's statement that GHGs are not regulated under the Clean Air Act is incorrect. EPA has issued a number regulatory actions under the Clean Air Act and in some cases other statutory authorities to address issues related to climate change. For example, on May 13, 2010, EPA issued a final rule that establishes thresholds for greenhouse gas (GHG) emissions that define when permits under the New Source Review Prevention of Significant Deterioration (PSD) and title V Operating Permit programs are required for new and existing industrial facilities. This final rule "tailors" the requirements of these CAA permitting programs to limit which facilities will be required to obtain PSD and title V permits. Facilities responsible for nearly 70 percent of the national GHG emissions from stationary sources will be subject to permitting requirements under this rule. This includes the nation's largest GHG emitters (power plants, refineries, and cement production facilities). EPA is also developing greenhouse gas (GHG) standards under the Clean Air Act for fossil fuel fired power plants and petroleum refineries. For additional information regarding current and proposed future regulatory programs for GHGs, see <http://www.epa.gov/climatechange/initiatives/index.html> .

**Commenter Name:** Leslie S. Ritts<sup>18</sup>

**Commenter Affiliation:** The National Environmental Development Association's Clean Air Project

**Document Control Number:** EPA-HQ-OAR-2009-0924-0056.1

**Comment Excerpt Number:** 20

**Comment:** In providing these comments, NEDA's interest is to preserve strong intellectual property protection, including trade secret protection, which fuels innovation and the growth of industry in the United States and is the foundation for competitive advantage. Without these protections, the US cannot hope to reclaim our economic position and manufacturing base. Laws and regulations should promote innovation by rewarding creativity and protecting it – thereby maintaining these valuable assets. The U.S. must continue to respect and reward innovation, not diminish it by asking companies to disclose sensitive information on websites for anyone to access. Whatever the government's desire for transparency, the nation has a keen interest in protecting its and its companies' investments in research and development.

NEDA/CAP is not suggesting that information should be kept from EPA. By protecting certain confidential information, EPA still will have the overall, sector-specific, and facility-specific GHG emissions information necessary to make informed policy decisions. However, there is no

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<sup>18</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).



reason that the public also needs access to information that will only be used by EPA to verify the accuracy of the emission submittals.

EPA recognizes in Section B(3) of its proposal that this information will inform EPA's policy decisions, but fails to articulate any reasons why the underlying data needed to verify emission numbers would be useful or needed by the members of the general public. Curiosity of the general public about this information should not be the basis for disclosure of sensitive information. (Moreover, as we commented on the proposed GHG Mandatory Recordkeeping and Reporting Rule, we do not object to sharing this information with EPA or the States as 'verifiers of GHG reports,' but we do object to sharing this information with 3rd party GHG verifiers/independent consultants.)

**Response:** As we outlined in the preamble to the final Mandatory GHG Reporting Rule (see 74 FR 56287, October 30, 2009), our approach to enforcement of Part 98 will include a combination of rigorous verification checks and site audits, which will be performed by EPA.

Third-party verification is not included in the final Mandatory GHG Reporting Rule. The GHG Reporting Program instead relies on self-certification with EPA verification, which ensures that data reported under this rule are consistent, accurate, and complete through initial review of all reported data (including comparisons with historical data and data reported by similar facilities) and on-site audits some facilities. Please also see the response to comment EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 above for the explanation of why EPA considers public access to Part 98 data important.

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 7**

**Comment:** EPA notes in the Preamble that "Comparisons of facility-specific data will improve our understanding of the factors that influence GHG emission rates and actions facilities could in the future or already take to reduce emissions. By tracking changes in facility-specific data, EPA and other stakeholders will be able to track trends in GHG emissions from industries and facilities over time and assess responses to policies and potential regulations." Air Products continually researches and implements measures to reduce emissions under the auspices of resource conservation, production efficiency, cost reduction and environmental stewardship, and not only as responses to regulatory policies and potential regulations. Air Products respectfully requests EPA provide detailed explanation of the types of comparisons EPA intends to conduct on the GHG MRR reported data and how those comparisons will be directly or indirectly correlated to emission rate factors or facility change initiatives. EPA notes in the Preamble that "Data submitted by suppliers are needed by EPA and other users of the reported data to help develop policies that could affect sources under a variety of CAA provisions." Air Products respectfully requests EPA identify what other users or stakeholders (other than EPA and the respective State environmental agencies) develop policies under the purview of the CAA and how these reported data would be used to develop those policies. EPA then discusses the feasibility and effectiveness of different GHG control strategies as an example for potential data use. "These may include regulatory and non-regulatory strategies and technologies for

preventing or reducing air pollutants, such as energy conservation, end-use efficiency, and fuel- or raw-material switching.” These appear to be EPA-driven initiatives and strategies, which would be nonetheless available for these EPA uses if submitted and controlled as CBI. EPA does recognize the sensitivity of much of the requested reported data. The Preamble states, “Given the importance of this data, we are publishing data elements that are emission data or are determined not be not CBI. EPA intends to publish the data only where they can be aggregated in a manner to protect the confidentiality of these data elements.” But then, EPA goes on to note that, “There are a number of different formats in which both CBI and non-CBI could be published using tables, graphs, charts, and other graphical methods. For example, EPA could publish tables or bar charts showing the emission data for individual facilities to allow comparison of data between facilities within a source category.” This seems to directly contradict EPA’s recognized sensitivity of the reported data.

**Response:** Please see the responses to comment EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 and EPA-HQ-OAR-2009-0924-0020.1, excerpt 6. EPA will not and did not propose to publish or otherwise disclose data that is determined through this rulemaking to be entitled to confidential treatment. In the July 7, 2010 CBI proposal, we discussed ways in which some information could be published in aggregated format, such as national totals. However, we also emphasized that we would only publish aggregated data where confidentiality of the underlying data would not be compromised. Data that has been determined to be CBI in this final rule will not be published or made available to the public through FOIA requests.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 14**

**Comment:** EPA claims that other stakeholders share some sort of enforcement right within the Clean Air Act concerning emissions reporting. In the existing federal system applicable to the chemical industry, no outside stakeholder (excepting EPA and the appropriate permitting authority) can collect enough information to perform the emissions evaluations that EPA seems to believe that non-governmental stakeholders should conduct. EPA has adequate authority in CAA § 114 to collect reporter data, evaluate the accuracy of the reported data, and require necessary corrections. EPA points to no authority where citizens should enforce emissions information that necessarily must come from the reporters. EPA should exclusively rely on this inspection and audit authority to provide Part 98 quality control review.

Fluorochemical manufacturing facilities are very complex. The chemistry required to make a fluorinated GHG product involves several manufacturing steps, the generation and management of a number of in-process streams, a variety of emission control strategies, and a substantial amount of process monitoring. The presence of the § 98.124 scoping test attests to the level of complexity inherent in Subpart L. EPA may be the only entity with the requisite expertise to evaluate reporter accuracy with such a complex system. Typical environmental citizens enforcement provisions include an EPA notice provision, where the citizen petitions EPA to conduct an enforcement action at a specific location for specific reasons. For example, in the 40 CFR 68 Risk Management Plan program, citizens have very limited rights to evaluate plan

participant data. Were a citizen to wish an inspection of the facility, that person would petition the appropriate EPA office, requesting that EPA conduct an inspection. EPA has not published any indications that the RMP system does not provide adequate CAA enforcement authority. If a citizen is concerned about the reporting at a single facility, that person should be afforded the chance to petition EPA for a review of that facility's Part 98 reporting system. EPA, as the expert agency, should then make the reasoned judgment if it wishes to conduct an inspection of that facility's reporting system within existing authority. Such a system, already authorized by Congress and available in existing EPA regulations and policy, would balance citizen perceived need for inspection activities and public transparency expectations. This balance seems to work in the RMP system, fits within the Clean Air Act, and maintains EPA primacy over the Part 98 program.

**Response:** EPA takes its enforcement responsibilities for all regulations very seriously. We do not believe and have never proposed that compliance with Part 98 should be determined by the public. As we outlined in the preamble to the final Mandatory GHG Reporting Rule (see 74 FR 56287, October 30, 2009), our approach to enforcement of Part 98 will include a combination of rigorous verification checks and site audits, which will be performed by EPA. Please also see the response to comment EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 above for the explanation of why EPA considers public access to Part 98 data (except for data determined to be confidential) important.

**Commenter Name: Juanita M. Bursley**

**Commenter Affiliation: Graf Tech International Holdings, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0052.1**

**Comment Excerpt Number: 1**

**Comment:** EPA states in the preamble to the subject proposed rule that public release of the information collected under Part 98 that are emission data or non-Confidential Business Information (CBI) is important because it ensures transparency and promotes public confidence in the data. Furthermore, for the stated purpose of "promoting transparency", EPA intends to publish on its Web site much of the Part 98 data that it determines to be emission data or not otherwise entitled to confidential treatment pursuant to CAA section 114(c). From this statement, GrafTech understands that EPA will not publish on its website or made available to the public through Freedom of Information Act (FOIA) requests only those data elements that it determines to be legally entitled to confidential treatment. As a general comment, GrafTech believes that EPA should reconsider its priorities concerning its plans to publish or provide as much information from the GHG reports as it determines it can legally do as being in the best interest of the public. While some transparency to the GHG emissions data to the public is certainly justified, GrafTech strongly suggests that several other issues are much more critical to the public than GHG-related information, such national security for the U.S. and competitive advantage for the affected manufacturing sectors, which could be compromised by the indiscriminate sharing of all collected data that will be submitted to EPA by direct emitters and suppliers covered under the Mandatory Greenhouse Gas Reporting Rule (GHGMRR). Furthermore, EPA should reconsider its previous stated priority when it promulgated the GHGMRR, which was to quickly provide Congress with the information it needs to develop appropriate national Climate Change and energy legislation. Disclosure of as much of the

collected information to the public as it can under the law is certainly not necessary to meet this original objective. Secondly, EPA has now passed a Final GHG Tailoring Rule to bring GHG emissions under the New Source Review and Title V Permitting Programs, which will establish future Best Available Control Technology provisions and operating permit conditions that will have the desired affect of reducing future GHG emissions from the largest sources. EPA states that facility identification data (e.g., name and physical address of a direct emitter) allows the public to identify which facilities are emitting GHGs and how much they are emitting. EPA believes comparisons of facility-specific data will improve its understanding of the factors that influence GHG emission rates and actions facilities could in the future or already take to reduce emissions. By tracking changes in facility-specific data, EPA believes that it and other stakeholders will be able to track trends in GHG emissions from industries and facilities over time and assess responses to policies and potential regulations. However, GrafTech presumes that EPA has another purpose for disclosing the maximum information to the public, similar to its reasoning for publicizing chemical substance release data under the EPCRA Section 313 Toxic Inventory Reporting program, which is to entice the public to put pressure on reporting entities to reduce their GHG emissions. That approach will be much less effective than the controls that EPA, and the state air programs, will be placing on the regulated community. Carbon dioxide and other greenhouse gases are often emitted as unavoidable by-products of manufacturing processes. Further GHG emissions reductions cannot be simply accomplished by changing raw material suppliers or implementing new, low cost management systems. Any significant reduction in direct GHG emissions will therefore require a major technology breakthrough. It will, therefore, be unreasonable and excessively burdensome to the reporting entities that will likely be subject to such public pressure as a result of its access to the majority of the submitted GHG data, when there may be no technologically and financially feasible means to make any significant reductions to their GHG emissions.

Furthermore, due to the highly technical nature of much of the submitted data, emission calculation formulas, etc., much of the public will likely not fully understand this data, only setting the stage for the public to misuse such information. Furthermore, EPA states in the preamble that information on unit characteristics and operations will be valuable to policy makers, the public, and industry because they improve the understanding of the sources of GHG emissions and the relationship between process operating characteristics and emissions. GrafTech believes this information could be just as useful if aggregated or averaged across broad industry sectors and that it is unnecessary and possibly damaging to reporting entities make individual source data available to the public. GrafTech also believes that most technologies to improve process efficiencies thereby potentially reducing GHG emissions will not come from reviewing such data, but will more likely come from research and development into technologies for preventing or reducing air pollutants, such as energy conservation, end-use efficiency, and fuel- or raw-material switching. To further illustrate this point, the European Union (EU) has had an Emissions Trading Scheme (ETS) under the Kyoto Protocol, which has been in place for several years as a mechanism to promote the decrease of GHG emissions from affected carbon-intensive industry sectors. Despite these economic incentives, there have been no significant technological breakthroughs in carbon dioxide or any other GHG emission control methodologies. This is with the one possible exception of the worldwide steel industry's advancements in a "low carbon emission" technology, for which the research and development

funding would arguably have been financed on the related cost advantages alone, even without the ETS in the EU.

Another important point GrafTech believes that EPA should consider in its final rulemaking on the matter of CBI is its stated reasoning for requiring the majority of information to be reported by the covered direct emitters and suppliers under the final GHGMRR. That purpose was for EPA to conduct its own GHG verification checks of the reported GHG emissions data, rather than require the reporting entities to receive independent third party verification of their data. The formulas and calculations are quite complex and in some cases may require the use of models. The public will, for the most part, not be able to complete these complex calculations themselves and it is more reasonable for them to rely on the quality assurance checks that will be provided as a public service by the EPA. So, if the general public cannot fully understand all of this supporting information, and cannot effectively use it for quality checks, then there is no significant value in disclosing such information to the public, particularly when the data could be used to provide a competitive disadvantage to competing entities, or by domestic or foreign entities wishing to do harm to the U.S., or to subject reporting entities to unreasonable pressure to reduce their GHG emissions.

**Response:** In this action, EPA is making final CBI determinations for Part 98 data. EPA is not making decisions regarding the format for publishing Part 98 data. While we solicited ideas for data publication and aggregation in the July 7, 2010 CBI proposal, we do not need to establish the format for publishing Part 98 data in this rule. We are interested in providing the public access to emission and non-CBI data through a user-friendly, online interface. We will take into consideration the comments and recommendations submitted by stakeholders when deciding on the appropriate format for publishing GHGRP data and will ensure that data that has been determined to be CBI is not disclosed to the public. Please also see the response to comments EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 for the explanation of why EPA considers public access to Part 98 data (except for data determined to be confidential) important.

Please also see the responses to comments EPA-HQ-OAR-2009-0924-0019.1, excerpt 2 and EPA-HQ-OAR-2009-0924-0052.1, excerpt 4 for the responses to these comments.

## 9. Cost of the Proposed Rule

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**Commenter Name: Paul Noe**

**Commenter Affiliation: American Forest & Paper Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0034.1**

**Comment Excerpt Number: 6**

**Comment:** Executive Order 12866 requires all agencies to issue “only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need.” When regulations are issued, they must rest on a careful cost-benefit analysis, must be drafted to maximize net social benefits, and must be crafted to impose the least burden on society. EPA’s proposal violates all these principles. It simply ignores the need to balance costs against benefits as detailed above. In addition, the Agency has also ignored the old rule that massive changes should be avoided when there is no proven need for them.

**Response:** EPA disagrees with the commenter that this rulemaking is inconsistent with the provisions of Executive Order 12866 (58 FR 51735, October, 1993). We also disagree with the commenter's assertion that this rulemaking represents "massive changes" for which "there is not proven need." As required by Executive Order 12866, this action was submitted to the Office of Management and Budget (OMB) review. Changes made in response to OMB recommendations are documented in the docket for this rulemaking (see Docket EPA-HQ-OAR-2009-0924).

EPA made its final CBI determinations using the definition of emission data at 40 CFR 2.301. For data that do not meet the definition of emission data, EPA used the confidentiality determination criteria at 40 CFR 2.208. Both the emission data definition at 40 CFR 2.301 and the confidentiality determination criteria at 40 CFR 2.208 have been part of EPA's CBI regulations since the regulations were first promulgated in 1976. Since this action used the same criteria for determining CBI status as used by EPA when evaluating individual case-by-case CBI claims, no additional financial impacts are incurred beyond those already calculated and document in Section VII of the preamble to the final Mandatory GHG Reporting Rule (see 74 FR 56361, October 30, 2009 and the *Regulatory Impact Analysis* (EPA-HQ-OAR-2008-0508) for more information on the costs and economic impacts of the Mandatory GHG Reporting Rule). This rulemaking will benefit the public and reporters by: (1) avoiding unnecessary delays in publishing data that is emission data or otherwise not eligible for CBI; and (2) reducing the burden on industry by eliminating the need to prepare and submit individual CBI claims with each annual report.

**Commenter Name: William C. Herz**

**Commenter Affiliation: The Fertilizer Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 9**

**Comment:** EPA must include in its regulatory flexibility analysis the costs to industry resulting from EPA's overly broad conclusion that all greenhouse gas reporting rule emissions are "emission data" and allow for meaningful comment. In the Greenhouse Gas Reporting Rule CBI proposal, EPA concludes that the proposal, if adopted, will not impose a significant economic impact on a substantial number of small entities. Further, EPA relies on its earlier Regulatory Flexibility Act analysis prepared for the Greenhouse Gas Reporting Rule to support its conclusion. What EPA fails to recognize, however, is that by disclosing "emissions" that are not releases to ambient air, and by disclosing unit-specific direct emissions, significant economic harm will occur to domestic producers of ammonia and nitric acid. EPA previously recognized the associated limitations with the Rule in the context of ammonia and nitric acid manufacturing: "Domestic producers of synthetic nitrogen-based fertilizer make up less than one-half of the total amount of synthetic nitrogen-based fertilizer used in the United States. The remaining share is made up by synthetic nitrogen-based fertilizer imports, as well as fertilizer produced domestically outside of the Nitric Acid and Ammonia production industries using imported ammonia and nitric acid." 75 Fed. Reg. 48,744, 48,767 (August 11, 2010). As EPA is aware, importers of synthetic nitrogen-based fertilizers and domestic fertilizers produced outside of the nitric acid and ammonia industries using imported ammonia and nitric acid are not required to report greenhouse gas emissions. By denying domestic manufacturers of synthetic nitrogen-

based fertilizers at ammonia or nitric acid facilities the opportunity to claim as confidential these data elements, sensitive process-related information will fall into the hands of competitors. This harm, which is not accounted for in any EPA analysis of the Rule, is demonstrated in the ammonia manufacturing sector.

Further evidence of this harm is found where an ammonia plant must report the amount of “CO<sub>2</sub> from the steam reforming of a hydrocarbon or the gasification of solid and liquid raw material at the ammonia manufacturing process unit used to produce urea . . . .” 75 Fed. Reg. at 48,801 (proposed 40 § 98.76(b)(13)). In turn, sources generating carbon dioxide and shipping the carbon dioxide off-site for subsequent use must report this quantity of carbon dioxide. See, e.g., 40 §§ 98.426(a)(1), (b)(1), (c), (d). These reported values could be used to estimate ammonia production rates which, when combined with natural gas usage data [Footnote: See, e.g., 40 C.F.R. §§ 98.33(a)(1) (“Fuel” term), (a)(2)(i) (“Fuel” term), (a)(2)(ii) (“Fueli” term).], could be used to identify source-specific efficiencies and sensitivities to fluctuations in natural gas price. Clearly, disclosure of these data elements could cause substantial harm to the competitive positions of the sources required to report this information to EPA if it is deemed not protected from disclosure. This harm to domestic manufacturers is not discussed in either the Greenhouse Gas Reporting Rule or the Greenhouse Gas Reporting Rule CBI proposal. Before allowing such a harm to fall upon domestic manufacturers, EPA needs to reevaluate its conclusion that all “emissions” reported under the Rule, whether non-direct emissions or individual unit direct emissions, are “emission data” and subject to disclosure.

**Response:** For the response to the comment regarding cost, please see the response to the comment EPA-HQ-OAR-2009-0924-0034.1, excerpt 6 above. For the response to the comment regarding CO<sub>2</sub> collected for either use onsite or transfer off-site, please see the discussion of data elements 40 CFR 98.3(c)(4), 40 CFR 98.76(a), 40 CFR 98.196(a)(1), and 40 CFR 98.246(a)(2) in Section II.B.3 of the preamble to the final rule.

EPA agrees that the amount of CO<sub>2</sub> used to manufacture urea (reported under 40 CFR 98.76(b)(13)) provides sensitive production information about a production facility. As proposed in the July 27, 2010 supplemental CBI proposal, EPA has made a final determination that this data element is CBI.

Although we had proposed that the total CO<sub>2</sub> supplied as reported under subpart PP (40 CFR 98.426(a)(1), (b)(1), (c), (d)) would be non-CBI, we have determined in this final action that this information is CBI for industrial CO<sub>2</sub> production facilities (e.g., ammonia production facilities that collect CO<sub>2</sub> for transfer off site), is non-CBI for CO<sub>2</sub> production wells, and is CBI for importers and exporters. We previously proposed that 40 CFR 98.426(a)(1), (b)(1), (c), and (d) would be non-CBI for all CO<sub>2</sub> suppliers because we had identified sources of CO<sub>2</sub> supply data. However, we have since determined that although facility-level CO<sub>2</sub> supply data is generally available for CO<sub>2</sub> production wells, such data for industrial CO<sub>2</sub> production facilities and importers/exporters is not publicly available. We also agree that for industrial sources and for importers/exporters the information would be likely to cause competitive harm because it provides competitors with sensitive information that may be used to determine a reporter’s market share, gain insight into a reporter’s ability to meet increases in market demand, and to develop marketing strategies that undermine or weaken a competitor’s position. We also note

that the amount of CO<sub>2</sub> collected by production facilities and transferred off site and the amount of CO<sub>2</sub> imported or exported does not meet the definition of emission data in 40 CFR 2.301(a)(2)(i), because the CO<sub>2</sub> is not emitted at the reporter's facility. EPA has therefore determined that the total CO<sub>2</sub> supplied as reported under subpart PP is CBI when reported by industrial CO<sub>2</sub> production facilities (e.g., ammonia production facilities that collect CO<sub>2</sub> for transfer off site) and importers/exporters, and non-CBI when reported by CO<sub>2</sub> production wells.

Fuel consumption data is used as an input to emission equations. As discussed in Section II.A.4 of the preamble to the final rule, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category.

**Commenter Name:** Arline M. Seeger<sup>19</sup>  
**Commenter Affiliation:** National Lime Association  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0023.1  
**Comment Excerpt Number:** 6

**Comment:** In light of the potential economic impacts discussed in these comments, EPA should have conducted a Small Business Advocacy Review Panel under the Regulatory Flexibility Act, 5 U.S.C. § 601, et. seq. At a minimum, a Panel would have afforded EPA the opportunity to learn firsthand from Small Entity Representatives (SERs) what the impacts of this rule will be on small businesses.

**Response:** For the response to the comment regarding the impact of this rulemaking on small business, please see the response to the comment EPA-HQ-OAR-2009-0924-0034.1, excerpt 6 above.

10. Delaying Publication of Emission Data and Non-CBI Data that are Considered Sensitive By Reporters.

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**Commenter Name:** Bryan Brendle  
**Commenter Affiliation:** Portland Cement Association  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0045.1  
**Comment Excerpt Number:** 4

**Comment:** In the event there is stakeholder/agency disagreement over what may or may not constitute CBI, Portland Cement Association (PCA) supports EPA's proposal to delay of publication of data elements while such issues are being decided. Administrative delays of public disclosure will allow stakeholders to educate regulators on which disclosures are necessary to accurately calculate GHG emissions. Because cement manufacturers have complied with various GHG registries and disclosure programs for several years, PCA believes that its members will prove to be a valuable resource for regulators confronting this issue for the first time at the federal level.

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<sup>19</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).



**Response:** In the July 7, 2010 CBI proposal, EPA sought comment on whether the delay the release of emission data and data not entitled to confidential treatment would ease business concerns regarding the release of this data. However, under the Freedom of Information Act (FOIA), EPA must make emission data and data determined to be not CBI available to the public upon receipt of a FOIA request. Therefore, EPA therefore concludes that delaying publication is not viable option. For a response to the comment regarding disagreement with EPA's final confidentiality determinations, see Section II.A.2 of the preamble to the final rule.

**Commenter Name:** Leslie S. Ritts<sup>20</sup>

**Commenter Affiliation:** The National Environmental Development Association's Clean Air Project

**Document Control Number:** EPA-HQ-OAR-2009-0924-0056.1

**Comment Excerpt Number:** 18

**Comment:** EPA also asks for public comment regarding whether delaying the publication of facility specific information may allay concerns over the release of CBI information. We believe that EPA should not further consider delay in publication as a means of diffusing manufacturers' concern over the release of CBI information. While there may be certain industry sectors for which such delay could be helpful. However, for the subparts and industry sectors represented by NEDA's membership, many of our manufacturing technologies have a lifespan of 20 to 40 years, or more. Thus, delaying the release of CBI by five years would not be considered protective of the confidential business information.

**Response:** For the response to this comment, see the response to comment EPA-HQ-OAR-2009-0924-0045.1, excerpt 4 above.

**Commenter Name:** None

**Commenter Affiliation:** The Federal Trade Commission

**Document Control Number:** EPA-HQ-OAR-2009-0924-0065.1

**Comment Excerpt Number:** 6

**Comment:** Improved information can lead to better coordination even when there is a gap in time between the reported conditions and the availability of the information. Competitors having capacity information that is one or two years old may be able to discern that capacity has not changed significantly in that time. As a result, publishing capacity data that is several years old could improve competitors' estimates of current capacity.

**Response:** For the response to this comment, see the response to comment EPA-HQ-OAR-2009-0924-0045.1, excerpt 4 above.

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<sup>20</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

## 11. Comments on Potential Anti-Trust Concerns

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**Commenter Name:** Glen E. Davis  
**Commenter Affiliation:** Mississippi Lime  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0049.2  
**Comment Excerpt Number:** 9

**Comment:** Notably, it would be illegal per se under the antitrust laws for lime producers to share this type of data and adjust their pricing or output. 15 U.S.C. §1. Mississippi Lime Company (MLCO) maintains an effective antitrust compliance program which, in part, is designed to prevent release of competitively sensitive information. Public release of the extensive data envisioned by the CBI Proposal would undermine these efforts. Further, while MLCO would not participate in any effort to restrain trade, release of the data heightens the risk in a concentrated market that others might engage in collusion. Absent the USEPA compelled release of this information, such an effort would be much more difficult to arrange and police. Accordingly, MLCO believes firmly that there are strong reasons to avoid release of CBI related to antitrust compliance and the risk of anticompetitive effects.

**Response:** CAA section 114(c), which requires that EPA make information publicly available except for CBI, precludes emission data from being protected as CBI. In other words, “emission data” must be made publicly available even if they are CBI. In this rulemaking, EPA determined which part 98 data elements are “emission data” based on the long standing definition of the term at 40 CFR 2.301(a)(2)(i). EPA carefully construed the regulatory definition to include only those data elements necessary to determine the emission information specified in 2.301(a)(2)(i)(A) or to distinguish one source from another source as required in 2.301(a)(2)(i)(C).

For data elements that are not considered emission data, EPA evaluated their confidentiality status using the criteria from the existing CBI regulations at 40 CFR 2.208. The criteria do not require that the Agency assess potential violations or enforcement under the antitrust law, nor does the Agency have the requisite expertise to do so. However, based on 2.208(e)(1), EPA proposed to determine as CBI those data elements (that are not emission data) the disclosure of which would likely cause substantial competitive harm to the reporting facility. We solicited comment on our proposal and made final determinations based on an evaluation of comments we received (see Sections B and C of this document and Sections II.B and II.C of the preamble to the final rule for responses to comments on individual data categories). EPA uses these same criteria to evaluate all CBI claims submitted to the Agency. EPA therefore has no reason to believe that the CBI determinations made in this final action would present greater anti-competitive risk than other determinations made by the Agency.

Many commenters expressed concern that data elements in the Inputs to Emission Equations are competitively sensitive and some suggested that public availability of data elements in this category raised antitrust concerns. As discussed in Section A.3 of this document, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category to allow additional time to evaluate these concerns and to determine whether additional methods that would require reporting of less sensitive data elements would be appropriate. We also

published the “Call for Information: Information on Inputs to Emission Equations under the Mandatory Reporting of Greenhouse Gases Rule,” which solicits additional information to help with our deliberations (see 75 FR 81366, December 27, 2010). For additional information on the regarding our proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Gregory M. Scott**

**Commenter Affiliation: National Petrochemical & Refiners Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0036.1**

**Comment Excerpt Number: 1**

**Comment:** As an initial matter, our view is that the mere act of reporting data to EPA would not constitute a violation of the antitrust laws and raises no practical antitrust risk for the participants. It is well-established in antitrust case law that merely participating in an information reporting program, to the government or otherwise, is not in and of itself a violation of the antitrust laws. *Fischer v. City of Berkeley*, 475 U.S. 260, 267 (1986) (where the Court held that providing data pursuant to a government mandate did not constitute an unlawful agreement within the relevant industry, because the program was a legal requirement “unilaterally imposed by government”). In addition, the act of reporting data to the EPA may be covered by express or implied immunities under the antitrust laws. See *Areeda & Hovenkamp*, *ANTITRUST LAW* (3rd ed. 2006) at 243. However, the reporting and/or public release of competitively sensitive information by and among competitors usually raises a red flag under the antitrust laws, as it is often taken as a possible indicator of a prohibited agreement, when such is found to exist. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978). In *Gypsum*, the members of a trade association were accused of engaging in a conspiracy to fix the price of gypsum board by, among other things, exchanging information regarding current and future published or market rates. The Supreme Court reached a similar determination in *United States v. Container Corp.*, 393 U.S. 333, 337-38 (1969). In *Container Corp.*, several large sellers of corrugated shipping containers were alleged to have engaged in a pattern of price checking – exchanging information regarding “the most recent price charged or quoted”. *Id.* at 335. The Court concluded that the competitors’ exchange of price information, involving a highly concentrated industry and a fungible product with inelastic demand, “had an anticompetitive effect in the industry, chilling the vigor of price competition.” *Id.* at 337. Despite no explicit agreement to adhere to a price schedule, the Court found the defendants guilty of conspiring in violation of Section 1. *Id.* at 335. Those two rulings from the Supreme Court (*Gypsum* and *Container Corp.*) provide the foundation for a well-established line of antitrust cases that places great scrutiny on the reporting and exchange among industry participants of competitively sensitive information. While not prohibited outright, participants in data reporting programs can face a heightened level of practical antitrust risk, both from government investigation and prosecution, as well as from private antitrust lawsuits. All information publishing and exchange programs are examined according to a set of factors including: the stated purpose and rationale, the potential benefits to the functioning of the marketplace, the current level of market transparency and the impact of the proposed program, the homogeneity of the products at issue, the degree of concentration of the industry, the impediment to entry of new competitors, and any protective mechanisms that will be used to ameliorate antitrust risk in the data gathering and publication process. The proposed rulemaking creates an increased “downstream” exposure under the antitrust laws for reporting

companies – the antitrust risk is created by the re-publication of certain of the data that is competitively sensitive without employing traditional protective mechanisms. As discussed above, the antitrust laws prohibit coordinated action by competitors that harm consumer welfare. In many instances, one of the key factors to alleging and ultimately proving a claim of coordinated action among competitors is the degree of transparency among competitors in a concentrated market. Plaintiffs in an antitrust litigation must attempt to show that alleged conspirators could: (i) coordinate information sufficiently amongst each other to conduct a conspiracy on price/output, (ii) detect deviations and cheating by participants in the conspiracy, and (iii) punish such deviations. Typically their antitrust claims cannot survive a motion to dismiss, much less prevail in a final adjudication, if they do not have a reasonable argument for these allegations.

A high degree of information transparency on price, production, or other key competitive indicators can thus be a necessary predicate for an industry-wide antitrust conspiracy claim. Any requirement that mandates new levels of transparency for competitively sensitive information in a concentrated market can substantially increase the risk that the competing companies will be accused of engaging in unlawful coordination on key aspects of competition, including price, costs and output – and harm those companies’ ability to request early dismissal of any such claims that are brought against them. There is thus increased exposure to antitrust lawsuits, and increased practical risk in defending such lawsuits due to a reduced ability to seek early dismissal.

Increased Exchange of Competitively Sensitive Information May be Used as a “Plus Factor” in Antitrust Prosecutions against the Refining Industry.

Allegations of concerted activity by competitors are frequently based on a pattern of uniform business conduct among competing industry participants, often referred to as “conscious parallelism.” Under this theory of antitrust violation, plaintiffs seek to prove that industry participants tacitly agreed to restrain trade, but with no evidence of direct agreement or communication with each other. Instead, the charge is proved through the parallel conduct of industry participants. However, parallel conduct is often legal and not related to any implied conspiracy; this type of activity is often observed in concentrated industries, as firms set their prices at a similar, profit-maximizing level based on their shared economic interests. For that reason, conscious parallelism, in itself, does not establish a contract, combination, or conspiracy in violation of Section 1. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2nd Cir. 1987) (“even if defendants knew of each other’s actions, parallel conduct alone does not prove conspiracy.”). Because mere parallel conduct is not sufficient for a violation of the antitrust laws, courts have stated that companies can be liable for parallel behavior only when other facts or circumstances – referred to as “plus factors” – are present that support an inference of concerted action. *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2nd Cir. 2001) (“even in the absence of direct ‘smoking gun’ evidence, a horizontal price-fixing agreement may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors such as defendant’s use of facilitating practices”).

Courts have stated that exchanging competitive information can constitute a plus factor for assessing parallel behavior under the antitrust laws. *Exxon Corp.*, 275 F.3d at 198 (“Information

exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement”). As noted above, successful collusion requires that the parties reach terms of coordination; and monitor, detect and punish any deviation from those terms; increased transparency may facilitate collusion. See *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 368 (3rd Cir. 2004). In *Flat Glass*, plaintiffs presented evidence that defendant glass manufacturers possessed each other’s pricing documents, exchanged price increase announcements, and held meetings between their senior executives regarding pricing issues. *Id.* The court concluded that while there was no evidence of an explicit agreement, those information exchanges and resulting price transparency constituted a plus factor, and that it could reasonably be inferred that defendants were sharing information in furtherance of a conspiracy to fix prices. *Id.* at 369.

In the current situation, the data reporting required by the EPA proposed rulemaking may in the future be viewed as a plus factor in industry-wide lawsuits against the refining industry. Though this should not be the case and is not an intended result of the authorizing statute, NPRA requests that EPA consider the refining and petrochemical industry’s legitimate concerns about this unnecessary risk.

#### There are Recent Empirical Examples of Antitrust Case Filings That Involved Data Reporting as an Alleged Plus Factor

The petroleum industry as well as other industries has been the subject of prior accusations of conspiracy in restraint of trade, and the degree of data reporting and industry transparency has featured prominently in those cases. For example, in *Petroleum Prods. Antitrust Litig.*, plaintiffs alleged that defendants conspired to set wholesale and retail gasoline prices. *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445 (9th Cir. 1990). The evidence showed that defendants’ prices typically moved in parallel, and company employees testified that they announced and posted their prices “for the purpose of quickly informing competitors of the price change, in the express hope that these competitors would follow the move and restore their prices.” *Id.* at 446. When considered along with a pattern of parallel pricing, the court concluded that the price announcements were sufficient to support a reasonable inference of an agreement to raise or stabilize prices. *Id.* at 446-47. See also, *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2nd Cir. 2001) (where plaintiffs brought an antitrust conspiracy claim against 14 major petrochemical companies relying on alleging that “defendants violated § 1 of the Sherman Act by regularly sharing detailed information regarding compensation”, court reversed district court ruling in favor of defendants after analysis of concentration of industry, susceptibility of the market to collusion, and the nature of the information exchanged). See also, *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 2001); *In re Late Fee and Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 963-64 (N.D. Cal. 2007).

#### The Department of Justice has Questioned Prior Regulatory Mandates for Increased Reporting in the Energy Industry Based on Similar Concerns

The Antitrust Division of the U.S. Department of Justice (“DOJ”) has previously expressed concern that agency reporting mandates could increase transparency, foster greater coordination, and ultimately harm U.S. consumers. In fact, the DOJ previously filed public comments in an analogous context related to FERC’s proposed rulemaking in connection with the Energy Policy

Act of 2005. Pursuant to that statute, FERC intended to collect and publicly disseminate certain information regarding the natural gas and electricity markets that was competitively sensitive, and to make such information public. The DOJ filed written comments into the FERC docket noting the increased antitrust risk such reporting would entail. See Comments of the U.S. Department of Justice, FERC Docket No. AD06-11-111 (January 25, 2007). While recognizing the pro-competitive benefits that can result from transparency, DOJ cautioned FERC that mandating the disclosure of detailed firm- and transaction-specific information may increase the risk of coordination. In particular, DOJ cautioned FERC to be wary of increasing transparency in industries that are already susceptible to coordination due to high levels of concentration, homogeneous product offerings, high barriers to entry, low elasticity of demand, or other factors. In those instances, DOJ urged FERC to reduce the potential anticompetitive impact by adopting safeguards, including aggregating and masking the information reported, as well as delaying its release.

The proposed rulemaking does not provide confidential treatment to all of the categories of data that need such treatment. It is the public release of these categories that create the antitrust problems at issue. If EPA amends the rulemaking to treat these categories as CBI, this will ameliorate the antitrust risks. For example, refiners do competitive analyses of their competitors. This involves many estimates. If EPA publicly releases all of the data that it proposes are not CBI, then some estimates can be replaced with accurate data with competitive harm.

**Response:** For the response to this comment regarding the potential violation of anti-trust laws, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 9 above.

**Commenter Name: Gregory M. Scott**

**Commenter Affiliation: National Petrochemical & Refiners Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0036.1**

**Comment Excerpt Number: 6**

**Comment:** NPRA believes that EPA should provide CBI status to all of the data categories that involve competitively sensitive information as this would significantly ameliorate or even eliminate the antitrust risks created by the NPRA. Our understanding is that the EPA has not conducted a full confidential sensitivity review of some or all of the proposed non-emissions categories of information. One possible approach is for EPA to conduct such a review, for the categories denominated above, and provide CBI treatment based on the outcome of that review. As discussed above, the greatest risk is raised by any information that involves pricing, costs, margins, key operational information (plant capacity, operating philosophies, downtime and scheduling) throughput, output, and production volumes.

**Response:** For the response to the comment regarding antitrust risks and the recommendation that certain part 98 data be considered confidential, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 9 above.

**Commenter Name: Keith McCoy**

**Commenter Affiliation: National Association of Manufacturers**

**Document Control Number: EPA-HQ-OAR-2009-0924-0044.1**

**Comment Excerpt Number: 7**

**Comment:** EPA’s proposed rule implicates antitrust concerns. The information that EPA proposes to categorize as “not CBI” includes information that competitors may be prohibited from sharing with each other under antitrust laws and corresponding agency guidance. Manufacturers urge EPA to consider the potential anticompetitive effects that could result from the public disclosure of such information, and to consult with the Department of Justice (DOJ) and Federal Trade Commission (FTC) regarding the antitrust implications of the proposed MRR. Although the MRR does not directly require disclosure of price data, it requires collection of cost- and output-related data that are significant determinants of prices. EPA is proposing to treat various information relating to fuel production and distribution as not CBI, even though such information includes specific details about inputs, the nature and location of sources, and plant operations. Antitrust enforcers would likely view the exchange of such competitively-sensitive information among competitors as problematic, since such exchanges might create opportunities for the kind of harmful coordination that the antitrust laws are designed to prevent. For these reasons, EPA should consult with the DOJ and FTC regarding the possible anticompetitive implications of data collected under the MRR, and should consider modifying the MRR (and EPA’s CBI proposal) to mitigate possible harms to competition.

**Response:** For the response to the comment regarding the potential for violation of antitrust laws, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 9 above.

**Commenter Name: Karin Ritter**<sup>21</sup>

**Commenter Affiliation: American Petroleum Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**

**Comment Excerpt Number: 19**

**Comment:** The information that EPA proposes to categorize as "not CBI" includes information that competitors may be prohibited from sharing with each other under antitrust laws and corresponding agency guidance. API urges EPA to consider the potential anticompetitive effects that could result from the public disclosure of such information, and to consult with the Department of Justice (DOJ) and Federal Trade Commission (FTC) regarding the antitrust implications of the proposed MRR.

Antitrust Law Limits The Business Information That Can Be Shared Among Competitors.

The antitrust laws generally prohibit competitors from sharing price, output, and other information that may facilitate anticompetitive coordination in prices or production and thereby harm consumers. The exchange of price information is of particular concern under the antitrust laws. *See United States v. Container Corp. of America*, 393 U.S. 333 (1969). However, because the antitrust laws prohibit agreements to restrict output as well as agreements to fix prices, *see United States v. Andreas*, 216 F.3d 645,666-69 (7th Cir. 2000), a similar set of antitrust concerns applies to information-sharing that may facilitate coordinated output decisions.

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<sup>21</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

As the FTC has explained in its *Guide to the Antitrust Laws*, "One area for concern is exchanging price or other sensitive business data among competitors .... Any data exchange or statistical reporting that includes current prices, or information that identifies data from individual competitors, can raise antitrust concerns if it encourages more uniform prices than otherwise would exist." [FOOTNOTE: Fed. Trade Comm'n, FTC Guide to the Antitrust Laws, Dealings with Competitors: Spotlight on Trade Associations, [http://www.ftc.gov/bc/antitrust/trade\\_associations.shtm](http://www.ftc.gov/bc/antitrust/trade_associations.shtm).]

The *Guide* further provides, "Information about future plans should be closely guarded; disclosing future plans outside the company could alter competitors' decisions and raise antitrust concerns," and emphasizes that "employees should be careful when sharing information they could not otherwise share with competitors through intermediaries" since "indirect communications could be seen as facilitating an agreement if other evidence points to a coordinated strategy." [FOOTNOTE: Fed. Trade Comm'n, FTC Guide to the Antitrust Laws, Dealings with Competitors: Spotlight on Trade Associations, [http://www.ftc.gov/bc/antitrust/trade\\_associations.shtm](http://www.ftc.gov/bc/antitrust/trade_associations.shtm).]

Thus, the sharing of "sensitive business data" raises antitrust concerns that EPA should consider carefully before finalizing how it will handle data provided to it under the MRR. The DOJ and FTC have provided additional guidance on information-sharing in their *Statements of Health Care Antitrust Enforcement Policy*. Statement 6 of those guidelines emphasizes that in order for price or cost data to be safely shared among competitors, it must be managed by a third party, must be more than three months old, and it must be "sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation [costs] paid by any particular provider." [FOOTNOTE: Dep't of Justice & Fed. Trade Comm'n, Statements of Health Care Antitrust Enforcement Policy, Statement 6: Statement of Department of Justice and Federal Trade Commission Enforcement Policy on Provider Participation in Exchanges of Price and Cost Information, <http://www.ftc.gov/bc/healthcare/industryguide/policy/statement6.htm>.] Price and cost information exchanges that fall outside of this "safety zone" are evaluated under a "rule of reason" that balances anti competitive and procompetitive effects. The DOJ and FTC apply the framework set out in the health care statement to information-sharing activities in other industries.

Data to be Provided to EPA under the MRR Raises Antitrust Concerns Under DOJ And FTC Standards.

Although the MRR does not directly require disclosure of price data, it requires collection of cost- and output-related data that are significant determinants of prices. As discussed above, EPA has determined that various information relating to fuel production and distribution is not CBI, even though such information includes specific details about inputs, the nature and location of sources, and plant operations. Antitrust enforcers would likely view the exchange of such competitively-sensitive information among competitors as problematic, since such exchanges might create opportunities for the kind of harmful coordination that the antitrust laws are designed to prevent.



EPA's proposed disclosure of certain data provided to it under the MRR violates the principle that shared data should be "sufficiently aggregated" and should "not allow recipients to identify" the competitive information of "any particular provider." In the absence of this safeguard, producers are more likely to learn the specifics of individual competitors' ongoing operations, and such knowledge could have an impact on prices or output. The risk of causing anti competitive harm is increased because some competitively sensitive aspects of fuel production (e.g, the nature and location of sources) may persist over time.

For these reasons, EPA should consult with the DOJ and FTC regarding the possible anti competitive implications of data collected under the MRR, and should consider modifying the MRR (and EPA's CBI proposal) to mitigate possible harms to competition.

**Response:** For the response to the comment regarding antitrust concerns and potential for violation of antitrust laws, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 9 above. EPA notes that FTC submitted comments on the proposed determinations and that EPA met with FTC to discuss these comments. Responses to FTC's comments are included in this response to comment document.

**Commenter Name: None**

**Commenter Affiliation: The Federal Trade Commission**

**Document Control Number: EPA-HQ-OAR-2009-0924-0065.1**

**Comment Excerpt Number: 5**

**Comment:** In some cases, sharing information among competitors may increase the likelihood of collusion or coordination on matters such as price or output. [Footnote: FTC/DOJ Guidelines for Collaborations Among Competitors §3.31(b)]. Coordinated interaction among competitors includes collusive agreements, but it can also include conduct not necessarily condemned by the antitrust laws [Footnote: This includes parallel accommodating conduct by rivals in which "each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence, nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms." FTC/DOJ Horizontal Merger Guidelines §7]. Firms that engage in coordinated interaction are better able to predict, even absent explicit agreement, how rivals will react to price changes [Footnote: The FTC recognizes that rivals in the petroleum and other industries collect market intelligence to anticipate and respond to rivals' output and pricing decisions. See, e.g., In re Chevron Corp., FTC Docket No. C-4023, Analysis of Proposed Consent Order to Aid Public Comment (Sept. 7, 2001) ("Integrated refiner-marketers carefully monitor the prices charged by their competitors' retail outlets, and therefore can readily identify firms that deviate from a coordinated or collusive price.")]. The antitrust agencies have explained how coordinated interaction harms consumers: "[c]oordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm's incentive to raise prices by assuaging the fear that such a move would lose customers to rivals." [Footnote: FTC/DOJ Horizontal Merger Guidelines §7].

The potential for information disclosure to harm competition will depend on the structure of the affected market and the type of information disclosed [Footnote: 31 See *Todd v. Exxon Corporation*, 275 F.3d 191, 199 (2d. Cir. 2001) (quoting *U.S. v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16 (1978)) (“A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of [the information disclosed.]”); see also FTC/DOJ Guidelines for Collaborations Among Competitors §3.31(b)].

The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals’ responses to price change or other competitive initiative. Markets are more vulnerable to coordinated conduct if each firm’s rivals can promptly and confidently observe its behavior. Market factors that support this ability and increase the likelihood of coordination include transparency, concentration, entry barriers, homogeneous products, and low elasticity of demand.[Footnote: FTC/DOJ Horizontal Merger Guidelines §7]. Many of these market factors are present in industries covered by the EPA’s rule. [Footnote: For instance, in relevant geographic markets with few players, the FTC has expressed concerns about mergers or acquisitions in the petroleum industry that would reduce the number of competitors necessary to engage in tacit or overt collusion. See, e.g., *In re Dan Duncan*, FTC Docket No. C-4173, Consent Agreement and Order (2006) (in merger matter, consent agreement ordering divestiture of certain pipeline assets related to salt dome storage for natural gas liquids in Mont Belvieu, Texas – a concentrated market with high barriers to entry – in order to protect competition in that region), available at <http://www.ftc.gov/os/caselist/0510108/0510108.shtm>; *In re Dow Chemical*, FTC Docket No. C-4243 (2009) (consent agreement regarding Dow Chemical’s acquisition of Rohm and Haas, which implicated glacial acrylic acid, butyl acid, ethyl acrylate, acrylic latex polymers for traffic paint, and hollow sphere particles throughout North America – all concentrated markets with high barriers to entry), available at <http://www.ftc.gov/os/caselist/0810214/index.shtml>; *In re BASF, Inc.*, FTC Docket No. C-4253 (2009) (in a merger involving the production of pigments globally – a concentrated industry with high barriers to entry – FTC ordered BASF to maintain the viability of certain assets so as to preserve competition in the relevant market). Additional examples of FTC orders involving industries subject to the GHG reporting requirements may be obtained through the FTC Competition Enforcement Database, available at <http://www.ftc.gov/bc/caselist/industry/index.shtml>.] Information disclosures raise particular competitive concerns when the information contains details about output, production capacity, production rates, current price and cost data, and other business plans [Footnote: See FTC/DOJ Guidelines For Collaborations Among Competitors §3.31(b) (describing potential harm to competition when firms disclose competitively sensitive data); see also Susan S. DeSanti and Ernest A. Nagata, *Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, 63 *Antitrust L.J.* 93 (1994) (describing activities that make it easier for parties to coordinate on price or engage in tacit collusion)]. Disclosure under the proposed rule of the “inputs to emission equations,” which can reveal capacity and capabilities, other capacity information, and forward-looking operational status would increase transparency in the affected industries. In many instances, the actual output of a unit could be made public. In other cases, the amount of feedstock used, the intermediate product produced, or

the unit's capacity would be made public. As a result, collusion or coordination could become more likely as firms are better able to predict one another's behavior.

For example, improved information on the capacity and capabilities of a rival's facility can make it easier for a firm to anticipate how the rival will react to any strategic changes it makes. More information about a rival's output also will increase a firm's ability to detect when a rival deviates from the agreement, which need not be explicit. In contrast, without output information, it would be difficult for a firm to determine whether a price decrease is due to a fall in overall market demand or an increase in output from a rival deviating from the agreement.

**Response:** For the response to the comment regarding antitrust concerns and the potential for Part 98 data to be used for anti-competitive purposes, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 9 above.

**Commenter Name: Bryan Brendle**

**Commenter Affiliation: Portland Cement Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0045.1**

**Comment Excerpt Number: 2**

**Comment:** In the proposal, EPA proposes to classify five data categories as "emission data," and therefore not subject to CBI protections. With respect to the five categories proposed as "emissions data," many PCA members are concerned that although the disclosure of specific data points may not, in isolation, raise competitiveness concerns, that "stitching together" certain data over a period of time, including but not limited to unit/process operating characteristics that are inputs to emission equations, may pose competitiveness concerns for cement manufacturers. Portland Cement Association (PCA) opposes disclosure of information which will give market competitors a clear picture of the cost structure associated with a specific product manufactured by a given plant. Disclosure of information, especially related to fuel use, will not only help competitors determine investment obligations and market advantages/disadvantages confronted by other companies, but such disclosure might also raise anti-trust legal issues. The public disclosure and therefore sharing of certain data outlining a company's operational costs and investment obligations could have the unintended consequence of harmonizing investment decisions among specific companies that otherwise compete in a free market. PCA therefore urges EPA to consider potential impacts on compliance with other federal laws, including anti-trust statutes, when determining the CBI-status of so-called "emissions data." With respect to the five proposed categories of emission data, for the reasons outlined above, PCA urges EPA to consider that disclosing certain data that are classified as "emission data," could lead to competitive concerns. Because of these potential challenges, PCA opposes a broader interpretation of what constitutes "emission data." An expanded interpretation of "emission data" would unnecessarily narrow the number of potential CBI protections.

**Response:** For the response to the comment regarding potential for violation of antitrust laws and use of Part 98 for anticompetitive purposes, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 9 above.

## 12. Other General Comments

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**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 9**

**Comment:** EPA has listed hundreds of items under its recordkeeping requirements. Those items that are not required to be reported to the Agency should be considered CBI. For example, the written GHG monitoring plan required under §98.3(g)(5) contains substantial amounts of business sensitive and trade secret information. DuPont is concerned that such information may be collected during an Agency inspection or through an Agency request but may not be afforded appropriate CBI protection.

**Response:** The final CBI rule establishes the confidential status of certain Part 98 data elements to be reported to EPA either in annual reports or other documents submitted to EPA (e.g., BMM extension requests). We have prepared a memorandum that lists each data element covered by this final action. The memorandum shows the data category assignment and confidential status for each data element. A copy of this memorandum is available in the docket for this rulemaking (see “Final Data Category Assignments and Confidentiality Determinations for Part 98 Reporting Elements” in Docket EPA-HQ-OAR-2009-0924 and on the website, <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>).

EPA did not propose nor has it finalized in this rule confidentiality determinations for data required to be maintained as records on-site but not required to be submitted under part 98 (“part 98 records”), such as the GHG monitoring plan required under 40 CFR 98.3(g)(5). If reporters are asked to submit any part 98 record to EPA that they believe contain confidential business information, they can submit a CBI claim at the time they first submit the data to EPA. EPA will make confidentiality determination in accordance with CAA section 114(c) and EPA’s CBI regulations for any Part 98 records claimed as CBI either upon receipt of such information or upon a request pursuant to FOIA. Please note that 40 CFR 2.301(d) applies only to data submitted under Part 98 for which confidentiality determinations are made through rulemaking.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma<sup>22</sup>**

**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**

**Document Control Number: EPA-HQ-OAR-2009-0924-0053.2**

**Comment Excerpt Number: 10**

**Comment:** We urge the agency to carefully document in the record precisely what data it has to support each CBI determination, in or out of the supplier data category. In particular, we ask that the agency describe how it knows whether information it believes to be CBI is not public, and

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<sup>22</sup> This comment was also submitted by the Environmental Defense Fund (EPA-HQ-OAR-2009-0924-0047.1).

how it knows that its disclosure will cause competitive harm. EPA has already identified instances where other reporting systems or industry practice have made supplier information public, see, e.g., 75 Fed. Reg. at 39,123 (data from various importers and gas distribution companies is already public, and so not CBI). We are not aware of records in the docket systematically demonstrating how EPA conducted any data reviews to determine what information is in the public domain, or EPA's procedures for such reviews. Nor have we found market analyses that show how EPA has determined that a given data element will cause competitive harm. Instead, the rule merely offers general, theoretical statements about why a disclosure would "likely" cause such harm. See, e.g., id. at 39,122-23. EPA does not convincingly demonstrate such harms on an industry-by-industry basis. In the docket for the final rule, EPA should assemble this information, and use it to judge whether its initial assumptions are correct. We expect that EPA will discover that more information is public, and less information is harmful, than it now assumes.

**Response:** We disagree with the commenter that EPA failed to provide sufficient documentation of our decisions or that further research and evaluation are necessary regarding the final decisions made in this rule. As we explained in the July 7, 2010 CBI proposal, we have used the same approach to making CBI determinations as that used by EPA to decide case-by-case CBI claims. Specifically, CBI determinations for non-emission data were based on (1) whether the data was already publicly available (40 CFR 2.208(c)); and (2) whether the data elements would be likely to cause substantial harm to the business's competitive position (40 CFR 2.208(e)(1)). In the July 2010 CBI proposals and in the preamble to the final rule, we explained in detail the rationale behind our decisions, including documenting alternative public sources of data where those sources exist. For each data category, we searched for alternative public sources of each data element, including EPA sources (e.g., NEI, Title V, New Source Review, TRI, Acid Rain Program, etc.), other state and federal programs (e.g., EIA, state permitting programs). For those data elements that are not in the public domain, we considered whether the data would reveal detailed information about a production process that would cause competitive harm or whether it revealed sensitive information regarding the relative strength or weaknesses of a reporter that would affect the competitive position of an individual business. A market analysis would not assist us in determining whether the data provides confidential information about the design or operation of a production process. Such determinations must be made based on a review of the specific process and not through an analysis of the market place. Nor is it clear how a market analysis would better assist us in determining whether a particular data element would disclose competitive information about the relative strength or weaknesses of a business. For example, market analysis is not needed to determine that market share and pricing structures are competitive information, and therefore, any Part 98 data element or set of data elements that would disclose this information would be likely to cause competitive harm is self-evident.

**Commenter Name: Thomas P. Diamond<sup>23</sup>**

**Commenter Affiliation: Semiconductor Industry Association**

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<sup>23</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**

**Comment Excerpt Number: 12**

**Comment:** Most importantly, the federal cases [RSR Corp. v. Environmental Protection Agency, 588 F. Supp. 1251 (N.D. Tex. 1984) and NRDC v. Leavitt, 2006 U.S. Dist. LEXIS 13326 (D.D.C. Mar. 14, 2006)] addressing EPA’s interpretation of “emission data” under 40 C.F.R. 2.301 require that EPA undertake an analysis of its own regulations and clearly explain its rationale for determining that particular data are “emission data.” These cases [RSR Corp. v. Environmental Protection Agency, 588 F. Supp. 1251 (N.D. Tex. 1984) and NRDC v. Leavitt, 2006 U.S. Dist. LEXIS 13326 (D.D.C. Mar. 14, 2006)] fall squarely within a long line of federal cases establishing that agencies must adequately explain the reasoning behind their decisions, both in applying their own regulations and in a rulemaking. [Footnote: See e.g., U.S. Telecom Ass’n v. Fed. Comm’n Comm’n, 227 F.3d 450, 460 (D.C. Cir. 2000)(“It is well-established that an agency must cogently explain why it has exercised its discretion in a given manner and that explanation must be ‘sufficient to enable us to conclude that the [agency’s action] was the product of reasoned decisionmaking.’”) (quoting A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1491 (D.C. Cir. 1995) (internal citations omitted)); Tripoli Rocketry Ass’n v. Bureau of Alcohol, Tobacco, and Firearms, 437 F.3d 75, 81 (D.C. Cir. 2006)(“In order to survive under the arbitrary and capricious standard, an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”) (internal citations and quotations omitted); City of Holyoke Gas & Elec. Dep’t. v. Fed. Energy Regulatory Comm’n, 954 F.2d 740, 743 (D.C. Cir. 1992)(Agency “must support its decision with enough data to enable . . . a reviewing court, to understand” its decision)].

The need to adequately explain its decision is especially true here, given the higher standard of explanation, relative to the Administrative Procedure Act (APA), created under the CAA statute. In particular, under the APA, all agencies must publish in the Federal Register a notice of proposed rulemaking which “shall include. . . either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. 553(b)(3). Section 307(d)(3) of the CAA, on the other hand, requires a much more detailed notice and explanation of rulemaking under the Act. First, EPA must publish a notice of proposed rulemaking “as provided under [APA] section 553(b).” However, in addition, this notice must be “accompanied by a statement of its basis and purpose” which includes a summary of “(A) the factual data on which the proposed rule is based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) the major legal interpretations and policy considerations underlying the proposed rule.” 42 U.S.C. 7607(d)(3). These detailed criteria impose upon EPA a greater duty to explain and justify its proposed regulations. The statute further requires that this explanation and justification be included in the notice. [Footnote: Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983).]

Indeed, in this situation, EPA should be held to an even higher standard because it is not making an individual case-by-case determination based on the particular facts at hand, but rather a generic, blanket “pre-determination” that will apply to entire categories of data elements and industries. In these circumstances, EPA has an even greater duty to engage in the requisite analysis of its own regulations – including its potential effects on particular industries, such as

the semiconductor industry – and to provide a reasoned and well-supported explanation of its decision. On the contrary, EPA has utterly failed to provide any explanation of its rationale in light of the generalized nature of the GHG reporting under the GHG Reporting Rule.

**Response:** In Section I.C of July 7, 2010 CBI proposal, we identified the applicable statutory laws and existing regulations, described how they applied to this action, and explained our reasons for undertaking this rulemaking. We also described in detail our approach to making the CBI determinations, the 22 data categories and the rationales for our proposed confidentiality determinations, whether by category or for specific data elements. We provided a list of individual data elements and their proposed determinations in two memoranda titled “Data Category Assignments for Reporting Elements to be Reported under 40 CFR Part 98 and its Amendments” and “Data Category Assignments for the Proposed New and Revised 40 CFR part 98 Data Elements Addressed in the Proposed Confidentiality Determinations for Data Required under the Mandatory Greenhouse Gas Reporting Rule: Supplemental Proposal” (see Docket EPA-HQ-OAR-2009-0924). We provided a 60 day comment period to provide stakeholders the opportunity to comment on the proposed approach and confidentiality determinations. We specifically sought comment on the proposed determination for each category, on whether the proposed categories were too broad and too narrow, and on facility specific issues that could not be addressed through the categorical approach. We also encouraged businesses to submit information substantiating any CBI claims they may have for any part 98 data elements. EPA reviewed and addressed those comments and described the significant changes we made and the rationale for those changes in the preamble to the final rule and in this document. We therefore disagree with the commenter’s assertion that EPA failed to explain our approach and rationale for the determinations and failed to comply with the Administrative Procedure Act.

**Commenter Name: Thomas P. Diamond**<sup>24</sup>

**Commenter Affiliation: Semiconductor Industry Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**

**Comment Excerpt Number: 16**

**Comment:** EPA has Failed to Explain Its Proposed Determinations and has Not Considered the Ramifications of the Proposed CBI Rule to the Semiconductor Industry and Therefore the Proposed CBI Rule Is Arbitrary and Capricious. [I]n the Proposed CBI Rule, EPA has crafted an entire CBI regime for GHGs based on blanket pronouncements that certain classes of information are “emission data” and/or CBI with absolutely no explanation of what information it considered in making the determinations, how or why these determinations were made for the specific data elements. With respect to the semiconductor industry, EPA has proposed to determine that all “inputs to emissions equations” qualify as “emission data” backed up only by conclusory statements that such data are “necessary” to determine emissions. EPA provides no evidence that it has considered the impacts of this proposed determination on the semiconductor industry, which has always treated as highly confidential much of the information required to be

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<sup>24</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

submitted under Subpart I of Reporting Rule. Under these circumstances, the Proposed CBI Rule is Arbitrary and Capricious.

Pursuant to CAA 307(d), the validity of rules promulgated under the CAA are judged under the same standard as in the Administrative Procedure Act – i.e., they are subject to reversal if they are found by a court to be “arbitrary, capricious an abuse of discretion, or otherwise not in accordance with the law.” 42 U.S.C. 7607(d). It is well-established law that, for a rule to survive an “arbitrary and capricious” challenge, the promulgating agency “must examine the relevant data and articulate a satisfactory explanation for its action including ‘a rational connection between the facts found and the decision made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted). Further, in reviewing the agency’s explanation, the court “must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment.’” *Id.* Similarly, “an agency’s decisions” are to be subject to “a thorough, probing, in-depth review” and are subject to reversal if “there is no accompanying explanation of the agency’s decision.” *RSR Corp. v. Environmental Protection Agency* at 1254 (internal citations omitted). “The agency must have examined the relevant data, explained the evidence which is available and offered a rational connection between the facts found and the choice made.” *Id.* at 1254-55. [Footnote: See also *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 313 (D.C. Cir. 1992) (“our task is to determine whether the agency has articulated a rational connection between its factual judgments and its ultimate policy choice . . . .”)(internal citations and quotations omitted); *Eagle-Picher Indus., Inc. v. Env’tl. Prot. Agency*, 759 F.2d 905, 921 (D.C. Cir. 1985)(“Under the arbitrary and capricious standard we look to see if the agency has examined relevant data and has articulated a rational explanation for its action.”); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132-33 (D.C. Cir. 2007) (“The Administrative Procedure Act instructs courts to set aside agency action ‘found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. We therefore require more than a result; we need the agency’s reasoning for that result. Even when we agree with an agency’s ultimate judgment, ‘[i]n administrative law, we do not sustain a ‘right-result, wrong-reason’ decision of an agency. We send the case back to the agency so that it may fix its reasoning or change its result.’” *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132-33 (D.C. Cir. 2007) (internal citations and quotations omitted)(emphases added)].

Here, where EPA has proffered no explanation or justification for its proposed determinations for specific data elements, and has provided no evidence in the Proposed CBI Rule that it has considered the ramifications of its proposed blanket determinations on the semiconductor industry, it has failed to establish a “rational connection between the facts found and the decision made.” As such, the Proposed CBI Rule is arbitrary and capricious. . . .

**Response:** We disagree with the comment that the CBI proposals did not include sufficient substantive explanation and justifications for the proposed “emission data” and CBI determinations. In the July 7, 2010 CBI proposal, we explained our approach to making the determinations and described in detail the 22 data categories and the rationales for our determinations, whether by category or for specific data elements. While EPA generally makes CBI on a case-by-case basis in accordance with 40 CFR part 2, EPA has authority, as demonstrated by the analogous provisions of 40 CFR 2.207 (Class Determinations). to make



category-based CBI determinations where it would serve a useful purpose (40 CFR 2.207(a)(3)) and the data in a category share the same characteristics and CBI status (40 CFR 2.207(a)(2)). Our primary reasons for initiating the CBI rulemaking are to avoid unnecessary delays in publishing data that is emission data or otherwise not eligible for CBI and to reduce the burden on industry of having to prepare and submit individual CBI claims with each annual report. EPA concluded that the categorical approach, added through this action, is appropriate for Part 98 because there are over 1,900 data elements and many share common characteristics. In the final action, we have also identified in the preamble to the final rule the significant changes since our CBI proposals and the rationale for those changes.

We also disagree that our approach and determinations are arbitrary and capricious. As we explained in the July 7, 2010 proposal, our decisions are based on CAA section 114(c) and the existing CBI regulations at 40 CFR part 2, subpart B. EPA specifically sought comment on the proposed determination for each category, on whether the proposed categories were too broad and too narrow, and on facility specific issues that could not be addressed through the categorical approach. We reviewed and addressed these comments in this document and in the relevant sections of the preamble to the final rule (see sections II.B.2 through II.B. 11 for direct emitters and sections II.C.3 through II.C.13 for suppliers).

**Commenter Name: Scott J. DeBoer**

**Commenter Affiliation: Micron Technology, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0063.1**

**Comment Excerpt Number: 4**

**Comment:** Micron also maintains its market position and derives independent economic value from certain information not being known to or readily ascertainable by the competition, including but not limited to, chemical identity and amounts, process recipes, process configuration, and production in terms of substrate surface area. This information is trade secret and confidential business information protected by the Clean Air Act (CAA) and other federal and state laws.

Trade secrets have long been recognized as property protected by the United States Constitution and other laws. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (environmental data can be trade secret; unauthorized disclosure is a taking). Idaho, where Micron is headquartered, protects trade secrets under the Idaho Trade Secrets Act, among other statutes and regulations. The Idaho Trade Secrets Act is modeled on the Uniform Trade Secrets Act that has been adopted in 46 states and the District of Columbia since 1985. Trade secret law is designed to encourage and protect individualized plans of operation to promote industrial efficiency. *Kewanee Oil v. Bicron Corp.*, 416 U.S. 470 (1974) (permanent injunction against misappropriation reinstated). Under Idaho Law, trade secret means: "... information including a formula, pattern, compilation, program, computer program, device, method, technique, or process, that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Idaho Code section 48-801(5); see *GME, Inc. v. Carter*, 128 Idaho 597, 917 P. 2d 754 (1996) (damages awarded and permanent injunction issued against

misappropriation of trade secret blueprint engineering drawings). An arrangement of non-secret information in unique combination to create a unified process or system is a protectable trade secret. *Rivendell Forest Products, Ltd. v. Georgia-Pacific Corp.*, 28 F.3d 1042 (10th Cir. 1994) (summary judgment for defendant misappropriator reversed); *Integrated Cash Management Services, Inc. v. Digital Transactions, Inc.*, 920 F. 2d 171 (2d Cir. 1990) (permanent injunction entered against misappropriation of a trade secret). Processes that provide advantage by saving time and expense are trade secrets. *Saunders v. Florence Enameling Co.*, 540 So. 2d 651 (1988) (permanent injunction entered against misappropriation of pipe coating manufacturing process). Trade secrets include engineering drawings, tooling specifications, and material requirements. *Boeing Co. v. Sierracin Corp.*, 108 Wash. 2d 38, 738 P. 2d 665 (1987) (damages awarded and injunction issued against misappropriation of trade secret engineering drawings, tooling specifications, and material requirements). The use of certain machinery, by itself, is a trade secret. *BY-BUK Co. v. Printed Cellophane Tape Co.*, 163 Cal. App. 2d 157, 329 P. 2d 147 (1958) (permanent injunction affirmed). Reverse engineering is an acceptable and lawful practice. In the Semiconductor industry, reverse engineering involves starting with a known product and working backwards to discover the process by which it was developed and manufactured. *People v. Gopal*, 171 Cal. App. 4d 524, 533 (1985) (citing *Kewanee Oil v. Bicron*, supra, criminal conviction of misappropriation of trade secrets concerning semiconductors affirmed).

**Response:** EPA thanks the commenter for their input. As we explained in Section I.C of the July 7, 2010 CBI proposal, CAA section 114(c) requires that “[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets . . . , the administrator shall consider such record, report, or information or particular portion thereof confidential.” EPA interprets CAA section 114(c) to afford confidential treatment to both trade secrets and confidential business information, provided such data are not emission data.

## B. DIRECT EMITTERS

### 1. Facility and Unit Identifier Information Category

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**Commenter Name:** Glen E. Davis  
**Commenter Affiliation:** Mississippi Lime  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0049.2  
**Comment Excerpt Number:** 4

**Comment:** The categories required, as potentially applicable to MLCO, are depicted [below] denoting whether the data or information is routinely claimed as CBI or non-CBI by MLCO. MLCO has no objection to submission of truly non-CBI categories of information on a non-confidential basis. . . .

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(b))  
Non-CBI: The unit ID number

CBI: Customer meter number for units that combust natural gas

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(c)(1))

Non-CBI: Group ID number, beginning with the prefix "GP"

CBI: An identification number for each unit in the group

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(c)(3))

Non-CBI: Common pipe ID number, beginning with the prefix "CP"

CBI: The ID numbers of the units served by the common pipe

Reporting required under Subpart A: Content of the Annual Report (40 CFR 98.3(c)(1)-(4) & (6)-(9))

Non-CBI: Facility name and physical street address including city, state, and zip code

Non-CBI: Year and months covered by the report

Non-CBI: Date of submittal

Non-CBI: A signed and dated certification statement provided by the designated representative of the owner or operator, according to the requirements of 98.4(e)(1)

Non-CBI: [April 12, 2010 rule revision (98.3(c)(10))1: NAICS codes(s) that apply to the facility — primary NAICS code and additional NAICS codes(s)

Non-CBI: [April 12, 2010 rule revision (98.3(c)(11))1: Legal name(s) and physical address(es) of the highest-level United States parent company(s) and the percentage of ownership interest for each listed parent company as of December 31 of the reporting year

**Response:** EPA disagrees with the commenter that identification numbers reported under 40 CFR 98.36(c)(1) and (c)(3) are eligible for confidential treatment. As explained in Sections I.C and II.C.2 of the July 7, 2010 CBI preamble, identification numbers meet the definition of emission data at 40 CFR 2.301(a)(2)(i) because they provide information about the “identity . . . of any emission”. EPA considers the term “identity” as applying not just to the names of the pollutants being emitted, but also to other identifying information, such as from what and where the emissions originate. Furthermore, 40 CFR 2.301(a)(2)(i)(C) specifies that emission data includes “[a] general description of the location and/or name of the source to the extent necessary to identify the source and to distinguish it from other sources . . .”. Consistent with this definition of emission data, EPA has determined facility and emission unit identifiers to be emission data. We also note that emission unit identifiers do not reveal any competitive information about a facility and are typically included in construction and operating permits as a means of identifying individual units. For additional information, please see Section II.C.2 of the July 7, 2010 CBI preamble and Section II.B.1 of the preamble to the final rule. Please also note that reporters are no longer required to report the customer meter number (previously listed under 40 CFR 98.36(b)(10)) (see the amendments to subpart C in 75 FR 79092, December 17, 2010).

**Commenter Name: Leslie S. Ritts<sup>25</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 7**

**Comment:** With respect to the table of information, NEDA/CAP generally does not dispute that facility identifier information is not CBI, except for hydrogen and nitric acid production identifiers which may present security risks under Homeland Security laws and should be further examined.

**Response:** Part 98 requires sources to report information needed to identify each facility subject to reporting and includes information such as the name and address of the facility, NAICS codes, number of production units and associated unit identification numbers. EPA is aware of the Department of Homeland Security's (DHS) Chemical Facilities Anti-Terrorism Standards (CFATS) regulation that requires certain chemical facilities (producing ammonia, nitric acid, hydrogen, magnesium) to prepare security vulnerability assessments, develop and implement site security plans, which include measures that satisfy risk-based performance standards established by DHS. While the CFATS program does designate certain information as confidential or "Chemical-Terrorism Vulnerability Information" or "CVI", DHS agreed in 2007 that their actions did not affect any Federal statutes, including section 114 of the Clean Air Act (see DHS implementing regulations at 72 Fed. Reg. 17688). The facility identifier information published under Part 98 is generally publicly available from state agencies and trade associations. Specifically, we have found that much of this information is already publicly available through other sources (e.g., Title V permits). Therefore, we have concluded that this does not impact our determination that data elements in the Facility and Unit Identifier Information qualify as emission data and, therefore, are not eligible for confidential treatment.

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 15**

**Comment:** As noted in the Preamble, "emission data" is defined in 40 CFR 2.301(a)(2)(i)(A) to include, among other things, "information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source." EPA considers the term "identify... of any emission" as not simply referring only to the names of the pollutants being emitted, but to also include other identifying information, such as from what and where the pollutants are being emitted. Air Products agrees. Air Products supports EPA's position that information including plant name, address, city, state zip code, emission point or device description, SIC code, NAICS

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<sup>25</sup> Comments submitted by the National Environmental Development Association's Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).

code and Source Classification Code are necessary to satisfy the intent of 40 CFR 2.301(a)(2)(i)(A).

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Facility and Unit Identifier Information category are emission data.

**Commenter Name: Paul Noe**  
**Commenter Affiliation: American Forest & Paper Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0034.1**  
**Comment Excerpt Number: 11**

**Comment:** AF&PA supports the automatic disclosure of data on source identity.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Facility and Unit Identifier Information category are emission data.

**Commenter Name: Kevin M. Dempsey**  
**Commenter Affiliation: American Iron and Steel Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**  
**Comment Excerpt Number: 4**

**Comment:** We agree that Facility and Unit Identifier Information . . . are “emissions data” not subject to CBI status.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Facility and Unit Identifier Information category are emission data.

## 2. Emissions Category

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**Commenter Name: Kevin M. Dempsey**  
**Commenter Affiliation: American Iron and Steel Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**  
**Comment Excerpt Number: 7**

**Comment:** We agree that . . . Emissions . . . are “emissions data” not subject to CBI status.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Emissions category are emission data.

**Commenter Name: Paul Noe**  
**Commenter Affiliation: American Forest & Paper Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0034.1**

**Comment Excerpt Number: 12**

**Comment:** AF&PA supports the automatic disclosure of data on . . . actual emissions.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Emissions category are emission data.

**Commenter Name:** Leslie S. Ritts<sup>26</sup>

**Commenter Affiliation:** The National Environmental Development Association's Clean Air Project

**Document Control Number:** EPA-HQ-OAR-2009-0924-0056.1

**Comment Excerpt Number:** 8

**Comment:** NEDA/CAP [does not] disagree that Emissions . . . are not entitled to CBI treatment. Such information is provided currently as the basis of compliance certifications under other laws and is not sensitive.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Emissions category are emissions data.

**Commenter Name:** Keith Adams and Brian Keck

**Commenter Affiliation:** Air Products and Chemicals, Inc.

**Document Control Number:** EPA-HQ-OAR-2009-0924-0058.1

**Comment Excerpt Number:** 16

**Comment:** Air Products supports EPA's position that direct emitters must report annual CO<sub>2</sub>e emissions and must also report emissions by GHG and source category, and Air Products agrees with reporting separately for each process, manufacturing line or emission unit within a source category or facility. This is the specific type of "emission data" targeted by 40 CFR 2.301(a)(2)(i)(A), which is not confidential and should be publicly released. As EPA notes in this section of the Preamble, "The 1991 notice lists the "Emission type (e.g., the nature of emissions, such as CO<sub>2</sub>, particulate or a specific toxic compound, and origin of emissions such as process vents, storage tanks or equipment leaks)" and "Emission rate (e.g., the amount released to the atmosphere over time such as kg/yr or lbs/yr)" as data that are not entitled to confidential treatment and are, therefore, releasable to the public." This is the type of data often reported and subsequently available to the public in annual emission inventories and similar compliance/deviation reports for both major and minor sources of regulated air pollutants.

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<sup>26</sup> Comments submitted by the National Environmental Development Association's Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Emissions category are emission data.

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 21**

**Comment:** Subpart O – §98.156(a)(7) to (a)(11) – Annual mass of HFC-23 emitted – DuPont agrees that emissions of HFC-23 are not CBI, but data and calculations used to derive the emissions should be as it is with TRI, and other Air Programs.

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Emissions category are emission data. EPA has also proposed to defer reporting of data elements in the Inputs to Emission Equations category. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: William C. Herz**

**Commenter Affiliation: The Fertilizer Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 4**

**Comment:** TFI believes that EPA has erroneously concluded that all data elements in the “Emissions Category” (that is, the “GHG emissions to be reported by direct emitters under Part 98”) constitute “emission data” and, therefore, are not afforded protection from disclosure pursuant to Clean Air Act (CAA) §114(c) and 40 CFR 2.301. 75 Fed. Reg. at 39107. EPA improperly classifies all greenhouse gas emissions reported by direct emitters as “emission data”. In the preamble, EPA proposes to determine that “all GHG emissions to be reported by direct emitters are ‘emission data’ under 40 CFR 2.301(a)(2)(i).” 75 Fed. Reg. at 39,107. This proposal is based on EPA concluding that “these data elements are clearly information regarding the identity, amount, and frequency of any emission emitted by the reporting direct emitters . . . .” Id. at 39108. Further, according to EPA, the proposal is based on a 1991 EPA Statement of Policy (the “Policy”) regarding, in EPA’s view, what constitutes “emission data” for purposes of CAA § 114(c). Id. In this Policy, EPA provides a “bright line” regarding what the Agency views as the “kinds of data [that] will always constitute emission data within the meaning of section 114(c).” 58 Fed. Reg. 7042.

According to EPA, the 1991 Policy identifies “Emission type” and “Emission rate” as data that are not entitled to confidential treatment. 75 Fed. Reg. at 39,108 (citing 58 Fed. Reg. 7642-7643). However, what EPA fails to recognize by its blanket conclusion is that not every greenhouse “emission” reported until the Greenhouse Gas Reporting Rule is the type of “emission” contemplated as “emission data” under the 1991 Policy. Only emissions to the ambient air are the types of data elements identified by the 1991 policy for contemplated disclosure. As noted by EPA, the 1991 Policy defines the categories of “Emission type” and

“Emission rate” as “emission data” not eligible for confidential treatment. The 1991 Policy defines “Emission type” as the “nature of emissions such as CO<sub>2</sub>” and the “Emission rate” as “the amount [of the Emission type] released to the atmosphere over time such as kg/yr or lbs/hr.” 56 Fed. Reg. at 7042-7043. When read together, it is clear that in 1991 EPA envisioned “Emission type” and “Emission rate” to relate to the release of a particular pollutant to the ambient air. This read is consistent with other data elements identified in the 1991 Policy as constituting “emission data,” for example (1) “Release height” – defined as “height above ground level where the pollutant is emitted to the atmosphere”; (2) “Stack or vent diameter at point of emissions” – defined as “the inside diameter of vent at the point of emission to the atmosphere in meters”; and (3) “Duration of the release” – defined as “the time associated with a release to the atmosphere”. Id. at 7043.

In the Greenhouse Gas Reporting Rule, EPA requires sources to report greenhouse data that the Agency considers to be “emissions.” The general policy of the Greenhouse Gas Reporting Rule, as expressed in 40 C.F.R. § 98.1, is to gather greenhouse gas data from “certain facilities that directly emit GHGs as well as for certain fossil fuel suppliers and industrial GHG suppliers.” The policy therefore is to gather data on “direct emissions,” which from a common sense perspective means releases to the atmosphere. While direct emissions to the atmosphere constitute “emission data,” The Fertilizer Institute (TFI) does not believe, in light of the 1991 Policy, that many of EPA’s reportable data elements under the Greenhouse Gas Reporting Rule constitute “direct emissions” and, therefore, these data elements should not be disclosed. [Footnote: For example, EPA has recognized that reported CO<sub>2</sub> from ammonia manufacturing facilities includes CO<sub>2</sub> that is not released to the ambient air. 75 Fed. Reg. 48,744, 48,766-767 (August 11, 2010).]

**Response:** EPA agrees with the commenter that where some or all of the GHGs produced by a production process are captured for use onsite (e.g., urea manufacture) or transferred off site, the GHGs reported as process emissions do not meet the definition of emission data in 40 CFR 98.301(a)(2)(i). EPA has identified three subparts where CO<sub>2</sub> generated is sometimes collected. These subparts are subpart G (Ammonia Manufacturing), subpart P (Hydrogen Production) and subpart S (Lime Manufacturing). In situations where some or all of the GHG is collected, the data element for reporting the amount of GHG generated (e.g., 40 CFR 98.76(a), 40 CFR 98.196(a)(1), etc.) is assigned to the data category Unit/Process Operating Characteristics that are Not Inputs to Emission Equations. For those facilities where a reporter does not collect the CO<sub>2</sub> generated by a process, such that the CO<sub>2</sub> is emitted into the atmosphere, the data element remains in the Emissions Category. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Emissions category are emission data.

**Commenter Name:** Glen E. Davis  
**Commenter Affiliation:** Mississippi Lime  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0049.2  
**Comment Excerpt Number:** 13

**Comment:** The categories required, as potentially applicable to MLCO, are depicted [below] denoting whether the data or information is routinely claimed as CBI or non-CBI by MLCO. MLCO has no objection to submission of truly non-CBI categories of information on a non-confidential basis. . . .



Reporting required under Subpart S: Data Reporting Requirements (40 CFR 98.196(b))

Non-CBI: Annual CO<sub>2</sub> process emissions from all kilns combined (metric tons)

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(b))

CBI: For a unit that uses Tiers 1, 2, and 3, the CO<sub>2</sub>, CH<sub>4</sub>, and N<sub>2</sub>O emissions for each type of fuel combusted, expressed in metric tons of each gas and in metric tons of CO<sub>2</sub>e

Non-CBI: Annual GHG emissions from all fossil fuels burned in the group (i.e., the sum of the CO<sub>2</sub>, CH<sub>4</sub>, and N<sub>2</sub>O emissions), expressed in metric tons of CO<sub>2</sub>e

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(c)(1))

CBI: Annual CO<sub>2</sub>, CH<sub>4</sub>, and N<sub>2</sub>O mass emissions aggregated for each type of fuel combusted in the group of units during the year, expressed in metric tons of each gas and in metric tons of CO<sub>2</sub>e

Non-CBI: Annual GHG emissions from all fossil fuels burned in the group (i.e., the sum of the CO<sub>2</sub>, CH<sub>4</sub>, and N<sub>2</sub>O emissions), expressed in metric tons of CO<sub>2</sub>e

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(c)(3))

Non-CBI: Annual CH<sub>4</sub> and N<sub>2</sub>O emissions from the units served by the common pipe, expressed in metric ton of each gas and in metric tons of CO<sub>2</sub>e

Non-CBI: Annual GHG emissions from all fossil fuels burned in the units served by the common pipe (i.e., the sum of the CO<sub>2</sub>, CH<sub>4</sub>, and N<sub>2</sub>O emissions), expressed in metric tons of CO<sub>2</sub>e

Reporting required under Subpart A: Content of the Annual Report (40 CFR 98.3(c)(1)-(4) & (6)-(9))

Non-CBI: For facilities, annual emissions of CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O

Non-CBI: Annual emissions (excluding biogenic CO<sub>2</sub>) aggregated for all GHG from all applicable source categories in Subparts C through JJ, and expressed in metric tons of CO<sub>2</sub>e calculated using Eq. A-1

Non-CBI: Annual emissions from each applicable source category in Subparts C through JJ, expressed in metric tons of each GHG: CO<sub>2</sub> (excluding biogenic CO<sub>2</sub>), CH<sub>4</sub>, N<sub>2</sub>O,

CBI: Emissions and other data for individual units, processes, activities, and operations as specified in the "data reporting requirements" section of each applicable Subpart

**Response:** EPA disagrees with the commenter that the emissions by unit and by fuel type should be treated as CBI. As explained in Section II.C.3 of the July 7, 2010 CBI proposal, emission data is defined in 40 CFR 2.301(a)(2) as “information necessary to determine the identity, amount, frequency, concentration, . . . of any emission which has been emitted by the source . . . .” The data elements identified by the commenter consist of the emissions into the atmosphere. Both the facility and unit-level emissions are clearly information regarding the identity, amount, and frequency of any emission emitted by the reporter and, therefore, they are emission data. Under CAA section 114(c), EPA must make public any data that is emission data regardless whether the emissions are reported at the facility-level, unit-level, or by other criteria (e.g., fuel-type).

**Commenter Name: Paul Noe**  
**Commenter Affiliation: American Forest & Paper Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0034.1**  
**Comment Excerpt Number: 9**

**Comment:** Fuel combustion sources must also report their emissions on a unit by unit basis [See 40 CFR 98.36(a)], and must in general report the method of quantifying emissions they used, their emissions by fuel type combusted, and the maximum rated heat input capacity of each unit [See 40 CFR 98.36(b)]. In addition, a separate paragraph entitled “verification data” requires facilities that do not use CEMs to report total fuel consumption by fuel type and unit, and (depending on the verification method used) also report the total amount of steam produced in each unit, “the ratio of the maximum rated heat input capacity to the design rated steam output capacity of the unit”, the heating value of each fuel, and detailed information on how fuel carbon content was calculated [See 40 CFR 98.36(e)]. As EPA noted, many businesses already collect this data “for business reasons.” They have also long kept it confidential for equally good “business reasons.”

**Response:** For the response to the comment recommending emissions by unit and fuel type should be afforded CBI protection, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 13 above.

For the response to the comment recommending heat input capacity of combustion units be afforded CBI status, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 14 in Section II.B.3 of this document.

The other data elements identified by this commenter (e.g., steam produced, fuel consumption, heating value, and carbon content) are used as inputs to emission equations. EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

The method (including the methodological tiers in 40 CFR part 98, subpart C) used by a direct emitter to calculate emissions is emission data under 40 CFR 2.301(a)(2) because it is information necessary for the reporter to actually calculate the emissions and for EPA and the public to verify that an appropriate method was used. The method used by a facility is important for determining whether the facility selected the appropriate equations and used appropriate inputs to the calculations. For example, if a facility chooses to use a default emission factor method, they must select the appropriate factor provided in the rule, whereas if they select a site-specific emission factor method, they must collect additional data to support their own factor. Therefore, data elements that are used to determine what methodology is required (or allowed) to be used are also necessary to determine emissions because these data are also needed to determine whether the reporter selected the appropriate equations and inputs.

**Commenter Name: William C. Herz**  
**Commenter Affiliation: The Fertilizer Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

## Comment Excerpt Number: 8

**Comment:** EPA should allow aggregation of data regarding emissions to the ambient air to protect trade secrets. Balancing the need to protect U.S. plants subject to reporting under the Greenhouse Gas Reporting Rule with EPA's desire to release emission data to the public, TFI requests that emissions from individual process units not be disclosed; rather, TFI believes that only aggregate greenhouse gas information should be released to the public. TFI believes that the following data elements, which are aggregated with other data elements to generate a facility-wide value, should be protected from public disclosure: 40 CFR 98.33(a)(1); 40 CFR 98.33(a)(2)(i); 40 CFR 98.33(a)(2)(iii); 40 CFR 98.33(a)(3)(i); 40 CFR 98.33(a)(3)(ii); 40 CFR 98.33(a)(3)(iii); 40 CFR 98.36(b)(6); 40 CFR 98.36(b)(9); 40 CFR 98.73(b)(1); 40 CFR 98.73(b)(2); 40 CFR 98.73(b)(3); 40 CFR 98.73(b)(4); 40 CFR 98.76(b)(1), 40 CFR 98.223(c)(2); 40 CFR 98.223(g); 40 CFR § 98.226(b); . . .

**Response:** As described in the preamble to the final rule, EPA has determined that the data in the Emissions category are emission data. For a response to the comment that emission from individual process units should be confidential, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 13 above. Section 114(c) of CAA, precludes emission data from being withheld from the public. Therefore, when responding to FOIA requests, EPA would not be able to withhold emissions from individual process units from public release or aggregate this data as suggested by the commenter.

For ammonia manufacturing plants that collect the CO<sub>2</sub> generated from ammonia production for use onsite (e.g., to manufacture urea) or transfer offsite, the data element for the process emissions from ammonia manufacturing (40 CFR 98.76(b)(1)) is assigned to the Production/Throughput Data that are Not Inputs to Emissions Equations. For ammonia manufacturing plants that do not collect the CO<sub>2</sub> generated from ammonia production, the data element for the process emissions from ammonia manufacturing (40 CFR 98.76(b)(1)) is assigned to the Emissions category. For additional information regarding this data element, see the response to comment EPA-HQ-OAR-2009-0924-0024.1, excerpt 4 above.

The data element listed under 40 CFR 98.36(b)(9) is no longer required to be reported (see 75 FR 79092, December 17, 2010). The references (i.e., 40 CFR 98.33(a)(1); 40 CFR 98.33(a)(2)(i); 40 CFR 98.33(a)(2)(iii); 40 CFR 98.33(a)(3)(i); 40 CFR 98.33(a)(3)(ii); 40 CFR 98.33(a)(3)(iii); 40 CFR 98.73(b)(2); 40 CFR 98.73(b)(3); 40 CFR 98.73(b)(4); 40 CFR 98.73(b)(1); 40 CFR 98.223(c)(2); and 40 CFR 98.223(g) refer to the calculation methods and not to reporting requirements. This final rule covers only those Part 98 data elements that are required to be reported to EPA. For the subparts C, G, and V, the only data elements required to be reported are those listed in 40 CFR 98.36 (subpart C), 40 CFR 98.76 (subpart G), and 40 CFR 98.226 (subpart V).

In this action, we are making final confidentiality determinations for data elements collected under Part 98 as described in section I.C of the preamble to the final rule. While we solicited ideas for data publication and aggregation in the July 7, 2010 CBI proposal, we do not need to establish the format for publishing Part 98 data in this rule. We are interested in providing the public access to emission and non-CBI data through a user-friendly, online interface. We will

take into consideration the comments and recommendations submitted by stakeholders when deciding on the appropriate format for publishing GHGRP data and will ensure that data that has been determined to be CBI is not disclosed to the public.

**Commenter Name: Lorraine Gershman**<sup>27</sup>

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 16**

**Comment:** Subpart C – General Stationary Fuel Combustion Sources. Almost all of the data reported under subpart C is proposed to be treated as non-CBI. However, we believe that there is some information that should be protected. This information includes throughput information, as competitors would be able to gain valuable trade information by knowing the capacity and utilization rates of combustion units. Knowing the capacity utilization of energy, competitors could then calculate the production output of that facility.

We also believe that the composition of emissions from individual process vents can reveal similar confidential data.

**Response:** EPA disagrees with the commenter that the composition of emissions from individual process vents should be CBI. As explained in Section II.C.3 of the July 7, 2010 CBI proposal, emission data is defined in 40 CFR 2.301(a)(2) as “information necessary to determine the identity, amount, frequency, concentration, . . . of any emission which has been emitted by the source . . . .” The GHG emissions from individual process vents are clearly information regarding the identity, amount, and frequency of any emission emitted by the reporter and, therefore, they are emission data. Under CAA section 114(c), EPA must make public any data that is emission data.

For the response to the comment recommending heat input capacity of combustion units be afforded CBI status, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 14 in Section II.B.3 of this document.

Fuel consumption data is used as an input to emission equations. As discussed in Section II.A.4 of the preamble to the final rule, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category.

**Commenter Name: Lorraine Gershman**<sup>28</sup>

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 18**

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<sup>27</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), PPG Industries, Inc. (EPA-HQ-OAR-2009-0924-0040), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

<sup>28</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

**Comment:** Subpart N – Glass Production: We oppose EPA’s proposal not to treat several data elements as CBI under this subpart, including:

(1) Annual process emissions of CO<sub>2</sub> by process (§98.146(b)(1)). Process specific information could be used to determine manufacturing capacities and/or throughputs. Facility aggregation of CO<sub>2</sub> emissions would be more protective of this CBI information unless the facility contained a single production process. . . .

**Response:** For the response to the comment recommending process-level emissions should be afforded CBI protection and that emissions should be aggregated to the facility level, please see the response to comment EPA-HQ-OAR-2009-0924-0024.1, excerpt 8 above.

**Commenter Name: Lorraine Gershman**

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 3**

**Comment:** California’s GHG emissions reporting tool allows the public to see facility location and emission data. However, that information is provided in an aggregated format. A facility information public report includes the facility name, ID, sectors, description, address, geographic location, facility contact name, email and phone number. The GHG emissions are reported as summed emissions data, for CO<sub>2</sub>eq., CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, biomass, HFCs, and SF<sub>6</sub>, for stationary combustion and process emissions. Providing the public with GHG emissions information in such a way protects process specific information while still allowing the public to easily compare similar facility emissions. We strongly recommend that EPA consider presenting a facility’s annual GHG emissions in an aggregated format to avoid the potential disclosure of sensitive information.

**Response:** For the response to the comment recommending process-level emissions should be afforded CBI protection and that emissions should be aggregated to the facility level, please see the response to comment EPA-HQ-OAR-2009-0924-0024.1, excerpt 8 above.

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 12**

**Comment:** DuPont is concerned about the non-confidentiality determination for a large fraction of combustion data [Footnote: In fact, it appears that all but three elements of reporting data under Subpart C are proposed as non-confidential.], particularly for our single product plants. Combustion based CO<sub>2</sub> is different from other emissions because simple conversion factors are available to convert CO<sub>2</sub> generated to energy input. Knowledgeable experts can then take energy input (design and actual) for a given plant and closely estimate production capability, actual production and profitability (based on operation as a % of design rate). In addition, when this information is available for all of the key U.S. manufacturers, U.S. market share and market

potential can be evaluated. Although some of this operating data may be available through Title V permits, it is not readily accessible and would be difficult to bring together into a coherent package, unlike what EPA proposes here. Publishing this information on the internet will make it widely available to our domestic and overseas competitors.

**Response:** The emissions from combustion units are not eligible for confidential treatment because they meet the definition of emission data in 40 CFR 2.301(a)(2)(i). As we explained in Section I.C of the July 7, 2010 CBI preamble, CAA section 114(c) does not afford confidential treatment to emission data. We also note that similar emissions data for certain pollutants are available through the National Emissions Inventory, which can similarly be used in conjunction with readily available emission factors (e.g., EPA’s *Compilation of Air Pollution Emission Factors (AP-42)*) to calculate energy input.

**Commenter Name:** Arline M. Seeger<sup>29</sup>

**Commenter Affiliation:** National Lime Association

**Document Control Number:** EPA-HQ-OAR-2009-0924-0023.1

**Comment Excerpt Number:** 4

**Comment:** [A]s a legal matter, EPA is not compelled under the CAA to disqualify as CBI throughput data related to GHG emissions. The only throughput data that must be disclosed, even according to EPA’s interpretation some thirty years ago, is data necessary to “enable members of the public to inform themselves in order that they may initiate or participate on an informed basis in proceedings by which standards and limitations under the Act are enforced.” There are no GHG standards or limitations to enforce. Therefore, EPA should not compel the automatic disclosure of vast amounts of closely held business information, an outcome again at odds with EPA’s longstanding interpretation of Congress’ intent. Instead, EPA should require only that a plant’s total GHG emissions be disclosed to the public until Congress expressly instructs EPA in legislation as to the prudent balance between legitimate business needs and the public’s need-to-know.

**Response:** EPA agrees that data on a facility’s GHG emissions should not be treated as confidential. As described in the preamble to the final rule, EPA has determined that the data in the Emissions category are emission data. Section 114(c) of the CAA precludes emission data, as defined in 40 CFR 2.301(a)(2), from being considered CBI.

Regarding the comments on throughput data, as discussed in Section II.A.4 of this document, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category (including certain throughput data). We are therefore not responding to comments on the Inputs to Emission Equations category at this time. A list of the comments we received is provided in Appendix A at the end of the document. For additional information regarding our decision to not finalize a determination for this category, see Section II.A.4 of the preamble to the final rule.

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<sup>29</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

Where raw material and production data are not used to calculate GHG emissions (e.g., where CEMS are used instead of a calculation method), such data elements are assigned to the Production/Throughput Data that are Not Input to Emission Equations category. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data that are Not Inputs to Emission Equations category are CBI.

**Commenter Name: Stephen E. Woock**

**Commenter Affiliation: Weyerhaeuser Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0041.1**

**Comment Excerpt Number: 3**

**Comment:** Because the GHG MRR is an emissions reporting rule only and there is no compliance limit to evaluate for specific units, facilities, or companies, we believe there is no compelling legal or policy reason that EPA has to reveal any of the emissions or emission related data at the unit level. We propose that EPA should aggregate the GHG emissions data for public availability at the facility level as the lowest identifiable level.

**Response:** EPA disagrees with the commenter's statement that there is no reason that EPA has to reveal Part 98 emissions data. As we explained in Section I.C of the July 7, 2010 CBI proposal, Part 98 was promulgated under the authority of CAA section 114(a). Section 114(c) of CAA requires that "[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets . . . , the Administrator shall consider such record, report, or information or particular portion thereof confidential . . . ." (see 75 FR 39100). Section 114(c) requires that emission data be made publicly available irrespective of the sensitivity, level of reporting (i.e., facility or unit/process), or whether the emissions data can be used to discern other information about a production process. EPA used the existing definition of emission data at 40 CFR 2.301(a)(2)(i) to determine which data categories are emission data and therefore not entitled to CBI treatment. In 40 CFR 2.301(a)(2)(i), emission data is defined as follows:

“(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).”

As explained in Section I.C of the July 7, 2010 CBI proposal, EPA finds that 40 CFR 2.301(a)(2)(i)(B), which addresses emissions from sources that are authorized to emit, does not apply. However, the remaining parts of the definition in 40 CFR 2.301(a)(2)(i)(A) and (C) apply to any source of emissions and would therefore apply to Part 98 emissions data. As we explained in Section II.C.2 of the July 7, 2010 CBI proposal, the GHG emissions are clearly information regarding the identity, amount, and frequency of any emission emitted by the reporter and, therefore, they are emission data. Under the legal authority of CAA section 114(c), EPA must make public any data that is emission data regardless of whether the emission is at the unit or the facility level..

**Commenter Name: Robert P. Strieter**

**Commenter Affiliation: Aluminum Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0021.1**

**Comment Excerpt Number: 1**

**Comment:** The Aluminum Association respectfully requests EPA to reconsider its proposal and modify the rule to make only direct GHG emissions data unavailable for CBI protection for each reporting entity. Other data should be retained under CBI protections at the discretion of the reporting entity.

**Response:** As we explained in the July 7, 2010 CBI proposal, our CBI determinations were made using the definition of emission data at 40 CFR 2.301(a)(2)(i). This is the same definition for emission data has been used by EPA for over 20 years to make decisions on individual case-by-case CBI claims. EPA carefully construed this regulatory definition to include only those data elements necessary to determine the emission information specified in 2.301(a)(2)(i)(A) or to distinguish one source from another source as required in 2.301(a)(2)(i)(C). For those data categories that EPA determined did not qualify as emission data, EPA used the criteria from the existing CBI regulations at 40 CFR 2.208 to determine the CBI status of each Part 98 data element.

**Commenter Name: Gregory M. Scott**

**Commenter Affiliation: National Petrochemical & Refiners Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0036.1**

**Comment Excerpt Number: 2**

**Comment:** The Agency proposes that some data are “emissions data” “if they are ‘necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality)’ of a reporting facility’s emission in the context of another (or future) regulatory program or future legislation.” (75 Fed. Reg. 39101). This is an unreasonable goal. The Agency should not try to design a reporting program that anticipates future regulatory programs or legislation. If there are future regulatory programs or legislation, they should include reporting provisions that are necessary, tailored and effective.

**Response:** In the July 7, 2010 CBI proposal, EPA evaluated whether each data category met the definition of emission data within the context of Part 98. However, EPA recognized (in the excerpt quoted by the commenter) that these data elements may or may not be emission data in



the context of current or future programs. EPA does not agree with the comment that this action designs a reporting program in anticipation of future regulatory or legislation. This action makes confidentiality determinations for specific data elements as described in Section I.C of the preamble to the final rule. Part 98 was established under the Final Mandatory Reporting of Greenhouse Gases Rule (74 FR 56260).

**Commenter Name: Karin Ritter**<sup>30</sup>

**Commenter Affiliation: American Petroleum Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**

**Comment Excerpt Number: 20**

**Comment:** API has identified the specific direct emitter data elements that should be identified as CBI in the attached chart... EPA correctly found that these data are not emission data, but incorrectly determined that they are not CBI. Because this information qualifies for protection under EPA's regulations governing the confidentiality of business information, EPA should revise these determinations in the final rule. *See* 40 C.F.R. §§ 2.208, 2.301(e).

Business information is entitled to confidential treatment if:

- (a) "[t]he business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;"
- (b) "[t]he business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;"
- (c) "[t]he information is not, and has not been, reasonably obtainable without the business's consent;"
- (d) "[n]o statute specifically requires disclosure of the information;" and
- (e) either the business shows that disclosure of the information "is likely to cause substantial harm to the business's competitive position" or, if the information is voluntarily submitted, "its disclosure would be likely to impair the Government's ability to obtain necessary information in the future."

40 C.F.R. § 2.208. These substantive criteria apply to information collected pursuant to Sections 114 and 208 of the CAA, except that information which is "emission data, a standard or limitation, or is collected pursuant to Section 211 (b)(2)(A) of the Act is not eligible for confidential treatment." 40 C.F.R. § 2.301(e). . .

Certain data elements in the unit/process operating characteristics category should be provided CBI protection. This data includes:

Subpart Y - Petroleum Refineries:

Process vents: annual volumetric flow discharged to the atmosphere and mole fraction of each GHG in the vent (as required by Section 98.256(1)(5));

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<sup>30</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

The five regulatory requirements are met for these data elements. First, with this comment letter, "[t]he business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn." 40 C.F.R. § 2.208(a).

Second, API members can show that they have "taken reasonable measures to protect the confidentiality of the information, and that [they] intend[] to continue to take such measures." *Id.* § 2.208(b).

Third, EPA could not easily collect this information without API members' consent. *Id.* § 2.208( c) . . .

Fourth, no statute requires the disclosure of this information. 40 C.F.R. § 2.208(d).

Finally, disclosure of the information is likely to cause substantial harm to the API members' competitive positions. *Id.* § 2.208(e)

**Response:** As discussed in Section II.B.3 of the preamble to the final rule, the annual volumetric flow discharged to the atmosphere and mole fraction of each GHG in process vent emissions (reported under 40 CFR 98.256(1)(5)) have been moved from the Inputs to Emission Equations category to the Emissions category. These data elements provide information about the rate and concentration of GHG emissions into the atmosphere from process vents at petroleum refineries. As with other data elements in this category, they meet the definition of emission data in 40 CFR 2.301(a)(2)(i) and are not eligible for confidential treatment.

### 3. Calculation Methodology and Methodological Tier Category

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**Commenter Name: Kevin M. Dempsey**

**Commenter Affiliation: American Iron and Steel Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**

**Comment Excerpt Number: 13**

**Comment:** We agree that . . . the Calculation Method and Methodological Tier are “emissions data” not subject to CBI status.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Calculation Methodology and Methodological Tier category are emission data.

**Commenter Name: Leslie S. Ritts<sup>31</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

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<sup>31</sup> Comments submitted by the National Environmental Development Association’s Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 9**

**Comment:** NEDA/CAP [does not] disagree that . . . the Calculation Method and Methodology Tier are not entitled to CBI treatment. Such information is provided currently as the basis of compliance certifications under other laws and is not sensitive.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Calculation Methodology and Methodological Tier category are emission data.

**Commenter Name: Glen E. Davis**

**Commenter Affiliation: Mississippi Lime**

**Document Control Number: EPA-HQ-OAR-2009-0924-0049.2**

**Comment Excerpt Number: 14**

**Comment:** While Mississippi Lime Company (MLCO) recognizes that true "emissions data" is not granted confidentiality protection under the CAA in most cases, not all data that is somehow related to emissions is "emissions data." For example, MLCO agrees that the emissions per unit of time (e.g., tons/yr) should be made available to the public. However, if other required information is characterized as "emissions data" and disclosed, simple "back-calculations" using other emissions-related information would provide a competitor with precisely the CBI that is worthy of protection.

The categories required, as potentially applicable to MLCO, are depicted [below] denoting whether the data or information is routinely claimed as CBI or non-CBI by MLCO. MLCO has no objection to submission of truly non-CBI categories of information on a non-confidential basis. The USEPA inappropriately defines the majority of categories, however, as non-confidential. MLCO opposes production of such CBI on a non-confidential basis.

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(b))

CBI: Maximum rated heat input capacity of the unit (mmBtu/hr)

CBI: Each type of fuel combusted in the unit during the report year

Non-CBI: The Tier used to calculate the CO<sub>2</sub> emissions form each type of fuel combusted

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(c)(1))

CBI: The highest maximum rated heat input capacity of any unit in the group (mmBtu/hr)

CBI: Each type of fuel combusted in the group of units during the reporting year

Non-CBI: The tier used to calculate the CO<sub>2</sub> mass emissions for each type of fuel combusted in the units

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(c)(3))

CBI: Maximum rated heat input capacity of each unit served by the common pipe (mmBtu/hr)

CBI: Fuels combusted in the units during the reporting year

Non-CBI: Methodology used to calculate the CO<sub>2</sub> mass emissions (i.e., Tier 1, 2, or 3)

Reporting required under Subpart A: Content of the Annual Report (40 CFR 98.3(c)(1)-(4) & (6)-(9))

Non-CBI: A written explanation, as required under 98.3(e), if changed emission calculation methodologies during the reporting period

CBI: A brief description of each "best available monitoring method" used according to 98.3(d), the parameter measured using the method, and the time period during which the "best available monitoring method" was used.

Mississippi Lime Company (MLCO) closely guards production throughput information, including the monthly amount of each lime product produced/sold, calcined byproduct/waste sold, calcined byproduct/waste not sold, and the annual lime production capacity of each facility within the company. [Footnote: The maximum capacity of all facility processes, potential production schedules, maximum yearly design rates, emission factors and their sources, control efficiencies, and hours of operation are also considered CBI by MLCO] . If a competitor obtained this information, it could be used to gain unfair leverage in the marketplace. Monthly production information can be used to determine annual, actual production quantities and production efficiencies. This actual data can then be compared to the annual, potential production capacity of the facility, and a competitor could determine the degree of facility utilization. This knowledge can then be used to modulate pricing accordingly when bidding customer contracts. Customer contract bidding should be free from competitor access to this type of CBI, which otherwise would not be available.

Allowing the highest maximum rated heat input of any unit, or any unit in a reporting group, to be public information can also negatively impact fair competition in the lime industry. Given published MMBTU ratings, one can assume a default production rate of MMBTU/ton of lime produced, and kiln capacities correspondingly determined. Again, this insight can be utilized by competitors to understand facility utilization and unfairly gain market advantage.

Publicly available fuel-related information can also provide competitors with information influencing production, marketing, and pricing decisions. The type of fuel combusted in a unit or group of aggregated units during the reporting year, as well as the quantity of each type of fuel combusted (monthly or annually) in the unit/units, provides competitors with knowledge of fuel sources, amount of fuel consumed, and production capacities. Such information can be utilized to determine fuel costs, which can be compared to production capacities for estimating operating efficiencies of a unit or of a facility. Once again, this provides a competitor with access to information that it could not legally obtain by any other means, which could be used to disadvantage MLCO in the marketplace.

**Response:** As explained in Section II.C.5 of the July 7, 2010 CBI proposal, the reporting tier that a facility is allowed to use under Subpart C depends on the size of the combustion unit and the type(s) of fuel combusted. This information is emission data under 40 CFR 2.301(a)(2), because it is necessary for the reporter to determine the method they should use to calculate their emissions. Under CAA section 114(c), EPA must make emission data available to the public. Therefore, the maximum rated heat input capacity and the type of fuel combusted are not eligible for confidential treatment.

EPA also disagrees with the commenter that the maximum rated heat input capacity of a combustion unit and types of fuels combusted should be treated as CBI. Facilities report only generic information regarding the type of fuel combusted that would not reveal specific information about the composition of the fuel. In most cases, facilities use standard fuels, such as distillate fuel oil or natural gas. In cases where non-standardized fuels are used, such as waste process gas, the facilities report under this data element only that they combust “off-gas.” The actual quantity and composition of the fuels are used as inputs to the emission equations and as discussed in Section II.A.4 of the preamble to the final rule, EPA has proposed to defer reporting of data elements that are used as inputs to emission equations.

For the response to the comment that the maximum capacity of a process unit should be CBI, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 1 in section B.5 of this document.

For the response to the comment that the description of each best available monitoring method should be CBI, see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 18 in Section B.7 of this document.

The other data elements mentioned in this comment (e.g., Fuel consumption data) are used as inputs to emission equations. As discussed in Section II.A.4 of the preamble to the final rule, EPA has decided to defer reporting of data elements in the Inputs to Emission Equations category.

**Commenter Name: Keith Adams and Brian Keck**  
**Commenter Affiliation: Air Products and Chemicals, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**  
**Comment Excerpt Number: 23**

**Comment:** For §98.36(b) and (c), there are situations when the fuel-type might be CBI. In these instances, facilities will not want to report their fuel type, and EPA should not require it to be reported. This is especially true for §98.36(b)(5) for hydrogen production.

**Response:** For the response to this comment, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 14.

**Commenter Name: Lorraine Gershman<sup>32</sup>**  
**Commenter Affiliation: American Chemistry Council (ACC)**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**  
**Comment Excerpt Number: 25**

**Comment:** Subpart TT – Industrial Waste Landfills. There are several data elements in industrial waste landfills that EPA has deemed as non-CBI that we believe should be CBI.

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<sup>32</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

Unlike municipal waste landfills, industrial landfills are usually created to dispose of certain process waste. Knowing key information about waste streams would allow a competitor to determine production information at the affected facility. These elements are:

- (1) Description of each waste stream, if specific characterization is required
- (2) Methods for estimating historical quantities of each waste stream (depending on the method, production data could be revealed)

**Response:** We disagree that the types of materials in each waste stream and the method for estimating historical waste disposal quantities reported under 40 CFR part 98, subpart TT (Industrial Landfills) are sensitive or proprietary. To estimate the historical amount of waste sent to an industrial landfill, facilities select one of the methods specified in the rule. The methods include direct measurement of the waste or an alternative estimation method for use by reporters who do not have records of the amount of waste disposed. The reporter's choice of method does not disclose any information about the design or operating characteristics of production processes, historical production volumes, or any other production-related information. For the types of materials in each waste stream, reporters select from the generic list of waste types specified in the rule under Table TT-1, an approach that does not reveal any proprietary or specific information about the contents of the waste stream. Furthermore, the method and the type of waste are necessary to determine that the emissions were calculated using an appropriate methodology. As explained in Section II.C.5 of the July 7, 2010 CBI proposal, the method and any other information necessary to determine that the emissions were calculated using an appropriate methodology meet the definition of emission data at 40 CFR 2.301(a)(2)(i). Under CAA section 114(c), EPA must make emission data available to the public. Therefore, the method and the type waste are not eligible for confidential treatment.

**Commenter Name: Robert D. Bassette**

**Commenter Affiliation: Council of Industrial Boiler Owners**

**Document Control Number: EPA-HQ-OAR-2009-0924-0064.1**

**Comment Excerpt Number: 2**

**Comment:** The capacity of process heaters, the type of fuel utilized in process heaters, and the calculation methodology utilized should be treated as confidential.

**Response:** For the response to this comment, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 14.

**Commenter Name: Robert D. Bassette**

**Commenter Affiliation: Council of Industrial Boiler Owners**

**Document Control Number: EPA-HQ-OAR-2009-0924-0064.1**

**Comment Excerpt Number: 3**

**Comment:** For some facilities, the use of specific fuels for combustion sources should be treated as CBI. Some facilities utilize non-traditional fuels whose composition and quantity are currently unknown among competitors, and release of such information could place the reporting entity at a competitive disadvantage.

**Response:** For the response to this comment, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 14.

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 24**

**Comment:** DuPont is concerned about the non-confidentiality determination for a large fraction of combustion data [Footnote: In fact, it appears that all but three elements of reporting data under Subpart C are proposed as non-confidential.], particularly for our single product plants. . . . Although some of this operating data may be available through Title V permits, it is not readily accessible and would be difficult to bring together into a coherent package, unlike what EPA proposes here. Publishing this information on the internet will make it widely available to our domestic and overseas competitors. Specific concerns include (for example) but are not limited to: . . . §98.36(b)(3-4), (c)(1)(iii-v), (c)(2)(iii-iv), (c)(3)(iii-iv) and (d)(2)(A) – Maximum rated heat capacity, and each type of fuel combusted in the units during the year. As explained above, capacity information can be used by competitors to determine market information, production capability and other competitive information. In some cases the type of fuel used is proprietary to the process and a key competitive advantage. This should be considered CBI. Further, there is no significant public value for release of this information. It has significant private value (i.e., competitive intelligence).

**Response:** For the response to this comment, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 14.

**Commenter Name: Karin Ritter<sup>33</sup>**

**Commenter Affiliation: American Petroleum Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**

**Comment Excerpt Number: 11**

**Comment:** [For flexicoking units, API highlighted the maximum rated throughput of the flexicoking unit (40 CFR 98.256(g)(3)) as CBI in Table 1 attached to their comment letter. However, API did not provide any rationale for this claim in the text of their comment letter.]

**Response:** EPA disagrees with the commenter that the maximum rated throughput of flexicoking units (reported under 40 CFR 98.256(g)(3)) are eligible for confidential treatment. The maximum rated throughput is used to determine which calculation method is used for catalytic cracking units and fluid coking units. This data element is necessary to determine that the emissions are calculated using the appropriate methodology. It therefore meets the definition of emission data at 40 CFR 2.301(a)(2)(i) because it is information necessary to determine the quantity of emissions. As proposed in the July 7, 2010 CBI proposal, EPA has made a final

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<sup>33</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

determination that the data elements in the Calculation Methodology and Methodological Tier category are emission data and, therefore, are not eligible for confidential treatment.

4. Data Elements Reported for Periods of Missing Data that are Not Inputs to Emission Equations Category

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**Commenter Name: Vickie Patton**

**Commenter Affiliation: Environmental Defense Fund**

**Document Control Number: EPA-HQ-OAR-2009-0924-0047.1**

**Comment Excerpt Number: 7**

**Comment:** Missing Data Elements Must be Treated As Emissions Data and Disclosed: Missing data elements due to poor equipment operation, the failure to collect required data, or incomplete data for other factors seriously undermines the availability of accurate, complete, rigorous emissions data. We strongly agree with EPA's proposed determination that the data elements in the Missing Data Category are "emission data" that must be disclosed to ensure the data is complete and correct. Identification of all periods of missing data and use of substitute data during such periods are necessary for determining the annual GHG emissions. In order to determine if the reported annual emission data are complete and the correct methods were used to determine substitute values, EPA needs to know when reported data values are substitutes for missing data and what method was used to calculate substitute data.

**Response:** EPA agrees with the commenter that the data elements in this category are necessary to determine the accuracy of reported emissions. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Data Elements Reported for Periods of Missing Data that are Not Inputs to Emission Equations category are emission data.

**Commenter Name: Leslie S. Ritts<sup>34</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 10**

**Comment:** NEDA/CAP does not disagree that the method for filling missing data gaps should be information that is publicly available. In fact, data conventions and/or protocols are generally enunciated in state and local regulations for missing data.

**Response:** EPA agrees with the commenter that the method used to estimate a missing data element should be publicly available. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Data Elements Reported for Periods of Missing Data that are Not Inputs to Emission Equations category are emission data.

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<sup>34</sup> Comments submitted by the National Environmental Development Association's Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).



**Commenter Name: Glen E. Davis**  
**Commenter Affiliation: Mississippi Lime**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0049.2**  
**Comment Excerpt Number: 15**

**Comment:** The categories required, as potentially applicable to MLCO, are depicted [below] denoting whether the data or information is routinely claimed as CBI or non-CBI by MLCO. MLCO has no objection to submission of truly non-CBI categories of information on a non-confidential basis. . . .

Reporting required under Subpart S: Data Reporting Requirements (40 CFR 98.196(b))

Non-CBI: Number of times in the reporting year that missing data procedures were followed to measure lime production (months) or the chemical composition of lime products sold (months)

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(c)(3))

Non-CBI: The number of substitute data values use for carbon content and, if applicable, molecular weight determinations used in the annual GHG emissions calculations

CBI: Indicate whether each HHV is a measure value or a substitute value

Reporting required under Subpart A: Content of the Annual Report (40 CFR 98.3(c)(1)-(4) & (6)-(9))

Non-CBI: Each data element for which a missing data procedure was used according to the procedures of an applicable Subpart and the total number of hours in the year that a missing data procedure was used for each data element

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Data Elements Reported for Periods of Missing Data that are Not Inputs to Emission Equations category are emission data and, therefore, are not eligible for confidential treatment. EPA disagrees with the commenter that the data element 40 CFR 98.36(e)(2)(ii)(C) (indication of whether the HHV is a measured value or substitute value) is entitled to confidential treatment. As explained in Section II.C.6 of the July 7, 2010 CBI preamble, the identification of data elements for which substitute data are used are necessary for determining whether the reported GHG emissions are accurate and complete, and therefore meet the definition of emission data at 40 CFR 2.301(a)(2). We also note that this data element does not provide any information about the design or operation of the production process and therefore disclosure of this information would be unlikely to provide insight to competitors that would result in competitive harm to the reporter. In addition, this data element only provides information on how the HHV was measured; it does not provide information on the actual value of the HHV.

**Commenter Name: Caitlin Post**  
**Commenter Affiliation: Southern Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0027.1**  
**Comment Excerpt Number: 2**

**Comment:** EPA proposes to determine that data elements used to replace missing data are considered "emissions data" and therefore cannot remain confidential. Southern Company would like the ability to designate this information as CBI. There are standard procedures in place for estimating missing data for units subject to 40 CFR Part 75, but there are not similar procedures for Subpart C units of 40 CFR Part 98. §98.35(b) allows the use of the “best available estimate of the parameter, based on all available process data (e.g. electrical load, steam production, operating hours)” to substitute for missing data for units that use one of the Subpart C Tier calculation methodologies. This information is not currently available to the public. Southern Company would like the ability to designate unit specific operational and production data that may be needed to estimate missing data as confidential business information. This information could include efficiency information, such as fuel flow rate, which is clearly competitive information and not essential for missing data public disclosures.

**Response:** Most subparts require facilities to report only the substitute values used in the emission equations and not the underlying data used to calculate the substitute values. For example, facilities are required to measure feedstock consumption for ammonia production facilities using a flow meter. During periods when the flow meter is not working, a facility must estimate the amount of feedstock using process data, such as production efficiency or hours of operation. Facilities are required to keep records of the data and methods used to calculate the best estimate of the amount of feedstock consumed during the period the flow meter was not working. However, they are only required to report the best estimate of the feedstock consumed. The underlying process data used to calculate the estimate is not reported to EPA in the annual reports. Please also note that, as an input to the emission equations, the best estimate of the feedstock consumed is assigned to the input to the emission equations category. As discussed in Section II.A.4 of the preamble to the final rule, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category.

The types of data elements assigned to the Data Elements Reported for Periods of Missing Data that are Not Inputs to Emission Equations category includes information that indicates the quality and accuracy of the calculated emissions, such as the number of times substitute values are used, the period during which BMM was used, the reasons for using substitute values, and the method used to determine a substitute value. For reasons described in Section II.C.6 of the proposal preamble (75 FR 39094, July 7, 2010), EPA has determined in this final action, that the data elements in the Data Elements Reported for Periods of Missing Data that are Not Inputs to Emission Equations category are necessary to determine the amount of reported emissions and therefore qualify as emission data under 40 CFR 2.301(a)(2)(i).

#### 5. Unit/Process Static Characteristics that are Not Inputs to Emission Equations Category

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**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 23**

**Comment:** DuPont is concerned about the non-confidentiality determination for a large fraction of combustion data [Footnote: In fact, it appears that all but three elements of reporting data under Subpart C are proposed as non-confidential.], particularly for our single product plants. . . . Although some of this operating data may be available through Title V permits, it is not readily accessible and would be difficult to bring together into a coherent package, unlike what EPA proposes here. Publishing this information on the internet will make it widely available to our domestic and overseas competitors.

Specific concerns include (for example) but are not limited to:

- 1) §98.36(b)(2) – Code representing the type of unit – It is unclear how specific this code must be (e.g., whether EPA will specify codes for every type of device. In some situations we have proprietary combustion approaches that are a key to our competitive advantage. We would not want to be put in a position of divulging how or where we use such units. It is not clear what the public value of this information would be. If the codes were very generic or meant to be devised by the regulated entity, then we would not object to the release of this information. . . .

**Response:** The code representing the type of unit (reported under 40 CFR 98.36(b)(2)) is unlikely to reveal any proprietary information about an individual combustion unit. Under 40 CFR 98.36(b)(2) facilities report only general information regarding the type of combustion unit (e.g., whether the unit is a boiler, flare, internal combustion engine, process heater, etc) and very general information regarding the design of the combustion unit. Much of this information is already available to the public through sources such as Title V operating permits and detailed information on the type of combustion devices is available from other public sources, (e.g., NEI). Therefore, we conclude that there is no CBI concern regarding this data element.

**Commenter Name:** Glen E. Davis  
**Commenter Affiliation:** Mississippi Lime  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0049.2  
**Comment Excerpt Number:** 6

**Comment:** The categories required, as potentially applicable to MLCO, are depicted [below] denoting whether the data or information is routinely claimed as CBI or non-CBI by MLCO. MLCO has no objection to submission of truly non-CBI categories of information on a non-confidential basis. . . .

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(b))  
Non-CBI: A code representing the type of unit

**Response:** For the response to this comment, please see the response to comment EPA-HQ-OAR-2009-0924-0030, excerpt 23 above.

**Commenter Name:** Lorraine Gershman<sup>35</sup>

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<sup>35</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-

**Commenter Affiliation: American Chemistry Council (ACC)**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**  
**Comment Excerpt Number: 20**

**Comment:** Subpart V – Nitric Acid Production. We oppose EPA’s proposal not to treat several data elements CBI, including: . . .

(4) Type of nitric acid process used for each nitric acid train

. . .

Each of the highlighted data elements above should be designated as CBI. By making such information publicly available, competitors would be able to “reverse engineer” and calculate the nitric acid production at each facility.

**Response:** Based on our re-evaluation of the data elements in the Static Operating Characteristics Data that are Not Inputs to Emission Equations Category, EPA has decided not to make a final determination for the type of nitric acid plant (reported under 40 CFR 98.226(k)). In the July 2010 CBI proposals, we stated that this data element consists of general information that would be unlikely to provide any trade secrets or other sensitive information about a nitric acid production process. However, while we consider it unlikely that the type of nitric acid production process would be sensitive, we note that there may be facility-specific situations in which this information would provide competitively sensitive information. EPA is also not aware of any public sources of this data. Therefore, although we believe it is unlikely that this data element would cause competitive harm, EPA has decided not to make a determination.

**Commenter Name: Michael Tiller**  
**Commenter Affiliation: Compressed Gas Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0020.1**  
**Comment Excerpt Number: 10**

**Comment:** Overall, CGA believes that any information not directly needed to calculate emissions should be considered CBI. Such information to be considered CBI includes production efficiency, feedstock consumption, market share, product volumes, etc. CGA agrees that submittal of information as indicated in Table 2 and Table 3 may be necessary to perform verification of reported data; however, unit/process characteristics, either static or operating, should be considered CBI or, at least, the EPA should retain the ability for a reporting entity to petition on a case-by-case. A blanket determination that case-by-case confidentiality claims would “result in significant delays” does not justify bypassing the existing determination process under the CAA. EPA should follow its own established mechanism for case-by-case determinations, as detailed in 40 CFR Part 2, Subpart B, or, to minimize the perceived burden on EPA, allow the unit/process static and operating characteristics of a reporting site or entity to be managed as CBI if the information meets the criteria in 40 CFR 2.208.

**Response:** EPA disagrees that all data in the Unit/Process Static Characteristics that are Not Inputs to Emission Equations category and in the Unit/Process Operating Characteristics that are Not Inputs to Emission Equations category should be CBI. As we explained in Section I.C of the July 7, 2010 CBI proposal, Section 114(c) of CAA requires that “[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets . . . , the Administrator shall consider such record, report, or information or particular portion thereof confidential . . . .” EPA has interpreted CAA section 114(c) to afford confidential treatment to both trade secrets and confidential business information (see 40 FR 21987, 21990 (May 20, 1975)). We used the existing criteria in 40 CFR 2.208 to determine whether the data would qualify for CBI treatment. In making this determination, we focused on whether disclosure would be likely to cause “substantial harm to the business’s competitive position.” Although we proposed a category-wide non-CBI status for both the Unit/Process Static Operating Characteristics that are Not Inputs to Emission Equations category and Unit/Process Operating Characteristics that are Not Inputs to Emission Equations category, we received a number of comments objecting to this proposed determination and concluded that review of each individual data element was appropriate. We therefore evaluated each individual data element using the criteria in 40 CFR 2.208 and determined that some of the data elements in these two data categories are eligible for confidential treatment. For a list of the data elements that we determined to be eligible for CBI treatment, please see Section II.B.6 and B.7 of the preamble to the final rule.

For the response to the comment regarding the need for case-by-case review of individual CBI claims, please see the responses to similar comments in Section A.1 of this document.

**Commenter Name:** Glen E. Davis  
**Commenter Affiliation:** Mississippi Lime  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0049.2  
**Comment Excerpt Number:** 1

**Comment:** Lime manufacturing is a relatively small but concentrated and extremely competitive industry. Therefore, MLCO maintains competitively sensitive information/data secret and proprietary business information which qualifies as confidential business information (CBI). This CBI, if made public, could readily influence production, marketing, and pricing decisions within the lime industry, which would have a direct negative impact on MLCO’s business interests. In recent years, there has been increasing consolidation in the domestic lime industry and large companies and foreign entrants have used sensitive market information to put smaller companies at a competitive disadvantage. This conduct directly harms and disadvantages consumers over the long-run as they will have fewer choices of suppliers. Foreign market entrants who import lime are also not subject to full USEPA regulation, which provides them with the competitive advantage of avoiding the costs and requirements of compliance with U.S. environmental laws and regulations.

In order to enable MLCO to compete for the long term, the company has made substantial capital investments in new technologies and construction projects that both significantly reduce its

emissions and improve its cost competitiveness. Mississippi Lime understands the regulatory goal of addressing GHG issues through statistical reporting and analysis to support greenhouse gas emissions calculations. However, the CBI Proposal threatens to penalize compliant companies by exposing their CBI to domestic and foreign competitors.

The potential misuse of MLCO's CBI, ... is not hypothesized. Many competitors in the industry are larger than MLCO and sophisticated. The "back calculations" described [in our comment letter] could be readily performed by them to MLCO's detriment.

MLCO is not objecting to production of the requested GHG emissions information, which is utilized by the USEPA, state environmental agencies, and public stakeholders to determine air quality compliance. Rather, the company objects to forced public disclosure of critical, strategic information, including product analytical data, unit and total facility production capacities, fuel-specific consumption data, and production output rates to direct competitors.

**Response:** Although we proposed a category-wide non-CBI status for Unit/Process Static Operating Characteristics that are Not Inputs to Emission Equations category, we received a number of comments objecting to this proposed determination and concluded that review of each individual data element was appropriate. We therefore re-evaluated each individual data element in this data category using the criteria in 40 CFR 2.208. Based on our review, we decided not to make final determinations for the following 18 data elements related to production capacity:

- The annual ferroalloy product production capacity (reported under 40 CFR 98.116(a)).
- The annual lead product production capacity reported by facilities using CEMS (reported under 40 CFR 98.186(a)(2)).
- The annual lead product production capacity for facilities not using CEMS (reported under 40 CFR 98.186(b)(3)).
- The annual lead product production capacity for each smelting furnace reported by facilities not using CEMS (reported under 40 CFR 98.186(b)(3)).
- The annual lime production capacity (reported under 40 CFR 98.196(b)(15)).
- The maximum rated throughput capacity of the catalytic cracking unit, traditional fluid coking, or catalytic reforming unit (reported under 40 CFR 98.256(f)(3)).
- The maximum rated throughput of the sulfur recovery plant (reported under 40 CFR 98.256(h)(2)).
- The maximum rated throughput of each coke calcining unit (reported under 40 CFR 98.256(i)(2)).
- The annual phosphoric acid permitted production capacity (reported under 40 CFR 98.266(b)).
- The annual phosphoric acid production capacity for each wet-process phosphoric acid process line (reported under 40 CFR 98.266(f)(3)).
- The annual production capacity of silicon carbide reported by facilities using CEMS (reported under 40 CFR 98.286(a)(3)).
- The annual production capacity of silicon carbide reported by facilities not using CEMS (reported under 40 CFR 98.286(b)(3)).

- The annual production capacity of soda ash for each manufacturing line reported by facilities using CEMS (reported under 40 CFR 98.296(a)(3)).
- The annual production capacity of soda ash reported by facilities not using CEMS (reported under 40 CFR 98.296(b)(4)).
- The annual production capacity of titanium dioxide reported by facilities using CEMS (reported under 40 CFR 98.316(a)(4)).
- The annual production capacity of titanium dioxide for each production line reported by facilities not using CEMS (reported under 40 CFR 98.316(b)(5)).
- The annual zinc product production capacity reported by facilities using CEMS (reported under 40 CFR 98.336(a)(1)).
- The annual zinc product production capacity reported by facilities not using CEMS (reported under 40 CFR 98.336(b)(2)).

In the July 2010 CBI proposals, we proposed that these capacity data elements would be not entitled to CBI protection because we believed that the data was readily available from other public sources (e.g., permits, trade and government publications). However, in response to comments that this data may not be readily available for all sources and to claims from some commenters this information is competitively sensitive, EPA reviewed the available capacity information and determined that the situation may vary for individual facilities. While the capacity data are generally available, there may be facilities where this is not public. Further, the information publicly available for facilities may not necessarily be the same as the data elements required under Part 98. We therefore decided not to make a confidentiality determination for these specific data elements at this time.

Fuel consumption data (reported under subpart C), product analytical data (reported under 40 CFR 98.196(b)), and production data (reported under 40 CFR 98.196(b)) are used as inputs to the emission equations in subpart S; however, as discussed in Section II.A.4 of this document, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category. The lime production data (reported under 40 CFR 98.196(a)) by facilities using CEMS are not used to calculate emissions and are therefore assigned to the Production/Throughput Data that are Not Input to Emission Equations category. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data that are Not Inputs to Emission Equations category are CBI.

**Commenter Name: Lorraine Gershman<sup>36</sup>**  
**Commenter Affiliation: American Chemistry Council (ACC)**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**  
**Comment Excerpt Number: 22**

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<sup>36</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

**Comment:** Subpart EE – Titanium Dioxide Production. We oppose EPA’s proposal not to treat several data elements as CBI, including:

- (1) Annual production capacity of titanium dioxide
- (5) Number of separate chloride process lines located at the facility

Each of the highlighted data elements above should be designated as CBI. By making such information publicly available, competitors would be able to “reverse engineer” and calculate the titanium dioxide production at each facility.

**Response:** We disagree with the commenter that the number of titanium dioxide production lines should be afforded confidential treatment. This information is generally included in both construction and Title V operating permits as well as in permit applications and permit fact sheets and is therefore already publicly available. Because the number of production units are already publicly available for these data, they do not qualify for confidential treatment pursuant to 40 CFR 2.208(c).

Please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 1 above for the response to the comment regarding annual production capacity for titanium dioxide.

**Commenter Name: Robert A. Reich**  
**Commenter Affiliation: DuPont Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0030**  
**Comment Excerpt Number: 19**

**Comment:** Subpart EE – Titanium Dioxide Production. There is significant competitive business risk from leakage of confidential information on the DuPont titanium dioxide production process if that information is not adequately protected. We know that competitive TiO<sub>2</sub> manufacturers (in China, for example) are actively seeking insight into chloride TiO<sub>2</sub> technology, knowledge they do not have today. Furthermore there are different types of chloride technology, and to maintain our competitiveness, we guard our own approaches even from other chloride producers. Eventually others, such as foreign manufacturers, may gain an understanding and master it in some form, but we as a nation should not hasten that day. The U.S. Government may be unwittingly conspiring in industrial espionage benefiting foreign powers by relaxing CBI considerations. The chloride process for TiO<sub>2</sub> manufacture was invented on U.S. soil and is today the source of employment for thousands of U.S. workers and millions of dollars of U.S. exports. . . .

The following items should not be made available to the public for the reasons stated:

1) §98.316(a)(3) –Annual Production Capacity of Titanium Dioxide: We have always held exact production volume capability as trade secret information. Our single-reactor lines can produce at much higher rates than those of our competitors, who must generally use multiple reactors to achieve what we are capable of doing (with unit operations of much greater capacity).

. . .

5) §98.316(b)(14) –Number of Separate Chloride Process Lines Located at the Facility: It would be preferable to hold this as internal information, as has been done in the past. It is a less critical aspect than the remaining items in this list, however.



**Response:** For the response to the comments regarding number of separate chloride process lines (40 CFR 98.316(b)(14)), please see the response to comment EPA-HQ-OAR-2009-0924-0031.1, excerpt 22 above. For the response to the comment regarding annual production capacity for titanium dioxide (40 CFR 98.316(a)(3)), please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 1 above.

**Commenter Name: Glen E. Davis**  
**Commenter Affiliation: Mississippi Lime**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0049.2**  
**Comment Excerpt Number: 16**

**Comment:** The categories required, as potentially applicable to MLCO, are depicted [below] denoting whether the data or information is routinely claimed as CBI or non-CBI by MLCO. MLCO has no objection to submission of truly non-CBI categories of information on a non-confidential basis. The USEPA inappropriately defines the majority of categories, however, as non-confidential. MLCO opposes production of such CBI on a non-confidential basis.

Reporting required under Subpart S: Data Reporting Requirements (40 CFR 98.196(b))  
CBI: Annual lime production capacity (tons) per facility

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 1 above for the response to the comment regarding annual lime production capacity.

**Commenter Name: None**  
**Commenter Affiliation: The Federal Trade Commission**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0065.1**  
**Comment Excerpt Number: 1**

**Comment:** Three categories of data that the EPA proposes to make public contain potentially sensitive competitive business information: “inputs to emission equations,” “unit/process ‘static’ characteristics that are not inputs to emission equations,” and “unit/process operating characteristics that are not inputs to emission equations.” These three categories include data on production, throughput, raw material consumption, capacity, and future operations. Public disclosure of such facility- and firm-specific sensitive business information may make it easier for reporting companies to either tacitly [Footnote: Tacit coordination exists without any actual communication among competitors. See, e.g. In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d. 651, 654 (7th Cir. 2002) (a tacit agreement to fix prices is, “an agreement made without any actual communication among the parties to the agreement.”)] or explicitly coordinate their pricing decisions. This is especially true when certain market conditions are present, such as transparency, high concentration, impediments to entry, homogeneous products, and low elasticity of demand. [Footnote: See U.S. Department of Justice and Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors, §3.31(b) (2000) available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>).

Because many industries subject to the GHG reporting requirements share at least some of these market conditions, making confidential business information (CBI) public may lead to collusion that harms consumers through higher prices, decreased quality, and decreased innovation. Therefore, the FTC recommends that the EPA treat data that is an input to emission equations as confidential.

**Response:** For a response to the comment on capacity, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 1 above for the response to the comment regarding facility production capacities. For the response to the comment regarding data elements that provide forward-looking information about future operations, please see the response to comment EPA-HQ-OAR-2009-0924-0065.1, excerpt 3 in Section B.6 of this document. Regarding the comment on production, throughput and raw material consumption, as discussed in Section II.A.4 of this document, EPA has proposed to defer reporting of data elements when they are used as Inputs to Emission Equations. Where raw material and production data are not used to calculate GHG emissions (e.g., where CEMS are used instead of a calculation method), such data elements are assigned to the Production/Throughput Data that are Not Input to Emission Equations category. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data that are Not Inputs to Emission Equations category are CBI.

**Commenter Name: None**

**Commenter Affiliation: The Federal Trade Commission**

**Document Control Number: EPA-HQ-OAR-2009-0924-0065.1**

**Comment Excerpt Number: 2**

**Comment:** The FTC also recommends that the EPA delay publication of any reported data concerning plant or unit capacity or future operating status until after reporting companies receive sufficient time to apply for confidential treatment. The competitive sensitivity of this data can vary by industry, which suggests that more information is needed to make a confidentiality determination. . . .

By designating “unit/process ‘static’ characteristics that are not inputs to emission equations” as non-CBI, the proposed rule would make certain capacity information public. The EPA explains that much capacity information is already publicly available through other reporting programs, reference materials and industry publications, making its release here not harmful. Although that may be true in some industries, there are others in which accurate capacity data is not publicly available. In those cases, capacity information can be competitively sensitive.

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 1 above for the response to the comment regarding facility production capacities. For the response to the comment recommending EPA delay publication of emission or non-CBI data, please see the response to comment EPA-HQ-OAR-2009-0924-0045.1, excerpt 4 in Section A.11 of this document. For the response to the comment on allowing facilities time to apply for confidential treatment, please see the responses to similar comments in Section A.1 of this document.

**Commenter Name: Michael Tiller**

**Commenter Affiliation: Compressed Gas Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0020.1**  
**Comment Excerpt Number: 2**

**Comment:** Information such as equipment specifications, raw material volumes, and unit operating parameters could present a detailed picture of a site's vulnerability to criminal or terrorist attacks. This information may be required to be reported under other federal laws or regulations, but is kept under strict confidentiality laws to maintain the security of the site. It is illogical and contradictory to require an entity to report information to the public when a different federal law requires maintaining strict confidentiality of that same information.

**Response:** EPA disagrees with the commenter that process specifications and operating parameters would make a production facility vulnerable to criminal or terrorist attacks. Detailed information regarding the location, and number and type of production units are already available to the public through State and Federal air permits. Raw material consumption data is eligible for confidential treatment when not used to calculate the GHG emissions. In situations where raw material consumption is used to calculate GHG emissions, we have recently deferred reporting of such data elements to allow additional time to consider stakeholder comments (see Section II.A.4 of the preamble for additional information regarding our proposal to defer reporting of data elements in the Inputs to Emission Equations category). EPA is aware of the Department of Homeland Security's (DHS) Chemical Facilities Anti-Terrorism Standards (CFATS) regulation that requires certain chemical facilities (producing ammonia, nitric acid, hydrogen, magnesium) to prepare security vulnerability assessments, develop and implement site security plans, which include measures that satisfy risk-based performance standards established by DHS. While the CFATS program does designate certain information as confidential or "Chemical-Terrorism Vulnerability Information" or "CVI", this program does not designate the type of information published under the Greenhouse Gas Reporting Program as CVI. We also note that CFATS does not alter EPA's authority or responsibility under the CAA.

**Commenter Name: None**  
**Commenter Affiliation: The Federal Trade Commission**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0065.1**  
**Comment Excerpt Number: 9**

**Comment:** Capacity and operational data are also potentially competitively sensitive, but the EPA may need more specific information about how competitors might use such information in a particular industry before determining whether it is CBI. For that reason, the EPA may wish to consider delaying a decision on publication of these categories until reporters can provide better information on the impact of making them public and the need for confidentiality in particular industries.

**Response:** EPA disagrees with the commenter that additional time is required to evaluate the potential confidentiality issues related to data elements in the Unit/Process Static Characteristics that are Not Inputs to Emission Equations and the Unit/Process Operating Characteristics that are Not Inputs to Emission Equations categories. EPA evaluated each data element in these

categories before publication of the CBI proposals and included detailed rationales in Section II.C.7 and II.C.8 of the July 7, 2010 CBI proposal. As described in more detail in Section II.A.6 of the preamble to the final rule, we decided to re-evaluate each data element in these two categories after proposal before making final CBI determinations due to the concerns expressed by this and other commenters. In most cases, we confirmed that our proposed determinations were appropriate and finalized those determinations in the final rule. Please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 1 above for additional information regarding our determination that facility production capacities. As discussed in Section II.A.4 of the preamble to the final rule, EPA has proposed to defer reporting of data elements that are assigned to the Inputs to Emission Equations category.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0067.1**  
**Comment Excerpt Number: 2**

**Comment:** [T]he FTC’s suggestion that EPA should refrain from disclosing unit or process static operating characteristics that are not inputs to emission equations conflicts with the Clean Air Act. See FTC Comments at 7-8. Because these characteristics are public, general, descriptions of a given unit – embracing such basic data as the number of boilers at a power plant or the general type of emission control used – no operator could plausibly show that they are “entitled to protection as trade secrets,” as EPA recognizes. See 42 U.S.C. § 7414(c). Indeed, much of this information, such as data on which control devices are being used, is specified in public permits. See 75 Fed. Reg. at 39,112. Though the FTC suggests that, in some industries, this information is not publicly available and “can be” competitively sensitive, it offers no concrete examples. EPA has carefully reviewed this concern, and determined that it is not well-founded. See *id.* (this information “does not provide data that could allow competitors to infer market share, production costs, or pricing structure.”).

At bottom, the atmosphere is the quintessential public resource, so the Clean Air Act makes clear that the public has a broad right to air pollution information. EPA has carefully protected confidential and competitively sensitive information where the statute and regulations allow, but it must ultimately require disclosure of core emission data, which includes the inputs to emission equations. Although the FTC might prefer a different balance, controlling law dictates another course.

**Response:** EPA agrees with the comment that not all data elements in the Unit/Process Static Characteristics that are Not Inputs to Emissions Equations category are eligible for confidential treatment. Please see response to comment EPA-HQ-OAR-2009-0924-0020.1 excerpt 10 above for an explanation of how EPA made confidentiality determinations for data elements in this category.

**Commenter Name: Bryan Brendle**  
**Commenter Affiliation: Portland Cement Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0045.1**  
**Comment Excerpt Number: 10**

**Comment:** Portland Cement Association (PCA) members believe that CBI protection should apply to all six data categories that EPA does not classify as “emissions data,” and not be restricted to the three data categories laid out in Table 2 of the Preamble (75 FR 39094 at 39097).

**Response:** The commenter is referring to the following six data categories that EPA proposed were not emission data: Unit/Process Static Characteristics that are Not Inputs to Emissions Equations, Unit/Process Operating Characteristics that are Not Inputs to Emission Equations, Test and Calibration Methods Category, Production/Throughput Data Elements that are Not Inputs to Emission Equations, Raw Materials Consumed that are Not Inputs to Emission Equations, and Process-Specific and Vendor Data Submitted in BMM Extension Requests. As discussed in Section I.C of the July 7, 2010 CBI preamble, data elements that do not meet the definition of emission data in 40 CFR 2.301(a)(2) were evaluated using the CBI criteria in EPA’s existing CBI regulations (see 40 CFR 2.208). Specifically, EPA evaluated each data element in accordance with the criteria specified in 40 CFR 2.208(c) (not already publicly available) and (e) (release of the data would cause substantial harm to the business’s competitive position). Only those data elements that meet these criteria are eligible for confidential treatment. For additional information on the approach to making CBI determinations, see Section I.C of the preamble to the July 7, 2010 CBI proposal.

For the data categories Unit/Process Static Characteristics that are Not Inputs to Emissions Equations and Unit/Process Operating Characteristics that are Not Inputs to Emission Equations, we had proposed category-wide non-CBI determinations. However, in response to comments on this proposed determination, we re-evaluated the data elements in this data category and concluded that the proposed categorical determination of non-CBI may not be appropriate for all the data elements in this category. Therefore, to make determinations for these two data categories, we evaluated each data element individually using the criteria in 40 CFR 2.208. Using this approach, we made a final determination that some of the data elements in the Unit/Process Static Characteristics that are Not Inputs to Emissions Equations and Unit/Process Operating Characteristics that are Not Inputs to Emission Equations data categories are eligible for confidential treatment. For a list of the data elements determined to be CBI, please see Sections II.B.6 and B.7 of the preamble to the final rule.

For the response the comment recommending that the other five data categories should be CBI, please see the response to this comment in the relevant sections of this document.

**Commenter Name: Michael Tiller**  
**Commenter Affiliation: Compressed Gas Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0020.1**  
**Comment Excerpt Number: 1**

**Comment:** CGA is concerned with the classification EPA has made of certain information, which EPA has defined as both not emission data and not qualified to be treated as confidential business information (CBI). The sort of information used as examples by EPA, such as unit capacity, production efficiency, feedstock consumption, and market share, is not universally disclosed under the Clean Air Act (CAA), or any other regulatory program. CGA is only aware

of the Title V Permit Program under the CAA, which currently requires some (but not all) of the parameters defined by EPA as “not emission data and not qualified as CBI”. Facilities that do not have a Title V permit are not required to report this data and could reasonably claim the confidentiality of such previously undisclosed information.

In addition, if such information is made available to the public it could easily be used by domestic or international competitors or customers to “reverse engineer” the reporting entity’s efficiencies, manufacturing costs, design parameters, or cost to deliver goods or materials. This is the sort of information sharing expressly forbidden by anti-trust laws and mechanisms designed to protect and promote business competition. While some industries develop industry metrics and reports available to industry groups, the public, or various stakeholders, this is not true of the compressed gas industry, particularly on newer or more rapidly evolving production processes such as hydrogen, alternative energy sources, and specialty materials. In fact, such industry reports could violate the Sherman Anti-trust Act. For example, if only two entities manufacture product A, an aggregate report would allow either to discern their competitors’ business efficiencies.

**Response:** As discussed in Section I.C of the July 7, 2010 CBI preamble, data elements that do not meet the definition of emission data in 40 CFR 2.301(a)(2) were evaluated using the CBI criteria in EPA’s existing CBI regulations (see 40 CFR 2.208). Specifically, EPA evaluated each data element in accordance with the criteria specified in 40 CFR 2.208(c) (not already publicly available) and (e) (release of the data would cause substantial harm to the business’s competitive position). Only those data elements that meet these criteria are eligible for confidential treatment. We agree with the commenter that not all facilities subject to Part 98 are subject to Title V. However, we note that many smaller facilities are subject to state air regulations, including permitting requirements for minor sources. We also note that we sought comment on facility specific issues that could not be addressed through the categorical approach and have addressed those comments in the relevant sections of this document. For additional information on the approach to making CBI determinations, see Section I.C of the preamble to the July 7, 2010 CBI proposal. Please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 1 above for the response to the comment regarding unit/process capacity information. For the response to the comments regarding anti-trust concerns, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 9 in Section A.13 of this document.

**Commenter Name: Gregory M. Scott**

**Commenter Affiliation: National Petrochemical & Refiners Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0036.1**

**Comment Excerpt Number: 4**

**Comment:** Unit-specific data contain competitively sensitive data, related to key competitive parameters. These include unit . . . capacity, fuel usage, and other sensitive competitive data elements. In the refining industry, participants engage in competitive intelligence vis-à-vis their competition against other participants by modeling the performance of competing refineries. At present, the data elements are not publicly disseminated, and so assumptions must be used for them in the models. But under the EPA proposed rulemaking, these data elements would be released with no protective mechanisms, and would be used by competitors in their models.

From these models competitors can derive cost, price, and operating margin data, as well as strategic plans, operational plans, and scheduling information. All of these raise substantial antitrust risks.

**Response:** Please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 1 above for the response to the comment regarding unit capacity information. Fuel usage data is used as an input to emission equations. As discussed in Section A.4 of this document, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category. For the response to the comment regarding anti-trust concerns, please see the response to comment EPA-HQ-OAR-2009-0924-0049.2, excerpt 9 in Section A.13 of this document.

**Commenter Name:** Karin Ritter<sup>37</sup>

**Commenter Affiliation:** American Petroleum Institute

**Document Control Number:** EPA-HQ-OAR-2009-0924-0057.1

**Comment Excerpt Number:** 8

**Comment:** The data elements in [the inputs to emissions equations] category that have been incorrectly identified as emissions data and categorized as "not CBI" . . . include: . . .  
From Subpart Y - Petroleum Refineries: . . .

Delayed coking units:

total number of delayed coking drums, . . . typical drum outage of coke drum or vessel, . . .  
number of coking drums in the set, . . . (as required by Section 98.256(k)(3) and (k)(4)); . . .  
These data elements divulge information about facility processes and operations, including information about fuel supplies, unit throughput, and production volumes. Disclosing these data elements would reveal confidential business information related to ownership interests, processes employed by individual facilities, and business practices at individual facilities. If a competitor is provided access to this information, it can obtain a competitive advantage over the facility by reverse engineering information about the facility's operations and business strategies. This competitive information must be protected as CBI in the final rule. All five elements for evaluating whether information is entitled to confidential treatment are satisfied. *See* 40 C.F.R. § 2.208.

First, with these comments, API members are properly asserting their business confidentiality claim with respect to this information. *Id.* § 2.208(a). Second, API members have taken and will continue to take reasonable measures to protect the confidentiality of the data elements in this category. *Id.* § 2.208(b). Notably, the Department of Energy's Energy Information Administration (EIA) appropriately provides confidential treatment for facility-level fuel production and distribution information. *See* Petroleum Supply Monthly, Appendix B: Explanatory Notes, March 2007. Indeed, EIA is prohibited from making public or sharing disaggregated or entity-specific fuel use or distribution data. *See* 44 U.S.C. § 3501 note at Sec. 208 (preventing disclosure of information in identifiable form where information was submitted

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<sup>37</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

under a pledge of confidentiality). In addition, voluntary GRG inventory programs-such as the Department of Energy's Voluntary Reporting of Greenhouse Gases Program, authorized by Section 1605(b) of the Energy Policy Act of 1992, The Climate Registry, and the California Climate Action Registry-do not require reporting facilities to disclose the details behind their GRG emissions data. Very limited information beyond the emissions results, are made available to the public. The detailed information is, however, subject to third party verification, and it is the verification process that provides confidence in the information.

Third, EPA could not otherwise obtain this data without the consent of the relevant businesses. 40 C.F.R. § 2.208(c). The cost or difficulty associated with obtaining information is an important consideration in assessing whether it is "reasonably obtainable." *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45,52 (D.C. Cir. 1981). These data are not reasonably obtainable. For example, the quantity of fuel gas combusted in each combustion unit or group of combustion units is not information that is routinely reported and is not currently available to the public. Under the California reporting rule, for instance, fuel quantity for each combustion device is recognized as CBI. API members are claiming fuel quantity as CBI in their California emissions report. Fourth, "[n]o statute specifically requires disclosure of the information" included in the "Inputs to Emissions Equations" category. 40 C.F.R. § 2.208(d). Indeed, EPA has not asserted that the requested information is required by statute.

Fifth, disclosure of the requested information is likely to cause substantial harm to API members' competitive positions. *Id.* § 2.208( e). The disclosure of process-specific information and production volumes would reveal sensitive process capabilities and operational limits. In addition, if that information were combined with other publicly available information, disclosed under air quality permits and CAA Section 112(r) hazard assessments, competitors would have a detailed picture of a facility's operational capabilities. This information could expose a facility's business position, weaknesses, or vulnerabilities, which could then be used by competitors to disadvantage the reporting facility. For example, the disclosure of unit-specific throughputs and unit-specific fuel use could give competitors a detailed understanding of a facility's process capability and create an advantage in optimizing future crude or product supply. Disclosure of fuel use and process volumes would also reveal a refinery's process operational capacity, limits, bottlenecks, and options to reconfigure in response to market change.

Finally, the disclosure of operational data and throughputs would enable equipment/technology providers to quantify the facility's capabilities. This information could be used against the refiner in future negotiations to upgrade or replace its equipment. For these reasons, the "inputs to emission equations" data requested of petroleum refineries should receive confidential treatment.

...

**Response:** The number of delayed coking drums, the typical drum or vessel outage, and the number of coking drums in a set (reported under 40 CFR 98.256(k)(3) and (k)(4)) have been moved from the Inputs to Emission Equations category to the Unit/Process Characteristics that are Not Inputs to Emission Equations. As discussed in Section II.A.4 of the preamble to the final rule, these data are related to the data used as inputs, but are not the actual values used to calculate emissions.



As we explained in Section I.C of the July 7, 2010 CBI proposal, Section 114(c) of CAA requires that “[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets . . . , the Administrator shall consider such record, report, or information or particular portion thereof confidential . . . .” EPA has interpreted CAA section 114(c) to afford confidential treatment to both trade secrets and confidential business information (see 40 FR 21987, 21990 (May 20, 1975)). Using the criteria in 40 CFR 2.208, we evaluated each of the three data three data elements mentioned by the commenter to determine whether they qualify as trade secrets or confidential business information. In making this determination, we focused on whether disclosure would be likely to cause “substantial harm to the business’s competitive position” and determined that the following data elements are eligible for confidential treatment. We concluded that these data elements can be used by competitors to determine the actual raw material input to a delayed coking unit and would provide insight into innovative operating practices that are considered sensitive by the reporter because they provide the reporter with a competitive advantage over other refineries. For example, changes in operating practices can produce increases in production capacity without adding new drums/vessels. Further, comments from refineries indicate that they consider these data elements to be sensitive and take precautions to ensure this information is not made public. We are also not aware of any public sources for these data elements. For the reasons described above, EPA has made a final determination that the number of delayed coking drums, typical drum outage, and number of coking drums are CBI.

6. Unit/Process Operating Characteristics that are Not Inputs to Emission Equations Category

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**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 25**

**Comment:** DuPont is concerned about the non-confidentiality determination for a large fraction of combustion data [Footnote: In fact, it appears that all but three elements of reporting data under Subpart C are proposed as non-confidential.], particularly for our single product plants. . . .Although some of this operating data may be available through Title V permits, it is not readily accessible and would be difficult to bring together into a coherent package, unlike what EPA proposes here. Publishing this information on the internet will make it widely available to our domestic and overseas competitors.

Specific concerns include (for example) but are not limited to: . . .

§98.36(e)(2) – Total quantity of each type of fuel combusted, and many other items under this provision, including total number of source operating hours. As described above, this information would provide key competitive intelligence on production capability and profitability.

**Response:** EPA disagrees with the commenter that the total number of operating hours for a combustion unit (reported under 40 CFR 98.36(e)(2)(vi)(A)) should be considered CBI. EPA notes that this data element is only reported by those facilities that use continuous emissions monitors to measure the emissions from the combustion unit. Furthermore, the number of operating hours for stationary combustion units is publicly available through the NEI and is therefore not eligible for confidential treatment pursuant to 40 CFR 2.208(c).

Fuel consumption data and many of the other data elements reported under 40 CFR 98.36(e)(2) (e.g., cumulative heat input, steam production, etc) are used as inputs to emission equations. As discussed in Section II.A.4 of the preamble to the final rule, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category.

**Commenter Name: Bryan Brendle**

**Commenter Affiliation: Portland Cement Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0045.1**

**Comment Excerpt Number: 9**

**Comment:** Portland Cement Association (PCA) members believe that CBI protection should apply to all six data categories that EPA does not classify as “emissions data,” and not be restricted to the three data categories laid out in Table 2 of the Preamble (75 FR 39094 at 39097).

**Response:** The commenter is referring to the following six data categories that EPA proposed were not emission data: Unit/Process Static Characteristics that are Not Inputs to Emissions Equations, Unit/Process Operating Characteristics that are Not Inputs to Emission Equations, Test and Calibration Methods Category, Production/Throughput Data Elements that are Not Inputs to Emission Equations, Raw Materials Consumed that are Not Inputs to Emission Equations, and Process-Specific and Vendor Data Submitted in BMM Extension Requests. As discussed in Section I.C of the July 7, 2010 CBI preamble, data elements that do not meet the definition of emission data in 40 CFR 2.301(a)(2) were evaluated using the CBI criteria in EPA’s existing CBI regulations (see 40 CFR 2.208). Specifically, EPA evaluated each data element in accordance with the criteria specified in 40 CFR 2.208(c) (not already publicly available) and (e) (release of the data would cause substantial harm to the business’s competitive position). Only those data elements that meet these criteria are eligible for confidential treatment. For additional information on the approach to making CBI determinations, see Section I.C of the preamble to the July 7, 2010 CBI proposal.

For the data categories Unit/Process Static Characteristics that are Not Inputs to Emissions Equations and Unit/Process Operating Characteristics that are Not Inputs to Emission Equations, we had proposed category-wide non-CBI determinations. However, in response to comments on this proposed determination, we re-evaluated the data elements in this data category and concluded that the proposed categorical determination of non-CBI may not be appropriate for all the data elements in this category. Therefore, to make determinations for these two data categories, we evaluated each data element individually using the criteria in 40 CFR 2.208. Using this approach, we made a final determination that some of the data elements in the Unit/Process Static Characteristics that are Not Inputs to Emissions Equations and Unit/Process Operating Characteristics that are Not Inputs to Emission Equations data categories are eligible

for confidential treatment. For a list of the data elements determined to be CBI, please see Sections II.B.6 and B.7 of the preamble to the final rule.

For the response the comment recommending that the other five data categories should be CBI, please see the response to this comment in the relevant section of this document.

**Commenter Name: None**

**Commenter Affiliation: The Federal Trade Commission**

**Document Control Number: EPA-HQ-OAR-2009-0924-0065.1**

**Comment Excerpt Number: 3**

**Comment:** By designating “unit/process operating characteristics that are not inputs to emission equations” as non-CBI, the proposed rule could make future operating status information public. For instance, companies must report anticipated dates and steps for installing monitoring equipment. This information could be sensitive when it alerts competitors that a production facility will be taken off-line.

**Response:** We agree with the commenter that some of the data elements reported as part of a BMM extension request should be CBI because they provide sensitive forward-looking information on the future plant or process shutdowns. For example, the planned installation date and the date of anticipated startup (reported as part of a BMM extension request under 40 CFR 98.3(d)(2)(ii)(F)) provides very specific information on future process shutdowns. This type of data likely would cause competitive harm if disclosed because competitors could use this information to anticipate and potentially benefit from future decreases in product supply. For example, a competitor able to anticipate the shutdown of a reporter’s facility and resulting decrease in product supply, could use this information to steal customers from a reporters by increasing its own production or could adjust the price of their own products. Specifically, we have determined that the following four data elements in the Unit/Process Operating Characteristics category are CBI:

- The reason for submitting a BMM extension request (reported under 40 CFR 98.3(d)(ii)(C)).
- The reason why equipment was not or could not be obtained and installed during a planned shutdown between October 30, 2009 and April 1, 2010 as reported in a BMM extension request (reported under 40 CFR 98.3(d)(2)(ii)(E)).
- Planned installation date for monitoring equipment as reported in a BMM extension request (reported under 40 CFR 98.3(d)(2)(ii)(F)).
- The anticipated date on which a facility applying for a BMM extension will begin using the monitoring methods specified in Part 98 (reported under 40 CFR 98.3(d)(2)(ii)(F)).

**Commenter Name: Glen E. Davis**

**Commenter Affiliation: Mississippi Lime**

**Document Control Number: EPA-HQ-OAR-2009-0924-0049.2**

**Comment Excerpt Number: 7**

**Comment:** The categories required, as potentially applicable to MLCO, are depicted [below] denoting whether the data or information is routinely claimed as CBI or non-CBI by MLCO. MLCO has no objection to submission of truly non-CBI categories of information on a non-confidential basis. The USEPA inappropriately defines the majority of categories, however, as non-confidential. MLCO opposes production of such CBI on a non-confidential basis.

Reporting required under Subpart S: Data Reporting Requirements (40 CFR 98.196(b))

Non-CBI: Indicate whether CO<sub>2</sub> was used on-site; if so, provide the following information: Annual amount of CO<sub>2</sub> captured for use in the on-site process; and Method used to determine the amount of CO<sub>2</sub> captured.

Reporting required under Subpart A: Content of the Annual Report (40 CFR 98.3(c)(1)-(4) & (6)-(9))

Non-CBI: [April 12, 2010 rule revision (98.3(c)(4)(v))]: Indicate whether reported emission from the facility include emissions from a cogeneration unit (yes or no)

**Response:** EPA agrees that the use of cogeneration (reported under 40 CFR 98.3(c)(4)(v)) is not the type of data that would cause competitive harm. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that this data element is not CBI.

After reviewing industry comments related to the capture of process emissions for use on site, EPA determined that the data element required to be reported by 40 CFR 98.196(b)(17)(i) was incorrectly assigned to the Unit/Process Operating Characteristics that are Not used as Inputs to Emission Equations Data Category. EPA has determined that this data element, which requires lime manufacturers to report the amount of CO<sub>2</sub> captured for use in on-site processes, is information about materials used in a production process. Such information relates to production (such as the actual production rate) and not unit/process operating characteristics. Therefore, we have assigned this data element to the Production/Throughput Data That are Not Inputs to Emissions Equations Data Category (which contains similar data elements (e.g., 40 CFR 98.76(b)(13) requiring ammonia facilities to report the amount of CO<sub>2</sub> from the ammonia production process used to produce urea) and have concluded that the CBI determination applied to that category also applies to this data element.

**Commenter Name:** Karin Ritter<sup>38</sup>

**Commenter Affiliation:** American Petroleum Institute

**Document Control Number:** EPA-HQ-OAR-2009-0924-0057.1

**Comment Excerpt Number:** 13

**Comment:** API believes that two direct emitter categories contain numerous data elements that warrant confidential treatment and, therefore, have been improperly identified as "not CBI" in the proposed rule: . . .(2) Unit/Process Operating Characteristics that are Not Inputs to Emissions Equations. This second category includes vendor data submitted in BAMM extension requests.

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<sup>38</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

Notably, the company reporting this information may not be legally permitted under its contractual obligations to share this third party information. As explained further below, such data should be classified as CBI.

API has identified the specific direct emitter data elements that should be identified as CBI in the attached chart. . . With respect to the unit/processing operating characteristics category, EPA correctly found that these data are not emission data, but incorrectly determined that they are not CBI. Because this information qualifies for protection under EPA's regulations governing the confidentiality of business information, EPA should revise these determinations in the final rule. *See* 40 C.F.R. §§ 2.208, 2.301(e).

Business information is entitled to confidential treatment if:

- (a) "[t]he business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;"
- (b) "[t]he business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;"
- (c) "[t]he information is not, and has not been, reasonably obtainable without the business's consent;"
- (d) "[n]o statute specifically requires disclosure of the information;" and
- (e) either the business shows that disclosure of the information "is likely to cause substantial harm to the business's competitive position" or, if the information is voluntarily submitted, "its disclosure would be likely to impair the Government's ability to obtain necessary information in the future."

40 C.F.R. § 2.208. These substantive criteria apply to information collected pursuant to Sections 114 and 208 of the CAA, except that information which is "emission data, a standard or limitation, or is collected pursuant to Section 211 (b )(2)(A) of the Act is not eligible for confidential treatment." 40 C.F.R. § 2.301(e). . .

Certain data elements in the unit/process operating characteristics category should be provided CBI protection. This data includes:

from Subpart A - BMM Extension Request: reason for the extension request, planned installation date;

from Subpart C - Stationary Combustion: each type of Fuel combusted in the units during the year (as required by Section 98.36(c)(2)(iv)), each type of fuel combusted in the unit during the reporting year (as required by Section 98.36(d)(2)(ii)(A)), the total number of source operating hours in the reporting year (as required by Section 98.36(e)(2)(vi)(A));

from Subpart Y - Petroleum Refineries: types of materials loaded than have an equilibrium vapor-phase concentration of CH<sub>4</sub> of 0.5 volume percent or greater; type of vessels in which material that has an equilibrium vapor-phase concentration of CH<sub>4</sub> of 0.5 volume percent or greater is loaded from Subpart Y - Petroleum Refineries:

Catalytic cracking units, traditional fluid coking units, and catalytic reforming units: annual average exhaust gas flow rate, % CO<sub>2</sub> and %CO (as required by Section 98.256(f)(7)); annual

average flow rate of inlet air and oxygen-enriched air, %O<sub>2</sub>, %O<sub>oxy</sub>, % CO<sub>2</sub>, and %CO (as required by Section 98.256(f)(8)); ... number of regeneration cycles during the reporting year, average coke burn-off quantity per cycle . . .

Flexicoking units: Same as the aforementioned incorrectly identified data elements for catalytic cracking units, traditional fluid coking units, and catalytic reforming units in 98.256(f)(7)-(f)(12)) (as required by Section 98.256(g));

Process vents: annual volumetric flow discharged to the atmosphere and mole fraction of each GHG in the vent (as required by Section 98.256(1)(5));

The five regulatory requirements are met for these data elements.

First, with this comment letter, "[t]he business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn." 40 C.F.R. § 2.208(a).

Second, API members can show that they have "taken reasonable measures to protect the confidentiality of the information, and that [they] intend [] to continue to take such measures." *Id.* § 2.208(b).

Third, EPA could not easily collect this information without API members' consent. *Id.* § 2.208(c). EPA suggests that "the same data are already being submitted and made available to the public under other Federal programs. For example, for electricity generating units, the Acid Rain program already releases unit operating characteristics such as operating hours and fuel type for combustion units, which are the same data to be reported under 40 CFR part 98, subparts C and D." 75 Fed. Reg. at 39113. However, the fact that electricity producers have not asserted confidentiality claims to date in the context of the Acid Rain program is an insufficient basis to withhold CBI protection to an entire category of data that is highly sensitive for other industries. As EPA acknowledges, electricity producers may be less concerned about public disclosure of information than other industries. Indeed, power companies are not direct competitors with each other in the same way that members of the oil and natural gas industry are. [FOOTNOTE: The facilities and combustion units subject to the Acid Rain program are a minor subset of the facilities and combustion units subject to Subparts C and D of the MRR. Table VII-Ion page 56363 of the final MRR shows 1,108 facilities subject to the Acid Rain program (or Subpart D of the MRR) and 3,000 facilities subject to Subpart C of the MRR. Further, Table 4-3 on page 4-17 of the Regulatory Impact Analysis for the MRR shows that for the 25,000 metric tons per year reporting threshold, only 3,279 combustion units are subject to the Acid Rain program out of the 14,038 combustion units subject to the MRR, or less than 25%.].

Fourth, no statute requires the disclosure of this information. 40 C.F.R. § 2.208(d).

Finally, disclosure of the information is likely to cause substantial harm to the API members' competitive positions. *Id.* § 2.208(e). For example, the reason provided for a BMM Extension Request will indicate a facility's ability (or inability) to capitalize on specific market opportunities and allow competitors to target markets based on the facility's weakness or vulnerabilities. The reason for an extension request could be that the facility is awaiting a

turnaround; this information, combined with information about the planned installation data, also required under the MRR, would disclose the data of a future shutdown. If competitor A knows competitor B's turnaround times or shutdown information, it can ramp up its own production when it knows competitor B's production will be down. This will cause serious harm to competitor B's competitive position. Such commercially sensitive information must be protected under the final rule. The data elements identified above in Subpart C would also threaten API members' competitive positions. For example, because information about some facilities' maximum firing capacity is already public, disclosing information about those facilities' fuel rate would provide competitors with commercially sensitive information, such as whether the facility was at its maximum capacity and whether it would need to invest in order to produce additional product. Finally, the data elements identified above in Subpart Y should not be disclosed because they would provide commercially sensitive information about transfer operations. For these reasons, EPA should categorize the unit/process operating characteristics information identified above as CBI.

**Response:**

Data Elements Reported for Bamm Extension Requests: EPA agrees with the commenter that forward-looking information, such as the reason for the Bamm extension request (reported under 40 CFR 98.3(d)(2)(ii)(C)) and the planned installation date (reported under 40 CFR 98.3(d)(2)(ii)(F)) qualify as CBI. As discussed in the response to comment EPA-HQ-OAR-2009-0924-0065.1, excerpt 3, we have determined that these data elements are CBI.

Types of Fuel and Operating Hours: EPA disagrees with the commenter that the types of fuels combusted (reported under 40 CFR 98.36(c)(2)(ii)(A)) and number of operating hours (reported under 40 CFR 98.36(e)(2)(vi)(A)) are CBI. The type of fuel combusted is generic information that would not reveal specific information about the composition of the fuel or information about the design of a production process. The types of fuels burned in a combustion unit are typically identified in construction and operating permits. The actual fuels burned during a year are available through the NEI. EPA therefore concluded that the type of fuel burned is unlikely to cause competitive harm to reporters and is information generally available to the public through other sources. We also note that the type of fuel combusted does not provide any information about the fuel combustion rates. We also do not agree with the commenter's rationale that the types of fuels combusted reveals information about the current capacity utilization and the potential for future production increases since the actual consumption of raw materials and production throughput cannot be discerned from the type of fuel combusted. EPA has therefore concluded that the type of fuels combusted is not CBI. For the response to the comment on operating hours, see the response to comment EPA-HQ-OAR-2009-0924-0030, excerpt 25.

Types of Materials Loaded and Types of Vessels: EPA agrees with the commenter that the type of material loaded at the refinery (reported under 40 CFR 98.256(p)(2)) provides sensitive information that would be likely to cause harm to the competitive position of the reporter. This data could be used by competitors to determine that the approximate amount of products produced by the refinery, which provides insight into competitively sensitive information such as product types, market share, and in combination with publicly available capacity information, plant utilization. We are not aware of any public source of this information. EPA has learned

that that this data is only released in aggregated form by EIA. For the reasons explained above, EPA has determined that the type of products loaded are eligible for confidential treatment.

EPA disagrees that the types of vessels loaded (also reported under 40 CFR 98.256(p)(2)) is CBI. This data element provides only generic information about a refinery that is unlikely to cause competitive harm. The types of vessels used to ship materials does not reveal the amount or type of each product shipped or detailed compositional information about an individual product. Although the commenter states that this information is “commercially sensitive” they did not explain why the data is sensitive and how the data could cause competitive harm. EPA therefore concludes that the proposed non-CBI determination for this data element is appropriate.

Process Data for Sulfur Plants, Catalytic Cracking Units, Traditional Fluid Coking Units, and Catalytic Reforming Units: EPA moved the annual average exhaust gas flow rate, % CO<sub>2</sub> and %CO (as required by Section 98.256(f)(7) and (g)); annual average flow rate of inlet air and oxygen-enriched air, %O<sub>2</sub>, %Ooxy, % CO<sub>2</sub>, and %CO (as required by Section 98.256(f)(8) and (g)); and the number of regeneration cycles during the reporting year and average coke bum-off quantity per cycle (reported under 40 CFR 98.256(f)(13) from the Inputs to Emission Equations category to the Unit/Process Operating Characteristics that are Not Inputs to Emission Equations category. As discussed in Section II.A.4 of the preamble to the final rule, these data elements are related to the data used as inputs, but are not the actual values used to calculate emissions.

We are not making final determinations for the following seven data elements.

- Annual average value of the exhaust gas flow rate reported by refineries (40 CFR 98.256(f)(7)).
- Annual average value of %CO<sub>2</sub> reported by refineries (40 CFR 98.256(f)(7)).
- Annual average value of %CO reported by refineries (40 CFR 98.256(f)(7)).
- Annual average value of %O<sub>2</sub> reported by refineries (40 CFR 98.256(f)(8)).
- Annual average value of %CO<sub>2</sub> reported by refineries (40 CFR 98.256(f)(8)).
- Annual average value of %CO reported by refineries (40 CFR 98.256(f)(8)).
- Annual average value of %N<sub>2</sub> exhaust reported by refineries (reported under 40 CFR 98.256(f)(9)).

Based on our review of these data elements, we have concluded that the configuration of individual facilities would impact the confidentiality determinations for these data elements. Because we do not have the necessary information on the facility configuration, we are unable to make a confidentiality determination for these data elements. For example, under 40 CFR 98.256(f)(7) facilities report the exhaust flow rate and outlet concentrations of CO<sub>2</sub> and CO. In some cases, the exhaust gases from these units are exhausted directly to the atmosphere. In such cases, the flow rate and CO<sub>2</sub> and CO content of the exhaust gases meet the definition of emission data at 40 CFR 2.301(a)(2)(i)(A) because they are “. . . information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source. . .” and therefore precluded from confidential treatment pursuant to CAA section 114(c). However, other reporters do not exhaust these gases directly to the atmosphere but instead route them to other units (e.g., other combustion units). For these facilities, the flow rate and concentrations of CO<sub>2</sub> and CO reported



under 40 CFR 98.256(f)(7) would not be precluded from CBI treatment because the data elements would not meet the definition of emission data since they do not provide information on the type and characteristics of pollutants emitted to the atmosphere. Because we do not have information on site-specific conditions that impact the status of these data elements, we have decided not to make determinations for these seven data elements in this action.

We have made a final determination that that the following data elements are CBI:

- Annual average value of the inlet air flow rate reported by refineries (40 CFR 98.256(f)(8)).
- Annual average value of oxygen-enriched air flow rate reported by refineries (40 CFR 98.256(f)(8)).
- The average annual value of %O<sub>oxy</sub> reported by refineries (40 CFR 98.256(f)(8)).
- Annual average value of the inlet air flow rate reported by refineries (reported under 40 CFR 98.256(f)(9)).
- Annual average value of oxygen-enriched air flow rate reported by refineries (reported under 40 CFR 98.256(f)(9)).
- Annual average value of %N<sub>2oxy</sub> reported by refineries (reported under 40 CFR 98.256(f)(9)).
- Number of regeneration cycles or measurement periods during the reporting year for each catalytic cracking unit, traditional fluid coking unit, and catalytic reforming unit reported by refineries (reported under 40 CFR 98.256(f)(13)).
- Average coke burn-off quantity per cycle/measurement period for individual catalytic cracking units, traditional fluid coking units, and catalytic reforming units (reported under 40 CFR 98.256(f)(13)).
- Annual volume of tail gas recycled and the mole fraction of carbon in the tail gas (reported under 40 CFR 98.256(h)(5))

We determined that public availability of these data would cause competitive harm to reporters for the following reasons. Information on the flow rates and composition of inputs to the catalytic cracking units (i.e., 40 CFR 98.256(f)(8) and (f)(9)) provide insight into the operation of the production process that may reveal operating conditions that are considered sensitive by the reporter because they provide the reporter with a competitive advantage over other refineries. The average coke burn-off quantity per cycle/measurement period for individual catalytic cracking units, traditional fluid coking units, and catalytic reforming units (reported under 40 CFR 98.256(f)(13)) discloses information about the operation of the unit (e.g., the level of reforming), and indicates the quantity of naphthalene the feedstock and the quantity of aromatics produced. The annual volume of tail gas recycled and the mole fraction of carbon in the tail gas (reported under 40 CFR 98.256(h)(5)) provide information about the refinery's ability to process different types of crude oil, and the products the refinery can produce. As indicated by this commenter, refineries consider these data elements to be sensitive. We are also not aware of any public sources for these data elements. For the reasons described above, we conclude that these data elements are CBI.

**Commenter Name: Karin Ritter**<sup>39</sup>  
**Commenter Affiliation: American Petroleum Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**  
**Comment Excerpt Number: 12**

**Comment:** For Subpart Y, the proposed rule would require the disclosure of the quantity and type of materials loaded by vessel type under Section 98.256(p)(2) for loading operations at refineries. EPA proposed the quantities of refinery non-crude feedstocks and petroleum products reported under Subpart MM Section 98.396(a) are CBI. The CBI determination for quantities of refinery petroleum products is inconsistent between Subparts Y and MM. The quantities and type of materials loaded by vessel type reported under Subpart Y loading operations is a subset of the quantities of petroleum products reported under Subpart MM. The same reasons for determining the Subpart MM petroleum product quantities are CBI apply to the quantities and type of materials reported under Subpart Y for loading operations.

**Response:** For the response to the comment on type of material loaded by vessel type, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 13 above. The quantity of each material loaded is used as an input to calculate the GHG emissions from loading operations. As discussed in Section II.A.4 of the preamble to the final rule, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category.

**Commenter Name: Karin Ritter**<sup>40</sup>  
**Commenter Affiliation: American Petroleum Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**  
**Comment Excerpt Number: 16**

**Comment:** For Subpart Y, the proposed rule would require disclosure of data elements under Sections 98.256(h)(4) and (5) that would reveal sulfur plants' capacity, gas feed rate and composition. These data, in combination with information reported under Subpart MM, would provide insight into a refinery's capacity for processing different crude oil and the products and product quantities that the refinery can produce. Requiring the disclosure of information about a refinery's sulfur recovery process could enable competitors to determine the operational strengths and weaknesses of that refinery. For example competitors could determine if a refinery has excess sulfur plant capacity or is constrained by its sulfur plant capacity. In turn, this information would indicate whether or not capital expenditures are needed to expand capacity or process different crude oils. Based on this information, competitors could make competitive decisions and formulate strategies to the detriment of the refinery. This commercially sensitive data thus warrants CBI protection. [Footnote: EPA includes the following Section 98.256(h)(5) data elements in the "calculation methodology and method" category: (1) indicate whether the recycled flow rate and carbon content are included in the measured data; and (2) indicate

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<sup>39</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

<sup>40</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

whether a correction for CO<sub>2</sub> emissions in the tail gas was used in Equation Y - 12. As explained above, all of these elements are commercially sensitive and should be protected.]

**Response:** In response to the comments that a non-CBI determination for this category was not appropriate, EPA decided to re-evaluate each data element assigned to this data category to determine if the proposed determination applies. As part of that process, EPA has decided not to make a final determination for the capacity of a sulfur plant (reported under 40 CFR 98.256(h)(2)). Although this information is generally available in construction and Title V operating permits, it may not be available for all facilities. For this reason, we have decided not to make a CBI determination for this data element in this action.

EPA has listed the following data elements in both the Inputs to Emission Equations category and in the Process/Unit Operating Characteristics that are Not Inputs to Emission Equations category:

- Annual volume of recycled tail gas (reported under 40 CFR 98.256(h)(5)); and
- Annual average mole fraction of carbon in the tail gas (reported under 40 CFR 98.256(h)(5))

When these data elements are not used by the reporter to calculate the recycling correction factor, then they are assigned to the Unit/Process Operating Characteristics Category. When they are used by the reporter to calculate the recycling correction factor they are assigned to the Inputs to Emission Equations category and as discussed in Section A.4 of this document are deferred. When they are not used to calculate the recycling correction factor, EPA agrees that the annual volume of tail gas recycled and the annual average mole fraction are CBI because they provide information about the refinery's ability to process different types of crude oil and the types of products the refinery can produce. The commenter indicated that refineries consider these data elements to be sensitive and take precautions to ensure this information is not made public. We are also not aware of any public sources for these data elements. For the reasons described above, we conclude that these data elements are CBI.

The other data elements listed under 40 CFR 98.256(h)(4) and (h)(5) either provide information on the method used to calculate the emissions (assigned to the Calculation Methodology and Methodological Tier category) or are used as inputs to emission equations (assigned to the Inputs to Emission Equations category). EPA disagrees with the commenter that the following data elements are eligible for confidential treatment: (1) indicate whether the recycled flow rate and carbon content are included in the measured data; (2) indicate whether a correction for CO<sub>2</sub> emissions in the tail gas was used in Equation Y – 12 (reported under 40 CFR 98.256(h)(5)). These data elements are necessary to determine that the emissions are calculated using the appropriate methodology and therefore, meet the definition of emission data at 40 CFR 2.301(a)(2)(i) because they are necessary to determine the quantity of emissions. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Calculation Methodology and Methodological Tier category are emission data and, therefore, are not eligible for confidential treatment.

## 7. Test and Calibration Methods Category

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**Commenter Name: Glen E. Davis**

**Commenter Affiliation: Mississippi Lime**

**Document Control Number: EPA-HQ-OAR-2009-0924-0049.2**

**Comment Excerpt Number: 8**

**Comment:** The categories required, as potentially applicable to MLCO, are depicted [below] denoting whether the data or information is routinely claimed as CBI or non-CBI by MLCO. MLCO has no objection to submission of truly non-CBI categories of information on a non-confidential basis. The USEPA inappropriately defines the majority of categories, however, as non-confidential. MLCO opposes production of such CBI on a non-confidential basis.

Reporting required under Subpart S: Data Reporting Requirements (40 CFR 98.196(b))

Non-CBI: Standard method used (ASTM or NLA testing method) to determine chemical compositions of each lime type and lime byproduct/waste type

Non-CBI: Method used to determine the quantity of lime byproduct/waste sold

Non-CBI: Method used to determine the quantity of lime sold

Reporting required under Subpart C: Data Reporting Requirements (40 CFR 98.36(e)(2))

Tier 2:

Non-CBI: Frequency of the HHV determinations

CBI: specify the date on which each fuel sample was taken

Tier 3:

Non-CBI: Frequency of carbon content and, if applicable, molecular weight determinations for each type of fuel for the reporting year

Non-CBI: Total number of valid carbon content determinations and, if applicable, molecular weight determinations made during the reporting year, for each fuel type

Subpart A:

CBI: A brief description of each "best available monitoring method" used according to 98.3(d)

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Test and Calibration Methods category are not CBI. We disagree with the commenter that the description of the Best Available Monitoring Method (BAMM) should be considered CBI. Descriptions of BAMM provide relatively general information about the alternative monitoring method used by the reporter. For example, a facility may report using billing records, operating hours, or sales volumes to estimate raw material consumption. Since the data element does not require the facility to report the actual data they used to estimate emissions, a description of the method used to make the estimate, which the facility has full flexibility to write in a manner that is deemed not to reveal confidential business information, is unlikely to disclose competitively sensitive information about the facility's design, operating conditions, production volumes, production efficiency, or costs.

Please also note that reporters are no longer required to report the dates on which fuel samples are taken (previously listed under 40 CFR 98.36(e)(2)(ii)(C)) (see the amendments to subpart C in 75 FR 79092, December 17, 2010).

**Commenter Name: Stephen E. Woock**

**Commenter Affiliation: Weyerhaeuser Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0041.1**  
**Comment Excerpt Number: 5**

**Comment:** Test and calibration methods include site-specific calibration methods, frequency of sampling and analysis, performance test methods, and material composition analytical methods. These are already spelled out in the GHG MRR regulation and we agree that this information is not CBI.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Test and Calibration Methods category are not CBI.

**Commenter Name: William C. Herz**  
**Commenter Affiliation: The Fertilizer Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**  
**Comment Excerpt Number: 16**

**Comment:** TFI believes that the following data elements are not the “emission type” contemplated by the 1991 Policy as “emission data” and should be protected from disclosure: 40 CFR § 98.76(b)(13) (proposed). . .

**Response:** The following two data elements listed under 40 CFR 98.76(b)(13) were added to the reporting requirements by the December 17, 2010 amendment (see 75 FR 79092): (1) the amount of CO<sub>2</sub> from ammonia production used to produce urea (assigned to the Production/Throughput that are Not Inputs to Emission Equations category); and (2) the method used to determine the amount of CO<sub>2</sub> consumed in urea production (assigned to the Test and Calibration Methods category). These data elements were included in the supplemental CBI notice, where we had proposed these data elements be CBI (see 75 FR 43889, July 27, 2010).

We agree with the commenter that these data elements do not meet the definition of emission data in 40 CFR 2.301(a)(2)(i). We also agree that the amount of CO<sub>2</sub> used to make urea is eligible for confidential treatment. As proposed in the July 7, 2010 CBI proposal, this data element is categorized under the Production/Throughput that are Not Inputs to Emission Equations category and is determined to be CBI in the final rule. However, we disagree with the commenter that the second data element (the method used to determine the CO<sub>2</sub> consumed) should be afforded CBI protection. EPA has found that the general description of the method and/or equipment used to make a measurement does not reveal any proprietary information about the design, operation, or efficiency of a production process that would cause competitive harm to a reporter if made available to the public. As proposed in the July 7, 2010 CBI proposal, EPA has determined that the method used to determine the amount of CO<sub>2</sub> consumed is not eligible for confidential treatment.

**Commenter Name: William C. Herz**  
**Commenter Affiliation: The Fertilizer Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 17**

**Comment:** TFI believes that the following data elements are not the “emission type” contemplated by the 1991 Policy as “emission data” and should be protected from disclosure: . . . 40 CFR 98.76(b)(16). . .

**Response:** The following two data elements are listed under 40 CFR 98.76(b)(12) (formerly listed as 40 CFR 98.76(b)(16) in the July 7, 2010 CBI proposal): (1) annual urea production (assigned to the Production/Throughput that are Not Inputs to Emission Equations category) and is determined to be CBI in the final rule; and (2) the method used to determine the amount of urea produced (assigned to the Test and Calibration Methods category). We agree with the commenter that these two data elements do not meet the definition of emission data in 40 CFR 2.301(a)(2)(i). For the reasons discussed in Section II.C.9 of July 7, 2010 CBI proposal, we also agree that the amount of urea produced (reported under 40 CFR 98.76(b)(12) and assigned to the Production/Throughput that are Not Inputs to Emission Equations category) is eligible for confidential treatment and have made a final determination that this data element is CBI. However, we disagree with the commenter that the second data element (the method used to determine the amount of urea produced) should be afforded CBI protection. EPA has found that the general description of the method and/or equipment used to make a measurement does not reveal any proprietary information about the design, operation, or efficiency of a production process that would cause competitive harm to a reporter if made available to the public. As proposed in the July 7, 2010 CBI proposal, EPA has determined that the method used to measure the amount of urea produced is not eligible for confidential treatment.

**Commenter Name: Bryan Brendle**

**Commenter Affiliation: Portland Cement Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0045.1**

**Comment Excerpt Number: 8**

**Comment:** Portland Cement Association (PCA) members believe that CBI protection should apply to all six data categories that EPA does not classify as “emissions data,” and not be restricted to the three data categories laid out in Table 2 of the Preamble (75 FR 39094 at 39097).

**Response:** The commenter is referring to the following six data categories that EPA proposed were not emission data: Unit/Process Static Characteristics that are Not Inputs to Emissions Equations, Unit/Process Operating Characteristics that are Not Inputs to Emission Equations, Test and Calibration Methods Category, Production/Throughput Data Elements that are Not Inputs to Emission Equations, Raw Materials Consumed that are Not Inputs to Emission Equations, and Process-Specific and Vendor Data Submitted in BMM Extension Requests. We disagree with the commenter that the data elements in the Test and Calibration Methods category should be afforded CBI protection. As previously described in Section II.C.9 in the proposal preamble (75 FR 39094, July 7, 2010), the data elements in this category consist of descriptions of devices or methods used to measure a parameter, the method and frequency of calibrating measurement devices, and the frequency and analytical methods used for conducting performance tests or sample analysis. The type of device used to make the measurement (e.g., flow meter, weighing scales) and the frequency and method of calibrating the measuring device

do not reveal the actual values of the measured parameters or provide any other sensitive information about the design or operating characteristics of a process. The standardized analytical method and the frequency of sample collection and analysis are generally specified by each subpart and do not provide any insight into the design or operating conditions of a facility. For the reasons stated above and in Section II.C.9 in the proposal preamble (75 FR 39094, July 7, 2010), we have determined that the data elements in the Test and Calibration Methods are not CBI.

For the response the comment recommending that the other five data categories listed above should be CBI, please see the response to this comment in the relevant sections of this document.

**Commenter Name: Robert P. Strieter**

**Commenter Affiliation: Aluminum Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0021.1**

**Comment Excerpt Number: 2**

**Comment:** [T]he following are considered by the Aluminum Association and its members as potentially CBI for the Primary Aluminum industry reporters: . . . §98.66 (c)(3) (the last date when the smelter-specific slope coefficients (or overvoltage emission factors) were measured) and (d) Method used to measure the frequency and duration of anode effects (or overvoltage). . . .. These elements are of CBI concern for the following reasons:

PFC Specific Information and Measurement Method – the combination of PFC specific information and the method used to measure such emissions would lead to the ability of competitors to easily back-calculate production levels for primary aluminum companies. In effect, it is essentially the same as publishing production data itself. . . . Annual Aluminum Production – is a key indicator of economic performance for companies. The Aluminum Association never publishes company specific production data, and strives to publish such statistics only when combined for at least three companies in order to insure confidentiality and compliance with the antitrust laws. In effect, the EPA proposal to make public aluminum primary production data will lead to the publication of information that the Aluminum Association itself does not publish in compliance with the antitrust laws.

**Response:** EPA disagrees with the commenter that the method used to measure the frequency and duration of anode effects or overvoltage would cause competitive harm to the reporter if made public. The type of device or method used to make the measurement does not reveal the actual values of the measured parameters or provide any other sensitive information about the design or operating characteristics of a process. Please also note that EPA has proposed to defer reporting of the PFC-specific data and annual aluminum production (reported under 40 CFR 98.66(a) and (c)(2)) and all other data elements that are used as inputs to emission equations. For additional information regarding the proposal to defer reporting of these data elements, please see Section II.A.4 of the preamble to the final rule.

8. Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations Categories

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**Commenter Name: E. Donald Elliott**

**Commenter Affiliation: Bloomberg, LP**

**Document Control Number: EPA-HQ-OAR-2009-0924-0033.1**

**Comment Excerpt Number: 1**

**Comment:** To achieve its regulatory goals of facilitating comparisons by investors and encouraging the development of a low GHG economy, EPA should routinely make production volume data available whether or not the data was used in GHG computations. GHG emissions are not meaningful in isolation; GHG intensity per unit of output is what counts to investors and the business community. EPA has proposed to determine that all "Production/Throughput Data That Are Not Inputs to Emission Equations" is confidential business information that will result in competitive harm if disclosed to the public. Item 10, 75 Fed.Reg. at 39115. Bloomberg disagrees and respectfully requests EPA to re-consider and make production/throughput information routinely available to the public, rather than routinely withhold it. The reason is that GHG emissions information is not meaningful in isolation, but must be compared with a company or facility's output in order to be meaningful. For example, GE recently reported that its GHG intensity" had dropped by 39% [Footnote: GE Citizenship Report: GHG Intensity Falls 39% (July 21,2010) <http://www.environmentalleader.com/2010/07/21/ge-citizenship-report-ghgintensity-falls-39/>.] But such meaningful comparisons among companies cannot be made without production information. Moreover, Bloomberg respectfully suggests that production information is routinely made available in many industries, or reported to the government and disclosed without harm. Therefore, EPA categorical presumption is not justified that all production or throughput information in every industry or context is highly sensitive and would result in competitive harm, as is required to withhold information under Exemption 4 of the Freedom of Information Act (FOIA).

FOIA was enacted for the purpose of making information in the possession of the government more freely available to the public. Its exemptions are narrowly construed and applied. Despite the administrative burdens, EPA is simply not justified in erecting an irrebuttable presumption that all production or throughput information would cause competitive harm if released. Moreover, EPA's position is internally contradictory, because the risks of competitive harm are equivalent whether or not production information is or is not used in GHG computations. In lieu of its unjustified presumption that all production and throughput information would result in competitive harm, EPA should allow a showing on an industry-by-industry basis whether production and throughput data is actually sensitive in that particular industry, and maintain and update a list from time to time of whether such an industry-wide categorical showing has or has not been made. But EPA is not justified, on either a policy or legal basis, from withholding production information for every industry just because it can be imagined that such data might be sensitive in some situations. Rather, EPA has an obligation to build a factual record to support its speculation.

**Response:** EPA disagrees with the commenter that a category-wide determination for Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to



Emission Equations categories is not appropriate due to differences between industries. The data elements in these categories share characteristics that make them inherently sensitive to all industries. We agree that the data elements in these categories are useful for making comparisons between industries and individual facilities and could be useful to industry, non-government organizations (NGOs), public, and other stakeholders when assessing any regulatory program. However, CAA section 114(c) requires that EPA afford confidential treatment to CBI (except for emission data). As we explained in the July 7, 2010 CBI proposal, none of the data elements in these data categories meet the definition of emission data in 40 CFR 2.301(a)(2). Although the data may be used to verify the accuracy of the reported emissions, none of them are used by reporters to calculate GHG emissions under Part 98. Therefore, we do not consider them “necessary to determine” the amount of GHG emissions under Part 98 because emissions are in fact calculated without these data elements. Since these data elements are not emission data, we evaluated whether they would cause competitive harm to the reporter using the criteria in 40 CFR 2.208 and determined that the amount and composition of product produced by a facility and the amount and composition of raw material consumed provide information about a facility that is inherently sensitive for all manufacturers. As we described in the July 7, 2010 CBI proposal, the production and raw material data for a facility provides information about a reporter’s market share, production efficiency, cost basis, production process, and, when combined with capacity information provided in Title V permits, capacity utilization. This information would be harmful to any business irrespective of the industry sector or particular product produced. Although production information for some industries is made public for the industry as a whole, we are not aware of any public sources of the detailed facility and process-level production and raw material data reported annually under Part 98. We also received comments from industry agreeing with this rationale. Some indicated that production throughput and raw material consumption are sensitive business information because they could be used to reverse engineer their production process, to estimate production efficiency, or to derive production costs. Others indicated that this information could be used to estimate operating margins and other strategic information that could be used by competitors to develop strategic plans. For example, a glass manufacturer stated that the amount of each carbonate charged to a furnace and the amount of glass produced are confidential because competitors would be able to use this data to back-calculate product formulae that are trade secrets. Some commenters also stated that they take measures to keep these data confidential. For example, one commenter stated that they avoid patenting information on some production processes to avoid making process-specific data available to competitors.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**

**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**

**Document Control Number: EPA-HQ-OAR-2009-0924-0053.2**

**Comment Excerpt Number: 4**

**Comment:** While EPA should, at minimum, require public disclosure of all equation inputs as emission data, we encourage the Agency to consider whether certain verification data points are likewise emission data. Specifically, the Agency should re-examine its data categories: (1) Raw Materials Consumed that are Not Inputs to Emission Equations and (2) Production / Throughput Data that are Not Inputs to Emission Equations. While neither of these data categories are direct

inputs into emission equations, they are both necessary to verify the accuracy of emission equation outputs.

EPA gives examples of Production /Throughput data including annual quantities of petrochemicals produced (40 CFR part 98, subpart X), monthly cement production (40 CFR part 98, subpart H), and annual urea production (40 CFR part 98, subpart G), among others. 75 Fed. Reg. at 39115. EPA requires reporting of this data as an important part of the emissions verification process. See, e.g., 74 Fed. Reg. 56260, 56322 (defining reporting requirements necessary for determining and verifying emissions from petrochemical producers). Likewise, EPA defines the Raw Materials Consumed data category to include annual quantity of feedstock consumed (40 CFR part 98, subpart G) and annual steam purchases (40 CFR part 98, subpart AA). Like Production /Throughput data, this data is critical to verify facility emissions from these sectors.

We encourage EPA to define these data as emission data and publicly disclose them. Disclosing the above-described verification data as emission data is consistent with the CAA and EPA regulations. As previously noted, emission data is any information “necessary to determine the identity, amount, frequency, [and] concentration” of any emission. Verification data, specifically data on the amount of raw materials consumed along with production and throughput data, are necessary to ensure that calculated emissions approximate actual emissions. This is especially true where emissions are measured indirectly, through the use of emissions factors or some other estimation procedure, as these measurement methods persistently underestimate actual emissions. [Footnote: Emissions underestimation is a well-documented phenomenon. For oil and gas production, for example, EPA revised emission factors for four underestimated sources leading to revised emissions estimates ranging from ten times higher (for well venting from liquids unloading) to 35 times higher (from gas well venting from conventional well completions) to as much as 3,500 and 8,800 times higher (for gas well venting from completions and well workovers.) Especially for facilities using indirect measurement, then, EPA should determine the production /throughput data category and data concerning raw materials consumed constitute emission data because these data are necessary to accurately determine the amount of emissions from these facilities.

Making such a determination further supports and reinforces EPA’s goals of transparency and public confidence in the GHG emissions data. Given the persistent, documented underestimation bias for many of these facilities, EPA’s disclosure of verification data points for these sources will aid public verification of emissions estimates and promote public confidence in the dataset.

**Response:** EPA disagrees with the commenter that production and raw material data that are not used as inputs in the emission equations should be made public. We agree that production and raw material information can be useful for verifying reported emissions and comparing emissions calculated using a mass-balance equation, estimated using an emission factor, or measured using CEMS. However, CAA section 114(c) requires that EPA afford confidential treatment to CBI (except for emission data). As we explained in the July 7, 2010 CBI proposal, none of the data elements in these data categories meet the definition of emission data in 40 CFR 2.301(a)(2). Although the data may be used to verify the accuracy of the reported emissions, none of them are used by reporters to calculate GHG emissions under Part 98. Therefore, they

are not “necessary to determine” the amount of GHG emissions under Part 98. In response to the comments on emission factors, If the production and raw material data are not used to calculate emissions, then they do not meet the definition of emission data regardless of whether the emissions are calculated using an emission factor, mass-balance equation, or measured using CEMS.

Since the data elements in the Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations categories are not emission data, we used the existing criteria in 40 CFR 2.208 to determine whether the data qualify as CBI. In making this determination, we focused on whether disclosure would be likely to cause “substantial harm to the business’s competitive position.” We concluded that production and raw material data for a facility provides sensitive information about a reporter’s market share, production efficiency, cost basis, and production process. Such information would harm the competitive position of the reporter and therefore, is eligible to be treated as CBI. For additional information on how this information would cause competitive harm to reporters, see the response to EPA-HQ-OAR-2009-0924-0033.1, excerpt 1 above and Sections II.C.10 and II.C.11 of the July 7, 2010 CBI proposal.

**Commenter Name: Kevin M. Dempsey**

**Commenter Affiliation: American Iron and Steel Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**

**Comment Excerpt Number: 2**

**Comment:** We support the listed elements in the third category - data that are not emissions data but are CBI. These include: (1) production/throughput data that are not inputs to emission equations, (2) raw materials consumed that are not inputs to emission equations . . . As these data have nothing to do with or emissions calculations, there is no reason they would be reported. Since these data are not emissions data and would therefore not be reported, there would be no need for CBI protection. However, if it is necessary to provide this information to substantiate any aspect of the emissions reported, even if not inputs to emission equations, they should be afforded CBI protection, and EPA has correctly identified and recognized elements of data that would by their very nature be confidential and proprietary.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations categories are CBI.

Regarding the comment that EPA should require reporters to maintain supporting information as records instead of reporting to EPA is beyond the scope of this action. This action determines the confidentiality status of certain data elements reported under Part 98; this action does not add or amend the reporting requirements under Part 98. The reporting requirements addressed in this rule were established under the Final Mandatory Greenhouse Gas Reporting Rule (74 FR 56260, October 30, 2010) and several subsequent amendments (see 75 FR 39736, July 12, 2010; 75 FR 57669, September 22, 2010; 75 FR 66434, October 28, 2010; 75 FR 74458, November 30, 2010; 75 FR 74774, December 1, 2010; 75 FR 75060, December 1, 2010; and 75 FR 79092, December

17, 2010). For additional information regarding these requirements, please see the preambles and comment response documents for these rulemaking (available on the following web site: <http://www.epa.gov/climatechange/emissions/notices.html>).

**Commenter Name: Keith Adams and Brian Keck**  
**Commenter Affiliation: Air Products and Chemicals, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**  
**Comment Excerpt Number: 21**

**Comment:** EPA correctly notes that information about the chemical composition of products may allow competitors to reasonably infer the types of feed stocks or raw materials consumed in the production process. This same inference can be made from composition of intermediates, by-products, vent gas streams and fugitive emissions since they represent the complete characterization of the process at that point thereby providing further insight into the various phases of the production process. Therefore, any stream composition which must be publicly disclosed under this rule should be limited to the GHG reportable constituents.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations categories are CBI. Therefore, information about the quantity and composition of intermediates, by-products and vent gas streams are eligible for confidential treatment, provided they are not vented to the atmosphere. Information regarding the amount, rate, and composition of regulated pollutants, including GHGs, that are emitted to the atmosphere by the facility are not entitled to CBI because these data meet the definition of emission data under 40 CFR 2.301(a)(2). The CAA section 114(c) precludes emission data from being held as CBI. EPA has proposed to defer reporting of composition data when the data are used as inputs to emission equations. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Gregory M. Scott**  
**Commenter Affiliation: National Petrochemical & Refiners Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0036.1**  
**Comment Excerpt Number: 3**

**Comment:** [The following] petrochemical production elements . . . should also be re-designated as CBI, as disclosure of this information would cause harm to NPRA members' businesses.

§98.246(a)(9): Volume or mass of off-specification product produced.

**Response:** EPA agrees with the commenter that the volume or mass of off-specification product produced by a facility (reported under 40 CFR 98.246(a)(9)) qualifies as CBI. In the July 7, 2010 CBI proposal, this data element was incorrectly categorized in the Inputs to Emission Equations category and therefore proposed as emission data that is not eligible for confidential treatment. However, during a review of the data elements in the Inputs to Emission Equations

category, we determined that this data element is not used to calculate the GHG emissions and should have been categorized in the Production/Throughput Data that are Not Inputs to Emission Equations category because this data element is similar to the other data elements in this category (e.g., the annual quantity of glass produced (reported under 40 CFR 98.146(a)(2))). As proposed in the July 7, 2010 CBI proposal, EPA has now made a final determination that the data elements in the Production/Throughput Data that are Not Inputs to Emission Equations category are CBI.

**Commenter Name: Lorraine Gershman<sup>41</sup>**

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 4**

**Comment:** Subpart V – Nitric Acid Production. We oppose EPA’s proposal not to treat several data elements CBI, including:

...

(3) Annual nitric acid production for the facility

...

Each of the highlighted data elements above should be designated as CBI. By making such information publicly available, competitors would be able to “reverse engineer” and calculate the nitric acid production at each facility.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data that are Not Inputs to Emission Equations category are CBI. Therefore, the annual nitric acid production for the facility (reported under 40 CFR 98.226(e)), which is not used to calculate N<sub>2</sub>O emissions is eligible for confidential treatment. The annual nitric acid production for each nitric acid train (reported under 40 CFR 98.226(c)) is used to calculate N<sub>2</sub>O emissions. EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Karin Ritter<sup>42</sup>**

**Commenter Affiliation: American Petroleum Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**

**Comment Excerpt Number: 4**

**Comment:** API supports EPA's proposed determination that the following three categories of data, to be reported by facilities that directly emit GHGs from industrial processes and stationary fuel combustion, are not emission data and are CBI: Production/Throughput Data that are Not

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<sup>41</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

<sup>42</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

Inputs to Emission Equations, Raw Materials Consumed that are Not Inputs to Emission Equations . . .

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations categories are CBI.

**Commenter Name:** Leslie S. Ritts<sup>43</sup>

**Commenter Affiliation:** The National Environmental Development Association's Clean Air Project

**Document Control Number:** EPA-HQ-OAR-2009-0924-0056.1

**Comment Excerpt Number:** 21

**Comment:** [R]equiring companies to disclose information related to processes and substances may violate contractual or license terms entered into with suppliers of processes or substances. This could lead to an unwillingness of suppliers to provide necessary reporting information, unavailability of resources and supplies, or new materials regarding which a supplier does not want disclosure to occur so readily. For all of these reasons, EPA should revise its proposed approach to confidentiality of this information.

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that data elements in the Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations categories are CBI. EPA has proposed to defer reporting of raw material composition and consumption data when they are used as inputs to emission equations. For additional information on the proposal to defer reporting of Inputs to Emission Equations, see Section II.A.4 of the preamble to the final rule.

**Commenter Name:** Robert A. Reich

**Commenter Affiliation:** DuPont Company

**Document Control Number:** EPA-HQ-OAR-2009-0924-0030

**Comment Excerpt Number:** 3

**Comment:** Companies use their research and development efforts and earnings in order to create and develop proprietary methods and processes for producing intermediates and products. These efforts contribute to the competitiveness within the marketplace and reflect the world-renowned creativity and innovation for which U.S. businesses are known. Competitors domestically and internationally can use production data, raw material consumption data, etc., to determine much about the capability, efficiency, etc., of a company's operations that would be valuable strategically and tactically in the marketplace. Loss of such proprietary knowledge and trade secrets – which are purposely not patented in order to protect this information from being taken by others – will hinder innovation and degrade business incentive to carry on the R&D that

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<sup>43</sup> Comments submitted by the National Environmental Development Association's Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).

is needed to maintain U.S. technology leadership. Industrial espionage and intellectual property theft is a real and growing challenge for U.S. businesses that the U.S. government is generally combating, not abetting. By allowing other entities, both U.S. and non-U.S., to obtain trade secrets and business knowledge without having to use their own finances and effort, EPA will be overturning one of the major tenets of the innovative American economy. A business builds a better mousetrap, but when the competition gets the mousetrap technology for free, cost barriers are lowered and those who invested in developing new technology lose. Companies are not the only losers when confidential business information is compromised – U.S. workers and the economic vitality of the U.S. also lose.

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that data elements in the Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations categories are CBI. EPA has proposed to defer reporting of raw material and production data when they are used as inputs to emission equations. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Gregory M. Scott**

**Commenter Affiliation: National Petrochemical & Refiners Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0036.1**

**Comment Excerpt Number: 5**

**Comment:** Unit-specific data contain competitively sensitive data, related to key competitive parameters. These include unit throughput, production rates, . . .and other sensitive competitive data elements. In the refining industry, participants engage in competitive intelligence vis-à-vis their competition against other participants by modeling the performance of competing refineries. At present, the data elements are not publicly disseminated, and so assumptions must be used for them in the models. But under the EPA proposed rulemaking, these data elements would be released with no protective mechanisms, and would be used by competitors in their models. From these models competitors can derive cost, price, and operating margin data, as well as strategic plans, operational plans, and scheduling information. All of these raise substantial antitrust risks.

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that data elements in the Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations categories are CBI. EPA has proposed to defer reporting of raw material and production data when they are used as inputs to emission equations. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Mark A. Erman**

**Commenter Affiliation: Pepper Hamilton LLP on behalf of Verallia**

**Document Control Number: EPA-HQ-OAR-2009-0924-0037.1**

**Comment Excerpt Number: 5**

**Comment:** Unless CO<sub>2</sub> continuous emissions monitors (CEMS) are installed in every furnace company-wide, Subpart N of Part 98 would require glass manufacturing facilities to report (1) the annual quantity of each carbonate-based raw material charged to each furnace, (2) the annual quantity of glass produced from each furnace, and (3) the carbonate-based mineral mass fraction (as percent) for each carbonate-based raw material charged to each furnace. See 40 CFR 98.146(b). . . . This information – regardless of whether it is an “input” – is confidential because competitors would be able to use it to back-calculate our trade secret product formulae and business confidential glass production rates. We are puzzled as to what the legitimate public interest is in obtaining this information when it is already accounted for in the final result of the GHG emission equation. We understand EPA’s need to verify the accuracy of a reporting entity’s emission calculation, but public disclosure of the “inputs” would share some of the industry’s most sensitive and protected information, e.g., how many containers we make, how we make them, batch formulae, and the like.

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that data elements in the Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations categories are CBI, including the amount of raw materials consumed (reported under 40 CFR 98.146 (a)(2) by facilities using CEMS) and the quantity of glass produced (reported under 40 CFR 98.146(a)(1) by facilities using CEMS and 40 CFR 98.146(b)(3) by facilities that use the mass balance equations). EPA has proposed to defer reporting of raw material and production data when they are used as inputs to emission equations. Therefore, reporting of the amount of raw material consumed (reported under 40 CFR 98.146(b)(2)) and the mass fraction of carbonate in the raw material (reported under 40 CFR 98.146(b)(4)), which are to be reported by facilities using the mass balance equations to calculate CO<sub>2</sub> emissions, have been deferred. For additional information on the proposal to defer reporting of these data elements, see Section II.A.4 of the preamble to the final rule.

**Commenter Name: Stephen E. Woock**  
**Commenter Affiliation: Weyerhaeuser Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0041.1**  
**Comment Excerpt Number: 1**

**Comment:** The proposed CBI categories in Table 2 are straightforward -- any production and raw materials information not included as inputs to the GHG emission calculations, . . . would be treated as CBI. We agree.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations categories are CBI .

**Commenter Name: Bryan Brendle**  
**Commenter Affiliation: Portland Cement Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0045.1**  
**Comment Excerpt Number: 7**



**Comment:** Portland Cement Association (PCA) members believe that CBI protection should apply to all six data categories that EPA does not classify as “emissions data,” and not be restricted to the three data categories laid out in Table 2 of the Preamble (75 FR 39094 at 39097).

**Response:** The commenter is referring to the following six data categories that EPA proposed were not emission data: Unit/Process Static Characteristics that are Not Inputs to Emissions Equations, Unit/Process Operating Characteristics that are Not Inputs to Emission Equations, Test and Calibration Methods Category, Production/Throughput Data Elements that are Not Inputs to Emission Equations, Raw Materials Consumed that are Not Inputs to Emission Equations, and Process-Specific and Vendor Data Submitted in BMM Extension Requests. EPA agrees with the commenter that the Production/Throughput Data Elements that are Not Inputs to Emission Equations, Raw Materials Consumed that are Not Inputs to Emission Equations categories are CBI. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data Elements and Raw Materials Consumed that are Not Inputs to Emission Equations categories are CBI. For the response the comment recommending that the other four data categories listed above should be CBI, please see the response to this comment in the relevant sections of this document.

**Commenter Name: William C. Herz**  
**Commenter Affiliation: The Fertilizer Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**  
**Comment Excerpt Number: 18**

**Comment:** TFI believes that the following data elements are not the “emission type” contemplated by the 1991 Policy as “emission data” and should be protected from disclosure: . . . 40 CFR § 98.76(b)(17); 40 CFR § 98.76(c); and 40 CFR § 98.226(o).

**Response:** The data elements listed under 40 CFR 98.76(b)(17) (i.e., uses of urea), 40 CFR 98.76(c) and 40 CFR 98.226(o) (i.e., the total pounds of synthetic fertilizer produced and nitrogen content of the synthetic fertilizer reported by ammonia and nitric acid plants, respectively) are no longer required to be reported (see 75 FR 79092, December 17, 2010).

**Commenter Name: Karin Ritter<sup>44</sup>**  
**Comment: Commenter Affiliation: American Petroleum Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**  
**Comment Excerpt Number: 9**

**Comment:** For Subpart P, the proposed rule would require the disclosure the quantity of each fuel and feedstock, quantity of hydrogen and ammonia produced, and the carbon content and molecular weight of each fuel and feedstock. Some hydrogen plants are licensed by the hydrogen technology company to the merchant hydrogen producer or refinery, which operate the hydrogen plants required to report under this subpart. Such licenses prohibit the owners and

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<sup>44</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

operators of the hydrogen plant from divulging certain process information that is currently labeled as non-CBI: quantity of each fuel and feedstock, quantity of hydrogen and ammonia produced, and the carbon content and molecular weight of fuel and feedstocks. If owners and operators of the hydrogen plants are required to report these data elements as non-CBI, they would be in a no-win situation, having to either risk litigation by the hydrogen technology company for divulging process information, or risk enforcement action by not reporting all required data elements under subpart P.

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the amount of hydrogen produced by a hydrogen production plant (reported under 40 CFR 98.166(a)(2) by facilities using CEMS and 40 CFR 98.166(b)(2) by facilities using the mass balance method) and the amount of ammonia produced (reported under 40 CFR 98.166(a)(3) by facilities using CEMS and 40 CFR 98.166(b)(4) by facilities using the mass balance method) are CBI. The other data elements mentioned in this comment are assigned to the Inputs to Emission Equations category. As discussed in Section II.A.4 of the preamble to the final rule, EPA has proposal to defer reporting of data elements in the Inputs to Emission Equations category.

**Commenter Name:** Lorraine Gershman<sup>45</sup>  
**Commenter Affiliation:** American Chemistry Council (ACC)  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0031.1  
**Comment Excerpt Number:** 19

**Comment:** Subpart P – Hydrogen Production Some hydrogen plants are licensed by the hydrogen technology company to the merchant hydrogen producer or refinery, which operate the facilities required to report under this subpart. Such licenses prohibit the owners and operators of the hydrogen plant from divulging certain process information that is currently labeled as non-CBI. The quantity of each fuel and feedstock, the quantity of hydrogen and ammonia produced, and the carbon content and molecular weight of fuel and feedstocks, all of which is required to be reported under the GHG MRR, is CBI. If owners and operators of the hydrogen plants are required to report these data elements as non-CBI, they would be in a non-win situation, having to either risk being sued by the hydrogen technology company for divulging process information, or risk enforcement action by not reporting all required data elements under Subpart P.

**Response:** For the response to this comment, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 9 above.

**Commenter Name:** Keith Adams and Brian Keck  
**Commenter Affiliation:** Air Products and Chemicals, Inc.  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0058.1  
**Comment Excerpt Number:** 4

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<sup>45</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

**Comment:** Some hydrogen plants are licensed by a hydrogen technology company to the merchant hydrogen producer or refinery, which then operate the facilities required to report under this subpart. Such licenses prohibit the owners and operators of the hydrogen plant from divulging certain process information that is currently labeled as non-CBI. The quantity of each fuel and feedstock, the quantity of hydrogen, and the carbon content and molecular weight of fuel and feedstocks are examples of information which may be deemed confidential under the technology license but all of which is required to be reported under the MRR. This current proposal only treats the production data as CBI. If owners and operators of such hydrogen plants are required to report these data elements as non-CBI, they would be in a non-win situation, having to either risk being sued by the hydrogen technology company for divulging process information, or risk enforcement action by not reporting all required data elements under Subpart P.

In addition, §98.166(b)(2) of the MRR required reporting of monthly consumption of fuels, by type, used for hydrogen production and the monthly consumption of feedstocks, by type, used for hydrogen production. These fuel and feedstock consumptions do not need to be disaggregated in order to calculate the resulting CO<sub>2</sub>e emissions by the mass balance method. By requiring the discrete use of varying feedstocks versus fuels, competitive and cost information is revealed that does not improve the accuracy of the emissions reported. In addition, disclosure of reported monthly values reveals information about alternate supply sources between multiple facilities connected along a pipeline. How Air Products chooses to source its product (e.g. which facility produces how much with what fuel/feedstock choices) on a month-by-month basis is confidential business information. Alternately, disclosure of summarized, annual, combined fuel/feedstock consumption data is sufficient to provide an accurate accounting of the resultant CO<sub>2</sub>-e emissions.

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the amount of hydrogen produced by a hydrogen production plant (reported under 40 CFR 98.166(a)(2) (by facilities using CEMS) and 40 CFR 98.166(b)(2) (by facilities using the mass balance method) are CBI. The other data elements mentioned in this comment are assigned to the Inputs to Emission Equations category. As discussed in Section II.A.4 of the preamble to the final rule, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category.

**Commenter Name:** Lorraine Gershman<sup>46</sup> **Commenter Affiliation:** American Chemistry Council (ACC)

**Document Control Number:** EPA-HQ-OAR-2009-0924-0031.1

**Comment Excerpt Number:** 26

**Comment:** Subpart EE – Titanium Dioxide Production. We oppose EPA’s proposal not to treat several data elements as CBI, including:

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<sup>46</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

- (2) [Annual] Calcined petroleum coke consumption
- (3) Monthly production of titanium dioxide

...

Each of the highlighted data elements above should be designated as CBI. By making such information publicly available, competitors would be able to “reverse engineer” and calculate the titanium dioxide production at each facility.

**Response:** In the July 7, 2010 CBI proposal, the monthly production of titanium dioxide (reported under 40 CFR 98.316(b)(8)) was incorrectly assigned to the Inputs to Emission Equations. However, this data element is not used as an input in the mass balance calculations and therefore, has been re-assigned to the Production/Throughput Data that are Not Inputs to Emission Equations in this final action. The annual calcined petroleum coke consumption (reported under 40 CFR 98.316(a)(2) for facilities using CEMS and 40 CFR 98.316(b)(3) for facilities using the mass balance calculation method) were assigned to the Raw Materials Consumed that are Not Inputs to Emission Equations category. As discussed in Section II.B.9 of the preamble to the final rule, EPA has made a final determination that the data elements in the Production/Throughput Data that are Not Inputs to Emission Equations and the Raw Materials Consumed are Not Inputs to Emission Equations are CBI.

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 20**

**Comment:** Subpart EE – Titanium Dioxide Production. There is significant competitive business risk from leakage of confidential information on the DuPont titanium dioxide production process if that information is not adequately protected. We know that competitive TiO<sub>2</sub> manufacturers (in China, for example) are actively seeking insight into chloride TiO<sub>2</sub> technology, knowledge they do not have today. Furthermore there are different types of chloride technology, and to maintain our competitiveness, we guard our own approaches even from other chloride producers. Eventually others, such as foreign manufacturers, may gain an understanding and master it in some form, but we as a nation should not hasten that day. The U.S. Government may be unwittingly conspiring in industrial espionage benefiting foreign powers by relaxing CBI considerations. The chloride process for TiO<sub>2</sub> manufacture was invented on U.S. soil and is today the source of employment for thousands of U.S. workers and millions of dollars of U.S. exports. . . .

The following items should not be made available to the public for the reasons stated:

3) §98.316(b)(8) –Monthly Production of Titanium Dioxide: Same as production capacity [We have always held exact production volume capability as trade secret information. Our single-reactor lines can produce at much higher rates than those of our competitors, who must generally use multiple reactors to achieve what we are capable of doing (with unit operations of much greater capacity)].

**Response:** In the July 7, 2010 CBI proposal, the monthly production of titanium dioxide (reported under 40 CFR 98.316(b)(8)) was incorrectly assigned to the Inputs to Emission

Equations category. However, this data element is not used as an input in the mass balance calculations and is similar to other data elements in the Production/Throughput Data that are Not Inputs to Emission Equations category. For example, the monthly production of titanium dioxide produced is the similar to 40 CFR 98.146(a)(2) (i.e., the annual quantity of glass manufactured). In this final action, the monthly titanium dioxide production data element has been reassigned to the Production/Throughput Data that are Not Inputs to Emission Equations category. For the reasons discussed in Section II.C.10 of the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data that are Not Inputs to Emission Equations are CBI.

**Commenter Name: Lorraine Gershman<sup>47</sup>**

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 21**

**Comment:** Subpart X – Petrochemical Production. We oppose EPA’s proposal not to treat several data elements as CBI, including:

...

(4) Annual quantity of each petrochemical produced

Each of the highlighted data elements above should be designated as CBI. By making such information publicly available, competitors would be able to “reverse engineer” and calculate the petrochemical production operation at each facility.

**Response:** In the July 7, 2010 CBI proposal, the annual quantity of each petrochemical produced (reported under 40 CFR 98.246(a)(5)) was incorrectly assigned to the Inputs to Emission Equations. However, this data element is not used as an input in the mass balance calculations and therefore, has been re-assigned to the Production/Throughput Data that are Not Inputs to Emission Equations. As discussed in Section II.B.9 of the preamble to the final rule, EPA has made a final determination that the data elements in the Production/Throughput Data that are Not Inputs to Emission Equations are CBI. For additional information regarding the decision to make this data category CBI, see Section II.C.10 of the July 7, 2010 CBI proposal and Section II.B.9 of the preamble to the final rule.

**Commenter Name: Glen E. Davis**

**Commenter Affiliation: Mississippi Lime**

**Document Control Number: EPA-HQ-OAR-2009-0924-0049.2**

**Comment Excerpt Number: 3**

**Comment:** The categories required, as potentially applicable to MLCO, are depicted [below] denoting whether the data or information is routinely claimed as CBI or non-CBI by MLCO. MLCO has no objection to submission of truly non-CBI categories of information on a non-

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<sup>47</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

confidential basis. The USEPA inappropriately defines the majority of categories, however, as non-confidential. MLCO opposes production of such CBI on a non-confidential basis.

Reporting required under Subpart S: Data Reporting Requirements (40 CFR 98.196(b))

CBI: (EPA also designates this data as CBI): Beginning and end of year inventories for each lime product

CBI (EPA also designates this data as CBI): Beginning and end of year inventories for lime byproducts/wastes sold

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Data that are Not Inputs to Emission Equations category are CBI.

9. Process-Specific and Vendor Data Submitted in BAMB Extension Requests Category

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**Commenter Name: Kevin M. Dempsey**

**Commenter Affiliation: American Iron and Steel Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**

**Comment Excerpt Number: 12**

**Comment:** We support the listed elements in the third category - data that are not emissions data but are CBI. These include: . . . (3) process-specific and vendor data. As these data have nothing to do with or emissions calculations, there is no reason they would be reported. Since these data are not emissions data and would therefore not be reported, there would be no need for CBI protection. However, if it is necessary to provide this information to substantiate any aspect of the emissions reported, even if not inputs to emission equations, they should be afforded CBI protection, and EPA has correctly identified and recognized elements of data that would by their very nature be confidential and proprietary.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Process-Specific and Vendor Data Submitted in BAMB Extension Requests category are CBI. The comment recommending that EPA not require reporting of certain data elements is beyond the scope of this action. This action determines the confidentiality status of certain data elements reported under Part 98; this action does not add or amend the reporting requirements under Part 98. The reporting requirements addressed in this rule were established under the Final Mandatory Greenhouse Gas Reporting Rule (74 FR 56260, October 30, 2010) and several subsequent amendments (see 75 FR 39736, July 12, 2010; 75 FR 57669, September 22, 2010; 75 FR 66434, October 28, 2010; 75 FR 74458, November 30, 2010; 75 FR 74774, December 1, 2010; 75 FR 75060, December 1, 2010; and 75 FR 79092, December 17, 2010). For additional information regarding these requirements, please see the preambles and comment response documents for these rulemaking (available on the following web site: <http://www.epa.gov/climatechange/emissions/notices.html>).

**Commenter Name: Stephen E. Woock**

**Commenter Affiliation: Weyerhaeuser Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0041.1**  
**Comment Excerpt Number: 4**

**Comment:** The proposed CBI categories in Table 2 are straightforward -- . . . any process-specific and vendor data in the BAMB requests would be treated as CBI. We agree.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Process-Specific and Vendor Data Submitted in BAMB Extension Requests category are CBI.

**Commenter Name: Karin Ritter**<sup>48</sup>  
**Commenter Affiliation: American Petroleum Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**  
**Comment Excerpt Number: 5**

**Comment:** API supports EPA's proposed determination that the following three categories of data, to be reported by facilities that directly emit GHGs from industrial processes and stationary fuel combustion, are not emission data and are CBI: . . . Process-specific and Vendor Data Submitted in BAMB Extension Requests.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Process-Specific and Vendor Data Submitted in BAMB Extension Requests category are CBI.

**Commenter Name: Bryan Brendle**  
**Commenter Affiliation: Portland Cement Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0045.1**  
**Comment Excerpt Number: 6**

**Comment:** Portland Cement Association (PCA) members believe that CBI protection should apply to all six data categories that EPA does not classify as "emissions data," and not be restricted to the three data categories laid out in Table 2 of the Preamble (75 FR 39094 at 39097).

**Response:** The commenter is referring to the following six data categories that EPA proposed were not emission data: Unit/Process Static Characteristics that are Not Inputs to Emissions Equations, Unit/Process Operating Characteristics that are Not Inputs to Emission Equations, Test and Calibration Methods Category, Production/Throughput Data Elements that are Not Inputs to Emission Equations, Raw Materials Consumed that are Not Inputs to Emission Equations, and Process-Specific and Vendor Data Submitted in BAMB Extension Requests. EPA agrees with the commenter that the Process-Specific and Vendor Data Submitted in BAMB Extension Requests category are CBI. As proposed in the July 7, 2010 CBI proposal, EPA has

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<sup>48</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

made a final determination that the data elements in the Process-Specific and Vendor Data Submitted in BAMB Extension Requests category are CBI. For the response the comment recommending that the other five data categories should be CBI, please see the response to this comment in the relevant sections of this document.

## C. SUPPLIERS

### 1. General Comments on the Supplier Data Categories

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**Commenter Name: Karin Ritter**<sup>49</sup>

**Commenter Affiliation: American Petroleum Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**

**Comment Excerpt Number: 14**

**Comment:** API supports EPA's determination in the proposed rule that none of the data elements in the fuel and industrial GHG suppliers subparts are "emission data." "Emission data" is information necessary to determine characteristics related to past actual emissions from the emission source itself. *See, e.g.,* 40 C.F.R. § 2.301(a)(2)(i) (defining emission data, in part, as "Information *necessary* to determine the identity, amount, frequency, concentration, or other characteristics ... of any emission *which has been emitted by the source ...* ") (emphasis added). In contrast, the data to be reported by suppliers under the MRR bear no relationship to past actual emissions from the supplier's facilities providing such data. The MRR requires the reporting of emissions that *might* occur in the future *if* the products the suppliers place in commerce are completely combusted or oxidized downstream by countless users outside the control of those required to report fuel production and distribution data. As EPA explained, "[t]he data to be reported by suppliers under Part 98 pertain to potential future GHG emissions from the eventual use of the suppliers' products, not emissions from these suppliers' facilities." 75 Fed. Reg. at 29101.

Such data is not "emissions data." *See NRDC v. Leavitt*, Civ. No. 04-01295, 2006 WL 667327, at \*4 (D.D.C. March 14, 2006) (holding that a "plain reading of 40 C.F.R. § 2.301(a)(2)(i) indicates that 'emissions data' is defined narrowly to focus on information obtained from a source of emissions, not a producer of materials that will later contribute to emissions."). The term "emission" unambiguously means material that is actually discharged into the air. Information related to prospective, hypothetical emissions from countless sources independent of those producing the data by no means meets the regulatory definition of "emission data" and, therefore, that information is still eligible for CBI protection.

Fuel production data, which EPA is using to generate hypothetical emissions from mobile and other sources, is also not data about emissions "by the source" from which it is being collected, as defined by EPA regulation. *See, e.g.,* 40 C.F.R. § 2.301(a)(2)(i) (referring to information needed to identify characteristics of any emission "which has been emitted by the source.").

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<sup>49</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).



Here, EPA plans to use the fuel production data, to which emission factors will be applied, as a surrogate for measuring the potential future emissions from a variety of different and unknown sources. Fuel production data is not data about emissions from the suppliers from which the data is being collected. In the *NRDC* case, the court noted that "the five methyl bromide manufacturers are not directly responsible for any emissions; instead, it is the purchasers of methyl bromide that will create any eventual emissions." 2006 WL 667327, at \*3. The court held that information about the manufacturers' stockpiles was not emissions data. *Id.* at \*4. Similarly, the suppliers covered by the MRR are not actually combusting or oxidizing the relevant products and therefore information about their fuel production and distribution is not "emissions data." EPA thus correctly concluded that none of the supplier data categories constitute "emissions data."

**Response:** EPA agrees with the commenter that the data elements in the supplier data categories do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). As explained in the July 7, 2010 proposal, 40 CFR 2.301(a)(2)(i) defines emission data as emissions emitted or authorized to be emitted by a reporting facility. The data reported under the supplier subparts pertain to certain products that would result in GHG emissions if released, combusted, or oxidized by the downstream user of these products. Although EPA may use the data reported under the supplier subparts to estimate the GHG emissions that would result from the use or combustion of the products supplied, the data elements in the supplier categories do not include information on the actual emissions that occur at a supplier's facility. Therefore, as proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that none of the supplier data categories meet the definition of emission data in 40 CFR 2.301(a)(2)(i). For additional information on EPA's rationale for this decision, see Section I.C of the July 7, 2010 CBI proposal (75 FR 39094).

**Commenter Name: Michael Tiller**  
**Commenter Affiliation: Compressed Gas Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0020.1**  
**Comment Excerpt Number: 3**

**Comment:** In general, CGA supports the EPA's proposal to group the supplier data and that none of the categories qualify as emissions data.

**Response:** EPA agrees with the commenter that the data elements in the supplier data categories do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14.

**Commenter Name: Keith McCoy**  
**Commenter Affiliation: National Association of Manufacturers**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0044.1**  
**Comment Excerpt Number: 6**

**Comment:** The proposed rule correctly finds that no supplier data categories are "emissions data." In contrast to EPA's treatment of inputs to emission equations, Manufacturers support

EPA's determination in the proposed rule that none of the data elements in the fuel and industrial GHG suppliers subparts are "emission data." "Emission data" is information necessary to determine characteristics related to past actual emissions from the emission source itself. See, e.g., 40 C.F.R. § 2.301(a)(2)(i) (defining emission data, in part, as "Information necessary to determine the identity, amount, frequency, concentration, or other characteristics . . . of any emission which has been emitted by the source . . ."). In contrast, the data to be reported by suppliers under the MRR bear no relationship to past actual emissions from the supplier's facilities providing such data. The MRR requires the reporting of emissions that might occur in the future if the products the suppliers place in commerce are completely combusted or oxidized downstream by countless users outside the control of those required to report fuel production and distribution data. As EPA explained, "[t]he data to be reported by suppliers under Part 98 pertain to potential future GHG emissions from the eventual use of the suppliers' products, not emissions from these suppliers' facilities." 75 Fed. Reg. at 29101. Such data is not "emissions data." See *NRDC v. Leavitt*, Civ. No. 04-01295, 2006 WL 667327, at \*4 (D.D.C. March 14, 2006) (holding that a "plain reading of 40 C.F.R. § 2.301(a)(2)(i) indicates that 'emissions data' is defined narrowly to focus on information obtained from a source of emissions, not a producer of materials that will later contribute to emissions."). The term "emission" unambiguously means material that is actually discharged into the air. Information related to prospective, hypothetical emissions from countless sources independent of those producing the data by no means meets the regulatory definition of "emission data" and, therefore, that information is still eligible for CBI protection. Fuel production data, which EPA is using to generate hypothetical emissions from mobile and other sources, is also not data about emissions "by the source" from which it is being collected, as defined by EPA regulation. See, e.g., 40 C.F.R. § 2.301(a)(2)(i) (referring to information needed to identify characteristics of any emission "which has been emitted by the source."). Here, EPA plans to use the fuel production data, to which emission factors will be applied, as a surrogate for measuring the potential future emissions from a variety of different and unknown sources. Fuel production data is not data about emissions from the suppliers from which the data is being collected. In the *NRDC* case, the court noted that "the five methyl bromide manufacturers are not directly responsible for any emissions; instead, it is the purchasers of methyl bromide that will create any eventual emissions." 2006 WL 667327, at \*3. The court held that information about the manufacturers' stockpiles was not emissions data. *Id.* at \*4. Similarly, the suppliers covered by the MRR are not actually combusting or oxidizing the relevant products and therefore information about their fuel production and distribution is not "emissions data." EPA thus correctly concluded that none of the supplier data categories constitute "emission data."

**Response:** EPA agrees with the commenter that the data elements in the supplier data categories do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14.

**Commenter Name:** John M. Batt

**Commenter Affiliation:** Airgas, Inc.

**Document Control Number:** EPA-HQ-OAR-2009-0924-0022.1

**Comment Excerpt Number:** 1

**Comment:** Airgas, as a supplier of industrial GHGs, supports the EPA proposal to group supplier data into 11 categories and that none of these categories qualify as emissions data.

**Response:** EPA agrees with the commenter that the data elements in the supplier data categories do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14.

**Commenter Name: William C. Herz**

**Commenter Affiliation: The Fertilizer Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 6**

**Comment:** TFI believes that EPA has erroneously concluded that the . . . the inputs required for the equations set forth in Subpart PP, in particular, are “emission data” and not afforded protection from disclosure pursuant to CAA § 114(c) and 40 CFR 2.301. TFI believes that the following data elements are not the “Emission type” contemplated by the 1991 Policy as “emission data” and should be protected from disclosure: 40 CFR 98.423(a)(1), (b)(1) (proposed); 40 CFR 98.423(a)(2), (b)(2) (proposed); 40 CFR 98.423(a)(3), (b)(3) (proposed); 40 CFR 98.423(b); 40 CFR 98.426(a)(1); 40 CFR 98.426(b)(1); 40 CFR 98.426(c); 40 CFR 98.426(d); and 40 CFR 98.426(f). [Footnote: While TFI has attempted to identify all such data elements in this table, any omission of a data element in Subpart PP that does not represent an emission to ambient air should be protected from disclosure.]

**Response:** EPA agrees with the commenter that the data elements reported by suppliers of carbon dioxide under subpart PP are not emissions data. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that none of the supplier data categories meet the definition of emission data in 40 CFR 2.301(a)(2)(i), including those data elements reported under 40 CFR part 98, subpart PP. For additional information on EPA’s determination that supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14.

We disagree that all supplier data should be held as confidential because the supplier data does not meet the definition of emission data. As we explained in Section I.C of the July 7, 2010 CBI proposal, CAA section 114(c) requires that “[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets . . . , the administrator shall consider such record, report, or information or particular portion thereof confidential.” EPA interprets CAA section 114(c) to afford confidential treatment to both trade secrets and confidential business information, provided such data is not emission data. Therefore, data elements that do not meet the definition of emission data were evaluated using the CBI criteria in EPA’s existing CBI regulations (see 40 CFR 2.208). Specifically, EPA evaluated each data element in accordance with the criteria specified in 40 CFR 2.208(c) (not already publicly available) and (e) (release of the data would

cause substantial harm to the business's competitive position). Only those data elements that meet these criteria are eligible for confidential treatment.

In the July 2010 CBI proposals, EPA proposed to determine, either by category or data element, that certain supplier data elements are CBI while others are non-CBI. The CBI proposals provided detailed rationales for EPA's proposed determinations. We reviewed the supplier-specific issues raised by commenters during the public comment period and addressed those comments in the relevant sections of the preamble (see Section II.C.3 through II.C.13 of the preamble to the final rule and Sections C.2 through C.12 of this document for response to comments on the supplier data categories).

As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that CO<sub>2</sub> supplied by CO<sub>2</sub> production wells are not CBI (40 CFR 98.426(a)(1) through (a)(3), (b)(1) through (b)(4), (c)(2)(i) and (ii), and (f)). However, EPA has made a final determination that the amount of CO<sub>2</sub> supplied by industrial facilities (e.g., ammonia production plants) is entitled to confidential treatment. Although CO<sub>2</sub> supply data is generally available for CO<sub>2</sub> production wells, we have found no public sources of such data for industrial CO<sub>2</sub> production facilities. Furthermore, some commenters stated that CO<sub>2</sub> supply data for industrial CO<sub>2</sub> production facilities would be likely to cause competitive harm if disclosed to the public because information documenting the amount of CO<sub>2</sub> collected and transferred off site would provide competitors with sensitive information that may be used to determine a reporter's market share and to gain insight into a reporter's ability to meet increases in market demand.

The remaining references (i.e., 40 CFR 98.423(a)(1), (b)(1); 40 CFR 98.423(a)(2), (b)(2); 40 CFR 98.423(a)(3), (b)(3); and 40 CFR § 98.423(b)) refer to the calculation methods and not to reporting requirements. For the subpart PP, the only data elements required to be reported are those listed in 40 CFR 98.426.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**

**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council, Sierra Club**

**Document Control Number: EPA-HQ-OAR-2009-0924-0053.1**

**Comment Excerpt Number: 8**

**Comment:** The Clean Air Act itself does not define "emission data," other than making clear that it is some subset of the data which can be collected under section 114. See 42 U.S.C. § 7414(c). EPA's regulatory definition, however, focuses on data concerning "any emission which has been emitted by the source." 40 C.F.R. § 2.301(a)(2). Relying upon this definition, EPA determines that no supplier data qualifies as emission data because that information "pertain[s] to potential future GHG emissions from the eventual use of the suppliers' products, not emissions from the suppliers' facilities." 75 Fed. Reg. at 39,101. As a result, even basic data on suppliers' product-by-product emissions is eligible to be classified as CBI.

EPA omits to consider, however, that the fuels and other products which suppliers produce are, ultimately, emitted. The suppliers are the ultimate source of these emissions. Information on those emissions can therefore properly be classed as emission data. This result would be the most consistent with Congress' direction to EPA that it ensure "mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the

United States.” [Footnote: Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524, 729 (March 11, 2009) (citing Fiscal Year 2008 Consolidated Appropriations Act, Pub. L. No. 110-161, 121 Stat. 1844, 2128 (Dec. 26, 2007).) If sectors are nominally included in the rule, but their emissions are not fully reported, Congress’s purpose is frustrated. If EPA nonetheless determines that the existing regulatory definition bars this outcome, the additional statutory authority in the reporting rule appropriations acts would justify modifying the definition in that context to make clear that supplier emissions are included in the emission data category.

**Response:** EPA agrees with the commenter that the CAA does not define emission data. As we explained in the July 7, 2010 CBI proposal, our CBI determinations were made using the definition of emission data at 40 CFR 2.301(a)(2)(i). This is the same definition for emission data has been used by EPA for over 20 years to make decisions on individual case-by-case CBI claims.

EPA disagrees with the commenter that the data elements in the supplier data categories meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). EPA recognizes that the fuels and other products which suppliers produce are emitted. In fact, EPA may use the data reported under the supplier subparts to estimate the GHG emissions that would result from the use or combustion of the products supplied. However, the data elements in supplier categories do not include information on the actual emissions that occur at a supplier’s facility. Since supplier data does not meet the definition of emission data at 40 CFR 2.301(a)(2), we evaluated the supplier data elements using the CBI criteria in EPA’s existing CBI regulations (see 40 CFR 2.208). Specifically, EPA evaluated each data element in accordance with the criteria specified in 40 CFR 2.208(c) (not already publicly available) and (e) (release of the data would cause substantial harm to the business’s competitive position). Those data elements that meet these criteria are eligible for confidential treatment. The rationales for our determinations that certain supplier data categories or data elements qualify as CBI are provided in Sections II.D.2 through II.D.12 of the July 7, 2010 CBI proposal and Sections II.C.2 through II.C.13 of the preamble of this final rule.

We also disagree with the commenter that our determination that certain supplier data is entitled to CBI treatment is contrary to Congress’ intent in the Consolidated Appropriations Act. This Act directed EPA to draft a rule that requires reporting of greenhouse gas data. However, the Act did not address public access to the data. Further, the supplier data elements determined to be CBI must still be reported to the Agency; these data elements would not be available for public review.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**

**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council, Sierra Club**

**Document Control Number: EPA-HQ-OAR-2009-0924-0053.1**

**Comment Excerpt Number: 7**

**Comment:** EPA should release as much supplier data as possible. We are concerned that EPA’s approach to data from fuel and product suppliers is unduly restrictive in light of the broad transparency mandates of Section 114 and the statutes funding the reporting rule. Although we

are pleased that EPA has decided to release much of this data, we urge the agency to take another look at its remaining confidentiality determinations in this category.

As EPA describes in Tables 4 and 5 of the proposed rule, much supplier emissions data, and almost all production and throughput data, will be treated as CBI, see 75 Fed. Reg. at 39,119-122, along with several other supplier data elements. Initially, we are not persuaded that all of these data elements can properly be excluded from the “emission data” category of section 114. Even if they can be, it is not clear that the data should be treated as CBI. Indeed, as EPA explained as early as the proposed reporting rule, Congress directed EPA to use its Clean Air Act authority to include “reporting of emissions resulting from upstream production . . . sources.” 74 Fed. Reg. at 16,454 (citing Congressional reports on reporting rule appropriations). EPA should not make confidentiality determinations contrary to that intent. To the extent EPA determines this designation is appropriate, we urge it to explore ways to release as much data as possible without violating CBI restrictions.

**Response:** See the response to comment EPA-HQ-OAR-2009-0924-0053.1, excerpt 8.

**Commenter Name:** Craig H. Segall, Helen Silver, and Meleah Geertsma

**Commenter Affiliation:** Clean Air Task Force, Natural Resources Defence Council

**Document Control Number:** EPA-HQ-OAR-2009-0924-0018.1

**Comment Excerpt Number:** 2

**Comment:** We are concerned with EPA’s treatment of some fluorinated greenhouse gas supplier data. As a general matter, EPA must read the term “emission data” to include all data necessary to determine or verify emissions [See 40 C.F.R. 2.301(a)(2)]. This is especially important because the reporting rule often relies upon engineering equations and other estimation systems to report emissions. Because the inputs to these equations are therefore “necessary” to determine the “identity, amount, frequency, concentration,” and other characteristics of a source’s emissions [See 56 Fed. Reg. at 7,403], those inputs are emission data. Likewise, information used to verify those data points, or determine how they are to be measured, is likewise emission data because it is necessary to ensuring the integrity and accuracy of emissions estimates. Supplier data should also be considered emission data, to the maximum extent possible. Although it is true that emissions from suppliers may not be “emitted by the supplier,” [See 56 Fed. Reg. at 7,403] they are ultimately emitted, and the regulations apply to emissions from “any source of emissions,” not just suppliers [See 40 C.F.R. 2.301(a)(2)(i)]. If, as is frequently the case, EPA seeks to measure emissions from entities which use supplied fuels or gases, it may measure emissions from these “sources of emissions” by seeking data from suppliers. This data is, therefore, emission data. Particularly in light of its reporting rule mandate, EPA should not read its regulations unduly narrowly to exclude the entire class of suppliers from the “emission data” category.

**Response:** EPA disagrees with the commenter that the data elements in the supplier data categories meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i)(A). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14. Although we agree that the method and verification data reported by suppliers are important for determining the accuracy of the reported data, the method and verification information for

suppliers are not data used to determine actual emissions from the supplier's facility and therefore do not meet the definition of emission data. Under CAA section 114(c), data that is not emission data must be afforded CBI protection if it "would divulge methods or processes entitled to protection as trade secrets. EPA has interpreted CAA section 114(c) to afford confidential treatment to both trade secrets and confidential business information.

Finally, with regard to the comments on inputs to emission equations, EPA has proposed to defer reporting of data elements in the direct emitter category Inputs to Emission Equations category. For additional information on the proposal to defer reporting of these data elements, see Section II.B.2 of the preamble to the final rule.

## 2. Greenhouse Gases Reported Category

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**Commenter Name: Gregory M. Scott**

**Commenter Affiliation: National Petrochemical & Refiners Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0036.1**

**Comment Excerpt Number: 8**

**Comment:** NPRA supports the Agency's proposal that product-specific CO<sub>2</sub> emissions for subpart MM are CBI data. EPA proposes at the top of Table 4 (75 Fed. Reg. 39119) that product-specific CO<sub>2</sub> emissions are CBI data and they would be released with aggregation at the national level. NPRA strongly supports this proposal because it would protect facility-specific proprietary data. EPA could consider releasing it at the same aggregation level used by the Energy Information Administration (EIA), the five Petroleum Administration for Defense Districts (PADDDs). Refiners and importers report volumes of gasoline and diesel to EPA's Office of Transportation and Air Quality (OTAQ) as CBI. They also report volumes for these and other petroleum products to EIA as CBI. These two reporting requirements are mandatory, not voluntary. There is no question about the validity of CBI protection because these are not emissions data. The Agency could compare these CBI reports to facility-specific submissions for the GHG emissions mandatory reporting to verify consistency. This data have been protected as CBI by EPA's OTAQ and EIA and this should be continued for data submitted in the GHG emissions mandatory reporting rule.

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that product-specific CO<sub>2</sub> data reported under Subpart MM by refiners and exporters of petroleum products (40 CFR 98.396(a)(16), (c)(7), and (d)(1)(ii)) are CBI. Please also note that EPA has decided not to make a final determination for data elements in the GHGs Reported and Production/Throughput Quantities and Composition categories reported by importers of petroleum-based products (40 CFR 98.396(b)(7), (b)(8) and (d)(1)(ii)). We previously proposed a non-CBI status for these data elements because we believed the data are available to the public through EIA. However, we received a number of comments noting differences in product definitions used by EPA and EIA and stating that in some instances EPA's data would reveal information about the characteristics of an imported product that is not available through EIA. We were not able to find alternative public sources of importer data and we agreed with other commenters who stated that the import information could cause competitive harm in some situations (e.g., where the importer uses the imported product as a raw material for their manufacturing process, the amount and characteristics of the raw material provide competitors

with sensitive information on the manufacturing process, production costs, and efficiencies). Since the circumstances vary for each reporter with regard to whether the data reported under Part 98 is available through EIA, EPA has decided not to make a confidentiality determination at this time that would apply to all importers of petroleum products. Therefore, EPA is not finalizing confidentiality determinations in this action for data on the amount of CO<sub>2</sub> supplied reported by importers of petroleum products (40 CFR 98.396(b)(7) and (b)(8)).

For more information regarding the final CBI determination for suppliers of petroleum products, see Section II.C.3 of the preamble to the final rule, including the Comment on Suppliers of Coal-Based Liquid Fuels (Subpart LL) and Suppliers of Petroleum Products (Subpart MM) and the Comment on Facility Level CO<sub>2</sub>e.

EPA agrees with the commenter that the data elements in this data category do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14.

EPA agrees with the commenter that Table 4 of the July 7, 2010 proposal suggests that data reported by producers and exporters of coal-based liquids and petroleum products could be aggregated at the national level, by source category, and by product. However, in this final rule, EPA is not making decisions regarding the methods for aggregating data elements determined to be CBI in. In this action, we are making final confidentiality determinations for data elements collected under Part 98 as described in section I.C of the preamble to the final rule. While we solicited ideas for data publication and aggregation in the July 7, 2010 CBI proposal, we do not need to establish the format for publishing Part 98 data in this rule. We are interested in providing the public access to emission and non-CBI data through a user-friendly, online interface. We will take into consideration the comments and recommendations submitted by stakeholders when deciding on the appropriate format for publishing GHGRP data and will ensure that data that has been determined to be CBI is not disclosed to the public.

**Commenter Name: John M. Batt**

**Commenter Affiliation: Airgas, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0022.1**

**Comment Excerpt Number: 2**

**Comment:** For suppliers in subpart OO, EPA has appropriately proposed to determine as CBI reported facility and importer/exporter-level product-specific GHG data. However, there may be reporters who import/export a single product. The data element “Total importer/exporter level CO<sub>2</sub>e from subparts LL through PP” is designated as not CBI. This should be annotated with a footnote similar to footnote “e” for the Producer data element “Total facility-level CO<sub>2</sub>e from subparts LL through PP”, noting that “In cases where a reporter imports/exports a single product, the data should be held as CBI as the Individual data will be the same as the Total data. The single-product GHG quantities should be considered CBI because they too could be used to back-calculate import/export rates of the particular products.

**Response:** EPA agrees with the commenter and has therefore added a condition to the determination for this data element to account for the situation described by the commenter.



EPA has made a final determination that supplier-level CO<sub>2</sub>e for subparts LL through PP (40 CFR 98.3(c)(5)(i)) is non-CBI for producers, except in situations where the reporter is a facility that produces a single product and where EPA has determined that the amount of the one product produced is CBI. This provision also applies to importers or exporters that import or export a single product and where EPA has determined that the amount of that one product imported or exported is CBI. In all other circumstances this data element is not CBI. For additional information regarding this decision, see Section II.C.3 (Comment on Facility-level CO<sub>2</sub>e) of the preamble to the final rule.

**Commenter Name: Keith Adams and Brian Keck**  
**Commenter Affiliation: Air Products and Chemicals, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**  
**Comment Excerpt Number: 20**

**Comment:** EPA discusses aggregated reporting of GHG quantity data that are determined to be CBI. Air Products again disagrees because in the case of NF<sub>3</sub> there are few companies that manufacture the product and the viable production technologies are limited. Reporting this data in aggregated format would unnecessarily present the opportunity for affected companies to discern sensitive production and market data about their competitors. EPA recognizes this situation elsewhere in the proposed rule. In Table 4 – Proposed CBI Determination And Level Of Release For Greenhouse Gases Reported, footnote states that total facility-level CO<sub>2</sub> from Subparts LL through PP are not CBI; however, in cases where a facility produces a single product, this data element will be held as CBI. Air Products produces NF<sub>3</sub> and other GHG products, but NF<sub>3</sub> represents the vast majority of the GHG products produced and associated GHG emissions. Therefore, Air Products recommends that this footnote be expanded to cases where a facility produces < 5 GHG products, and where the production of a single product results in GHG reported emissions representing > 75% of the total facility-reported GHG emissions. Otherwise, as currently proposed, competitors could still deduce sufficient information about the primary production process or product. EPA states it would also release the total amount of each GHG supplied in the U.S. by all suppliers of industrial gases in cases where the gas is produced at three or more facilities. Air Products agrees with this aggregated disclosure approach, but again only when the reported GHG supplied by an individual company represents < 75% of the total aggregated reported data.

**Response:** Based on comments received, EPA has added a condition to the determination for the supplier-level CO<sub>2</sub>e for subparts LL through PP (40 CFR 98.3(c)(5)(i)). EPA has made a final determination that supplier-level CO<sub>2</sub>e for subparts LL through PP is non-CBI for producers, except in situations where the reporter is a facility that produces a single product and where EPA has determined that the amount of the one product produced is CBI. Similarly, this provision also applies to importers or exporters that import or export a single product and where EPA has determined that the amount of that one product imported or exported is CBI. In all other circumstances this data element is not CBI

However, we disagree that this condition should be expanded to include facilities that produce less than five fluorinated GHG products and where the production of a single product results in GHG reported emissions representing > 75% of the total facility-reported GHG emissions. We

do not believe, nor has the commenter demonstrated, that these additional conditions are necessary. Where a facility supplies more than one product, competitors would not be able to estimate with any degree of certainty the relative quantity of each product produced, imported, or exported using the facility-level or importer/exporter-level CO<sub>2</sub>e data. This calculation would be further complicated, because competitors would need to know the exact identity of each product supplied so that they could determine each product's global warming potential (as the total is reported in CO<sub>2</sub>e). Furthermore, we note that it is the agency's standard practice to mask CBI by aggregating data from three or more reporting sources. In such circumstances, a single reporter would know their own production rate but would not know how to apportion the remainder of aggregated total among their two competitors. Our approach here is similar in that competitors would not be able to determine the relative share of each product with just the aggregated total. For a response to the comment on methods of aggregation, please see the response to comment EPA-HQ-OAR-2009-0924-0036.1, excerpt 5.

**Commenter Name: Michael Tiller**  
**Commenter Affiliation: Compressed Gas Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0020.1**  
**Comment Excerpt Number: 11**

**Comment:** CGA also supports EPA's determination that certain supplier GHG quantity data elements at the facility level are not CBI, but that most of the product-specific GHG quantity data are CBI.

**Response:** EPA thanks the commenter for their input.

**Commenter Name: John M. Batt**  
**Commenter Affiliation: Airgas, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0022.1**  
**Comment Excerpt Number: 5**

**Comment:** Airgas also supports EPA's proposal to determine the most of the product-specific GHG quantity data are CBI but that certain supplier GHG quantity data elements at the facility level (or importer/exporter level) are not CBI.

**Response:** EPA thanks the commenter for their input.

**Commenter Name: Joel R. Hall**  
**Commenter Affiliation: Mexichem Fluor Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0055**  
**Comment Excerpt Number: 7**

**Comment:** Mexichem requests that the EPA consider total importer/exporter level CO<sub>2</sub>e from subparts LL through PP as confidential business information for importers and exporters that handle one or a few products. CO<sub>2</sub>e level data for importers and exporters that handle one or a few products could easily be converted into actual pounds, tons, etc of import and export of

specific product(s) and therefore could be used by competitors to gain insight into marketing strengths and weaknesses and thus gain a competitive advantage over these entities.

**Response:** EPA agrees with the commenter, and has therefore added a condition to the final determination such that supplier-level CO<sub>2</sub>e for subparts LL through PP (40 CFR 98.3(c)(5)(i)) is non-CBI for producers, except in situations where the reporter is a facility that produces a single product and where EPA has determined that the amount of the one product produced is CBI. Similarly, this provision also applies to importers or exporters that import or export a single product and where EPA has determined that the amount of that one product imported or exported is CBI. In all other circumstances this data element is not CBI. For a response to the comment that the supplier level CO<sub>2</sub>e for subparts LL through PP should be CBI if “only a few products” are supplied, please see the response to comment EPA-HQ-OAR-2009-0924-0058.1, excerpt 20.

**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 6**

**Comment:** Mexichem supports the EPA’s proposal to consider as confidential business information total facility level CO<sub>2</sub>e from subparts LL through PP for facilities that produce a single product. However, we question how this will be accomplished. The reporting tool will need to accommodate facilities that manufacture one product and those that manufacture more than one product while ensuring that CBI is designated as such and protected.

**Response:** EPA has added a condition to the final determination such that supplier-level CO<sub>2</sub>e for subparts LL through PP (40 CFR 98.3(c)(5)(i)) is non-CBI for producers, except in situations where the reporter is a facility that produces a single product and where EPA has determined that the amount of the one product produced is CBI. Similarly, this provision also applies to importers or exporters that import or export a single product and where EPA has determined that the amount of that one product imported or exported is CBI. In all other circumstances this data element is not CBI.

The reporting tool has been designed to accommodate facilities that manufacture a single product, as well as facilities that manufacture multiple products. The purpose of the reporting tool is to facilitate the collection of Part 98 data from reporters. The reporting tool is for use by Part 98 reporters only and is not accessible to the public. EPA EPA will be able to identify sources that supply a single product using the data submitted through the reporting tool.

**Commenter Name: Juanita M. Bursley**

**Commenter Affiliation: Graf Tech International Holdings, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0052.1**

**Comment Excerpt Number: 4**

**Comment:** EPA proposes that certain supplier GHG quantity data elements at the facility and importer/exporter levels are not CBI under CAA section 114(c), but that most of the product-specific GHG quantity data are CBI. In particular, total facility-level GHGs and total importer

level GHGs, and total exporter level GHGs from subparts LL and MM are identified as not CBI. Also, composition data for importers of petroleum products will be not treated as CBI. EPA indicates that some data elements do not qualify as CBI because they are already publicly available. Specifically, EPA refers to the information released by the U.S. Energy Information Administration (EIA). GrafTech believes this line of thinking is flawed for several reasons. For example, Petroleum Products and Miscellaneous Petroleum Products must be reported to EIA. By EIA's definition, Petroleum Products "are obtained from the processing of crude oil (including lease condensate), natural gas, and other hydrocarbon compounds. Petroleum products include unfinished oils, liquefied petroleum gases, pentanes plus, aviation gasoline, motor gasoline, naphtha-type jet fuel, kerosene-type jet fuel, kerosene, distillate fuel oil, residual fuel oil, petrochemical feedstocks, special naphthas, lubricants, waxes, petroleum coke, asphalt, road oil, still gas, and miscellaneous products." Under EIA's definition, Miscellaneous Petroleum Products include "all finished products not classified elsewhere (e.g., petrolatum lube refining by products (aromatic extracts and tars), absorption oils, ram-jet fuel, petroleum rocket fuels, synthetic natural gas feed stocks, and specialty oils)". EPA's definitions of petroleum products and miscellaneous products are somewhat different. Unless EPA can confirm that the reporting requirements are identical, this means that some reported GHG data from suppliers covered under the GHGMRR will be available for the first time to the public and may put the reporting entities at risk, including putting it at a competitive disadvantage.

As another example, some data, such as imports of petroleum coke, are routinely reported to EIA by the company that is the importer of record. This company can be under contract with the end-user company, such as in a brokering relationship and, in such cases, is not the company that utilizes the imported material as a fuel or as raw materials. This importer of record may also report to EIA for one or more companies with which it contracts for its services. The typical purpose of this type of contractual arrangement is to provide the end-user with the needed imported material, and to provide a service that includes the management of and compliance with all the complex importation regulations, including reporting to EIA. Another result of such a foreign supplier or broker arrangement, whether or not intended, is that the quantities and other data for the imported materials, which have to be reported to EIA, cannot be immediately traceable by the general public to the entity receiving the benefits from that importation. However, under this scenario, this importer of record for the EIA report will likely not be the "supplier", under EPA's definition, which will be required to report its GHG data to EPA. In these cases, the end-user receives the sole benefit of the imported materials and, if GrafTech understands correctly, is the entity responsible for the GHG data reporting under the GHGMRR. For example, under its current supplier/broker agreements, GrafTech has determined that it will, in the majority of cases, be responsible for reporting its own GHG data under the supplier provisions of the GHGMRR.

Therefore, GrafTech argues that the GHG data, which it will report under its company name for the first time as the importer of petroleum products and/or coal-based liquid fuels, should be treated as CBI, as that data could provide competitors with information that could be used to put it at a competitive disadvantage for many of the same reasons cited by EPA and reiterated below.

**Response:** For the reasons specified below, EPA has decided not to make a confidentiality determination at this time for certain data elements reported by importers of coal-based liquids (40 CFR 98.386(b)(1) through (3); 40 CFR 98.386(b)(5)(iii); 40 CFR 98.386(b)(6)(i); and 40

CFR 98.386(b)(7)) and petroleum products (40 CFR 98.396(b)(1) through (3); 40 CFR 98.396(b)(5)(iii); 40 CFR 98.396(b)(6)(i); and 40 CFR 98.386(b)(7)). EPA previously proposed a non-CBI status for these data elements because we believed the data elements were available to the public through EIA. Although we recognized that there are some differences in the products reported under part 98 and EIA reporting program, we previously considered the differences to be minor and unlikely to reveal sensitive information. However, after reviewing the EIA definitions of petroleum products and miscellaneous products, we agree that the differences between the EIA and Part 98 definitions may in some instances result in the Part 98 data revealing information about the characteristics of an imported product that is not available through EIA. We also agree that this information would cause competitive harm in some situations (e.g., where the importer uses the imported product as a raw material for their manufacturing process, the amount and characteristics of the raw material provide competitors with sensitive information on the manufacturing process, production costs, and efficiencies). However, we also note that the extent to which these part 98 data elements reveal competitively harmful information would depend on the type of product imported because some of the part 98 product definitions are identical to or sufficiently similar to those used by EIA (e.g., the part 98 definition of ethane is identical to that of EIA). We were also not aware at the time of the proposal that some importers subject to part 98 are not required to report their imports to the EIA and that the data is instead reported by brokers and published by EIA using the brokerage's name rather than the name of the company who ultimately instigated and received the imported products. Therefore, EPA agrees with the commenter that, in some limited cases, different entities may be required to report import data under the subparts LL and MM of part 98 and under the EIA reporting program. In such instances, we agree that the EIA data does not reveal the identity of the company reporting import data under Part 98 and therefore, we conclude that in these limited situations the data is not publicly available because it cannot be associated with part 98 reporter. Since the circumstances vary for each reporter with regard to whether the data reported under part 98 is available through EIA, EPA decided not to make a confidentiality determination at this time that would apply to all importers of coal-based liquids and petroleum products. For the reasons described above, EPA is not finalizing a confidentiality determination the amount of CO<sub>2</sub> supplied reported by importers of Coal-Based Liquids and Petroleum Products (subparts LL and MM).

**Commenter Name: John M. Batt**

**Commenter Affiliation: Airgas, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0022.1**

**Comment Excerpt Number: 4**

**Comment:** [I]n Table 4 the proposed national aggregation for imports/exports by GHG and product should be by corporate entity and not by facility. Individual facilities are not required to report imports/exports of Industrial GHGs, as these are only reported on a corporate entity basis.

**Response:** EPA agrees with the commenter that Table 4 in the July 7, 2010 CBI proposal incorrectly states “facility-level” instead of “import/exporter-level” for importers and exporters of Industrial GHGs. The commenter is correct that importers and exporters report imports and exports at the corporate-level and not at the facility-level. EPA has corrected this error in the

summary table provided in the preamble to the final rule (see Table 4, Final CBI Determination for Greenhouse Gases Reported, in Section II.C.3 of the preamble to the final rule.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.1**  
**Comment Excerpt Number: 1**

**Comment:** We are particularly pleased that EPA has correctly determined that supplier emissions at the facility level are not CBI and agree that these emissions figures “could not be used to back-calculate and reveal annual production rates of particular products or industrial gases or other sensitive information.” 75 Fed. Reg. at 39,120. This determination is critical, as it will ensure that the public has at least basic information on each supplier’s emissions at each facility, rather than having to rely on supplier-wide or industry-wide aggregated data.

**Response:** Based on comments received, EPA has added a condition to the determination for this data element. EPA has made a final determination that supplier-level CO<sub>2</sub>e for subparts LL through PP (40 CFR 98.3(c)(5)(i)) is non-CBI for producers, except in situations where the reporter is a facility that produces a single product and where EPA has determined that the amount of the one product produced is CBI. This provision also applies to importers or exporters that import or export a single product and where EPA has determined that the amount of that one product imported or exported is CBI. In all other circumstances this data element is not CBI. For additional information regarding this decision, see Section II.C.3 (Comment on Facility-level CO<sub>2</sub>e) of the preamble to the final rule.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.1**  
**Comment Excerpt Number: 9**

**Comment:** We recognize that questions of confidentiality are more difficult in the supplier context, where reporting some product-specific emissions might have competitive consequences, and may incline EPA to avoid an “emission data” determination for some categories of supplier data. Some tension between possible business consequences and transparency should not, however, automatically lead to a CBI designation, even for information that is not emission data. Instead, EPA should very carefully review competitive conditions in each covered sector before making such a determination.

**Response:** EPA thanks the commenters for their input. EPA has determined that the data elements in the supplier data categories do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i)(A). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14.

As the supplier categories do not meet the definition of emission data, EPA evaluated each data element in accordance with the criteria specified in 40 CFR 2.208(c) (not already publicly

available) and (e) (release of the data would cause substantial harm to the business's competitive position) . Only those data elements that met these criteria were determined to be CBI. For additional information on the approach to making CBI determinations, see Section I.C of the preamble to the July 7, 2010 CBI proposal.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**

**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council, Sierra Club**

**Document Control Number: EPA-HQ-OAR-2009-0924-0053.1**

**Comment Excerpt Number: 11**

**Comment:** We note that EPA recognizes that some suppliers, which produce only one product, could face competitive harm were their facility-level emissions to be reported, as all those emissions could be traced back to manufacturing a single product. Acknowledging this problem may exist in some instances, we urge EPA to define the term “product” narrowly, to prevent a facility from claiming, for instance, that some broad product category --all “natural gas liquids,” say, or all “bituminous coal” – is a single “product” and so subject to CBI protection.

**Response:** EPA agrees with the commenter that the term “product” should not be interpreted by reporters as a class or category of products. The term product, as used in the July 2010 CBI proposal and the final action, refers to the individual products and not to classes or groups of products. For example, under subpart NN, ethane, propane, normal butane, isobutane, etc. are considered to be separate products. Similarly, the individual products listed in Table MM-1 of 40 CFR part 98, subpart MM, such as kerosene and aviation gasoline are considered to be separate products.

### 3. Production/Throughput Quantities and Composition Category

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**

**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**

**Document Control Number: EPA-HQ-OAR-2009-0924-0053.1**

**Comment Excerpt Number: 5**

**Comment:** We are pleased that EPA has already removed certain supplier data elements from CBI, including . . . production and throughput data for local distribution companies and petroleum importers, and CO<sub>2</sub> production and injection data.. . . See 75 Fed. Reg. at 39,123-26.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that throughput data for local distribution companies and CO<sub>2</sub> supplied by CO<sub>2</sub> production wells are not CBI (40 CFR 98.426(a)(1) through (a)(3), (b)(1) through (b)(4), (c)(2)(i) and (ii), and (f)). However, for the reasons discussed in Section II.C.3 (Comment on Suppliers of CO<sub>2</sub> (Subpart PP)) of the preamble for the final rule, EPA has made a final determination that the amount of CO<sub>2</sub> supplied by industrial facilities (e.g., ammonia production plants) is entitled to confidential treatment. In addition, EPA has not made a determination for data elements in the Production/Throughput Quantities and Composition category reported by importers of coal based liquid fuels (40 CFR

98.386(b)(1) through (3); 40 CFR 98.386(b)(5)(iii); 40 CFR 98.386(b)(6)(i); and 40 CFR 98.386(b)(7)) and petroleum products (40 CFR 98.396(b)(1) through (3); 40 CFR 98.396(b)(5)(iii); 40 CFR 98.396(b)(6)(i); and 40 CFR 98.386(b)(7)). For the rationale for this decision, see Section II.C.3 (Comment on Suppliers of Coal-Based Liquid Fuels (Subpart LL) and Suppliers of Petroleum Products (Subpart MM)) of the preamble for the final rule.

With respect to the comment on CO<sub>2</sub> injection, we are not responding to comments regarding data elements reported under 40 CFR part 98, subparts RR. As explained in Section II.A.4 of the preamble to the final rule, EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0018.1**  
**Comment Excerpt Number: 5**

**Comment:** We differ with EPA on the classification of other subpart OO data elements. In EPA's view, reports on "the concentration of each fluorinated GHG" in some products and revised reports on changed concentrations should be considered confidential [See 56 Fed. Reg. at 7,403]. Because fluorinated gases are powerful global warming agents, with global warming potentials tens or hundreds of times that of carbon dioxide, we do not support shielding this information from public view. Initially, because fluorinated gases may well escape from these products, or may be discharged by end users, the products themselves are "sources" for the purposes of 40 C.F.R. 2.301(a)(2), and data on those emissions is therefore non-confidential emission data. At a minimum, fugitive emissions should fall within this category. Even if some data do not fall under the "emission data" rubric, EPA should still be working to further public reporting in this important area. We request, first, that EPA document its rationale for concluding that data of this sort is not already in public view. Companies presumably disclose greenhouse gas concentrations in their products to their customers, in marketing materials, and to regulators. EPA should consider whether any of these disclosures demonstrate that the information is already "reasonably obtainable" [See 40 C.F.R. 2.208(h)], and report its conclusions in any final rule.

**Response:** EPA disagrees with the commenter that information reported by suppliers of fluorinated greenhouse gases meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14.

In response to the comment that fugitive emissions should fall within this category, EPA notes that emissions from fluorinated gas production are reported under the direct emitter subpart L. As explained in Section II.A.4 of the preamble to the final rule, EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ.



Finally, as proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the concentration of each fluorinated GHG contained in products (reported under 40 CFR 98.416(e)(5)) is CBI. As explained in Section II.D.3 of the preamble to the July 7, 2010 CBI proposal, product composition may allow competitors to reasonably infer the types and approximate amounts of feedstocks or raw materials consumed. In response to the comment that companies presumably disclose greenhouse gas concentrations in their products to their customers, EPA notes that the level of detail on the concentration and identity of product constituents is not disclosed in this sector.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.1**  
**Comment Excerpt Number: 2**

**Comment:** Production and throughput data, presently often treated as CBI under the proposed rule, may often not actually be CBI because this data is frequently disclosed to investors, ratings agencies, the government, and the public as part of regular industry reporting, publicity initiatives, and marketing campaigns. EPA should carefully assess this category to determine which information has been made public in such ways.

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that much of the data in this data category are CBI. The approach and rationale for this decision are provided in Sections I.C and II.D.3 of the preamble to the July 7, 2010 CBI proposal and Section I.C.4 of the preamble to the July 27, 2010 supplemental CBI proposal. In making determinations under this and other supplier data categories, EPA considered whether the specific data elements were already available to the public. Where an alternative public source was available for a particular data element, we determined that the data element was not eligible for confidential treatment.

**Commenter Name: Jennifer Cleary**  
**Commenter Affiliation: Association of Home Appliance Manufacturers**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0051.1**  
**Comment Excerpt Number: 2**

**Comment:** EPA proposes to determine that reported facility level and importer/exporter level [fluorinated GHG] production and throughput quantity and composition data are Confidential Business Information (CBI). AHAM agrees that such information should be considered CBI.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that production/throughput data elements at the facility-level (40 CFR 98.416(a)(1) through (a)(7), (a)(9), (a)(11), (a)(12), (a)(14), and (a)(15)) and importer/exporter-level (40 CFR 98.416(c)(1) and (c)(2), (c)(6), (c)(8) through (c)(10); 40 CFR 98.416(d)(1), (d)(4); and 40 CFR 98.416(f)) related to fluorinated GHGs will be held as CBI for facilities producing, importing, or exporting fluorinated GHGs. For further information regarding EPA's final CBI determination for data elements in the supplier production/throughput

category, please see Section II.D.3 in the July 7, 2010 CBI proposal and Section II.C.4 of the preamble to the final rule.

**Commenter Name:** Sean Mackay  
**Commenter Affiliation:** Whirlpool Corporation  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0046.1  
**Comment Excerpt Number:** 2

**Comment:** EPA proposes to determine to be Confidential Business Information (CBI) reported facility level and importer/exporter level production and throughput quantity and composition data. Whirlpool Corporation agrees that such information should be considered CBI.

**Response:** For the response to this comment, please see the response to comment EPA-HQ-OAR-2009-0924-0051.1, excerpt 2.

**Commenter Name:** Dave Stirpe  
**Commenter Affiliation:** Alliance for Responsible Atmospheric Policy  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0050.1  
**Comment Excerpt Number:** 4

**Comment:** EPA appropriately proposes to protect individual company Subpart OO and QQ supplier reports from public disclosure. NRDC v. EPA (2006 U.S. Dist. LEXIS 13326, (D.D.C. 2006)) supports the proposal on page 39120 that individual supplier production and sales data should be held as confidential. In NRDC, the court held that individual methyl bromide suppliers were not required to release production or inventory data to the public. EPA was able to maintain CBI treatment of disaggregated data, perform the appropriate aggregation, and release industry-wide data. Here, EPA proposes an aggregation system that would, if implemented substantially as proposed, satisfy the NRDC criteria.

EPA appropriately proposes to protect individual company Subpart OO and QQ supplier reports from public disclosure. We suggest EPA follow the example of the former Alternative Fluorocarbon Environmental Acceptability Study (AFEAS) project where such aggregation would require at least three manufacturers with production levels for a particular HFC greater than 1000 metric tonnes each. Should fewer be used, those producing would be aware of competitive operating rates and they would also have good information if it is known that one of three manufacturers was producing only token volumes.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that production/throughput data elements at the facility-level (40 CFR 98.416(a)(1) through (a)(7), (a)(9), (a)(11), (a)(12), (a)(14), and (a)(15)) and importer/exporter-level (40 CFR 98.416(c)(1) and (c)(2), (c)(6), (c)(8) through (c)(10); 40 CFR 98.416(d)(1), (d)(4); and 40 CFR 98.416(f)) reported by suppliers of industrial greenhouse gases under subpart OO are CBI. For the rationale for this determination, see Section II.D.3 of the preamble to the July 7, 2010 CBI proposal. With regard to subpart QQ data elements, as explained in Section II.A.4 of the preamble to the final rule, EPA has decided to

undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ.

For a response to the comment on methods of aggregation, please see the response to comment EPA-HQ-OAR-2009-0924-0036.1, excerpt 5.

**Commenter Name: Juanita M. Bursley**

**Commenter Affiliation: Graf Tech International Holdings, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0052.1**

**Comment Excerpt Number: 5**

**Comment:** GrafTech fully agrees with EPA's comments that disclosure of reported facility level and importer/exporter level production and throughput quantity and composition data would likely cause substantial harm to the competitive positions of businesses reporting these data. Releasing these data could be detrimental to the operational and marketing strategies of the reporting parties. The disclosure of annual production quantities of products (i.e., quantities sold and/or delivered), used in conjunction with other publicly available data related to capacity (e.g., EIA publishes facility-level capacity data for refineries), could provide insight to a firm's operational strengths and weaknesses. Competitors could determine at what percent capacity a firm is operating, which can reveal information on the financial and competitive strength of the firm. For example, it could reveal that a manufacturer is operating well below capacity and likely could be experiencing financial difficulties or loss of market share. Having such information could allow competitors to narrow the competition by adjusting their prices to the further detriment of the reporting company, or to formulate other competitive strategies to corporate acquisition strategies to the detriment of the reporting company.

Having information on the percent of capacity at which a firm is operating could also reveal whether a manufacturer has existing capacity available to take on new customers in a growing market, or is already at their maximum production and would need to invest capital to expand capacity in order to manufacture more product. Having such information could give competitors insights to make competitive decisions on expanding their own production rates or altering their pricing strategies to the detriment of the reporting company. The disclosure of annual production quantities and compositions—in particular, products sold or delivered—provides insight into a firm's market strength and position.

Competitors could use production quantity data (i.e., quantities sold and/or delivered) to gain a competitive advantage over a firm by better approximating a firm's market share. For example, annual production data may reveal whether a firm is experiencing rapid growth or decline in market share. The data may also reveal the reporting supplier's customer base and marketing strategies. It might enable firms to determine which of their competitors won a contract/new customer for which they competed. This could substantially harm the company's competitive position because the information could enable competitors to devise strategies to steal specific customers or even key employees. Changes in the mix of products produced could reveal marketing strategies. In many cases, an accurate estimate of the market position of a firm is difficult to procure, and the disclosure of such information through the GHGMRR could harm the competitive position of reporting parties.

Disclosure of facility-level production/throughput quantities and product compositions could give competitors insight into a firm's local and regional market conditions and expansion plans, enabling competitors to devise strategies to prevent expansion and to steal market share in specific locations. In general, competitors do not currently have access to actual facility production rates or other information (i.e., financial information) that could allow them to assess competition and market conditions in regional detail, because publicly available financial and economic information is released at the corporate level rather than the facility level.

Information about production quantities and product composition may allow competitors to reasonably infer the types and approximate amounts of feedstocks or raw materials consumed. This may enable competitors to devise strategies to compete for resources. If in addition to production quantities, raw materials consumption data reported under the GHGMRR were also released, competitors could use the combination to expose sensitive information such as operating efficiencies (amount of product produced per unit of raw material consumed) and allow competitors to infer production costs and pricing structures.

**Response:** As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the following supplier-level production throughput and composition data reported by the following suppliers are CBI: fractionators (subpart LL); refineries (subpart MM); exporters of petroleum products (subpart MM); exporters of natural gas liquids (subpart LL); industrial gas manufacturing facilities (subpart OO); importers/exporters of industrial gases (subpart OO). EPA has also made a determination that local distribution companies providing natural gas supply are non-CBI as proposed in the July 7, 2010 CBI proposal. However, EPA has not made a determination for the following data elements in this category reported by importers of coal-based liquid fuels under subpart LL (40 CFR 98.386(b)(1) through (3); 40 CFR 98.386(b)(5)(iii); 40 CFR 98.386(b)(6)(i); and 40 CFR 98.386(b)(7)) and importers of petroleum products under subpart MM (40 CFR 98.396(b)(1) through (3); 40 CFR 98.396(b)(5)(iii); 40 CFR 98.396(b)(6)(i); and 40 CFR 98.386(b)(7)). For the rationale for this decision, please see the response to comment EPA-HQ-OAR-2009-0924-0052.1, excerpt 4 in Section C.2 of this document.

For further information regarding EPA's final CBI determination for data elements in the supplier production/throughput category, please see Section II.D.3 of the July 7, 2010 CBI proposal and Section II.C.4 of the preamble to the final rule.

**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 13**

**Comment:** Mexichem supports the EPA's proposal that the concentration of each fluorinated GHG contained a producer's products and concentrations of fluorinated GHGs when changes in composition are made to a producer's products are confidential business information (CBI). It is clear in the supplemental proposal and in the July 7, 2010 confidentiality proposal that the EPA

understands the potential harm from the release of information such as this to the competitive position of US companies.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the concentration of each fluorinated GHG contained in products reported in the initial report or in revised reports required when changes are made to product composition (reported under 40 CFR 98.416(f)) is CBI. For additional information regarding this decision, see Section II.D.3 of the preamble to the July 7, 2010 CBI proposal and Section I.C of the preamble to the July 27, 2010 supplemental CBI proposal.

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 13**

**Comment:** We are addressing the three subparts related to fluorinated gases, subparts L, O, and OO in this single section of comments as they are interrelated. DuPont believes that its Fluorochemical and Fluoropolymer operations data should be considered business confidential. Production rates, raw material identities, and flow rates, impurity generation, product or raw material yield rates, and the type of process are all information that DuPont treats as CBI. In the Fluorochemical and Fluoropolymer industry, production capacity or actual production rates are not published. If competitors have access to our production rates, in conjunction with market demand they can ascertain our idle capacity, and assess our pricing strategy. Competitors can then set their prices based on knowledge of DuPont pricing. Customers will be able to assess how tight DuPont supply is, and negotiate price accordingly.

Fluorochemical and Fluoropolymer supply and demand is not published. EPA's proposal would allow foreign nations such as China insight into our business' supply and demand profile, better enabling them to design and install optimum sized facilities that would likely impact U.S. manufacturing market share. Knowledge of the raw materials and/or type of process operated, yield information, and details on by-product generation rates will enable competition to ascertain our cost to manufacture, and enjoy an unfair advantage in setting price. For example, DuPont Fluorochemicals and Fluoropolymers insist on confidentiality agreements with all our major suppliers so that raw material identities are protected. Many products can be manufactured from a variety of feedstocks. For instance HFC-152a can be manufactured from vinyl chloride or acetylene. Knowledge of the raw material feedstock provides competitors key insight into our process, our cost to manufacture, and associated pricing.

Competitors can gain unfair advantage in understanding our market competitiveness. In addition, we agree with the confidentiality determinations for information reported under Subpart OO. We agree that this is information of significant competitive value and should be protected.

**Response:** Regarding subpart OO data elements, as proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the subpart OO data elements in this data category are CBI. These data elements are 40 CFR 98.416(a)(1) through (a)(3), (a)(5) through (a)(7), (a)(9) through (a)(12), (a)(14), (a)(15), (c)(1), (c)(2), (c)(6), (c)(8), (c)(9), (c)(10), (d)(1), (d)(4), and (f).

For additional information regarding this decision, see Section II.D.3 of the preamble to the July 7, 2010 CBI proposal and Section I.C of the preamble to the July 27, 2010 supplemental CBI proposal. This comment also relates to data used as inputs to emission equations in the direct emitter subparts L and O. As previously stated in Section A.4 of this document, EPA has proposed to defer reporting of data elements in the Inputs to Emission Equations category. For additional information on the proposal to defer reporting of these data elements, see Section II.B.2 of the preamble to the final rule. For responses to comments regarding subpart O data elements that are not inputs to emission equations, please see the response to the following comments in Section B of this document: EPA-HQ-OAR-2009-0924-0030 , excerpt 21 (see Section B.2) and EPA-HQ-OAR-2009-0924-0030, excerpt 3 (see Section B.8).

Please also note, as explained in Section II.A.4 of the preamble to the final rule, EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ.

**Commenter Name:** Karin Ritter<sup>50</sup>  
**Commenter Affiliation:** American Petroleum Institute  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0057.1  
**Comment Excerpt Number:** 24

**Comment:** API supports EPA's decision that . . . product quantities and composition are CBI. . . [T]he following data elements [reported by importers of petroleum products and natural gas liquids] should be [also] designated as CBI in the final rulemaking:  
From Subpart MM - Suppliers of Petroleum Products - Importers:

- Annual quantity by product in Table MM-1 by each quantity measurement standard method or other industry standard practice used;
- Annual quantity by product in Table MM-1;
- Percent of the volume of the petroleum product or NGL from Table MM-1 that is petroleum-based;
- Carbon share test results;
- Density test results; Percent of the volume of the petroleum product or NGL from table MM-1 that is petroleum-based (excluding any denaturant that may be present in any ethanol product);
- the volume or mass of each blending component; and
- the individual components of the blended product.

The identified data elements are entitled to confidential treatment. *See* 40 C.F.R. § 2.208. First, API is asserting its business confidentiality claim. *Id.* at 2.208(a). Second, API members have taken and will continue to take reasonable measures to protect the confidentiality of these data elements. *Id.* § 2.208(b). The type of operational and product information that is required to be reported under the MRR is generally protected by API members. Quantity data (required under

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<sup>50</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

98.396(b)) should be listed as CBI even though it is reported to EIA. Although the EIA website lists petroleum product volume information, the product categories used by EIA are fairly general and different than the specific data categories required to be provided under Subpart MM of the MRR (*i.e.*, product quantity reporting by product type listed in Table MM-1, product quantity reporting by measurement method, etc.). This type of detailed product information is guarded by the companies, not generally publicly available, and should be afforded CBI protection. Third, EPA could not otherwise obtain this data without the consent of the relevant businesses. *Id.* § 2.208(c). Fourth, no statute requires the disclosure of these data elements. *Id.* § 2.208(d). Finally, as described below, disclosure of the requested information is likely to cause substantial harm to API members' competitive positions. *Id.* § 2.208(e).

When considering the CBI implications of the EPA reporting requirements, it is important to remember that there are other sources of publicly-available information on facility operations (*i.e.*, air quality permits, 112(r) hazard assessments, etc.). API members are concerned that the requirement to report process specific information and production volumes would not only reveal sensitive process capabilities and operational limits, but that information when combined with other publicly available information would also complete a detailed picture of a facility's operational capabilities. This information could be exploited by competing businesses, or expose business position, weaknesses, or vulnerabilities during any type of contract negotiation with contractors or suppliers. The operational data required to be disclosed under the proposed rule could be used by competitors or in business negotiations to disadvantage the reporter. For example, release of unit-specific throughputs and unit-specific fuel use and emissions could enable competitors to gain a detailed understanding of a facility's process capability, which could advantage competitors in optimizing future crude and or product supply. Fuel use, process volumes, and product quantities (both capacities and actuals) would clearly illustrate a refinery's process operational capacity, limits, bottlenecks, and options to reconfigure in response to market change. This could indicate a company's ability (or inability) to capitalize on specific market opportunities allowing competition to target markets based on weakness or vulnerabilities of a competitor's operations or process unit configuration. In addition, the disclosure of operational data, throughputs, and product quantities would allow for a clear picture of process operations, capabilities, and potential process bottleneck to be derived. This would enable equipment/technology providers to quantify capabilities which could be used against the refiner in future negotiations to upgrade/replace equipment.

For these reasons, API believes petroleum fuel refiners, importers, and exporters should not have to report on petroleum feed stock and product volumes, and unit-specific GHG emissions and process data to EPA. EPA would be able to have access to these data provided they agree to keep that data business confidential. Agreeing to keep the data confidential would not preclude the agency from developing emission profiles from each refinery or product supplier.

**Response:** EPA has not made a determination for data elements in this category reported by importers of petroleum products and coal based liquid fuels (40 CFR 98.386(b)(1) through (3); 40 CFR 98.386(b)(5)(iii); 40 CFR 98.386(b)(6)(i); and 40 CFR 98.386(b)(7)) and petroleum products (40 CFR 98.396(b)(1) through (3); 40 CFR 98.396(b)(5)(iii); 40 CFR 98.396(b)(6)(i); and 40 CFR 98.386(b)(7))). For the rationale for this decision, please see the response to comment EPA-HQ-OAR-2009-0924-0052.1, excerpt 4 in Section C.2 of this document.

EPA agrees with the commenter that facility-level production throughput and composition data reported by refineries and exporters of petroleum products reported under Subpart MM are proprietary information and, as proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Production/Throughput Quantities and Composition category pertaining to these suppliers are CBI. For further information regarding EPA's final CBI determination for data elements in the supplier production/throughput category, please see Section II.D.3 of the July 7, 2010 CBI proposal and Section II.C.4 of the preamble to the final rule.

The commenter stated that petroleum refineries, importers, and exporters should not have to report petroleum feed stock and product volumes, and unit-specific GHG emissions and process data to EPA. This action determines the confidentiality status of certain data elements reported under Part 98; this action does not add or amend the reporting requirements under Part 98. The requirement to report this data was established under the Final Mandatory Reporting of Greenhouse Gases Rule (74 FR 56260, October 30, 2009). For information regarding these requirements, please see Section III.MM in 74 FR 56260 and “Mandatory Greenhouse Gas Reporting Rule: EPA’s Responses to Public Comments, Subpart MM: Suppliers of Petroleum Products (Volume 38)” (EPA-HQ-OAR-2008-0508-2254) (available electronically through <http://www.regulations.gov>).

**Commenter Name: Karin Ritter<sup>51</sup>**

**Commenter Affiliation: American Petroleum Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**

**Comment Excerpt Number: 26**

**Comment:** [T]he following data elements should be designated as CBI in the final rulemaking: From Subpart PP - Suppliers of Carbon Dioxide:

- Aggregated annual quantity of CO<sub>2</sub> that is transferred to food and beverage end use;
- Aggregated annual quantity of CO<sub>2</sub> that is transferred to industrial and municipal water/wastewater treatment end use applications; aggregated annual quantity of CO<sub>2</sub> that is transferred to metal fabrication, including welding and cutting;
- Aggregated annual quantity of CO<sub>2</sub> that is transferred to greenhouse uses for plant growth;
- Aggregated annual quantity of CO<sub>2</sub> that is transferred to Fumigants (e.g., grain storage) and herbicides end use applications;
- Aggregated annual quantity of CO<sub>2</sub> that is transferred to pulp and paper end use applications; Aggregated annual quantity of CO<sub>2</sub> that is transferred to Cleaning and solvent use end use applications;
- Aggregated annual quantity of CO<sub>2</sub> that is transferred to Fire fighting end use applications; Aggregated annual quantity of CO<sub>2</sub> that is transferred to Transportation and storage of explosives end use applications;

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<sup>51</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).



- Aggregated annual quantity of CO<sub>2</sub> that is transferred to Enhanced oil and natural gas recovery end use applications;
- Aggregated annual quantity of CO<sub>2</sub> that is transferred to Long-term storage (sequestration) end use applications;
- Aggregated annual quantity of CO<sub>2</sub> that is transferred to research and development end use applications;
- Aggregated annual quantity of CO<sub>2</sub> that is transferred to other end use applications.

The identified data elements are entitled to confidential treatment. *See* 40 C.F.R. § 2.208. First, API is asserting its business confidentiality claim. *Id.* at 2.208(a). Second, API members have taken and will continue to take reasonable measures to protect the confidentiality of these data elements. *Id.* § 2.208(b). . . .Third, EPA could not otherwise obtain this data without the consent of the relevant businesses. *Id.* § 2.208(c). Fourth, no statute requires the disclosure of these data elements. *Id.* § 2.208(d). Finally, as described below, disclosure of the requested information is likely to cause substantial harm to API members' competitive positions. *Id.* § 2.208(e). When considering the CBI implications of the EPA reporting requirements, it is important to remember that there are other sources of publicly-available information on facility operations (*i.e.*, air quality permits, 112(r) hazard assessments, etc.). API members are concerned that the requirement to report process specific information and production volumes would not only reveal sensitive process capabilities and operational limits, but that information when combined with other publicly available information would also complete a detailed picture of a facility's operational capabilities. This information could be exploited by competing businesses, or expose business position, weaknesses, or vulnerabilities during any type of contract negotiation with contractors or suppliers.

**Response:** EPA agrees with the commenter that the data elements reported under 40 CFR 98.426(f) (amount of CO<sub>2</sub> supplied by end use) reported by industrial facilities (e.g., ammonia production plants, refineries) are entitled to confidential treatment. As discussed in Section II.C.3 of this preamble, we previously proposed that these data elements would be non-CBI for all CO<sub>2</sub> producers because we had identified sources of CO<sub>2</sub> supply data. However, we have since determined that although CO<sub>2</sub> supply data are generally available for CO<sub>2</sub> production wells, such data for industrial CO<sub>2</sub> production facilities and for CO<sub>2</sub> importers and exporters is not publicly available. We therefore agree with the commenter that the data elements identified in their comment are not already available to the public. We also agree that this data can be used to calculate the facility-level CO<sub>2</sub> supply data for industrial sources. Information documenting the amount of CO<sub>2</sub> collected and transferred off site, including the data elements at issue, provides competitors with sensitive information that may be used to determine a facility's market share and to gain insight into a facility's ability to meet increases in market demand. We have therefore made a final determination that these data elements are CBI. For additional information, see Section II.C.3 (Comment on Suppliers of CO<sub>2</sub> (Subpart PP)) of the preamble for the final rule.

**Commenter Name: Karin Ritter**<sup>52</sup>

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<sup>52</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National

**Commenter Affiliation: American Petroleum Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**  
**Comment Excerpt Number: 25**

**Comment:** [T]he following data elements should be designated as CBI in the final rulemaking: From Subpart NN - Suppliers of Natural Gas and NGLs:

- Annual volume of natural gas placed into storage;
- Annual volume of natural gas withdrawn from on-system storage (that is not delivered to the city gate) for delivery on the distribution system;
- Annual volume of natural gas delivered to downstream gas transmission pipelines and other local distribution companies;
- Developed HHV(s);

The identified data elements are entitled to confidential treatment. *See* 40 C.F.R. § 2.208. First, API is asserting its business confidentiality claim. *Id.* at 2.208(a). Second, API members have taken and will continue to take reasonable measures to protect the confidentiality of these data elements. *Id.* § 2.208(b). The type of operational and product information that is required to be reported under the MRR is generally protected by API members. . . . Third, EPA could not otherwise obtain this data without the consent of the relevant businesses. *Id.* § 2.208(c). Fourth, no statute requires the disclosure of these data elements. *Id.* § 2.208(d). Finally, as described below, disclosure of the requested information is likely to cause substantial harm to API members' competitive positions. *Id.* § 2.208(e).

When considering the CBI implications of the EPA reporting requirements, it is important to remember that there are other sources of publicly-available information on facility operations (*i.e.*, air quality permits, 112(r) hazard assessments, etc.). API members are concerned that the requirement to report process specific information and production volumes would not only reveal sensitive process capabilities and operational limits, but that information when combined with other publicly available information would also complete a detailed picture of a facility's operational capabilities. This information could be exploited by competing businesses, or expose business position, weaknesses, or vulnerabilities during any type of contract negotiation with contractors or suppliers.

**Response:** EPA disagrees with the commenter that the identified data elements qualify for confidential treatment. These data elements are reported by local distribution companies (LDCs). LDC's are required to submit both monthly and annual reports on deliveries and transfers to consumers to EIA under the Federal Energy Administration Act of 1974. LDCs report gas volume (Mcf) and revenue (whole dollars) of deliveries by company, sector delivered to and sales versus transportation (using form EIA 176). The data reported to EIA are public, with the exception of the name of specific companies with which natural gas transactions occurred. They also submit reports to state regulators on gas throughput. Therefore, much of the data reported by LDCs is already available to the public through other sources and as such they do not qualify for confidential treatment (see 40 CFR 2.208(c)). Although we agree that some of

the data elements reported by LDCs may not be in the public domain (e.g., the higher heating values (HHVs) are not available through the EIA), we disagree that the information reported by LDCs is sensitive business information that would harm the competitive position of the reporter. As defined in 40 CFR part 98, subpart NN, LDCs are entities that are regulated as separate operating companies by State public utility commissions or operated as independent municipally-owned distribution systems (e.g. Memphis Light Gas & Water). LDCs must make filings to state public utility commissions that oversee rate setting, customer service, and financial management of distribution companies, and as such, LDC data related to rates and distribution quantities are already public information. Furthermore, LDCs supply similar information on total annual deliveries by customer class to the Energy Information Administration. For these reasons, we conclude that these data elements do not qualify for confidential treatment.

#### 4. Identification Information Category

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**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.1**  
**Comment Excerpt Number: 6**

**Comment:** We are pleased that EPA has already removed certain supplier data elements from CBI, including . . . supplier identification information . . . See 75 Fed. Reg. at 39,123-26.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Identification Information category are not CBI. For additional information regarding this decision, see Section II.C.5 of the preamble for the final rule.

**Commenter Name: Dave Stirpe**  
**Commenter Affiliation: Alliance for Responsible Atmospheric Policy**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0050.1**  
**Comment Excerpt Number: 11**

**Comment:** EPA has proposed to classify certain information in Subpart QQ as non-CBI including: the supplier name; address; year and months covered by the report; the date of submittal; signed and dated certification statement of accuracy and completeness; name and address of US parent companies and their percentage of ownership interest; NAICS codes; the dates on which F-GHGs are imported and/or exported; port of entry and port of export. We question the necessity of submitting data regarding the identity of parents companies, their percentage of ownership, import and export dates, and port of import and export. This data is not relevant to the purpose of EPA's goal of gathering "accurate and timely information on GHG emissions "in order to inform" future climate change policy decisions." 74 Fed. Reg. at 56,265 (Oct. 30, 2009). EPA's Section 114 authority does not extend so far as to provide EPA with independent authority to gather data that will not be used toward the furtherance of these goals; therefore, these data should not be required under Subpart QQ of the mandatory reporting rule.

If EPA nevertheless requires these data be reported under Subpart QQ, then all data related to the import and export of products should be classified as CBI.

Were EPA to provide the data specified above to the public as proposed, it would more easily allow competitors to link import and export data to related customs data. For example, the bill of lading number, foreign port of lading, manifest quantity, manifest units, weight, weight unit, shipper name, shipper address, piece count, and description of goods, among other data, are all available to the public under the Freedom of Information Act. Additionally, there are companies that data mine manifest information and make it available for purchase. To protect confidential and competitively sensitive information, importers/exporters may submit manifest confidentiality requests to U.S. Customs and Border Protection's (CBP) disclosure law officer to protect as confidential its name and address. See 19 CFR 103.31 (d)(1) (permitting importers and consignees to request confidential treatment of its name and address contained in inward manifests, including identifying marks and numbers; also permitting importers and consignees to request confidential treatment of the name and address of the shipper(s) to such importer or consignee); 19 CFR 103.31 (d)(2) (permitting shippers to request confidential treatment by Customs of the shipper's name and address contained in an outward manifest). Many importers/exporters do request such confidential treatment so that competitively sensitive information, such as shipment data (i.e., production quantities), cannot be discerned by those reviewing manifest information.

EPA's proposal would release information that could be cross-referenced with the publicly available information discussed above, thus undermining CBP granted confidentiality requests. For example, based on the manifest data, data related to origins, commodities, and volumes is available to the public, but it is not specifically tied to a particular importer/exporter who has requested and been granted confidential treatment of its name and address. If, on the other hand, a competitor were to have the data EPA proposes to release, which lists the company by name, date, and port of entry/exit, etc., that competitor could, with little difficulty, cross reference the data and determine which manifest data belongs to the once-anonymous importer/exporter. If competitors (both domestic and international) are more easily able to discern import and export practices, and potentially shipment data, by back calculating figures, there is a significant competitive risk to businesses required to report to EPA under the proposed rule.

Accordingly, we do not support EPA's classification as non-CBI the following data: supplier name; address; year and months covered by the report; the date of submittal; signed and dated certification statement of accuracy and completeness; name and address of United States parent companies and their percentage of ownership interest; NAICS codes; the dates on which fluorinated GHGs are imported and/or exported; and the port of entry and port of export. If EPA nevertheless determines to make that data available to the public as non-CBI, it must not connect any data to the particular importer/exporter from which it came. Only by keeping the data anonymous can the above-described effects be avoided.

**Response:** We disagree with the commenter that the following data elements reported under subpart A are proprietary information that should be afforded CBI protection: supplier name and address; U.S. parent company name, address, and percent ownership interest; NAICS codes; year

and months covered by the annual report and the date submitted to EPA; and certification statements.

The commenter argues that competitors would be able to link data available from Customs and Border Protection with the Part 98 data to gain insight into the amount of product supplied by an importer or exporter. According to the commenter, competitors could use the supplier identification information in combination with the import/export date and ports of entry/exit data reported under Part 98 together with data available through Customs to determine the amount of products imported or exported. In response to this comment, EPA has made a final determination that import/export dates and ports of entry/exit (reported under subpart OO) in the Unit/Process Operating Characteristics category are CBI. For more information on this determinations see Section II.C.6 of the preamble to the final rule. The commenter also identified the import/export date and port of entry/exit reported under subpart QQ as a concern. As explained in Section II.A.4 of the preamble to the final rule, EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ and will address comments on the CBI determinations for those data elements as part of that action.

The commenter does not argue that the public availability of supplier identification information reported under subpart A (supplier name and address; U.S. parent company name, address, and percent ownership interest; NAICS codes; year and months covered by the annual report and the date submitted to EPA; and certification statements) alone would cause competitive harm. This identification information does not reveal sensitive information about the supplier, and therefore, EPA has determined that this data is not CBI.

The comment questioning the need to report data regarding the identity of parents companies, their percentage of ownership, import and export dates, and port of import and export these data elements and recommending that suppliers be allowed to report in aggregate is beyond the scope of this action. This action determines the confidentiality status of certain data elements reported under Part 98; this action does not add or amend the reporting requirements under Part 98. The requirement to report the identity of the parent companies and their percentage ownership data was established under the Final Rule for Reporting of Corporate Parent, NAICS Code, and Co-Generation Information (74 FR 57669, September 22, 2010) and the requirements to report the dates and port of import/export were established in the Mandatory Reporting of Greenhouse Gases: Additional Sources of Fluorinated Gases (75 FR 74774, December 1, 2010) for subpart QQ. For additional information regarding these requirements, please see Section II.G in 75 FR 74774, December 1, 2010 (available electronically through <http://www.regulations.gov>).

**Commenter Name: Jerry Osheka**  
**Commenter Affiliation: PPG Industries, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0040.1**  
**Comment Excerpt Number: 1**

**Comment:** Import/Export Information: CBI practices that are contained for imports and exports should be consistent with those practices that are utilized by the Department of Commerce. It is PPG understands that this is currently limited to the port of entry, date, and a

very general commodities designation. Company names, addresses, or EIN should be protected as CBI. We are concerned that the information required to be disclosed under the MRR and this proposed rule, in conjunction with other information, could be used to determine the nature and quantity of a company's products imported and exported. We would point out that none of the import and export information is actual "emissions," nor is any of this information used to determine emissions. Accordingly, it should be considered CBI.

**Response:** EPA agrees with the commenter that the data elements in the supplier data categories do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i)(A). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14. However, we disagree that all supplier data should be held as confidential because the supplier data does not meet the definition of emission for the reasons discussed in the response to comment EPA-HQ-OAR-2009-0924-0024.1, excerpt 6.

We also disagree with the commenter that company names and addresses should be protected as CBI for the reasons discussed in the response to comment EPA-HQ-OAR-2009-0924-0050.1, excerpt 11. With respect to the comment regarding EIN, EPA also disagrees that this information is competitively sensitive. Just like the supplier name and address, the supplier EIN does not reveal information regarding market share, proprietary processes, or production rates.

**Commenter Name:** Lorraine Gershman<sup>53</sup>

**Commenter Affiliation:** American Chemistry Council (ACC)

**Document Control Number:** EPA-HQ-OAR-2009-0924-0031.1

**Comment Excerpt Number:** 14

**Comment:** CBI practices that are contained for imports and exports should be consistent with those practices that are utilized by the Department of Commerce. It is ACC's understanding that publicly released import and export information is currently limited to the port of entry, date, and a very general commodities designation. Company names, addresses, and EIN should be protected as CBI. We are concerned that the information required to be submitted under the MRR and disclosed under this proposed rule, in conjunction with other information, could be used to determine the nature and quantity of a company's products imported and exported. We would point out that none of the import and export information is actual "emissions," nor is any of this information used to determine emissions. Accordingly, it should be determined CBI.

**Response:** EPA agrees with the commenter that the data elements in the supplier data categories do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i)(A). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14.

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<sup>53</sup> Comments submitted by the American Chemistry Council were incorporated by reference by DuPont Company (EPA-HQ-OAR-2009-0924-0031.1), PPG Industries, Inc. (EPA-HQ-OAR-2009-0924-0040.1), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055.1), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050.1).

However, we disagree with the commenter that company names, addresses, and EIN should be protected as CBI. For additional information regarding our determination that the Identification Information category is not CBI, please see the response to comment EPA-HQ-OAR-2009-0924-0050.1, excerpt 11. With respect to the comment regarding EIN, EPA also disagrees that this information is competitively sensitive. Just like the supplier name and address, the supplier EIN does not reveal information regarding market share, proprietary processes, or production rates

**Commenter Name: David B. Calabrese**

**Commenter Affiliation: Air Conditioning, Heating and Refrigeration Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0032.1**

**Comment Excerpt Number: 5**

**Comment:** EPA has proposed to classify certain information as non-CBI including: the supplier name; address; year and months covered by the report; the date of submittal; signed and dated certification statement of accuracy and completeness; name and address of US parent companies and their percentage of ownership interest; NAICS codes; the dates on which F-GHG are imported and/or exported; port of entry and port of export. AHRI questions the necessity of submitting data regarding the identity of parents companies, their percentage of ownership, import and export dates, and port of import and export. This data is not relevant to the purpose of EPA's goal of gathering "accurate and timely information on GHG emissions" in order to inform "future climate change policy decisions." 74 Fed. Reg. at 56,265 (Oct. 30, 2009). EPA's Section 114 authority does not extend so far as to provide EPA with independent authority to gather data that will not be used toward the furtherance of these goals; therefore, these data should not be required under Subpart QQ of the mandatory reporting rule. If EPA mandates that they must be reported, AHRI suggests, as mentioned in Section 1 of this letter, that all data required under Subpart QQ be treated as CBI.

**Response:** As proposed in the July 7, 2010 CBI proposal, we have made a final determination that the following data are not entitled to CBI protection: supplier name and address; U.S. parent company name, address, and percent ownership interest; NAICS codes; year and months covered by the annual report and the date submitted to EPA; and certification statements. For the detailed rationale for this decision, please see the response to comment EPA-HQ-OAR-2009-0924-0050.1, excerpt 11. With respect to the comments on import/ export dates and port of import/export, we are not responding to comments regarding data elements reported under 40 CFR part 98, subpart QQ. As explained in Section II.A.4 of the preamble to the final rule, EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ and will address comments on the CBI determinations for those data elements as part of that action.

The comment questioning the need to submit corporate parent information is beyond the scope of this action. This action determines the confidentiality status of certain data elements reported under Part 98; this action does not add or amend the reporting requirements under Part 98. The requirement to report corporate parent information and NAICS codes was established under the Final Rule for Reporting of Corporate Parent, NAICS Code, and Co-Generation Information (74 FR 57669, September 22, 2010). For additional information regarding these requirements, please see 74 FR 57669, September 22, 2010, 74 FR 56260, October 30, 2009.

**Commenter Name: Sean Mackay**  
**Commenter Affiliation: Whirlpool Corporation**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0046.1**  
**Comment Excerpt Number: 4**

**Comment:** EPA proposed classifying certain information in subpart QQ as non-CBI, including: supplier name; address; year and months covered by the report; the date of submittal; signed and dated certification statement of accuracy and completeness; name and address of United States parent companies and their percentage of ownership interest; NAICS codes; the dates on which fluorinated GHGs are imported and/or exported; and the port of entry and port of export. If the EPA requires these data be reported under Subpart QQ, then all data related to the import and export of products should be classified as CBI. The public disclosure of this data does nothing to aid the public's understanding of reported fluorinated gases. To protect confidential and competitively sensitive information, importers/exporters may submit manifest confidentiality requests to U.S. Customs and Border Protection's (CBP) disclosure law officer to protect as confidential its name and address. Whirlpool Corporation routinely requests such confidential treatment so that competitively sensitive information, such as shipment data (i.e., production quantities), cannot be discerned by those reviewing manifest information.

EPA's proposed rule would release information that could be cross-referenced with the publicly available information discussed above, thus undermining CBP granted confidentiality requests. Therefore, Whirlpool Corporation does not support EPA's classification as non-CBI the following data: supplier name; address; year and months covered by the report; the date of submittal; signed and dated certification statement of accuracy and completeness; name and address of United States parent companies and their percentage of ownership interest; NAICS codes; the dates on which fluorinated GHGs are imported and/or exported; and the port of entry and port of export. If EPA nevertheless determines to make that data available to the public as non-CBI, it must not connect any data to the particular importer/exporter from which it came.

**Response:** We disagree with the commenter that the following data elements reported under subpart A are proprietary information that should be afforded CBI protection: supplier name and address; U.S. parent company name, address, and percent ownership interest; NAICS codes; year and months covered by the annual report and the date submitted to EPA; and certification statements. For the detailed response to this comment, see the response to comment EPA-HQ-OAR-2009-0924-0050.1, excerpt 11. At this time, we are not responding to comments regarding data elements reported under 40 CFR part 98, subpart QQ. As explained in Section II.A.4 of the preamble to the final rule, EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ and will address comments on the CBI determinations for those data elements as part of that action.

**Commenter Name: Jennifer Cleary**  
**Commenter Affiliation: Association of Home Appliance Manufacturers**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0051.1**  
**Comment Excerpt Number: 4**



**Comment:** Home appliance manufacturers will be harmed if certain import/export data is made publically available. EPA proposed classifying certain information as non-CBI, including: supplier name; address; year and months covered by the report; the date of submittal; signed and dated certification statement of accuracy and completeness; name and address of United States parent companies and their percentage of ownership interest; NAICS codes; the dates on which fluorinated GHGs are imported and/or exported; and the port of entry and port of export. AHAM opposes making this data public, especially in connection to the particular importer/exporter, and questions the relevancy of much of the data to EPA and the public in understanding GHG emissions. Furthermore, the proposed rule does not clearly state how this data will be reported. EPA should clearly state exactly how the data will be released so that stakeholders can more effectively comment on any potential competitive harm that may result.

Were EPA to provide the data specified above to the public as proposed, it would more easily allow competitors to link import and export data to related customs data. For example, the bill of lading number, foreign port of lading, manifest quantity, manifest units, weight, weight unit, shipper name, shipper address, piece count, and description of goods, among other data, are all available to the public under the Freedom of Information Act. Additionally, there are companies that data mine manifest information and make it available for purchase. To protect confidential and competitively sensitive information, importers/exporters may submit manifest confidentiality requests to U.S. Customs and Border Protection's (CBP) disclosure law officer to protect as confidential its name and address [See 19 C.F.R. 103.31(d)(1)-(2)]. Many importers/exporters do request such confidential treatment so that competitively sensitive information, such as shipment data (i.e., production quantities), cannot be discerned by those reviewing manifest information.

EPA's proposal would release information that could be cross-referenced with the publicly available information discussed above, thus undermining CBP granted confidentiality requests. For example, based on the manifest data, data related to origins, commodities, and volumes is available to the public, but it is not specifically tied to a particular importer/exporter who has requested and been granted confidential treatment of its name and address. If, on the other hand, a competitor were to have the data EPA proposes to release, which lists the company by name, date, and port of entry/exit, etc., that competitor could, with little difficulty, cross-reference the data and determine which manifest data belongs to the once-anonymous importer/exporter. If competitors (both domestic and international) are more easily able to discern import and export practices, and potentially shipment data, by back calculating figures, there is a significant competitive risk to businesses required to report to EPA under the proposed rule.

Accordingly, AHAM does not support EPA's classification as non-CBI the following data: supplier name; address; year and months covered by the report; the date of submittal; signed and data certification statement of accuracy and completeness; name and address of United States parent companies and their percentage of ownership interest; NAICS codes; the dates on which fluorinated GHGs were imported and /or exported; and the port of entry and port of export. If EPA nevertheless determines to make that data available to the public as non-CBI, it must not connect any data to the particular importer/exporter from which it came. Only by keeping the data anonymous can the above-described effects be avoided.

**Response:** We disagree with the commenter that the following data elements reported under subpart A are proprietary information that should be afforded CBI protection: supplier name and address; U.S. parent company name, address, and percent ownership interest; NAICS codes; year and months covered by the annual report and the date submitted to EPA; and certification statements. For the detailed response to this comment, see the response to comment EPA-HQ-OAR-2009-0924-0050.1, excerpt 11. At this time, we are not responding to comments regarding data elements reported under 40 CFR part 98, subpart QQ. As explained in Section II.A.4 of the preamble to the final rule, EPA has decided to undertake a separate action to determine the confidentiality status for data elements reported under subparts I, L, W, DD, SS, RR, UU, and QQ and will address comments on the CBI determinations for those data elements as part of that action.

#### 5. Unit/Process Operating Characteristics Category

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**Commenter Name: Keith Adams and Brian Keck**  
**Commenter Affiliation: Air Products and Chemicals, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**  
**Comment Excerpt Number: 1**

**Comment:** In the rationale for the proposed determination, EPA correctly notes that disclosing data pertaining to a facility's operating efficiency (amount of product produced per unit of raw material consumed)[reported under subpart OO], could allow competitors to infer production costs and pricing structures, and develop more competitive pricing and marketing strategies. It may also reveal proprietary information about the actual processes a facility is using. Therefore, disclosure of this data is likely to cause substantial harm to the reporting business' competitive position.

**Response:** EPA agrees with the commenter that the estimated percent efficiency of fluorinated GHG production processes (reported under 40 CFR 98.416(e)(5)) is proprietary information and, as proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that this data element is CBI. For additional information regarding this decision, see Section II.D.5 of the preamble to the July 7, 2010 CBI proposal.

**Commenter Name: Joel R. Hall**  
**Commenter Affiliation: Mexichem Fluor Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0055**  
**Comment Excerpt Number: 9**

**Comment:** Mexichem asserts that the estimated percent transformation efficiency of each production process for the fluorinated GHG produced is not "emission data" and should not be reported. The EPA makes a valid case that this information is confidential business information, but fails to explain how this data could be interpreted as being "emission data."

**Response:** EPA thanks the commenter for their input. As we stated in the July 7, 2010 CBI proposal, the estimated percent transformation efficiency for fluorinated GHG production

processes (reported under 40 CFR 98.416(e)(5)) is sensitive because it provides insight into a facility's production costs and pricing structures, which would allow a competitor to develop more competitive pricing and marketing strategies. EPA has made a final determination that this data element is CBI. For additional information regarding this decision, see Section II.D.5 of the preamble to the July 7, 2010 CBI proposal.

EPA also agrees with the commenter that this data element does not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14.

The comment that this data element should not be reported to EPA is beyond the scope of this action. This action determines the confidentiality status of certain data elements reported under Part 98; this action does not add or amend the reporting requirements under Part 98. The requirement to report this data was established under the Final Mandatory Reporting of Greenhouse Gases Rule (74 FR 56260).

**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 10**

**Comment:** Mexichem questions the need to report the dates of import and export shipments and the ports of entry or exit under Subpart OO and asserts that these are not "emission data." The importer and exporter reporting provisions of §98.416 were apparently developed using the importer and exporter reporting requirements developed under 40 CFR Part 82. Based on our experience, the number of imports and exports can be substantial. To lessen the burden on reporters, the EPA should consider allowing reporters to only report aggregated import and export data. The EPA has not explained how dates of import and export shipments and the ports of entry and exit could be considered "emission data."

**Response:** EPA agrees with the commenter that the data elements in the Unit/Process Operating Characteristics data category do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14. In response to other comments regarding potential competitive harm, EPA has made a final determination that the dates of import and export (40 CFR 98.416(c)(3) and (d)(5)) and the ports of entry or exit (40 CFR 98.416(c)(4) and (d)(5)) reported under Subpart OO are CBI. At the time of the July 10 CBI proposals, we were not aware of any potential competitive harm that would likely result from the disclosure of the dates on which fluorinated GHGs are imported and/or exported and the port of entry and export (reported under 40 CFR part 98, subpart OO). Since then, we have learned that release of these data elements to the public could allow competitors to link customs records on quantities and product composition with the import and export data reported under part 98, thus allowing competitors to determine market share and devise marketing strategies to undermine or weaken a competitor's position. Because disclosure of these data elements is likely to cause the competitive harm described above to suppliers

reporting these data under part 98, EPA determined in the final action that these data elements qualify as CBI.

The comment questioning the need to report these data elements and recommending that suppliers be allowed to report in aggregate is beyond the scope of this action. This action determines the confidentiality status of certain data elements reported under Part 98; this action does not add or amend the reporting requirements under Part 98. The requirement to report this data was established under the Final Mandatory Reporting of Greenhouse Gases Rule (74 FR 56260, October 30, 2009). For additional information regarding these requirements, please see Section III.OO in 74 FR 56260, October 30, 2009, and the “Mandatory Greenhouse Gas Reporting Rule: EPA’s Responses to Public Comments, Subpart OO: Suppliers of Industrial Greenhouse Gases (Volume 40)” (EPA-HQ-OAR-2008-0508-2276) (available electronically through <http://www.regulations.gov>).

**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 14**

**Comment:** Mexichem questions the need to report the date on which changes were made to fluorinated GHG concentrations in a product and the date on which production of a new product commenced and believes that if reporting of this data is required, it should also be considered CBI. Mexichem requests that the EPA require facilities to report only actual final emissions of greenhouse gases and not dates, etc. that could harm our competitive position.

**Response:** In the supplemental CBI proposal, EPA proposed that the date on which new products or changes to existing products occurred (as reported under 40 CFR 98.416(f)) as non-CBI, because this data element is unlikely to cause competitive harm. For example, this data element does not disclose the actual composition of the product, the raw materials used to make the product, the method of manufacture, or the efficiency of the manufacturing process. The manufacture of a new product and changes to existing product lines is often publicly available through company marking materials and other sources (*e.g.*, publication or revisions to Material Safety Data Sheets). The commenter did not provide any rationale or supporting information explaining how this data element would cause competitive harm. Because we are not aware of any situations under which public disclosure of this data element is likely to cause substantial harm to suppliers, our position regarding this data element remains unchanged in this final action.

The comment that suppliers should not be required to report this data element is beyond the scope of this action. This action determines the confidentiality status of certain data elements reported under Part 98; this action does not add or amend the reporting requirements under Part 98. The requirement to report this data was established under revisions to the Final Mandatory Reporting of Greenhouse Gases Rule (75 FR 79092, December 17, 2010). For additional information regarding the revisions to subpart OO, please see Section II.Q in 75 FR 79092, December 17, 2010 and the “Mandatory Greenhouse Gas Reporting Rule: EPA’s Responses to Public Comments: Revisions of Certain Provisions of the Mandatory Reporting of Greenhouse

Gases Rule” (EPA-HQ-OAR-2008-0508-2411) (available electronically through <http://www.regulations.gov>).

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 16**

**Comment:** We agree with the confidentiality determinations for information reported under Subpart OO. We agree that this is information of significant competitive value and should be protected.

**Response:** Of the nine subpart OO data elements assigned to this category, only one (the estimated percent efficiency of each production facility (40 CFR 98.416(e)(5)) was proposed by EPA as CBI and our position regarding this data element remains unchanged in this final action. This data element provides information about the efficiency of the production process (i.e., the amount of product produced per unit of raw material consumed) and could be used by competitor’s to determine costs and pricing structures and to develop competitive pricing and marketing strategies. It may also reveal proprietary information about the actual production process. We therefore agree with the commenter that this data element has significant competitive value.

In the July 2010 CBI proposals, EPA had proposed that the remaining eight subpart OO data elements assigned to this data category are CBI:

1. Date of import (as reported under 40 CFR 98.416(c)(3));
2. Port of entry (as reported under 40 CFR 98.416 (c)(4));
3. Port of export (as reported under 40 CFR 98.416(d)(5))
4. Date of export (as reported under 40 CFR 98.416(d)(5));
5. Destruction efficiency of each destruction device (as reported under 40 CFR 98.416(b)(1);
6. Chemical identity of the fluorinated GHG used in the performance test conducted to determine the destruction efficiency (as reported under 40 CFR 98.416(b)(4));
7. Name of all applicable federal or state regulations that apply to the destruction process (as reported under 40 CFR 98.416(b)(5)); and
8. Date on which new products or changes to existing products occurred (as reported under 40 CFR 98.416(f)).

For the reasons described in the response to comment EPA-HQ-OAR-2009-0924-0055, excerpt 10, EPA has made a final determination that the port and dates of import/export (40 CFR 98.416 (c)(3), (c)(4), are (d)(5)) are entitled to CBI treatment. However, our position regarding the other subpart OO data element listed above remains unchanged from our proposed determination that these data elements do not qualify as CBI. As we explained in Section II.C.5 of the July 7, 2010 CBI proposal, the destruction efficiency, the fluorinated GHG(s) used in the performance tests, and the names of federal and state regulations that apply to the destruction process are unlikely to cause competitive harm. The design destruction efficiencies of control devices are available

from the manufacturer and should be consistent with the destruction efficiency measured in the performance tests. The fluorinated GHGs used in the performance test to determine the destruction efficiency are usually stable compounds that are used as surrogates for a broad class of other fluorinated compounds. Disclosing the chemical identity of the fluorinated GHGs used in the performance test and the destruction efficiency determined by the performance test do not reveal sensitive business information about the process, such as the amount of a specific product that is destroyed or supplied by a facility. Nor do they reveal the actual technology used for fluorinated GHG destruction, or the operating conditions for a particular technology. The state and federal regulations that apply to the destruction unit are generally available from state and federal operating permits. The date on which a new product is produced or an existing product is changed does not disclose the actual composition of the product, the raw materials used to make the product, the method of manufacture, or the efficiency of the manufacturing process. The manufacture of a new product and changes to existing product lines is often publicly available through company marketing materials and other sources (*e.g.*, publication or revisions to Material Safety Data Sheets). We are not aware of any situations under which public disclosure of these data elements is likely to cause substantial harm to suppliers. For the reasons stated above, EPA made a final determination that these data elements are not CBI.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.1**  
**Comment Excerpt Number: 10**

**Comment:** We are pleased that EPA has already removed certain supplier data elements from CBI, including . . . destruction efficiency of fluorinated greenhouse gas destruction units . . . See 75 Fed. Reg. at 39123-26.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the destruction efficiency reported under 40 CFR 98.416(b)(1) is not CBI. Aside from the exceptions described in the preamble to the final rule, the data elements in the Unit/Process Operating Characteristics category are not CBI. For additional information regarding determinations for data elements in this category, see Section II.C.6 of the preamble for the final rule and Section II.D.5 of the July 7, 2010 CBI proposal.

## 6. Calculation, Test, and Calibration Methods Category

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**Commenter Name: Joel R. Hall**  
**Commenter Affiliation: Mexichem Fluor Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0055**  
**Comment Excerpt Number: 11**

**Comment:** Mexichem asserts that the calculation, test, and calibration methods for suppliers category is not “emission data.” The EPA has not explained how this data will be used to “determine” the parameters set forth in 40 CFR 2.301(a)(2)(i)(A) (*i.e.*, identity, amount, frequency, concentration, etc of any emission which has been emitted).

**Response:** EPA agrees with the commenter that the data elements in this data category do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14.

While it is not clear whether the commenter believes that these data element are sensitive, we note that we had proposed that the data elements in the Calculation, Test, and Calibration Methods data category would not be CBI. The data elements assigned to the Calculation, Test, and Calibration Methods category consist of the methods used to collect and analyze samples of products or raw materials, frequency of collecting samples, calculation methods used to calculate the GHGs reported, equipment used to make measurements, and the methods used to calibrate measurement devices. Many of these methods are selected from lists of allowed methods specified in Part 98 and are standardized methods that are generally already publicly available. The frequency of collecting and analyzing samples and the laboratory methods used to perform the analyses are also specified in the rule. These types of data do not contain sensitive, facility-specific information that would be likely to “. . . cause substantial harm to the business’s competitive position.” Likewise, the type of measurement device (e.g., flow meter, weighing scales) and the methods used to calibrate the device also would not reveal any sensitive information about the design or operation of a production process, the production efficiency, or the amount of product produced. For these reasons, we conclude that our proposed determination that the Calculation, Test, and Calibration Methods category is not CBI is appropriate.

**Commenter Name:** Craig H. Segall, Helen Silver, and Meleah Geertsma  
**Commenter Affiliation:** Clean Air Task Force, Natural Resources Defense Council  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0053.1  
**Comment Excerpt Number:** 12

**Comment:** We are pleased that EPA has already removed certain supplier data elements from CBI, including calibration and testing methods . . . , See 75 Fed. Reg. at 39,123-26.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Calculation, Test, and Calibration Methods category are not CBI. For additional information regarding this decision, see Section II.C.7 of the preamble for the final rule.

#### 7. Periods of Missing Data That Are Not Related to Production/Throughput Category

**Commenter Name:** Craig H. Segall, Helen Silver, and Meleah Geertsma  
**Commenter Affiliation:** Clean Air Task Force, Natural Resources Defense Council  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0053.1  
**Comment Excerpt Number:** 4

**Comment:** We are pleased that EPA has already removed certain supplier data elements from CBI, including . . . missing data reports . . . . See 75 Fed. Reg. at 39,123-26.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Periods of Missing Data That Are Not Related to Production/Throughput category are not CBI. For additional information regarding this decision, see Section II.C.8 of the preamble for the final rule.

## 8. Emission Factor Category

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**Commenter Name: Pamela A. Lacey**  
**Commenter Affiliation: American Gas Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0042.1**  
**Comment Excerpt Number: 1**

**Comment:** AGA supports EPA's proposal to protect emission factor data under Subpart NN as confidential business information.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Emission Factor category are CBI including certain data elements reported under Subpart NN. For additional information regarding this decision, see Section II.C.9 of the preamble for the final rule.

**Commenter Name: Juanita M. Bursley**  
**Commenter Affiliation: Graf Tech International Holdings, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0052.1**  
**Comment Excerpt Number: 7**

**Comment:** EPA proposes to determine that the data elements in the following data categories; the "Emission Factors" . . . are CBI under CAA section 114(c) because their release is likely to cause substantial harm to the competitive positions of the suppliers reporting these data. GrafTech agrees with these CBI determinations and EPA's stated rationales supporting these determinations.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Emission Factor category are CBI. For additional information regarding this decision, see Section II.C.9 of the preamble for the final rule.

**Commenter Name: Joel R. Hall**  
**Commenter Affiliation: Mexichem Fluor Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0055**  
**Comment Excerpt Number: 17**

**Comment:** Mexichem supports the EPA's determination that the following are CBI, but questions whether they are "emission data." . . . 1) emission factors. . . The EPA has not explained how this data will be used to "determine" the parameters set forth in 40 CFR 2.301(a)(2)(i)(A) (i.e., identity, amount, frequency, concentration, etc of any emission which has been emitted).



**Response:** EPA agrees with the commenter that the data elements in this data category do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Emission Factor category are CBI. For additional information regarding this decision, see Section II.C.9 of the preamble for the final rule.

**Commenter Name:** Karin Ritter<sup>54</sup>  
**Commenter Affiliation:** American Petroleum Institute  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0057.1  
**Comment Excerpt Number:** 22

**Comment:** API supports EPA's proposed determination that five categories of data, to be reported by upstream suppliers of fuels and industrial GHGs, are CBI: Emission factors . . . .

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Emission Factor category are CBI. For additional information regarding this decision, see Section II.C.9 of the preamble for the final rule.

## 9. Amount and Composition of Materials Received Category

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**Commenter Name:** Joel R. Hall  
**Commenter Affiliation:** Mexichem Fluor Inc.  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0055  
**Comment Excerpt Number:** 2

**Comment:** Mexichem supports the EPA's determination that the following are CBI, but questions whether they are "emission data." . . . 2) amount and composition of materials received. . . The EPA has not explained how this data will be used to "determine" the parameters set forth in 40 CFR 2.301(a)(2)(i)(A) (i.e., identity, amount, frequency, concentration, etc of any emission which has been emitted).

**Response:** EPA agrees with the commenter that the data elements in this data category do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Amount and Composition of Materials Received category are CBI. For additional information regarding this decision, see Section II.C.10 of the preamble for the final rule.

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<sup>54</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

**Commenter Name: Juanita M. Bursley**  
**Commenter Affiliation: Graf Tech International Holdings, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0052.1**  
**Comment Excerpt Number: 8**

**Comment:** EPA proposes to determine that the data elements in the following data categories; the . . . “Amount and Composition of Materials Received” . . . are CBI under CAA section 114(c) because their release is likely to cause substantial harm to the competitive positions of the suppliers reporting these data. GrafTech agrees with these CBI determinations and EPA’s stated rationales supporting these determinations.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Amount and Composition of Materials Received category are CBI. For additional information regarding this decision, see Section II.C.10 of the preamble for the final rule.

**Commenter Name: Robert A. Reich**  
**Commenter Affiliation: DuPont Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0030**  
**Comment Excerpt Number: 2**

**Comment:** We agree with the confidentiality determinations for information reported under Subpart OO. We agree that this is information of significant competitive value and should be protected.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Amount and Composition of Materials Received category are CBI including certain Subpart OO data elements. For additional information regarding this decision, see Section II.C.10 of the preamble for the final rule.

**Commenter Name: Karin Ritter<sup>55</sup>**  
**Commenter Affiliation: American Petroleum Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**  
**Comment Excerpt Number: 23**

**Comment:** API supports EPA's proposed determination that five categories of data, to be reported by upstream suppliers of fuels and industrial GHGs, are CBI: . . . Amount and composition of materials received.

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<sup>55</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Amount and Composition of Materials Received category are CBI. For additional information regarding this decision, see Section II.C.10 of the preamble for the final rule.

#### 10. Periods of Missing Data That Are Related to Production/Throughput

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**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 12**

**Comment:** Mexichem supports the EPA's determination that the following are CBI, but questions whether they are "emission data." . . . 3) numerical substitute values for production/throughput and materials received quantities and composition during missing data periods, . . . The EPA has not explained how this data will be used to "determine" the parameters set forth in 40 CFR 2.301(a)(2)(i)(A) (i.e., identity, amount, frequency, concentration, etc of any emission which has been emitted).

**Response:** EPA agrees with the commenter that the data elements in the Supplier Data Elements for Periods of Missing Data That Are Related to Production/Throughput data category do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in this category are CBI. For additional information regarding this decision, see Section II.C.11 of the preamble for the final rule.

**Commenter Name: Juanita M. Bursley**

**Commenter Affiliation: Graf Tech International Holdings, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0052.1**

**Comment Excerpt Number: 9**

**Comment:** EPA proposes to determine that the data elements in the following data categories; the . . . "Data Elements Reported for Periods of Missing Data That Are Related to Production/Throughput or Materials Received" . . . are CBI under CAA section 114(c) because their release is likely to cause substantial harm to the competitive positions of the suppliers reporting these data. GrafTech agrees with these CBI determinations and EPA's stated rationales supporting these determinations.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Supplier Data Elements for Periods of Missing Data That Are Related to Production/Throughput category are CBI. For additional information regarding this decision, see Section II.C.11 of the preamble for the final rule.

**Commenter Name: Robert A. Reich**  
**Commenter Affiliation: DuPont Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0030**  
**Comment Excerpt Number: 6**

**Comment:** We agree with the confidentiality determinations for information reported under Subpart OO. We agree that this is information of significant competitive value and should be protected.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Supplier Data Elements for Periods of Missing Data That Are Related to Production/Throughput category are CBI including certain data elements reported under Subpart OO. For additional information regarding this decision, see Section II.C.11 of the preamble for the final rule.

**Commenter Name: Karin Ritter<sup>56</sup>**  
**Commenter Affiliation: American Petroleum Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**  
**Comment Excerpt Number: 27**

**Comment:** API supports EPA's proposed determination that five categories of data, to be reported by upstream suppliers of fuels and industrial GHGs, are CBI : . . . data elements reported for periods of missing data that are related to production/throughput or materials received. . .

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Supplier Data Elements for Periods of Missing Data That Are Related to Production/Throughput category are CBI. For additional information regarding this decision, see Section II.C.11 of the preamble for the final rule.

#### 11. Supplier Customer and Vendor Information Category

**Commenter Name: Pamela A. Lacey**  
**Commenter Affiliation: American Gas Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0042.1**  
**Comment Excerpt Number: 2**

**Comment:** AGA supports EPA's proposal to protect utility customer information under subpart NN as confidential business information. To the extent that state utility law allows the LDC to report customer information to EPA, at a minimum, this information should receive CBI protection. We therefore support EPA's proposal to determine that information on customers and vendors associated with fuel suppliers are CBI under CAA section 114(c), including specifically

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<sup>56</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

the information called for in 40 CFR 98.406(b)(7) and (12). See CBI Proposal, 75 Fed. Reg. at 39129.

**Response:** EPA agrees with the commenter that the amount of natural gas supplied by local distribution companies to individual meters (reported under 40 CFR 98.406(b)(7)) and individual customer information (i.e., customer name, address, meter number, and EIA identification number) (reported under 40 CFR 98.406(b)(12)) are CBI. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Supplier Customer and Vendor Information category are CBI. For additional information regarding this decision, see Section II.C.12 of the preamble for the final rule.

**Commenter Name: Keith Adams and Brian Keck**  
**Commenter Affiliation: Air Products and Chemicals, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**  
**Comment Excerpt Number: 3**

**Comment:** EPA's rationale states that information on the identities of the customers and vendors associated with fuel and industrial GHG suppliers is CBI under CAA section 114(c). Air Products wholeheartedly concurs with EPA since its customers and vendors often require that this type of data be managed as CBI as a condition of the legal contractual agreements for purchase and supply.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Supplier Customer and Vendor Information category are CBI. For additional information regarding this decision, see Section II.C.12 of the preamble for the final rule.

**Commenter Name: Juanita M. Bursley**  
**Commenter Affiliation: Graf Tech International Holdings, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0052.1**  
**Comment Excerpt Number: 10**

**Comment:** EPA proposes to determine that the data elements in the following data categories; the . . . "Supplier Customer and Vendor Information" . . . are CBI under CAA section 114(c) because their release is likely to cause substantial harm to the competitive positions of the suppliers reporting these data. GrafTech agrees with these CBI determinations and EPA's stated rationales supporting these determinations.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Supplier Customer and Vendor Information category are CBI. For additional information regarding this decision, see Section II.C.12 of the preamble for the final rule.

**Commenter Name: Robert A. Reich**  
**Commenter Affiliation: DuPont Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 11**

**Comment:** We agree with the confidentiality determinations for information reported under Subpart OO. We agree that this is information of significant competitive value and should be protected.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Supplier Customer and Vendor Information category are CBI including certain data elements reported under Subpart OO. For additional information regarding this decision, see Section II.C.12 of the preamble for the final rule.

**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 15**

**Comment:** Mexichem supports the EPA's determination that the following are CBI, but questions whether they are "emission data." . . . 4) supplier, customer, and vendor information . . . The EPA has not explained how this data will be used to "determine" the parameters set forth in 40 CFR 2.301(a)(2)(i)(A) (i.e., identity, amount, frequency, concentration, etc of any emission which has been emitted).

**Response:** EPA agrees with the commenter that the data elements in this data category do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Supplier Customer and Vendor Information category are CBI. For additional information regarding this decision, see Section II.C.12 of the preamble for the final rule.

**Commenter Name: Karin Ritter<sup>57</sup>**

**Commenter Affiliation: American Petroleum Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**

**Comment Excerpt Number: 28**

**Comment:** API supports EPA's proposed determination that five categories of data, to be reported by upstream suppliers of fuels and industrial GHGs, are CBI : . . . supplier customer and vendor information. . .

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Supplier Customer

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<sup>57</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

and Vendor Information category are CBI. For additional information regarding this decision, see Section II.C.12 of the preamble for the final rule.

## 12. Process-Specific and Vendor Data Submitted in BAMB Extension Requests Category

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**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 18**

**Comment:** Mexichem supports the EPA's determination that the following are CBI, but questions whether they are "emission data." . . . 5) the process specific and vendor data submitted in the BAMB extension request. The EPA has not explained how this data will be used to "determine" the parameters set forth in 40 CFR 2.301(a)(2)(i)(A) (i.e., identity, amount, frequency, concentration, etc of any emission which has been emitted).

**Response:** EPA agrees with the commenter that the data elements in this data category do not meet the definition of emission data as defined in 40 CFR 2.301(a)(2)(i). For additional information regarding our determination that the supplier data are not emission data, please see the response to comment EPA-HQ-OAR-2009-0924-0057.1, excerpt 14. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Process-Specific and Vendor Data Submitted in BAMB Extension Request category are CBI. For additional information regarding this decision, see Section II.C.13 of the preamble for the final rule.

**Commenter Name: Juanita M. Bursley**

**Commenter Affiliation: Graf Tech International Holdings, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0052.1**

**Comment Excerpt Number: 11**

**Comment:** EPA proposes to determine that the data elements in the following data categories; the . . . "Process-Specific and Vendor Data Submitted in the BAMB Extension Request", are CBI under CAA section 114(c) because their release is likely to cause substantial harm to the competitive positions of the suppliers reporting these data. GrafTech agrees with these CBI determinations and EPA's stated rationales supporting these determinations.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Process-Specific and Vendor Data Submitted in BAMB Extension Request category are CBI. For additional information regarding this decision, see Section II.C.13 of the preamble for the final rule.

**Commenter Name: Karin Ritter<sup>58</sup>**

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<sup>58</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National

**Commenter Affiliation: American Petroleum Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**  
**Comment Excerpt Number: 21**

**Comment:** API supports EPA's proposed determination that five categories of data, to be reported by upstream suppliers of fuels and industrial GHGs, are CBI: . . . process-specific and vendor data submitted in BAMB extension requests. . .

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, EPA has made a final determination that the data elements in the Process-Specific and Vendor Data Submitted in BAMB Extension Request category are CBI. For additional information regarding this decision, see Section II.C.13 of the preamble for the final rule.

#### D. PROPOSED AMENDMENTS TO 40 CFR PART 2

**Commenter Name: Jennifer Cleary**  
**Commenter Affiliation: Association of Home Appliance Manufacturers**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0051.1**  
**Comment Excerpt Number: 1**

**Comment:** EPA should provide companies with an opportunity to comment should certain confidential information be determined to no longer be CBI. Under the proposed rule, the Office of General Counsel is authorized to determine that information is no longer CBI because of a change in law or newly discovered or changed facts. EPA would then be required to provide the affected company with an opportunity to submit comments prior to disclosure of the information at issue. AHAM supports this proposal; regulated parties should have the opportunity to comment on the determination that their once-protected information is no longer going to be treated by EPA as CBI.

**Response:** EPA thanks the commenter for their input. As proposed in the July 7, 2010 CBI proposal, the final amendment to 40 CFR 2.301 provides procedures for EPA to modify a prior confidentiality determination (see 40 CFR 2.301(d)(4)) should certain Part 98 data be no longer entitled to confidential treatment because of a change in the applicable law or newly discovered or changed facts. This provision reflects the requirements in CBI regulations at 40 CFR 2.205(h) for modifying prior determinations for other information. Business would be afforded an opportunity to comment on pertinent issues in the manner described in 40 CFR 2.204(e) and 2.205(b).

**Commenter Name: David B. Calabrese**  
**Commenter Affiliation: Air Conditioning, Heating and Refrigeration Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0032.1**  
**Comment Excerpt Number: 8**



**Comment:** Under this rule, the Office of General Counsel is authorized to determine that information is no longer CBI because of a change in law or newly discovered or changed facts. The EPA would be required only in this instance to provide the company with an opportunity to submit comments before disclosure of the information. AHRI supports EPA's decision to provide companies with the opportunity to comment on the Office of General Counsel's determination that information is no longer CBI. If the Office of General Counsel makes such a determination, companies should be afforded the same opportunity to comment as provided under 40 C.F.R. § 2.204 (e) and the opportunity for judicial challenge of the agency's final determination, as provided under 40 C.F.R. § 2.205 (f).

**Response:** For the response to this comment, please see the response to comment EPA-HQ-OAR-2009-0924-0051.1, excerpt 1.

**Commenter Name: Robert D. Bassette**  
**Commenter Affiliation: Council of Industrial Boiler Owners**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0064.1**  
**Comment Excerpt Number: 5**

**Comment:** Even if EPA provides CBI protections to input and other non-emission data, those protections are not necessarily complete or permanent because EPA has proposed making CBI determinations subject to reevaluation. See 40 C.F.R. 2.301(d)(4)(ii). Specifically, EPA has proposed to provide the Office of General Counsel with authority to determine based on the criteria in 40 C.F.R.2.208 that CBI is no longer entitled to confidential treatment because of a change in applicable law or newly discovered or changed facts. Id. EPA has also proposed to provide companies with the opportunity to comment on any final decision issued by the Office of General Counsel reevaluating whether information should be afforded CBI protections. Id. We support the inclusion of these procedural protections because companies have a due process right to challenge the decision to waive CBI treatment of data and should be afforded the same opportunity to comment as provided under the current protections provided in 40 C.F.R. 2.204(e). Furthermore, we also support giving companies the opportunity to judicially challenge the agency's final determination, as provided under 40 C.F.R. 2.205(f).

**Response:** For the response to this comment, please see the response to comment EPA-HQ-OAR-2009-0924-0051.1, excerpt 1.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.2**  
**Comment Excerpt Number: 7**

**Comment:** We recognize the difficulties that EPA may face in determining when confidential information should be declassified. The Clean Air Act, however, squarely places the burden on the business to show that the public interest in disclosure and transparency is outweighed by a "substantial" risk of competitive harm, and these principles should first and foremost guide EPA's decision in determining the duration of information's confidentiality status.

As an initial matter, to clarify its authority to declassify confidential data, we are pleased that EPA has made an affirmative statement in the regulatory text that information initially entitled to confidential treatment may lose this status with the passage of time if its disclosure would no longer present a substantial risk of harm or EPA otherwise determines that it is not entitled to confidential treatment. See 75 Fed. Reg. at 39,132 (proposed 40 C.F.R. §2.301(d)(4)).

To these ends, EPA should establish a process by which it will determine the duration of the confidential status of each type of information. In evaluating any of these and other approaches, EPA must be guided by certain considerations. First, EPA must be wary of burdening itself and the public with responding to industry challenges regarding the duration of confidentiality status. Imposing an onerous burden on the public and EPA would fly in the face of the statute's requirement that the burden be on the reporter to show demonstrate that the information constitutes confidential business information. To these ends, EPA should, as much as possible, make any determinations on an industry-and/or category-specific basis. That is, it should not be sufficient that one reporter make a showing of a risk of substantial harm to its individual interests. Rather, EPA should require that the showing must be made for each reporter in the industry. (The advantages of this approach are explained more fully below.) Finally, we suggest that each determination made pursuant to these proposed approaches be valid for only a certain amount of time – for instance one year – and that, absent an additional, satisfactory showing, the information would then be declassified. Such a requirement would be completely consistent with the overriding interest in public disclosure of this information. [Footnote: Even national security information is declassified as time passes. See EO 12958. The commercial concerns driving CBI determinations here provide far less justification for permanent confidentiality.]

One approach would be for EPA, after the conclusion of this rulemaking, to issue guidance that states that the confidential status of information would automatically lapse after two years of being submitted to EPA, unless a satisfactory showing is made by a reporter. While the confidentiality status of information will necessarily be industry-and/or category-specific, two years is a more than reasonable presumption given the rate at which the market moves, and it provides ample notice of EPA's determination to both reporters and the public. [Footnote: Indeed, two years may be conservative, given that in certain industries, data that may cause a business competitive harm upon submission may be irrelevant just weeks or months later. Therefore, we urge EPA to consider an even shorter time frame of, for instance, one year. The disadvantage of a shorter timeframe, however, would be the potential of an increased burden on all stakeholders and EPA itself of responding to these requests.] At that point, EPA would make the information publicly available, unless it receives a request to extend the duration of the confidentiality determination.

While this request could certainly be submitted by a single reporter or a collective group of reporters, EPA should only approve an extension of the confidentiality status on the basis that disclosure of that class of information would harm the competitive interests of the reporters in the industry as a whole, as opposed to only the reporters(s) filing the petitions. Such an industry-wide and/or category-specific determination would serve three purposes. First, it would avoid EPA receiving and responding to requests of the same substance from several different reporters. Second, it would ease the burden on industry as only one request would be necessary to cover all reporters. Third, if the requests and subsequent extension of confidentiality status could be

determined on a reporter-by-reporter basis, those reporters that have the resources to file such a request could receive an unfair competitive business advantage in comparison to others in the same industry, for whose confidentiality status of would have otherwise lapsed. We do not think that notice and comment pursuant to the requirements of section 307(d) of the Clean Air Act would be required with regard to the receipt and issuance of a determination on these requests. However, given the importance of public disclosure in the framework of the Clean Air Act, EPA should provide ample notice to the public that such a request has been filed and an opportunity for informed comment by stakeholders. [Footnote: We recognize that, in certain situations, making the request for such an extension publicly available would itself present a substantial risk of competitive harm. Therefore, EPA should make as much of the request publicly available as is possible and protect only those parts of the request it determines necessary. Again, in making this determination, EPA must be guided by the principle underlying section 114 that public disclosure and transparency is favored.]

A second approach would be for EPA to finalize this rulemaking (including its statement that the confidential status of information may be lost as a result of the passage of time) and to then issue industry-and/or category-specific guidance documents indicating when EPA believes that information would lose its confidential treatment. This approach has the advantage of allowing EPA to make industry-and/or category-specific determinations as to the duration of the confidentiality status of information, while putting stakeholders on notice of EPA's expected determination. A disadvantage of this approach would be that EPA and the public may be in the position of responding to several different industry responses to this guidance. In addition, another potential disadvantage is that any such industry-specific guidance could be considered a re-interpretation of the finalized rulemaking and thus arguably subject to the notice and comment procedures to be binding. [Footnote: See *Paralyzed Veterans of America*, 117 F.3d at 586.]

A third approach would be for EPA, after the conclusion of this rulemaking, to conduct a notice and comment rulemaking process to make industry-and/or category-specific determinations regarding the duration of the confidentiality status. The advantage of this process is two-fold. First, it would provide a notice and opportunity for comment for all stakeholders. Second, the final regulations would be binding and hence would reduce the uncertainty with regard to the status and timing of public disclosure of information. There are, however, two potential disadvantages, however. One is the burden upon EPA and all interested in stakeholders in responding to the proposed rulemaking. The second is that arguably if EPA wished to modify and duration determinations in the future, it would be probably required to do so through another notice and comment procedure. [Footnote: See *id.*] We would also like to note that EPA is likely well within its authority to include to these industry-and/or category-specific confidentiality determinations in the regulatory text of the mandatory monitoring and reporting rule upon finalization of this rulemaking, as EPA has specifically requested comment and information on this issue. [Footnote: See *Env't Integrity Project v. EPA*, 425 F.3d 992, 996-98 (describing when a final rule constitutes a "logical outgrowth" of the rule as proposed).]

In sum, EPA has the authority to allow the confidential status of information to lapse upon the passage of time, unless it can be shown by reporters to EPA's satisfaction that the disclosure of such information on an industry-wide basis would result in substantial competitive harm. Indeed, EPA is arguably required to remove CBI status where information's commercial sensitivity

diminishes over time. Therefore, EPA should develop a procedure to make such durational confidentiality determinations. While we have suggested various procedures, we do not suggest that these are by any means the only – or even the optimal – approaches available to EPA. We look forward to continue working with EPA to chart a correct and effective path regarding the duration of confidentiality determinations.

**Response:** Consistent with other programs, EPA intends to reevaluate determinations made through this action as new information becomes available or changes to applicable law made. The final amendment to 40 CFR 2.301 provides procedures for EPA to modify a prior confidentiality determination (see 40 CFR 2.301(d)(4)) should certain Part 98 data be no longer entitled to confidential treatment because of a change in the applicable law or newly discovered or changed facts. This provision reflects the requirements in CBI regulations at 40 CFR 2.205(h) for modifying prior determinations for other information. We therefore do not believe that a time limit on the duration of CBI determination is justified or necessary. This approach is consistent with other CBI determinations made by EPA, which are generally not time limited.

**Commenter Name: Vickie Patton**  
**Commenter Affiliation: Environmental Defense Fund**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0047.1**  
**Comment Excerpt Number: 4**

**Comment:** The Agency should review, within two years of program implementation, the scope of information withheld and evaluate whether the categories should be more narrowly tailored.

**Response:** For the response to this comment, please see EPA-HQ-OAR-2009-0924-0053.2, excerpt 7.

**Commenter Name: David B. Calabrese**  
**Commenter Affiliation: Air Conditioning, Heating and Refrigeration Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0032.1**  
**Comment Excerpt Number: 6**

**Comment:** AHRI agrees with EPA's assessment that unique circumstances may arise, requiring the re-evaluation of categorical determinations. Therefore, a review process should be available to accommodate those rare occasions.

**Response:** For the response to this comment, please see EPA-HQ-OAR-2009-0924-0053.2, excerpt 7.

## APPENDIX A: LIST OF COMMENTS ON THE INPUTS TO EMISSION EQUATIONS CATEGORY

In this appendix, we provide a list of public comments we received regarding the proposed determination the direct emitter data category Inputs to Emission Equations. These comments were received during the 60-day public comment period following publication of the July 7, 2010 CBI proposal (see 75 FR 39094, July 7, 2010). Many of the comments listed in this appendix raise concerns regarding potential harmful consequences from public availability of the data elements in this category. EPA concluded that some of these comments warrant more extensive evaluation and decided not to finalize the confidentiality determination for the Inputs to Emission Equations category in this action. In December 2010, we published the following three rulemakings: “Call for Information: Information on Inputs to Emission Equations under the Mandatory Reporting of Greenhouse Gases Rule” that solicits additional information to help with the more in-depth evaluation relative to Inputs to Emission Equations (see 75 FR 81366, December 27, 2010); an Interim Final notice to defer reporting of these data elements on a short-term basis (75 FR 81338, December 27, 2010); and a proposal to further defer reporting of these data elements for reporting years 2011, and 2012 until March 31, 2014 (75 FR 81350, December 27, 2010). As explained in these notices, EPA intends to complete additional evaluation of the comments received before finalizing confidentiality determinations for the data elements in this category.

Where possible, EPA separated comments on specific topics into their respective data categories by editing individual excerpts. However, in some cases, commenters made broad statements about groups of data elements from various categories or general comments on the approach that could not be easily separated by topic or data category without potentially affecting the intended meaning of the commenter’s statements. In such cases, we listed the comment excerpt in its entirety in this appendix and in the relevant sections of this document. For the response to any comments in this appendix regarding issues or data elements that are not inputs to emission equations, please see the appropriate section of this document.

**Commenter Name:** Lorraine Gershman<sup>59</sup>  
**Commenter Affiliation:** American Chemistry Council (ACC)  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0031.1  
**Comment Excerpt Number:** 5

**Comment:** Subpart V – Nitric Acid Production. We oppose EPA’s proposal not to treat several data elements CBI, including:

- (1) Annual nitric acid production from each train
- (2) Annual nitric acid production from each train during with abatement technology is operating

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<sup>59</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

...

(5) Production rate during each performance test

Each of the highlighted data elements above should be designated as CBI. By making such information publicly available, competitors would be able to “reverse engineer” and calculate the nitric acid production at each facility.

**Commenter Name: Lorraine Gershman<sup>60</sup>**

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 9**

**Comment:** EPA recognizes that some data is highly confidential. In conjunction with this proposal, EPA also released a June 28, 2010 memo with the subject line “Data category assignments for reporting elements to be reported under 40 CFR Part 98 and its amendments.” By defining all inputs as “emission data,” EPA will be revealing information that to date has been confidential business information. Process emissions, by their very nature, result from a process used to create a product. Information about the process, and the raw materials used in the process, could be used by competing companies to gain valuable inside business information. EPA acknowledges that production and throughput data that are not inputs to emission equations category should be CBI. 75 Fed. Reg. 39115-16. EPA proposes to determine “that the data elements in this data category are entitled to confidential treatment because disclosure of these production and throughput data is likely to cause substantial harm to the competitive position of businesses required to report these data elements under Part 98.” Id. EPA goes on to reason that, by having such production and throughput data, competitors would be able to gain insight into a firm’s operational strengths and weaknesses. EPA also reasons that having information about production quantities of each product and the product mix of a firm may enable competitors to determine the type of production processes used, as well as to reasonably infer the types and approximate amounts of feedstocks consumed. Yet EPA is requiring this same information – production and throughput data – be made publicly available under a number of subparts because such information may be an input in calculating GHG emissions. In other words, if a facility has a process that is amenable to a CEMS, its production and throughput data will not be “emission data” and will be protected as CBI. But a facility whose process is not amenable to a CEMS and uses production and throughput data to calculate its emissions for reporting under Part 98 will suffer the consequences of having this sensitive information being made public by EPA.

There is no justification for EPA’s arbitrary determination that the use of this data determines whether it should be protected as CBI. In using the data to help establish GHG emissions, a facility is not treating this data as if it were no longer CBI – it is and always will be CBI and EPA must protect it from disclosure.

**Commenter Name: Leslie S. Ritts<sup>61</sup>**

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<sup>60</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), PPG Industries, Inc. (EPA-HQ-OAR-2009-0924-0040), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 15**

**Comment:** NEDA/CAP urges that EPA presume that raw material and throughput inputs are CBI, and make such information available to the public only under current procedures for sharing this information, requiring submission of FOIA requests, notification of the owner/operator of the facility, and validation of the CBI nature of the information. Because the input data we have described represents a fraction of the 1,500 data elements that EPA is collecting, it would be reasonable, particularly given the sensitivity of this information, for EPA to provide a presumption of CBI for inputs into emission equations having to do with feed stocks and raw materials consumption. Thus, we strongly encourage EPA to modify the final rule in this respect.

**Commenter Name: Paul Noe**

**Commenter Affiliation: American Forest & Paper Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0034.1**

**Comment Excerpt Number: 10**

**Comment:** Subpart AA to 40 CFR Part 98 would require all chemical recovery furnaces and lime kilns in sources over the reporting thresholds to report their GHG emissions. These emissions would be calculated using formulas very similar to those required for fuel burning sources and require inputs such as the mass of spent liquor solids combusted in each chemical recovery furnace, the amount of fossil fuel combusted in each lime kiln, and the amount of recovery chemicals needed within the pulping process. Such data, especially on a unit-by-unit basis, but also at the facility level, can provide the means for competitors to determine plant and unit efficiencies, production levels, and overall cost-effectiveness.

**Commenter Name: Leslie S. Ritts<sup>62</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 12**

**Comment:** According to the July 7th Notice, Table 2, Inputs to Emission Equations, includes, for various reporting categories, monthly and/or annual production/ throughputs, monthly and/or annual line/process unit-specific throughputs, and raw material composition information, none of which are eligible for CBI protection. 75 Fed. Reg. 39097. In the same Table 2, production/throughput data and raw materials consumed data that are not used as inputs to an emission equation are to be afforded CBI protection. The production, throughputs, and raw material data used in emission equations should be treated as CBI, consistent with the

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<sup>61</sup> Comments submitted by the National Environmental Development Association's Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).

<sup>62</sup> Comments submitted by the National Environmental Development Association's Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).

information identified in the data categories that are not emissions data and considered CBI. Frankly EPA's proposed treatment of this information as non-CBI, also will have a collateral consequence and will act as an incentive for the use of generic emission factors by companies instead of the use of actual input information, which could make the emission information reported less valuable.

**Commenter Name: Arline M. Seeger<sup>63</sup>**

**Commenter Affiliation: National Lime Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0023.1**

**Comment Excerpt Number: 9**

**Comment:** EPA's discussion of how public disclosure of throughput data can be harmful to the competitive position of businesses is intended to defend its exclusion from the proposed generic non-CBI determination for throughput (and capacity data) that are not inputs to GHG equations (preamble, at pages 39,115-160). However, EPA's discussion also ably makes the point that releasing such data would be detrimental to the operational and marketing strategies of all reporting facilities, not just those sectors for which GHG calculations do not require their use. The excerpt below from EPA's preamble have been modified to put them in the context of a lime plant. However, as EPA has done, the argument could be made for most manufacturing plants. Lime and LKD (lime kiln dust) production/sales data & production capacity: The disclosure of annual production quantities of (e.g., lime, lime byproducts), used in conjunction with data related to capacity, provides insight to a firm's operational strengths and weaknesses. Competitors could determine at what percent capacity a firm is operating, which can reveal information on the financial and competitive strength of the firm. For example, it could reveal that a manufacturer is operating well below capacity and likely experiencing financial difficulties. Having such information could allow competitors to narrow the competition by adjusting their prices to the further detriment of the reporting company, or to formulate other competitive strategies or corporate acquisition strategies to the detriment of the reporting company. Having information on the percent of capacity at which a firm is operating could also reveal whether a manufacturer has existing capacity available to take on new customers in a growing market or is already at their maximum production and would need to invest capital to expand capacity in order to produce more. Having such information could give competitors insights to make competitive decisions on expanding their own production rates or altering their pricing strategies to the detriment of the reporting company. In particular, we note that small companies operating with constrained operating margins will be put at a great disadvantage vis-à-vis their larger competitors. Those competitors can act on this information to lower prices and drive the smaller companies from the market. The disclosure of annual byproducts sold and not sold—(e.g., LKD sold, not sold) provide insight to a firm's market strength and position. Competitors could use production data to gain a competitive advantage over a firm by better approximating a firm's market share. For example, annual production data (including byproducts produced and sold and byproducts produced and not sold) may reveal confidential information related to rapid growth or decline in market share, customer base, and marketing strategies. It might enable firms to tell which of their competitors won a contract/new customer they

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<sup>63</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).



competed for. This could substantially harm the firm's competitive position because the information could enable competitors to devise strategies to steal specific customers or even key employees. Changes in the mix of products produced (e.g., lime, lime byproducts), could reveal marketing strategies. In many cases, an accurate estimate of the market position of a firm is difficult to procure, and the disclosure of such information through Part 98 could lead to distortions in the market and could expose reporting parties to disadvantageous market conditions. We note that this information, along with production capacity information, would be particularly useful to foreign competitors and manufacturers of competing products, which may have no similar disclosure requirements. Information about the chemical composition of products (e.g., percentage of calcium oxide or magnesium oxide) may allow competitors to reasonably infer the purity of feedstocks or raw materials (e.g., limestone) consumed. This may enable competitors to devise strategies to compete for resources and harm the competitive position of reporting entities by otherwise driving up the costs of materials used for production. For example, a record showing significant consumption of a particular raw material resource (e.g., dolomitic limestone) may indicate to competitors that a firm is seeking entry into a new market (e.g., steel market), enabling the competitors to devise disruptive strategies.

**Fuel consumption:** The disclosure of the amount of coal (or other fuel) consumed could provide insight into a facility's operational strengths and weaknesses. For example, information about the coal's quantities and composition could reveal a firm's suppliers and sourcing strategies. Among other things, competitors could use this information to create new strategies to compete for coal and to obtain similar production cost structures. If in addition to coal consumption, production quantities data are also released under Part 98, competitors could use the combination of production and coal consumption data to expose sensitive information such as operating efficiencies (amount of product produced per unit of coal consumed) and allow competitors to infer production costs and pricing structures. For example, disclosing the annual amount of coal purchased, in combination with other production data, may reveal a facility's operating efficiency. Competitors could use such information to steal market share by undercutting a firm's pricing structure. Again, we note that small businesses would be put at a particular competitive disadvantage when compared to their larger counterparts.

It is obvious from the above that EPA knows that process-related information, such as production throughputs, product characteristics, raw material consumption, fuel usage, and unit capacity data should be protected as confidential because its release would reveal information on energy usage, raw materials, product chemistry, production efficiency, and other information that would infringe on business confidentiality and cause competitive harm. The states understand the importance of confidentiality. So too do the USGS, the EIA, Environment Canada and the European Union.

**Commenter Name: Paul Noe**

**Commenter Affiliation: American Forest & Paper Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0034.1**

**Comment Excerpt Number: 2**

**Comment:** Fuel combustion sources must also report their emissions on a unit by unit basis [See 40 CFR 98.36(a)], and must in general report the method of quantifying emissions they used, their emissions by fuel type combusted, and the maximum rated heat input capacity of each unit [See 40 CFR 98.36(b)]. In addition, a separate paragraph entitled "verification data"

requires facilities that do not use CEMs to report total fuel consumption by fuel type and unit, and (depending on the verification method used) also report the total amount of steam produced in each unit, “the ratio of the maximum rated heat input capacity to the design rated steam output capacity of the unit”, the heating value of each fuel, and detailed information on how fuel carbon content was calculated [See 40 CFR 98.36(e)]. As EPA noted, many businesses already collect this data “for business reasons.” They have also long kept it confidential for equally good “business reasons.”

**Commenter Name: Leslie S. Ritts<sup>64</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 11**

**Comment:** NEDA/CAP submits that actual input information, if it is based on process inputs, and process parameters, information that is entitled to CBI protections in the [three categories with data that are not emissions data (Production/Throughput Data that are not inputs to equations, Raw Materials Consumed that are not inputs to equations, and Process-specific and Vendor Data submitted in BMM extension requests)], it should not matter that that information was used to calculate emissions and it should also be subject to CBI protections.

**Commenter Name: William C. Herz**

**Commenter Affiliation: The Fertilizer Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 7**

**Comment:** For an ammonia process, knowing the carbon dioxide generated by the production process and the carbon dioxide from the fuel combustion allows for a reasonable postulation of plant performance. Providing natural gas composition and natural gas usage data on a unit specific basis provides more precise information on the ability of the unit to transform the natural gas to a usable product. Roughly 90 percent of the production cost of ammonia is the natural gas feed. By providing precise data, competitors will be able to benchmark their ammonia process against a reported U.S. plant's process. Knowing that a unit is more efficient provides information to competitors to conduct specific research of a company's purchases and licensing contractors. This information will provide a competitor with the opportunity to copy the technology and achieve similar efficiencies, at the expense of the reporting plant. In most cases, the modifications to an ammonia plant to make it competitive are not patentable and driven primarily by the experience of the company operating the unit. Thus, it is critical to protect plant-specific information from disclosure.

**Commenter Name: William C. Herz**

**Commenter Affiliation: The Fertilizer Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 12**

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<sup>64</sup> Comments submitted by the National Environmental Development Association's Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).

**Comment:** EPA must evaluate each input to the emission equations to determine what inputs are “emission data”. EPA concludes in the Greenhouse Gas Reporting Rule CBI proposal that all inputs to the emission equations are emission data subject to disclosure. However, the Agency, other than summarily stating that its conclusion is consistent with the 1991 Policy, does not provide its analysis of each equation input and why it believes that the input constitutes emission data. The Fertilizer Institute (TFI) does not believe that EPA is acting consistent with its 1991 Policy. Nor does EPA’s conclusion make sense on the face of its own definition of “emissions data.” It is not apparent how inputs to equations are necessary to determine the “identity, amount, frequency, concentration or other characteristics” of the emissions. The amount is determined by the equation itself. EPA has nowhere suggested that the public is entitled to access to all underlying production and process information that might be used to second-guess whether the calculated amount is valid. To be sure, the calculation method might be relevant to the range of error in the emissions calculation (including the methods for determining any inputs), but the actual numbers in the inputs do not add to that understanding. As such, a detailed analysis by EPA of each equation input and the Agency’s rationale for concluding that it is emission data consistent with the 1991 Policy is needed to allow for meaningful comment.

**Commenter Name: Leslie S. Ritts<sup>65</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 13**

**Comment:** Availability of production/throughput and raw material data offers insights into operational strategies that bear on pricing, marketing and many other competitive aspects of manufacturing and sales of these manufactured materials. EPA’s proposed system of public access to these data and the opportunity for foreign competitors to reconstruct American companies’ operational strategies places American GHG reporting companies at a distinct disadvantage to foreign competition that is not subject to similar, and reciprocal, disclosure requirements. In addition, even among the domestic competitors, availability of these data will make readily available information that could be used by others to gain a competitive advantage.

**Commenter Name: Leslie S. Ritts<sup>66</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 14**

**Comment:** NEDA/CAP disagrees with EPA’s legal arguments and basis for identification of CBI. Therefore, to be consistent with the approach that production/throughput and raw material data should be considered CBI, NEDA recommends that the data category, Inputs to Emissions

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<sup>65</sup> Comments submitted by the National Environmental Development Association’s Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).

<sup>66</sup> Comments submitted by the National Environmental Development Association’s Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).

Equations, in Table 2 be restated as Inputs to Emission Equations, Unless Otherwise Part of a Category Granted CBI Protection. Thus, this would mean that data that otherwise would meet the definition of the three data categories that are not emission data and considered CBI, would be excluded from Category 3, and are eligible for CBI protection.

**Commenter Name: William C. Herz**

**Commenter Affiliation: The Fertilizer Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 15**

**Comment:** Inputs to emission equations should not be subject to disclosure. TFI believes that EPA should conclude that all inputs to the equations set forth in Subparts C, G, V, Z, and PP are not emission data, and due to the company-specific production information that may be ascertained from them, subject to protection from disclosure pursuant to CAA § 114(c). At a minimum, the Agency should conclude that the following inputs to emission equations are not emission data, and subject to protection from disclosure pursuant to CAA § 114(c): 40 C.F.R. § 98.33(a)(1); 40 C.F.R. § 98.33(a)(2)(i); 40 C.F.R. § 98.33(a)(2)(ii); 40 C.F.R. § 98.33(a)(2)(iii); 40 C.F.R. § 98.33(a)(3)(i); 40 C.F.R. § 98.33(a)(3)(ii); 40 C.F.R. § 98.33(a)(3)(iii); 40 C.F.R. § 98.73(b)(1); 40 C.F.R. § 98.73(b)(2); 40 C.F.R. § 98.73(b)(3); 40 C.F.R. § 98.73(b)(6); 40 C.F.R. § 98.76(b)(2); 40 C.F.R. § 98.76(b)(14); 40 C.F.R. § 98.263(b)(1); 40 C.F.R. § 98.266(d); and 40 C.F.R. § 98.266(f)(6). [Footnote: While TFI has attempted to identify all such data elements in this table, any omission of a data element in Subparts CC, G, V, Z and PP of the character and type of the data set forth in the table should not be disclosed.]

**Commenter Name: Tom Siegrist**

**Commenter Affiliation: Koch Nitrogen Company, LLC**

**Document Control Number: EPA-HQ-OAR-2009-0924-0025.1**

**Comment Excerpt Number: 1**

**Comment:** EPA's proposal to make unit-specific and facility-specific production, fuel consumption, and feedstock data publically available, especially on a monthly basis, would endanger the competitive positions of those manufacturers required to report such data. (75 FR 39097) Specific fuel and feedstock consumption data, combined with associated production data, provide competing manufacturers with quantitative estimates of plant-specific efficiencies. Making such information publically available, especially when reported on a monthly basis, would allow competitors to derive cost and operating margin estimates, along with specific information regarding strategic and operational plans and scheduling. In the specific case of ammonia manufacturing, overall operating costs are largely determined by natural gas costs, so production and fuel/feedstock consumption data could be used to evaluate competitors' sensitivities to fluctuations in natural gas prices. Public disclosure of such information could cause significant harm to the competitive positions of sources required to report this information to EPA, and would certainly put domestic manufacturers in a disadvantaged position relative to their overseas competitors. More than half of the nitrogen-based fertilizer consumed in the US is imported or produced using imported ammonia and nitric acid. In light of this fact, the availability of such business-sensitive information to overseas manufacturers should be managed in a more careful manner than by means of a blanket policy that would render all such information publicly available. EPA should consider a more flexible confidential business information (CBI) policy for select industries, such as the ammonia and nitric acid

manufacturing sectors, in which overseas producers play a significant role in meeting US product demand, in order to insulate domestic producers from inadvertent consequences of EPA's proposed data management approach.

**Commenter Name: Stephen E. Woock**  
**Commenter Affiliation: Weyerhaeuser Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0041.1**  
**Comment Excerpt Number: 2**

**Comment:** We do not agree to the public release of "Inputs to Emission Equations" information to the extent that certain production/throughput or raw materials data included in that data element category should be treated as CBI for the same reasons that those types of data elements are listed by EPA as CBI in their proposed CBI determination grouping. When EPA proposed the GHG MRR, we supported EPA's plan to require reporting of additional facility and unit information so that EPA could act as verifier of data accuracy and appropriateness for the self-certified reporting. We supported that approach rather than the alternative proposal that would have required reporters to submit their information to third party verification. We noted in our comment [See DCN EPA-HQ-OAR-2008-0508-0451.1] that we did not support "...approaches requiring a special and substantially intrusive level of verification for GHG reporting that differs from the current well-established system for reporting other air program compliance information." We continue and expand that concern about "intrusiveness" here. It is one thing to have sensitive competitive information in EPA hands to facilitate and automate conducting their verification; it is another to open that information up to the public and therefore make it openly available to our competitors. EPA should not release to the public information that otherwise would be CBI except it is reported, as required, to support EPA's verification review of the simultaneously submitted GHG emissions estimates.

**Commenter Name: Juanita M. Bursley**  
**Commenter Affiliation: Graf Tech International Holdings, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0052.1**  
**Comment Excerpt Number: 2**

**Comment:** While GrafTech believes that EPA should provide the public with only the actual emissions data for each covered GHG ..., it is particularly concerned by EPA's plans to not treat information submitted by reporting entities under 40 CFR 98.3(d)(3)(v) as CBI. Under this provision, EPA requires that any facility operating data or process information used for the GHG emission calculations be submitted with the report. The availability of any operating data or process-specific information to GrafTech's domestic and foreign competitors can be very damaging, and can put our company at a significant competitive disadvantage in the global marketplace. Our company expects that the same will be true for numerous other industries reporting under the GHGMRR. Therefore, GrafTech requests that EPA treat 40 CFR 98.3d3v as CBI, thereby protecting all operating data and process information submitted by reporting entities.

**Commenter Name: Mark A. Erman**  
**Commenter Affiliation: Pepper Hamilton LLP on behalf of Verallia**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0037.1**  
**Comment Excerpt Number: 6**

**Comment:** Unless CO<sub>2</sub> continuous emissions monitors (CEMS) are installed in every furnace company-wide, Subpart N of Part 98 would require glass manufacturing facilities to report (1) the annual quantity of each carbonate-based raw material charged to each furnace, (2) the annual quantity of glass produced from each furnace, and (3) the carbonate-based mineral mass fraction (as percent) for each carbonate-based raw material charged to each furnace. See 40 CFR 98.146(b). EPA has acknowledged that companies should not be forced to install cost-prohibitive CEMS to avoid revealing substantial amounts of CBI. 75 Fed. Reg. at 39109. As a result, the disqualification of data required for annual GHG reporting (such as that identified in (1) and (3) above) from case-by-case determination of its status as CBI is overbroad and must be eliminated. This information – regardless of whether it is an “input” – is confidential because competitors would be able to use it to back-calculate our trade secret product formulae and business confidential glass production rates. We are puzzled as to what the legitimate public interest is in obtaining this information when it is already accounted for in the final result of the GHG emission equation. We understand EPA’s need to verify the accuracy of a reporting entity’s emission calculation, but public disclosure of the “inputs” would share some of the industry’s most sensitive and protected information, e.g., how many containers we make, how we make them, batch formulae, and the like. This goes well beyond any rational interpretation of “emission data.” EPA’s 1975 preamble (40 Fed. Reg. 21987, May 20, 1975) adopted an approach that struck a more reasoned balance than proposed here between private business interests in protecting proprietary information and public interest in disclosure: “EPA has given considerable attention to the question of whether the quoted phrases [“trade secrets or secret processes”] were intended to restrict confidential treatment to only such information as would disclose details of manufacturing methods or physical or chemical processes carried on by a business, or whether instead the phrase is a term of art encompassing other types of data which in many cases businesses regard as confidential, such as operating costs, profits and losses, details of transactions with others, plans for capital investment, marketing information, proposed new products, input and output rates, and similar information. In the proposed rule, the latter approach would be taken. EPA has noted that the meager legislative history concerning these provisions (like that concerning the similar language in section 308 of the Federal Water Pollution Control Act (FWPCA)) tends to indicate that Congress contemplated confidential treatment of all “trade secrets” or “proprietary data” except emission data. EPA has not been able to conclude that Congress intended either the Clean Air Act or the FWPCA to compel automatic disclosure of the vast amount of closely-held business information, production of which EPA may require under those statutes. Certainly the legislative histories give no indication that the drafters considered this possibility. Moreover, it is not apparent how automatic public availability of this information would further the overall purposes of either Act.... Finally, many business would oppose EPA requests for information in they knew that EPA would immediately make it available to the public; this could seriously hamper EPA programs by requiring diversion the Agency’s resources to time-consuming and expensive efforts to compel the firms to provide the information by use of court process. 40 Fed. Reg. at 21990.”

**Commenter Name: Robert D. Bassette**

**Commenter Affiliation: Council of Industrial Boiler Owners**

**Document Control Number: EPA-HQ-OAR-2009-0924-0064.1**

**Comment Excerpt Number: 1**

**Comment:** [T]he legal authority for the rule supports emissions data gathering and therefore, only emissions data should be publicly disclosed – not non-emissions data. Under the applicable regulatory definition and caselaw developed long before the regulation of GHGs was contemplated, "emission data" must be information that is "necessary" to determine the emissions from a source. *RSR Corp. v. EPA*, 588 F. Supp. 1251, 1255 (N.D. Tex. 1984). EPA's regulations define "emission data" must be information that is "necessary" to determine the emissions from a source. *RSR Corp. v. EPA*, 588 F. Supp. 1251, 1255 (N.D. Tex. 1984). EPA's regulations define "emission data" as "any source of emission of any substance into the air" that is "necessary to determine the identity, amount, frequency... of any emission... emitted by the source." 40 C.F.R. 2.301(a)(2)(i). Reporting mass data, for example, required to calculate emissions of conventional pollutants may be commonplace in existing EPA programs, but non-conventional GHG emissions reporting has other implications that EPA has failed to address. However, now that EPA has proposed collecting emissions data for GHGs and making it publicly available on its website, EPA must reconsider how to treat non-emissions data submitted to comply with the MRR. Further, EPA is proposing to broaden the definition of emissions data and other data that is not entitled to CBI protections. Whereas EPA proposes that data regarding production or throughput and raw materials consumed that are not used as inputs for emissions calculations would be CBI, that same sensitive data would not be provided CBI protection under the proposal if used in emission calculations. This disparity in treatment of the same data is not rational or defensible. Non-emission data used to calculate GHGs is a different type of data than that which has historically been reported under the CAA and made publicly available. For EPA to say that quantities such as fuel usage, for example, should be publicly available ignores the competitiveness implications of such disclosure. Now that EPA is mandating that non-emissions data must be submitted under the MRR, EPA's interpretation of what constitutes emissions data must change. Utilizing the old paradigm will cause direct harm to the ability of U.S. companies to compete in the global marketplace because EPA would make this information publicly available. Therefore, we urge EPA to interpret its regulations to ensure that all non-emission data – data utilized to calculate emissions, such as fuel usage, raw materials used, and process operating parameters – be classified per se as not constituting emissions data and therefore as qualifying for CBI treatment.

The CAA and its implementing regulations provide for the protection from public disclosure of data submitted by entities that is CBI. 42 U.S.C. § 114(c); 40 C.F.R. § 2.301. Under longstanding law, commercial or financial information involuntarily submitted by a company to EPA is entitled to confidentiality if "disclosure of the information is likely to . . . cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (reaffirming the National Parks test for determining whether information submitted under compulsion is confidential); see also 40 C.F.R. 2.208(e)(1). Parties claiming confidentiality must show "actual competition and a likelihood of substantial competitive injury." *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987). Notwithstanding these legal protections for CBI, under 40 C.F.R. § 2, emissions data cannot be protected from disclosure as CBI. 40 C.F.R. § 2.301(e). Given this limitation on CBI protection, it is very important for EPA to precisely define the data it gathers. If certain information collected through the MRR, such as input data used in emission equations and the calculations themselves, is released to the public, our members would suffer substantial harm to their competitive position. See *Leavitt*, 2006 WL 667327 at \*5 (EPA

defending CBI claims because the disclosure of information "would result in a competitive disadvantage to the respective companies"). Here, if non-emission input and other data were made publicly available, competitors would be privy to their direct competitors' production data. The disclosure of this CBI might also reveal a company's market strength and position or enable competitors to "infer production costs and pricing structures." See 75 Fed. Reg. 39,122-23 (July 7, 2010). Knowledge of a competitor's production rates and other information that can be derived from the data to be reported, would harm the competitive position of any companies required to report this information. Hence, we believe that some additional information should be protected as CBI. Examples of additional data that should be afforded CBI protection include process throughput information and fuel use rates.

Protecting data submitted under the MRR is of greatest importance to facilities that produce a single product, or a predominant product with lower volume secondary products. In such cases, publicly disclosing the specific energy use for such a facility may allow competitors to gain unfair intelligence regarding production capabilities, utilization, and costs. Knowing this information could enable competitors to calculate the production output and relative cost of manufacture at a particular facility. . .

Calculations have traditionally been treated as confidential because they utilize process data including fuel stream composition and maximum production rates in some instances. In contrast where the reporting methodology is based on either a CEMS, a stack test, or EPA identified factors, it is acceptable to not treat such calculations as CBI because of the availability of that information under other reporting requirements. . .

The potential for harm is especially likely here, where domestic companies face strong domestic and international competition. EPA must err on the side of protecting such data as CBI, rather than jeopardizing the competitiveness of American companies and risking that harm will occur through its public disclosure. This is particularly true where as here, the key environmental data relevant to EPA's regulatory authority and to the public's interest is emissions data, which will be made publicly available. But non-emissions input and other data should be defined differently and protected from public disclosure. . .

Therefore, non-emission input and other data should be given categorical protection as CBI and should be deemed as not constituting emissions data.

**Commenter Name: Arline M. Seeger<sup>67</sup>**  
**Commenter Affiliation: National Lime Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0023.1**  
**Comment Excerpt Number: 7**

**Comment:** The preamble to the 2010 CBI rule mentions that some commenters stated that release of throughput data would be consistent with other programs, including the European Trading System. NLA has contacted our counterparts in Europe and learned this is not the case for the lime industry. Only plant-wide total GHG emissions are disclosed under the ETS.

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<sup>67</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).



[Footnote: In the EU ETS, the total quantity of GHGs emitted and surrendered per installation (i.e., plant) are public and published on internet a few months after the declaration by the operators. Lime plants are obliged to give to the authority the details of that calculation (production – emission factor – quantity of fuels ...), but these data are not accessible by the public. The conditions of data communication are defined by the different regulations: - Directive Emission trading 2003/87 see art 17 “Access to information” - Directive 2003/4 Public Access for Env information see art 4 (d) - Regulation 2216/2004 Management of the register for ETS see art 17] Similarly, Environment Canada discloses to the public only total GHG emissions for lime plants. The reason for this is that the Canadian government afforded each lime company the opportunity to explain why reporting throughput data would cause them economic harm.

**Commenter Name: Kevin M. Dempsey**  
**Commenter Affiliation: American Iron and Steel Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**  
**Comment Excerpt Number: 1**

**Comment:** The proposed rule is deeply troubling to AISI members because it departs from established governmental policies and procedures for protection of confidential business information (CBI) and would mandate the public disclosure of important production-related information that would compromise both the domestic and international competitive position of our member companies.

**Commenter Name: Keith McCoy**  
**Commenter Affiliation: National Association of Manufacturers**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0044.1**  
**Comment Excerpt Number: 5**

**Comment:** EPA must apply the confidentiality criteria against the data that was improperly classified as “emissions data” and reclassify that data as CBI. For those data elements in the “Inputs to Emissions Equations” category that were improperly identified as “emissions data” and thus were not considered for confidential treatment, EPA must carefully analyze these data elements against the criteria for confidentiality of business information. [Footnote: Business information is entitled to confidential treatment if: (a) “[t]he business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;” (b) “[t]he business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;” (c) “[t]he information is not, and has not been, reasonably obtainable without the business’s consent;” (d) “[n]o statute specifically requires disclosure of the information;” and (e) either the business shows that disclosure of the information “is likely to cause substantial harm to the business’s competitive position” or, if the information is voluntarily submitted, “its disclosure would be likely to impair the Government’s ability to obtain necessary information in the future.” 40 C.F.R. § 2.208. These substantive criteria apply to information collected pursuant to Sections 114 and 208 of the CAA, except that information which is “emission data, a standard or limitation, or is collected pursuant to Section 211(b)(2)(A) of the Act is not eligible for confidential treatment.” 40 C.F.R. § 2.301(e).]

After properly applying that criteria, EPA should determine that much of that improperly classified data is actually confidential business information. Many of the data elements that EPA includes in its “Inputs to Emissions Equations” category are properly CBI. These data elements divulge information about facility processes and operations, including information about fuel supplies, unit throughput, and production volumes. Disclosing these data elements would reveal confidential business information related to ownership interests, processes employed by individual facilities, and business practices at individual facilities. If a competitor is provided access to this information, it can obtain a competitive advantage over the facility by reverse engineering information about the facility’s operations and business strategies. This competitive information must be protected as CBI in the final rule.

**Commenter Name: Tom Siegrist**

**Commenter Affiliation: Koch Nitrogen Company, LLC**

**Document Control Number: EPA-HQ-OAR-2009-0924-0025.1**

**Comment Excerpt Number: 6**

**Comment:** While KNC accepts the need for disclosure of source identity information and estimated greenhouse gas (GHG) emissions levels from facilities, KNC has significant concerns regarding EPA’s proposal to automatically disclose all inputs to emissions calculations as “emission data”. KNC believes that requests for disclosure of such data should be handled on a case-by-case basis, as is currently done. No existing right of public access to data would be lost under continuation of the current practice.

**Commenter Name: Arline M. Seeger<sup>68</sup>**

**Commenter Affiliation: National Lime Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0023.1**

**Comment Excerpt Number: 3**

**Comment:** Data submitted to EPA by states for inclusion in the National Emissions Inventory (NEI) that the states have collected in state emissions inventories from stationary sources cannot be withheld from the public by EPA. [Footnote: See EPA-456\B-95-001, AFS User's Guide AF3AFS Data Storage Version 8.1]. However, having long recognized that most states do not share the Agency’s view that throughput data submitted related to applicable standards should be readily available to the public, EPA has devised a way such that this data is not disclosed by EPA, and thus not automatically disclosed to the public. The device EPA uses is to allow states to not submit a source’s throughput data to the NEI, and instead instruct the states to label such data as “business sensitive.” [Footnote: Memo (undated) entitled “Changes to “Confidential” Data in Aerometric Information Retrieval System (AIRS) Facility Subsystem” from Jacob Summers, Information Management Group, to Regional AIRS Facility Subsystem Contacts. Noting that at least 15 states were designating as “confidential” throughput data, EPA developed the term “business sensitive” for data (including throughput data) that states did not believe should be available through the NEI]. Thus, for example, for the 22 states in which NLA members operate, only four states submit to the NEI throughput data they receive in state

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<sup>68</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

emissions inventories reports. [Footnote: Analysis of NEI for SIC Codes 327410 and 212312 conducted on August 24, 2010 by Tom McMullen of EPA's Emissions Inventory & Analysis Group, AQAD/OAQPS, USEPA, Research Triangle Park, NC. (919: 541-7742). NLA would be pleased to supply a copy of this analysis to EPA's Climate Change Division, if EPA affords it confidential business protection. Otherwise, Mr. McMullen has a copy of his analysis and, based on his analysis, NLA's summary of the states that do and do not treat throughput data as "business sensitive."]. Interestingly, EPA never mentions this practice in its 2010 CBI rule, preamble or docket materials. Nor does it acknowledge that many states' definitions of "emissions data" are far narrower than EPA's [Footnote: See, e.g. Missouri Code of State Regulations 10 CSR 10-6.210(3)(B)2 (confidential information provision defines "emissions data" more restrictively than federal definition)], and do not include throughput data.

**Commenter Name: Mark A. Erman**

**Commenter Affiliation: Pepper Hamilton LLP on behalf of Verallia**

**Document Control Number: EPA-HQ-OAR-2009-0924-0037.1**

**Comment Excerpt Number: 4**

**Comment:** While we applaud EPA's proposal to categorize the annual glass production rate data submitted under Subpart N for glass manufacturing as CBI as described in the Preamble at 75 Fed. Reg. 39115, the categorical determination of certain data as CBI under categories "Throughput Data That are Not Inputs to Emission Equations" and "Raw Materials Consumed That are Not Inputs to Emission Equations" does not fully alleviate the problems posed by this rulemaking. These "CBI" categories are effectively meaningless for protection of some CBI data due to the carve-out for "inputs to emission equations" given the fact that EPA has made raw material consumption and throughput data required data elements for numerous source categories including glass manufacturing. See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) ("the statutory [FOIA] exemptions are intended to have meaningful reach and application"). By creating these two "CBI" categories, EPA evidently has recognized that raw material consumption and throughput information are sensitive and critical to competitive advantage ("Rational for Proposed Determinations. EPA proposes to determine that the data elements in this data category are entitled to confidential treatment because disclosure of these production and throughput data is likely to cause substantial harm to the competitive position of businesses required to report these data under Part 98. Disclosing a facility's production/throughput data could be detrimental to a firm's competitiveness by revealing confidential process information and operational and marketing strategies." 75 Fed. Reg. at 39115.), but the "inputs" exception in this context eliminates whatever protection was intended for raw material consumption. Whether a data element is an equation "input" is not determinative of whether it qualified as CBI (We also note that in its Preamble, EPA repeatedly cites an earlier Federal Register notice [56 FR 7042-7043, February 21, 1991] as authority for determining what data elements constitute "emissions data," but, tellingly, this notice stops well short of concluding that "inputs" such as raw material consumption and throughputs are categorically non-CBI.).

**Commenter Name: E. Donald Elliott**

**Commenter Affiliation: Bloomberg, LP**

**Document Control Number: EPA-HQ-OAR-2009-0924-0033.1**

**Comment Excerpt Number: 3**

**Comment:** As a logical outgrowth of EPA's CEM suggestion, and of industry concerns about disclosure of input data, Bloomberg suggests that EPA require the disclosure of input data, except whether it has either been verified by a CEM, or has been disclosed to a third-party verifier in camera. Requiring reporter to either disclose input data or use a third-party verifier, would create an incentive or "nudge" toward greater use of third party verifiers, which Bloomberg favors, while still accommodating the legitimate needs of companies that believe that releasing input data to the public would cause them competitive harm by allowing them to make the disclosure instead in camera to a third party verifier who could be required by contract to keep it confidential. Bloomberg strongly supports third-party verification. While making input data available to the public is better than keeping it secret, as a practical matter, a professional third-party verifier will do a better job at the highly-technical job of GHG verification than just making the inputs available to the public. EPA should "nudge" industry in the direction of greater use of third-party verifiers by providing that input data that has been disclosed to a qualified third-party verifier in camera does not need to be disclosed publicly, where it may cause competitive harm. [Footnote: Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale Press, 2008).] Courts commonly handle sensitive but important information by inspecting it in camera. Third-party verifiers could perform the same function with regard to GHG data. If a third-party verifier inspects input data and verifies that GHG emissions are correct, they should co-report the data to EPA so that they become equally liable for any fraudulent reporting. On the other hand, industry cannot complain about public disclosure of input data if EPA offers the alternative of third-party verification.

**Commenter Name:** Arline M. Seeger<sup>69</sup>

**Commenter Affiliation:** National Lime Association

**Document Control Number:** EPA-HQ-OAR-2009-0924-0023.1

**Comment Excerpt Number:** 8

**Comment:** Each year, each lime plant in the United States submits lime production data to the National Minerals Information Center, U.S. Geological Survey. The form each plant fills out clearly notes that the information submitted will be treated in confidence by the Department of Interior, except that it may be disclosed to the Department of Defense or to the Congress upon official request for appropriate purposes. Similarly, each quarter, most lime plants submit to the Energy Information Administration information on the quantity and other characteristics (heat content) of the coal they consume. Again, the form that each plant fills out states that the information (i.e., throughput data) will be treated in confidence.

**Commenter Name:** Paul Noe

**Commenter Affiliation:** American Forest & Paper Association

**Document Control Number:** EPA-HQ-OAR-2009-0924-0034.1

**Comment Excerpt Number:** 8

**Comment:** AF&PA is not arguing for automatic trade secret status for emissions input information. Instead, such information should be handled as it is at present. Once a company has

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<sup>69</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

made a trade secret claim, EPA should treat the information as trade secret until there is a public demand for it. Any such claim should then be decided through the established procedures. No right of public access to input data that now exists would be lost under this approach. It would be more consistent with the law, principles of cost-benefit analysis, and the principles of sound policy embodied in Executive Order 12866 than EPA's proposed approach.

**Commenter Name: Tom Siegrist**

**Commenter Affiliation: Koch Nitrogen Company, LLC**

**Document Control Number: EPA-HQ-OAR-2009-0924-0025.1**

**Comment Excerpt Number: 7**

**Comment:** If EPA rejects [our] suggestion [to allow case-by-case CBI determinations], KNC in the alternative urges EPA to make inputs to emissions calculations available only as annual figures rather than monthly figures, only on a facility level rather than a unit-specific level, and only after a one-year delay from the date of reporting. The information disclosed would still be sensitive, but aggregating it on a yearly and facility basis and delaying its disclosure would provide competitors less information about a particular company's operations. Thus, this approach would help to partially alleviate the competitive harm that EPA's proposal would cause to fertilizer manufacturers.

**Commenter Name: William C. Herz**

**Commenter Affiliation: The Fertilizer Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 14**

**Comment:** EPA must include in its regulatory flexibility analysis the costs to industry resulting from EPA's overly broad conclusion that all greenhouse gas reporting rule inputs to equations are "emission data" and allow for meaningful comment. Similar to the case with emissions reported under the Rule, EPA needs to reevaluate its broad interpretation of emission data in the context of inputs to emission equations in accord with the Regulatory Flexibility Analysis. Of course, these costs exist; if the disclosure of the information is without competitive or economic costs, then the information would not likely qualify as trade secret at all.

**Commenter Name: Ray Niemiec**

**Commenter Affiliation: Texas Instruments Incorporated**

**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**

**Comment Excerpt Number: 4**

**Comment:** TI strongly believes that merely interpreting the definition of "emission data" to not include inputs to emission equations is not enough. Rather, TI strongly believes that the definition of "emission data" in 40 CFR 2.301(a)(2)(i)(A) itself must be amended by adding to the end of that section the phrase: "provided, however, that any data necessary to derive inputs to emission equations, or any data that are themselves inputs to an emission equation, required to be reported pursuant to 40 CFR Part 98 are not emission data." As discussed in more detail below, this commonsense amendment would not, among other things, preclude making public actual emissions data, source information, or EPA or other GHG emission factors, nor would it constrain the intent of Congress to ensure that useful emissions data, i.e., actual emissions and their sources, are publicly available.

TI believes that its proposed amendment to the definition of “emission data” is absolutely necessary given that, at least in the case of the semiconductor industry, virtually all data in the “inputs to emission equations” data category (Table 2, 75 Fed. Reg. 39097) is CBI.

TI believes that our proposed amendment of the term “emission data” is logical, does not diminish the substance of the definition, and is reasonable and sufficient for purposes of Part 98. Specifically, TI believes that the core meaning of the “emission data” definition remains intact, namely, that the identity, amount, and frequency of actual GHG emissions are reported to EPA and can be made available to the public. Further, TI’s proposed amendment does nothing to limit the breadth of 40 CFR 2.301(a)(2)(i)(C) related to source information.

Further, the existing definition of “emission data” does not specifically include “inputs to emission equations” – it is only EPA’s proposed interpretation that would further broaden the definition to include such data. TI strongly believes that inputs to emission equations are not “necessary to determine” (and do not themselves include) the identity, amount, frequency, concentration, and other characteristics (related to air quality) of emissions from a source. To the contrary, under the MRR, the identity of GHG emissions, the amount and frequency of GHGs emitted, and several other characteristics (such as the global warming potential) of GHG emissions are clearly non-CBI “emission data” that are required to be reported and can be made public. (See, e.g., 40 CFR 98.93 and 98.96).

Even if certain inputs to emission equations were “necessary to determine” certain unidentified characteristics of GHG emissions from a source, EPA is not bound by the Clean Air Act to define such inputs as “emission data.” The Clean Air Act does not define “emission data,” rather, EPA defines “emission data” in 40 CFR 2.301(a)(2). Expanding the definition of “emission data” to include “inputs to emission equations” would unnecessarily subject TI and many other companies to the likelihood of substantial competitive harm due to the broad reporting requirements of the MRR.

To conclusively eliminate such likelihood of substantial competitive harm, TI strongly believes it is necessary to amend the definition of “emission data” to exclude inputs to emission equations. Congress gave EPA no direction regarding the prescribed scope of “emission data.” EPA clearly has the authority and discretion to amend its own definition of “emission data.” Given the breadth of the MRR reporting requirements and the absolute prohibition on finding “emission data” to be trade secret under section 114(c), EPA should adopt TI’s proposed amendment to protect TI and many other businesses from the likelihood of substantial competitive harm engendered by the public release of inputs to emission equations under the MRR.

As a necessary corollary, EPA should make a determination that the data category “Inputs to Emission Equations” in Table 2 is “Data that are not emission data but are CBI.” These changes to the Proposed CBI Rule would protect companies such as TI from public disclosure of CBI that may otherwise be considered “emission data” under the interpretation proposed by EPA.

It is important to note that amending the “emission data” definition will not alter the MRR requirement to submit such data to EPA. As a result, EPA will continue to be provided with and have access to all information required to be submitted and retained by GHG emitters under the MRR, whether it is deemed emission data or not. Moreover, EPA will retain all of its rights and

privileges under section 114 to conduct inspections, require recordkeeping, and otherwise access CBI data related to the MRR.

Defining “emission data” to not include emission equation inputs in the GHG reporting context would be consistent with prior EPA interpretations of the scope of emission data. For the semiconductor industry, the MRR requires, for the first time ever, the collection and reporting of an unprecedented amount of information, much of which is CBI. The semiconductor industry is somewhat unique in that certain raw material and process data are trade secret information because such data are directly related to proprietary product “recipes.” Processes and recipes are developed and modified to provide improved process performance across wafer uniformity, particle performance, and cost of ownership. These metrics drive yield, pricing, cost, and are important trade secret information because TI maintains MOAs that directly prohibit our suppliers from divulging this information to our competitors.

Further, defining “emission data” to not include emission equation inputs is not contrary to the statutory goals of section 114. EPA would still receive CBI under the MRR, which would allow EPA to develop state implementation plans and performance standards, and carry out other provisions of the Clean Air Act (see 42 U.S.C.A. 7414(a)).

**Commenter Name: Ray Niemiec**

**Commenter Affiliation: Texas Instruments Incorporated**

**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**

**Comment Excerpt Number: 7**

**Comment:** Added to the sensitivity regarding inputs to emission equations is the fact that section 114(c) of the Clean Air Act prohibits emission data from being considered trade secret information. This creates the reality that, if interpreted by EPA to be emission data, inputs to emission equations data would be publicly released and likely cause substantial harm to TI’s (and many other businesses’) competitive position.

**Commenter Name: Ray Niemiec**

**Commenter Affiliation: Texas Instruments Incorporated**

**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**

**Comment Excerpt Number: 10**

**Comment:** TI believes that, for the semiconductor industry, several unique circumstances would warrant EPA’s reconsideration of a CBI determination under the case-by-case approach set forth in 40 CFR 2.301, which incorporates, with some modification, 40 CFR 2.201 – 2.209. For example, if for some reason EPA does not adopt TI’s proposed amendment to the “emission data” definition, a case-by-case confidentiality determination should be made by EPA each time CBI that could be considered “inputs to emission equations” is submitted under the MRR. All inputs to emission equations are either CBI standing alone, or would allow competitors to derive CBI using non-CBI emission equation inputs and actual GHG emissions reported. This is true for the semiconductor industry and TI specifically, but TI believes that this would also be true for several other industries where process and raw material data are key proprietary information, which if released publicly, would constitute the release of trade secret information that would be likely to substantially harm the competitive positions of the businesses that must report such information under the MRR.

**Commenter Name: Ray Niemiec**  
**Commenter Affiliation: Texas Instruments Incorporated**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**  
**Comment Excerpt Number: 12**

**Comment:** [W]hile TI appreciates EPA’s efforts to make categorical front-end determinations regarding whether MRR-reported data is CBI or not for efficiency purposes, there can be no “one-size-fits-all” approach to making confidentiality determinations for the 40+ industrial sectors subject to the MRR. Certainly not with respect to the semiconductor industry, where process changes and new products involving trade secret “recipe” changes, changes in yields, and pricing models are frequent and key to fostering innovation. Certain CBI is required to be reported under the MRR, and making such information public would likely lead to substantial competitive harm to TI. . . . TI’s competitors would be extremely interested in obtaining TI’s process technology information to increase their market share to the detriment of TI, and process technology information is so valuable in the semiconductor industry that companies have engaged in industrial espionage to obtain such information. Under the MRR, a substantial amount of trade secret CBI, particularly inputs to emission equations, are proposed to be made public by EPA. TI strongly believes that such information should not be considered “emission data” and not be made public in order to avoid the substantial likelihood of harm to TI’s competitive position.

Again, TI is focused not on all five proposed “emission data” categories in the Proposed CBI Rule, but rather only the “inputs to emission equations” category. It is this one proposed category that, because of the language in section 114(c), would automatically be precluded from confidentiality protections if deemed by EPA to be “emissions data.” And, because data in that category is CBI, it needs the added protection of the case-by-case process to determine confidentiality should EPA decide not to adopt TI’s uncomplicated and straightforward amendment to the “emission data” definition.

**Commenter Name: Ray Niemiec**  
**Commenter Affiliation: Texas Instruments Incorporated**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**  
**Comment Excerpt Number: 13**

**Comment:** TI believes that grouping data elements into categories may be a more efficient, economical approach to making confidentiality determinations. However, TI strongly believes that there can be no “one-size-fits-all” approach to making confidentiality determinations for the 40+ industrial sectors subject to the MRR. Complicating the categorical approach is the fact that section 114(c) of the Clean Air Act prohibits all “emission data” from being considered trade secret information by EPA. Without the section 114(c) prohibition, even certain categories of emission data could be considered CBI if warranted. However, EPA is challenged to work within the framework of the statute passed by Congress and, unfortunately, must now reconcile the extremely broad reporting requirements under the MRR, which EPA has adopted in part under its section 114 authority, with the language in section 114(c).

TI’s strongly preferred approach, which is logical and straightforward, would not diminish the substance of the “emission data” definition, and would allow the public to obtain all necessary and relevant information about GHG emissions and their sources, is the correct solution to the



tension between the MRR and section 114(c). Consistent with TI's proposed amendment to the definition, the only change TI suggests to the Proposed CBI Rule data categories is for EPA to determine that the data category "Inputs to Emission Equations" in Table 2 is "Data that are not emission data but are CBI." These changes to the Proposed CBI Rule would protect companies such as TI from public disclosure of CBI that may otherwise be considered "emission data" under the interpretation proposed by EPA and lack adequate protection due to section 114(c).

Notwithstanding TI's preferred approach of amending the "emission data" definition, and in conjunction with retaining the case-by-case process for making confidentiality determinations, TI would support efforts by EPA to incorporate language into the final CBI rule that would allow source (industry) category-specific confidentiality determinations within certain proposed data categories. Specifically, TI believes that if EPA decides not to adopt TI's suggested approach to addressing CBI that are "inputs to emission equations," EPA should allow semiconductor-specific confidentiality determinations to be made within that category.

TI appreciates EPA's efforts to simplify and streamline the confidentiality determination process with respect to information required to be submitted under the MRR. However, the language of section 114(c) and the proposed data category "inputs to emission equations" creates a critical pinch point for the semiconductor industry (and, TI suspects, for many other industries as well). Specifically, that proposed data category, when overlaid upon the Part 98, Subpart I reporting requirements, will result in the public release of information that will likely cause substantial competitive harm to TI (and TI suspects for many other industries as well).

**Commenter Name: None**

**Commenter Affiliation: The Federal Trade Commission**

**Document Control Number: EPA-HQ-OAR-2009-0924-0065.1**

**Comment Excerpt Number: 4**

**Comment:** The FTC is concerned that the EPA's proposal to designate "inputs to emission equations" data as public "emission data" and the EPA's characterization of certain capacity and operational status information as non-CBI could injure consumers by harming market competition (not merely individual competitors). [Footnote: FTC has recognized that information exchange facilitated by a merger in otherwise concentrated petroleum markets can by itself lead to anticompetitive effects. See *In re TC Group, L.L.C.*, FTC Docket No. C-4183 (Jan. 25, 2007) (acquisition of partial interest in two of three independent terminaling companies in the southwestern United States could cause anticompetitive effects due to information exchange); *In re Chevron Corp.*, FTC Docket No. C4144 (June 10, 2005) (Chevron's acquisition of Unocal's reformulated gasoline patents would allow Chevron greater opportunity than Unocal would enjoy alone to coordinate with refining competitors to raise the price for reformulated gasoline)]. Sharing highly sensitive data under the auspices of a government-mandated reporting program may be as likely to lead to anticompetitive behavior as sharing that data by private agreement.

...

Because the disclosure of competitively sensitive business information can have adverse consequences for consumers, the FTC urges the EPA to consider the implications for competition when it decides what data should be publicly released under the proposed rule. Specifically, the FTC urges the EPA to consider designating as CBI – at least initially – "inputs

to emission equations,” which can reveal capacity, capacity information in the data category “unit/process ‘static’ characteristics,” and forward-looking operational information in the data category “unit/process operational characteristics.” The EPA can then determine the confidentiality status of those data elements whose competitive sensitivity varies by industry.

**Commenter Name: None**

**Commenter Affiliation: The Federal Trade Commission**

**Document Control Number: EPA-HQ-OAR-2009-0924-0065.1**

**Comment Excerpt Number: 5**

**Comment:** In some cases, sharing information among competitors may increase the likelihood of collusion or coordination on matters such as price or output. [Footnote: FTC/DOJ Guidelines for Collaborations Among Competitors §3.31(b)]. Coordinated interaction among competitors includes collusive agreements, but it can also include conduct not necessarily condemned by the antitrust laws [Footnote: This includes parallel accommodating conduct by rivals in which “each rival’s response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence, nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms.” FTC/DOJ Horizontal Merger Guidelines §7]. Firms that engage in coordinated interaction are better able to predict, even absent explicit agreement, how rivals will react to price changes [Footnote: The FTC recognizes that rivals in the petroleum and other industries collect market intelligence to anticipate and respond to rivals’ output and pricing decisions. See, e.g., *In re Chevron Corp.*, FTC Docket No. C-4023, Analysis of Proposed Consent Order to Aid Public Comment (Sept. 7, 2001) (“Integrated refiner-marketers carefully monitor the prices charged by their competitors’ retail outlets, and therefore can readily identify firms that deviate from a coordinated or collusive price.”)]. The antitrust agencies have explained how coordinated interaction harms consumers: “[c]oordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm’s incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm’s incentive to raise prices by assuaging the fear that such a move would lose customers to rivals.” [Footnote: FTC/DOJ Horizontal Merger Guidelines §7].

The potential for information disclosure to harm competition will depend on the structure of the affected market and the type of information disclosed [Footnote: 31 See *Todd v. Exxon Corporation*, 275 F.3d 191, 199 (2d. Cir. 2001) (quoting *U.S. v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16 (1978)) (“A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of [the information disclosed.]”)]; see also FTC/DOJ Guidelines For Collaborations Among Competitors §3.31(b)].

The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals’ responses to price change or other competitive initiative. Markets are more vulnerable to coordinated conduct if each firm’s rivals can promptly and confidently observe its behavior. Market factors that support this ability and increase the likelihood of coordination include transparency, concentration, entry barriers, homogeneous products, and low elasticity of demand.[Footnote: FTC/DOJ Horizontal Merger Guidelines §7]. Many of these

market factors are present in industries covered by the EPA's rule. [Footnote: For instance, in relevant geographic markets with few players, the FTC has expressed concerns about mergers or acquisitions in the petroleum industry that would reduce the number of competitors necessary to engage in tacit or overt collusion. See, e.g., *In re Dan Duncan*, FTC Docket No. C-4173, Consent Agreement and Order (2006) (in merger matter, consent agreement ordering divestiture of certain pipeline assets related to salt dome storage for natural gas liquids in Mont Belvieu, Texas – a concentrated market with high barriers to entry – in order to protect competition in that region), available at <http://www.ftc.gov/os/caselist/0510108/0510108.shtm>; *In re Dow Chemical*, FTC Docket No. C-4243 (2009) (consent agreement regarding Dow Chemical's acquisition of Rohm and Haas, which implicated glacial acrylic acid, butyl acid, ethyl acrylate, acrylic latex polymers for traffic paint, and hollow sphere particles throughout North America – all concentrated markets with high barriers to entry), available at <http://www.ftc.gov/os/caselist/0810214/index.shtml>; *In re BASF, Inc.*, FTC Docket No. C-4253 (2009) (in a merger involving the production of pigments globally – a concentrated industry with high barriers to entry – FTC ordered BASF to maintain the viability of certain assets so as to preserve competition in the relevant market). Additional examples of FTC orders involving industries subject to the GHG reporting requirements may be obtained through the FTC Competition Enforcement Database, available at <http://www.ftc.gov/bc/caselist/industry/index.shtml>.]

Information disclosures raise particular competitive concerns when the information contains details about output, production capacity, production rates, current price and cost data, and other business plans [Footnote: See FTC/DOJ Guidelines for Collaborations Among Competitors §3.31(b) (describing potential harm to competition when firms disclose competitively sensitive data); see also Susan S. DeSanti and Ernest A. Nagata, *Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, 63 *Antitrust L.J.* 93 (1994) (describing activities that make it easier for parties to coordinate on price or engage in tacit collusion)]. Disclosure under the proposed rule of the “inputs to emission equations,” which can reveal capacity and capabilities, other capacity information, and forward-looking operational status would increase transparency in the affected industries. In many instances, the actual output of a unit could be made public. In other cases, the amount of feedstock used, the intermediate product produced, or the unit's capacity would be made public. As a result, collusion or coordination could become more likely as firms are better able to predict one another's behavior.

For example, improved information on the capacity and capabilities of a rival's facility can make it easier for a firm to anticipate how the rival will react to any strategic changes it makes. More information about a rival's output also will increase a firm's ability to detect when a rival deviates from the agreement, which need not be explicit. In contrast, without output information, it would be difficult for a firm to determine whether a price decrease is due to a fall in overall market demand or an increase in output from a rival deviating from the agreement.

**Commenter Name: None**

**Commenter Affiliation: The Federal Trade Commission**

**Document Control Number: EPA-HQ-OAR-2009-0924-0065.1**

**Comment Excerpt Number: 7**

**Comment:** The information on operating conditions, inputs, and outputs that would be made public through disclosure of “inputs to emission equations” data could also give a firm added

insight into its rivals' cost structures. In addition to increasing the likelihood of collusion, this information can decrease the competitiveness of a bidding process. In this case, the disclosed information can allow a firm to better anticipate rivals' bids, which may lead it to bid less aggressively, resulting in increased prices. Therefore, disclosed information that would allow rivals to learn more about the underlying costs of their competitors has the potential to harm competition and consumers through higher prices. This can be true even when the information is one or two years old in industries where firms do not regularly upgrade their facilities. If a unit has not been upgraded, the underlying economics of the unit are unlikely to change and therefore the public release of older data may still threaten competition.

**Commenter Name: None**

**Commenter Affiliation: The Federal Trade Commission**

**Document Control Number: EPA-HQ-OAR-2009-0924-0065.1**

**Comment Excerpt Number: 8**

**Comment:** The EPA may wish to consider an interpretation of "emission data," as that term is used in the Clean Air Act and defined by EPA regulation, that allows the agency to classify inputs to emission equations as CBI. EPA regulations define "emission data" as "information necessary to determine the . . . amount . . . of any emission . . . ."

Inputs to the emission equations may not be "necessary to determine" the amount of emissions because EPA will be releasing the verified amounts to the public. [Footnote: See *Natural Resources Defense Council v. Leavitt*, Civ. No. 04-01295, 2006 WL 667327, at \*4 (D.D.C. 2006) ("[S]trict interpretation of the 'necessary to determine' requirement [for emission data] is warranted in order to ensure that the exception does not swallow the rule.").]

Assuming this interpretation of "emission data" is consistent with the Clean Air Act, classifying inputs to emissions equations as CBI would be an effective way to balance the Act's policy goals of promoting transparency and protecting competition. Publicly releasing the verified, total amount of emissions by unit would achieve the Act's purpose regarding public disclosure, while keeping sensitive business information confidential would achieve the Act's stated goal of protecting CBI. The Commission urges the EPA to interpret the Clean Air Act and related regulations in a way that gives sufficient weight to the Congressionally-authorized goal of protecting market competition for the benefit of consumers [Footnote: The Congressionally authorized goal of protecting competition can be seen in the Clean Air Act's protection of CBI and the federal antitrust laws' prohibition against data sharing that facilitates explicit or tacit collusion and harms consumers. See *Todd*, 275 F.3d at 198-99 (explaining that information exchange among competitors can constitute an antitrust violation even absent an explicit agreement among them)].

**Commenter Name: Glen E. Davis**

**Commenter Affiliation: Mississippi Lime**

**Document Control Number: EPA-HQ-OAR-2009-0924-0049.2**

**Comment Excerpt Number: 10**

**Comment:** Monthly or annual emission factors concerning lime product produced/sold, calcined byproduct/waste sold, calcined byproduct/waste not sold provide competitors with a means to "back-calculate" potential and actual throughput, which is highly sensitive information.

Emission factors can be combined with emissions data (e.g., tons/yr) to determine either the actual or potential facility production capacity. This information is secret, and it would again violate bedrock antitrust laws for competitors to exchange current capacity information of this nature.

**Commenter Name: M. Lindsay Ford**

**Commenter Affiliation: Parsons, Behle & Latimer on behalf of Utah Business Change Coalition**

**Document Control Number: EPA-HQ-OAR-2009-0924-0028.1**

**Comment Excerpt Number: 2**

**Comment:** The regulatory definition of “emission data” includes “information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source.” 40 CFR § 2.301(a)(2)(i)(A). This definition appears to capture inputs to emission equations, which would prevent confidential treatment for such data. However, the definition of “emission data” excludes certain types of information from the definition (i.e., information concerning research or products/methods to be marketed). See 40 CFR § 2.301(a)(2)(ii). One approach for narrowing the definition of emission data would be to add language to section 2.301(a)(2)(ii) specifically excluding inputs to equations used to calculate GHG emissions under 40 CFR Part 98.

**Commenter Name: Arline M. Seeger<sup>70</sup>**

**Commenter Affiliation: National Lime Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0023.1**

**Comment Excerpt Number: 2**

**Comment:** Even if section 114(c) properly governs CBI treatment of GHG information, EPA’s longstanding regulatory definition of “emissions data” excludes the GHG throughput and proprietary production data that EPA now seeks to make publically available [Footnote: Hereinafter in these comments, inputs to GHG equations are referred to as “throughput data” (e.g., rates of raw material use (e.g., fuel) or production (e.g., lime)). This is the same term used to refer to such data in EPA’s other emissions inventory programs -- notably the National Emissions Inventory (NEI)]. In 1976, EPA defined “emission data” as follows: “(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics . . . of any emission which has been emitted by the source . . . ; (B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics . . . of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and (C) A general description of the location and/or nature of the source to the extent necessary to identify the source and distinguish it from other sources . . . . 40 C.F.R. § 2.301(a)(2)(i) (emphasis added).” Because EPA has not promulgated an ambient air quality standard for GHGs, or associated limitations for GHGs, it is clear that paragraph (B) of the above

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<sup>70</sup> Comments submitted by the National Lime Association were incorporated by reference by the Mississippi Lime Company (EPA-HQ-OAR-2009-0924-0049).

definition does not apply. Instead, EPA is asserting for the first time in its July 2010 proposed rule that GHG emissions, as well as data required to perform emissions calculations (i.e., inputs to the equations) meet the criteria in paragraph (A). This expansive new interpretation of paragraph (A) is unnecessary, unwarranted, and runs counter to thirty-five years of federal and state practice.

**Commenter Name: Frederick R. Harnack**  
**Commenter Affiliation: United States Steel Corporation**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0054.1**  
**Comment Excerpt Number: 2**

**Comment:** The expansion of the term “emissions” to include secondary information as deemed necessary solely in U. S. EPA judgment, and the subsequent public distribution of the information by U. S. EPA, is an arbitrary and capricious act that goes beyond the regulatory authority of the agency. Greenhouse Gases (“GHG”) are not subject to emission limits or similar regulations. The GHG Mandatory Reporting Rule (“GHG Rule”), the only current regulation of GHG, may be best characterized as an inventory reporting exercise; that is: Requiring only the quantity of GHG emitted by specific sources as stipulated in the various subparts of the rule. The U. S. EPA has a regulatory right to require accurate reporting under GHG Rule, and may investigate any given report to determine such accuracy, but the wholesale publication of private information used by regulated entities to make reports is beyond the scope of what is required under the rule.

**Commenter Name: William C. Herz**  
**Commenter Affiliation: The Fertilizer Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**  
**Comment Excerpt Number: 2**

**Comment:** The Fertilizer Institute (TFI) believes that EPA has taken too broad a view as to what constitutes “emission data” in the context of the Greenhouse Gas Reporting Rule. EPA’s preamble to the proposed determination emphasizes the Agency’s commitment to “transparency” but is remiss in failing to emphasize the critical importance Section 114 of the Clean Air Act attaches to protection of trade secrets. Indeed, trade secret protection is the primary thrust of Section 114(c) of the statute. The emissions data is an exception contained in a four-word parenthetical. As a matter of legal principle, it is an exception and should be interpreted cautiously and narrowly. Indeed, it is also not apparent how production information used to calculate emissions qualifies as “emissions data” by any common sense use of that term as Congress used it. At bottom, the Clean Air Act requires EPA to protect trade secret information other than emissions data, and EPA should be mindful that Congress purposely prohibited the Agency from requiring disclosure of trade secrets that are not emissions data.

**Commenter Name: Keith Adams and Brian Keck**  
**Commenter Affiliation: Air Products and Chemicals, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**  
**Comment Excerpt Number: 2**

**Comment:** Section 114(c) of the Clean Air Act (CAA) requires that “[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that

upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) \* \* \* if made public, would divulge methods or processes entitled to protection as trade secrets \* \* \*, the Administrator shall consider such record, report, or information or particular portion thereof confidential \* \* \*.” 40 CFR Section 2.301(a)(2)(i)(B) defines “emission data” as “[i]nformation necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions, which under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source).” Information that is “emission data” is an exception to the general rule that confidential business information is protected from public disclosure.

EPA’s proposed rule would interpret the term “emission data” in an unprecedented way, saying that inputs to emission equations, which potentially are company trade secret process information, are “emission data” and accordingly not confidential. EPA has asked in the preamble for comments on whether this should be interpreted more narrowly. Air Products believes that the language of CAA Section 114(c) as well as federal case law interpreting that language and the federal regulations support a much more narrow reading of “emission data.”

**Commenter Name: Homer Hine**

**Commenter Affiliation: RSR Corporation**

**Document Control Number: EPA-HQ-OAR-2009-0924-0026.1**

**Comment Excerpt Number: 1**

**Comment:** EPA seeks comments on whether this proposed CBI determination is consistent with the language and policy of Section 114(c) of the Clean Air Act. For the reasons set forth below, RSR submits that the proposal is not consistent with Section 114(c) and must be revised to protect competitively sensitive information that has long been treated as CBI. EPA’s proposal would greatly expand the scope of the term “emissions data” to include all information used in making the calculations EPA has set forth as the only way to comply with EPA’s GHG reporting rule unless a company has a continuous emissions monitoring (“CEMS”) system in place, which RSR does not. All information swept into this category would be, under the terms of the proposed determination, automatically disclosed to the public – and to competitors. This change would include categories of information that the notice acknowledges have great competitive sensitivity and have consistently been treated as confidential business information, such as production process and throughput data. In fact, EPA notes that disclosure of this kind of information could allow competitors to infer market share, production cost, or pricing structure information and “could be detrimental to a firm’s competitiveness by revealing confidential process information and operational and marketing strategies,” 75 Fed. Reg. at 39114, 39115.

In view of statutory language that provides a clear exception to disclosure in the case of information that “if made public, would divulge methods or processes entitled to protection as trade secrets,” which EPA has interpreted to include confidential business information, the proposed CBI determination would not be consistent with the language or intent of Section 114(c). Additional regulatory language, which recognizes that CBI should not be made public if doing so is “likely to cause substantial harm to the business’s competitive position,” see 75 Fed. Reg. at 39101, further reinforces that inappropriateness of EPA’s current proposal.

The notice offers three potential justifications for this expansive change: (1) disclosure promotes transparency and public confidence in the data, allowing the public to verify emissions data (75 Fed. Reg. at 39097, 39110), (2) proceeding under EPA’s established approach of making case-by-case confidentiality determinations would delay release of the data to the public and policy makers and impose administrative burden on the Agency (75 Fed. Reg. at 39102), and (3) under a prior policy determination, data that are “necessary to determine” the identity, amount, frequency, or concentration of emissions reported by a facility as “emission data,” and EPA now proposes to classify as “necessary” any data used as inputs in EPA’s method for calculating GHG emissions (75 Fed. Reg. at 39100). None of these arguments outweighs the statutory recognition of the importance of protecting CBI. Section 114(c)’s explicit recognition of the need to protect competitively sensitive information while making clear that “emission data” must be disclosed reflects a careful balancing of two goals and congressional intent to make the actual emissions data public without compromising information that businesses need to keep from their competitors in order to promote the public good of efficient competition. Confidential internal process and production information, while of little use to members of the public unfamiliar with industrial production is the kind of information EPA’s notice acknowledges “provides insight to [to competitors] into a firm’s operational strengths and weaknesses,” 75 Fed. Reg. at 39115. “Having such information could allow competitors to narrow the competition by adjusting their prices to the further detriment of the reporting company, or to formulate other competitive strategies or corporate acquisition strategies to the detriment of the reporting company,” *id.* Similarly, forced disclosure of production data “could enable competitors to devise strategies to steal specific customers or even key employees” and “could lead to distortions in the market and ...expose reporting parties to disadvantageous market conditions,” *id.* It is for these reasons that businesses guard the confidentiality of their production and process information and why it has consistently been treated by EPA and other federal and state agencies as CBI.

While there is no question that companies are willing to provide this information to EPA as underlying data components, used in compiling reportable emissions data that will be made available to the public, it does not of itself constitute emissions data and must be managed as CBI. General policy interests in transparency, reducing administrative burden, or the broadest conceivable interpretations of a term cannot outweigh the statute’s explicit recognition of the need to protect CBI.

**Commenter Name: Mark A. Erman**

**Commenter Affiliation: Pepper Hamilton LLP on behalf of Verallia**

**Document Control Number: EPA-HQ-OAR-2009-0924-0037.1**

**Comment Excerpt Number: 1**

**Comment:** Verallia applauds EPA’s decision to solicit public input on the regulatory interpretation of “emissions data” as it relates to data used to determine GHG emission at 40 CFR 2.301 (*i.d.* at 39105). We believe, however, that the proposed rule subverts Congress’s attempt to protect trade secrets when it seeks to categorically determine that certain raw material usage data loses its status as “Confidential Business Information” (CBI) when that non-emission data is used to calculate emissions. Specifically, the rationale for treating raw material data as CBI as articulated in the Preamble to the rule at 75 Fed. Reg. 39116 [Footnote: “Rationale for Proposed Determination. “EPA proposes to determine that the data elements in this data category are CBI under CAA section 114 (c) because the disclosure of these data could cause



substantial harm to the competitive position of businesses reporting these data. Releasing these data would likely be detrimental to the operational and marketing strategies of the reporting facilities.” 75 Fed Reg. at 39116.] applies equally to such data regardless of whether it is used as an “input” to calculate emissions or not. The Preamble specifically recognizes as CBI the following data used in glass making: “Annual quality of carbonate base raw materials charged (40 CFR part 98, subpart N)” (id.), but presumably would not accord such protection to the data if a CEMS were not used to calculate emissions.

EPA should narrowly interpret the existing interpretation of emissions data to categorically exclude such raw material usage data or retain the case-by-case provisions of 40 CFR Sections 2.201 through 2.215 that provide for a proper balance of the interests of public disclosure against the competing costs and risks to the reporting entity. While Congress clearly excluded “emissions data” from protection at 42 U.S.C. 7414(c), that action only requires the public disclosure of data quantifying the emissions to the atmosphere. More importantly, it does not compel, in all instances, the disclosure of underlying data used to quantify those emissions when that underlying data otherwise constitutes a trade secret. In fact, given Congress’s stated intent to not require disclosure of trade secrets, any expansion of the plain meaning of “emissions data” (e.g., mass rate or concentration data) must be very carefully and narrowly considered to avoid causing the very disclosure of proprietary information that Congress sought to avoid, especially if there is little need for exposing that underlying data to business competitors. While the underlying data used to quantify emissions will not always require protection as CBI, EPA should not define “emissions data” in a way that distorts Congressional intent and compels disclosure regardless of the associated cost to the reporting entity.

**Commenter Name: Thomas P. Diamond**<sup>71</sup>

**Commenter Affiliation: Semiconductor Industry Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**

**Comment Excerpt Number: 4**

**Comment:** For each of the 11 “Direct Emitter” data elements, EPA provides only a very brief explanation of the rationale for its proposed determination of whether the category qualifies as “emission data” and/or CBI. See 75 Fed. Reg. 3910739117. In particular, for the “Inputs to Emission Equations” category, EPA provides the following rationale for its proposed determination that such data are “emission data”: “Emission data is defined in 40 CFR 2.301(a)(2) as information necessary to determine the identity, amount, frequency, concentration, . . . of any emission which has been emitted by the source . . . .” Consistent with this definition of emission data, EPA considers inputs to emission equations to be “information necessary to determine . . . the amount” of any emission emitted by the source.” 75 Fed. Reg. 39109.

This “explanation” of EPA’s rationale is in fact nothing more than a restatement of the regulatory definition of “emission data” and a conclusory statement that “inputs to emission equations” are “emission data.” It therefore provides no explanation of the basis upon which EPA concludes that all “inputs to emission equations” are “necessary to determine” the amount

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<sup>71</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

of emissions. As explained in Section IV.A of these comments, neither the CAA statute nor the implementing regulations compel this conclusion.

EPA provides no further substantive explanation of this proposed determination for the “Inputs to Emission Equations” category, and provides absolutely no analysis of or justification for applying this blanket, prospective determination across all industry sectors. [Footnote: EPA does note that its proposed determination “is consistent with” its 1991 Notice of Policy document in which it “considered the emission rate, emission concentration, and emission density or molecular weight to be emission data and therefore releasable to the public.” 75 Fed. Reg. 39109. While this document (“Disclosure of Emission Data Claimed as Confidential Under Sections 110 and 114(c) of the Clean Air Act.” 56 Fed. Reg. 7042 (Feb. 14, 1991)) provides examples of information EPA considers “emission data,” it does not address whether all “inputs to emissions equations” are “emission data” and therefore provides no support for this proposed determination in the Proposed CBI Rule.] Moreover, despite SIA’s prior comments highlighting the highly sensitive nature of its GHG use and emission data, EPA does not recognize or discuss the potential effects of this determination on the semiconductor industry.

**Commenter Name: Thomas P. Diamond<sup>72</sup>**

**Commenter Affiliation: Semiconductor Industry Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**

**Comment Excerpt Number: 10**

**Comment:** EPA’s Proposed Determination That All Inputs to the Emission Equation in Subpart I Are “Emission Data” Is Not Compelled by the Clean Air Act or by EPA’s Implementing Regulations. EPA has, with no justification or analysis, proclaimed that all Subpart I data elements that are “inputs to emission equations” are “emission data” that must be made available to the public. However, this conclusion is in no way compelled by the language of either the statute or the Act’s implementing regulations at 40 C.F.R. 2.301. Moreover, this conclusion is contrary to the paradigm established by EPA in the recently finalized Tailoring Rule of the need to consider very carefully how to integrate regulate GHGs under the existing CAA regulatory scheme.

The CAA Statute Does Not Compel a Determination that all “Inputs to Emission Equations” are “Emission Data” Subject to Public Disclosure. Section 114(c) of the CAA provides that information submitted to comply with a CAA requirement shall be treated as confidential and not made available to the public as long as such information: a) “if made public, would divulge methods or processes entitled to protection as trade secrets of such person” [Footnote: EPA has interpreted “trade secrets” to include confidential business information. See 75 Fed. Reg. 39100, citing 40 Fed. Reg. 21987, 21990 (May 20, 1975)] ; and b) does not constitute “emission data.” [Footnote: Under CAA § 114(c) any “records, reports, or information” obtained by EPA under § 114(a) “shall be available to the public, except that upon a showing . . . that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets . . . , the Administrator

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<sup>72</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

shall consider such record, report, or information or particular portion thereof confidential . . . .’ 42 U.S.C. § 7414(c)]. The statute, however, does not define “emission data.”

Under the circumstances, EPA is legally compelled to give meaning to the statutory term “emission data” that is “reasonable” – with reasonableness gauged not only by how EPA has applied the term in its over three decades of exercising authority under the Act, but also how EPA has proposed to apply it within the current context. [Footnote: See *United States v. Haggart Apparel Co.*, 526 U.S. 380, 392 (1999) (where an agency’s statutory interpretation “fills a gap” in the statute, the interpretation must be reasonable in light of the legislature’s revealed design” for the statute) (internal quotation marks and citations omitted); see also *Regions Hosp. v. Shalala*, 522 U.S. 448, 456 (1998) (holding similarly that where an agency’s “reading fills the gap or defines a term” it must do so “in a reasonable way in light of the Legislature’s design.”)] Moreover, EPA has the obligation to explain the basis and rationale for finding its proposed approach a “reasonable” one.

Notably, no longstanding EPA position exists that all inputs to emissions calculations qualify automatically as “emissions data.” [Footnote: In several places in the Proposed CBI Rule Preamble, EPA cites its 1991 guidance document “Disclosure of Emission Data Claimed as Confidential Under Sections 110 and 114(c) of the Clean Air Act.” 56 Fed. Reg. 7042 (Feb. 14, 1991) as supporting its proposed determinations. However, this document also was released long before EPA ever considered regulating GHG’s under the CAA. Moreover, although this document provides examples of information EPA considers “emission data,” it does not address whether all “inputs to emissions equations” are “emission data” and therefore provides no support for its proposed determinations in the Proposed CBI Rule]. Indeed, judicial decisions do not support this result. [Footnote: See *RSR Corp. v. Environmental Protection Agency*, 588 F. Supp. 1251 (N.D. Tex. 1984) (holding that certain information submitted under the CAA, which could be used to calculate emissions, was not “necessary” to calculate emissions where alternatives exist that would avoid the release of CBI); *NRDC v. Leavitt*, 2006 U.S. Dist. LEXIS 13326 (D.D.C. Mar. 14, 2006) (holding that information on “stockpiles” of chemicals was not “necessary” to calculate the “amount, frequency, concentration, or other characteristics” of emissions). These cases are addressed in Section IV.B of these comments]. Under the circumstances, EPA has an even clearer legal obligation to explain itself. [Footnote: *Nat’l Black Media Coal. v. Fed. Commc’ns Comm’n*, 775 F.2d 342, 355-56 (D.C. Cir. 1985) (“it is . . . a clear tenet of administrative law that if the agency wishes to depart from its consistent precedent it must provide a principled explanation for its change of direction.”); *Nat’l Fed’n of Fed. Emples., Local 951 v. FLRA*, 412 F.3d 119, 121 (D.C. Cir. 2005) (“Of course, agencies may depart from precedent, but ‘an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.’”)(quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)); *Graphic Commc’ns Intern. Union, Local 554 v. Salem-Gravure Div. of World Color Press, Inc.*, 843 F.2d 1490, 1493 (D.C. Cir. 1988) (“Agency decisions that depart from established precedent without a reasoned explanation will be vacated as arbitrary and capricious.”)].

Moreover, . . . EPA by its own admission, is implementing GHG reporting not for the purpose of determining compliance with any “applicable standard or limitation” under the CAA or for any of the other specified purposes in 114 related to verification of CAA emission compliance for individual emission sources. [Footnote: Pursuant to Section 114(a) of the CAA, EPA may

require emission sources to collect and submit information “for the purpose of”: (i) developing or assisting in the development of any implementation plan under section 7410 or section 7411 (d) of this title, any standard of performance under section 7411 of this title, any emission standard under section 7412 of this title, or any regulation of solid waste combustion under section 7429 of this title, or any regulation under section 7429 of this title (relating to solid waste combustion), (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this chapter . . . ]. Rather, EPA is relying on 114(a)(iii)’s generalized grant of authority to collect data “for the purpose of . . . carrying out any other provision of this chapter.” Even under this general authority, EPA did not promulgate the final GHG Reporting Rule with a particularized “purpose” -- in terms of scope and timeframe -- to either develop regulations under one of the Act’s provisions enumerated in Section 114 or to “carrying out any other provision” of the Act. Instead, EPA describes in the Preamble to the final GHG Reporting Rule a more generalized, open-ended purpose for its information gathering. [Footnote: [see]. . .74 Fed. Reg. 56265].

Under such circumstances, where the information gathered by EPA is exclusively for generalized informational purposes and not to either demonstrate an individual company’s compliance with an emission standard or limitation, or to develop a particular regulation, it is not “reasonable” for EPA to, with absolutely no explanation, adopt an approach that concludes every input to a complex calculation of GHG emissions that intrudes deeply into the semiconductor manufacturing process constitutes “emission data” that must be made public.

Finally, it is important to emphasize that EPA’s proposed determination arises in a novel context: establishing a comprehensive reporting regime for a new set of “air pollutants” (i.e., GHGs) that, unlike the conventional “criteria pollutants” regulated to date by EPA under the CAA, are not expressly addressed by the statute and have never before been subject to its provisions. [Footnote: See e.g., CAA § 107 requiring states to designate attainment and non-attainment areas for the “criteria pollutants” particulate matter, ground-level ozone, carbon monoxide, and lead (42 U.S.C. § 7407) and CAA §§ 401-416, addressing acid deposition control of the “criteria pollutants” sulfur oxides and nitrogen oxides. 42 U.S.C. § 7651 et seq. ] In this novel situation, EPA has an even greater obligation to consider the potential effects carefully of its blanket “emission data” and CBI determinations in the Proposed CBI Rule on the regulated community – and in particular the ramifications to the semiconductor industry of its proposed determination that all “inputs to emission equations” are “emission data.” Yet, as described in Section II of these comments, EPA provides absolutely no substantive analysis of or justification for its proposed determinations. [Footnote: Notably, EPA’s failure in this case to perform the careful analysis necessary to demonstrate the reasonableness of its proposed determinations stands in stark contrast to its recent Tailoring Rule, where the Agency devoted considerably greater effort to evaluate the potential impacts of applying the current PSD/NSR permitting regime to GHG regulatory efforts. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule 75 Fed. Reg. 31514 (June 3, 2010)]. Without such a carefully-considered analysis, EPA’s determination that all “inputs to emission equations” are “emission data” simply cannot qualify as “reasonable.”

**Commenter Name: Thomas P. Diamond<sup>73</sup>**  
**Commenter Affiliation: Semiconductor Industry Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**  
**Comment Excerpt Number: 11**

**Comment: EPA’s Regulations Implementing the Act Also Do Not Compel a Finding that all “Inputs to Emission Equations” are “Emission Data.”**

In the absence of a statutory definition, EPA has adopted a definition of “emission data” at 40 C.F.R. 2.301 to implement CAA 114(c). As recited by EPA in the Preamble to the Proposed CBI Rule, “emission data,” in relevant part, is defined at 40 C.F.R. 2.301(a)(2)(A) as: “information necessary to determine the identity, amount, frequency [or] concentration . . . of any emission which has been emitted by the source.”

The language of this definition is very general and imprecise in nature, such that it cannot be read to compel a finding that all inputs to emission equations are “necessary” to determine the identity, amount, frequency or concentration of emissions.

In particular, the inputs to the semiconductor industry emission equation specified in Subpart I pertain not to “identity”, “frequency” or “concentration” of GHG emissions, but rather to the mass “amount” of emissions. Keying off of the statutory argument, one has to question whether it is “necessary” for detailed and complex --- and competitively sensitive – information be made public as “necessary” to determine the “amount” of emissions. Indeed, given the generalized, non-emissions standard specific purpose of EPA’s GHG reporting rule, it would seem that “information” “necessary” to determine the “amount” of GHG emissions is simply the amount of the emissions of the individual GHGs as reported by an individual semiconductor manufacturing facility and not the underlying and competitively sensitive information used by that manufacturer to determine the emissions.

Moreover, the word “determine” in the definition of “emission data” does not necessarily mean the same thing when applied to the emissions source versus the public, and EPA’s presumption underlying the CBI proposal -- which as described below federal case law rejects -- is that what is “necessary” for the source to comply with the rule is also “necessary” for the public to determine emissions. EPA simply provides no explanation of or justification for this position. In fact, collapsing the public and the source into one entity for purposes of determining whether particular information is “necessary” to determine emissions is neither mandated generally by the statute or the regulations, nor does it comport with the case law.

**Commenter Name: Thomas P. Diamond<sup>74</sup>**  
**Commenter Affiliation: Semiconductor Industry Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**  
**Comment Excerpt Number: 15**

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<sup>73</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

<sup>74</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

**Comment:** EPA is required by law to explain its determinations of whether information collected under the CAA is “emission data.” The definition of “emission data” in 40 C.F.R. 2.301 has never before been interpreted -- by either EPA or the courts -- to mean that every single component of an emission calculation is “necessary” to determine the amount of air pollutant emissions. Indeed, as explained below, this definition has been interpreted narrowly by the federal courts to mean that, where information is not strictly “necessary” to determine emissions – i.e., where emissions can be determined using alternative means not relying on confidential information – that information does not qualify as “emission data” under EPA regulations. Moreover, the federal courts require that any such determination by the Agency of whether information submitted under the CAA is “emission data” must be adequately explained by the Agency.

In *RSR Corp. v. Environmental Protection Agency*, 588 F. Supp. 1251 (N.D. Tex. 1984), to meet Clean Air Act reporting requirements, RSR submitted certain documents to EPA – including an air emissions inventory data form, a federal Air Pollutant Emissions Report, and an EPA inspection/monitoring report – under a claim of confidentiality. *Id.* at 1253. After reviewing these documents, EPA determined that they were the only means of calculating emissions through a material balance calculation and therefore constituted “emission data” not protected from disclosure. *Id.* at 1254. RSR challenged the EPA determination on the basis that, in the explanation of its decision, EPA indicated that other data could potentially have been used to calculate emissions, and therefore the information at issue was not strictly “necessary” to calculate emissions. *Id.* at 1256.

The Court agreed with RSR, finding that EPA’s decision was arbitrary and capricious, and thus improper, because EPA had not “considered and examined all relevant factors and alternatives” so that “release of information claimed to be proprietary could be avoided unless required by statute.” In reaching this conclusion, the court focused on the word “necessary” in the definition of emission data at 40 C.F.R. 2.301(a)(2)(i), holding that, in order for the information claimed as CBI to be truly “necessary” to determine emissions, EPA was required to show that no alternative methods for determining emissions existed that would avoid publication of confidential information. *Id.* Thus, where alternative means existed that would have allowed EPA to determine emissions without revealing CBI, the information considered CBI by the company was not “necessary” to determine emissions, and was not “emission data.” See also *NRDC v. Leavitt*, 2006 U.S. Dist. LEXIS 13326 (D.D.C. Mar. 14, 2006) (citing *RSR* and adopting a similarly strict interpretation of the “necessary to determine” requirement).

Accordingly, the only two federal cases to have squarely addressed the meaning of “emission data” under the Clean Air Act have held that the term “necessary to determine” emissions is to be defined narrowly to include only data actually required to determine emissions. Data are not necessary to determine emissions, and therefore are not “emission data,” if other methods of determining emissions that do not require the disclosure of CBI are available.

Most importantly, the federal cases addressing EPA’s interpretation of “emission data” under 40 C.F.R. 2.301 require that EPA undertake an analysis of its own regulations and clearly explain its rationale for determining that particular data are “emission data.” These cases fall squarely within a long line of federal cases establishing that agencies must adequately explain the reasoning behind their decisions, both in applying their own regulations and in a rulemaking. [Footnote: See e.g., *U.S. Telecom Ass’n v. Fed. Commc’ns Comm’n*, 227 F.3d 450, 460 (D.C.

Cir. 2000)(“It is well-established that an agency must cogently explain why it has exercised its discretion in a given manner and that explanation must be ‘sufficient to enable us to conclude that the [agency’s action] was the product of reasoned decisionmaking.’) (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995) (internal citations omitted)); *Tripoli Rocketry Ass’n v. Bureau of Alcohol, Tobacco, and Alcohol, Tobacco, and Firearms*, 437 F.3d 75, 81 (D.C. Cir. 2006)(“In order to survive under the arbitrary and capricious standard, an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”) (internal citations and quotations omitted); *City of Holyoke Gas & Elec. Dep’t. v. Fed. Energy Regulatory Comm’n*, 954 F.2d 740, 743 (D.C. Cir. 1992)(Agency “must support its decision with enough data to enable . . . a reviewing court, to understand” its decision)].

The need to adequately explain its decision is especially true here, given the higher standard of explanation, relative to the Administrative Procedure Act (APA), created under the CAA statute. In particular, under the APA, all agencies must publish in the Federal Register a notice of proposed rulemaking which “shall include. . .either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. 553(b)(3). Section 307(d)(3) of the CAA, on the other hand, requires a much more detailed notice and explanation of rulemaking under the Act. First, EPA must publish a notice of proposed rulemaking “as provided under [APA] section 553(b).” However, in addition, this notice must be “accompanied by a statement of its basis and purpose” which includes a summary of “(A) the factual data on which the proposed rule is based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) the major legal interpretations and policy considerations underlying the proposed rule.” 42 U.S.C. 7607(d)(3). These detailed criteria impose upon EPA a greater duty to explain and justify its proposed regulations. The statute further requires that this explanation and justification be included in the notice. [Footnote: *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983).]

Indeed, in this situation, EPA should be held to an even higher standard because it is not making an individual case-by-case determination based on the particular facts at hand, but rather a generic, blanket “pre-determination” that will apply to entire categories of data elements and industries. In these circumstances, EPA has an even greater duty to engage in the requisite analysis of its own regulations – including its potential effects on particular industries, such as the semiconductor industry – and to provide a reasoned and well-supported explanation of its decision. On the contrary, EPA has utterly failed to provide any explanation of its rationale in light of the generalized nature of the GHG reporting under the GHG Reporting Rule.

**Commenter Name: Thomas P. Diamond<sup>75</sup>**  
**Commenter Affiliation: Semiconductor Industry Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**  
**Comment Excerpt Number: 13**

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<sup>75</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

**Comment:** Because the result that “inputs to emission equations” are “emission data” is not compelled by the statute or regulations, EPA’s proposed CBI Rule is Arbitrary and Capricious. Where no such conclusion is compelled, EPA’s blanket determination for all industries that all “inputs to emission equations” are “emission data” subject to public disclosure, with no analysis of the potential ramifications of such a determination on the semiconductor industry, or of the industry’s history of treating such data as confidential, is arbitrary and capricious. EPA has Failed to Explain Its Proposed Determinations and has Not Considered the Ramifications of the Proposed CBI Rule to the Semiconductor Industry and Therefore the Proposed CBI Rule Is Arbitrary and Capricious.

**Commenter Name:** Thomas P. Diamond<sup>76</sup>

**Commenter Affiliation:** Semiconductor Industry Association

**Document Control Number:** EPA-HQ-OAR-2009-0924-0039.1

**Comment Excerpt Number:** 14

**Comment:** EPA has Failed to Explain Its Proposed Determinations and has Not Considered the Ramifications of the Proposed CBI Rule to the Semiconductor Industry and Therefore the Proposed CBI Rule Is Arbitrary and Capricious. [I]n the Proposed CBI Rule, EPA has crafted an entire CBI regime for GHGs based on blanket pronouncements that certain classes of information are “emission data” and/or CBI with absolutely no explanation of what information it considered in making the determinations, how or why these determinations were made for the specific data elements. With respect to the semiconductor industry, EPA has proposed to determine that all “inputs to emissions equations” qualify as “emission data” backed up only by conclusory statements that such data are “necessary” to determine emissions. EPA provides no evidence that it has considered the impacts of this proposed determination on the semiconductor industry, which has always treated as highly confidential much of the information required to be submitted under Subpart I of Reporting Rule. Under these circumstances, the Proposed CBI Rule is Arbitrary and Capricious.

Pursuant to CAA 307(d), the validity of rules promulgated under the CAA are judged under the same standard as in the Administrative Procedure Act – i.e., they are subject to reversal if they are found by a court to be “arbitrary, capricious an abuse of discretion, or otherwise not in accordance with the law.” 42 U.S.C. 7607(d). It is well-established law that, for a rule to survive an “arbitrary and capricious” challenge, the promulgating agency “must examine the relevant data and articulate a satisfactory explanation for its action including ‘a rational connection between the facts found and the decision made.’” Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal citations omitted). Further, in reviewing the agency’s explanation, the court “must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment.’” Id. Similarly, “an agency’s decisions” are to be subject to “a thorough, probing, in-depth review” and are subject to reversal if “there is no accompanying explanation of the agency’s decision.” RSR Corp. v. Environmental Protection Agency at 1254 (internal citations omitted). “The agency must have examined the relevant data, explained the evidence which is

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<sup>76</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).



available and offered a rational connection between the facts found and the choice made.” Id. at 1254-55. [Footnote: See also *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 313 (D.C. Cir. 1992) (“our task is to determine whether the agency has articulated a rational connection between its factual judgments and its ultimate policy choice . . . .”)(internal citations and quotations omitted); *Eagle-Picher Indus., Inc. v. Eenvtl. Prot. Agency*, 759 F.2d 905, 921 (D.C. Cir. 1985)(“Under the arbitrary and capricious standard we look to see if the agency has examined relevant data and has articulated a rational explanation for its action.”); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132-33 (D.C. Cir. 2007) (“The Administrative Procedure Act instructs courts to set aside agency action ‘found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. We therefore require more than a result; we need the agency’s reasoning for that result. Even when we agree with an agency’s ultimate judgment, ‘[i]n administrative law, we do not sustain a ‘right-result, wrong-reason’ decision of an agency. We send the case back to the agency so that it may fix its reasoning or change its result.’” *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132-33 (D.C. Cir. 2007) (internal citations and quotations omitted)(emphases added)].

Here, where EPA has proffered no explanation or justification for its proposed determinations for specific data elements, and has provided no evidence in the Proposed CBI Rule that it has considered the ramifications of its proposed blanket determinations on the semiconductor industry, it has failed to establish a “rational connection between the facts found and the decision made.” As such, the Proposed CBI Rule is arbitrary and capricious. . . .

The need for EPA to justify and provide a rational basis for its “emission data” and CBI determinations is especially critical for the semiconductor industry, which as detailed in these comments, is unique with respect to the potential harm that could result to a company’s business position from the public dissemination of certain data required under Subpart I of the Reporting Rule that EPA has deemed either “emission data” or non-CBI.

**Commenter Name: William C. Herz**  
**Commenter Affiliation: The Fertilizer Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**  
**Comment Excerpt Number: 5**

**Comment:** TFI believes that EPA has erroneously concluded that the “Inputs to Emission Equations” Category, in general, and the inputs required for the equations set forth in Subparts C, G, V, and Z, in particular, are “emission data” and not afforded protection from disclosure pursuant to CAA § 114(c) and 40 CFR § 2.301.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.2**  
**Comment Excerpt Number: 3**

**Comment:** We strongly support EPA’s definition of emissions data to include all equation inputs, as this information is “necessary” to determine the amount of emission from a facility. Disclosure of all equation inputs is required by the CAA and EPA regulations and is consistent with past EPA policies and procedures. See 40 C.F.R. 2.301(a)(2)(i). In light of this statutory and regulatory text, EPA has proposed to determine that data required to perform emissions

calculations specified in the direct emitter subparts meet the definition of “emission data.” 75 Fed. Reg. at 39108.

We strongly support this determination as both a legal and policy matter. EPA notes that some subparts of the reporting rule allow affected facilities to choose among several options for calculating their emissions. 75 Fed. Reg. at 39109. EPA decided to allow some facilities to choose not to use direct emissions reporting and use estimation equations instead. Once a facility has chosen to calculate its emissions using an equation, however, the equation becomes the only means of determining its emissions. *Id.* These equations were offered, in part, to ease reporting burdens while providing reasonably accurate data. Having benefited from this trade-off, facilities may not now opt both to reject direct reporting, which is generally more accurate though sometimes more costly, and to shield emissions equation inputs from the public. Having offered this methodological choice, EPA must ensure that it does not defeat the transparency purposes of the rule. EPA therefore properly concludes that “since the data inputs required by the selected equation are needed to perform the emission calculation, these inputs to the equation are information ‘necessary to determine’ the calculated emissions.” 75 Fed. Reg. at 39109. We agree. Any narrower interpretation of data “necessary to determine” facility emissions would shield from the public eye some data that are absolutely essential for determining such emissions. At minimum, then, the plain language of the statute and regulations require that all equation inputs are “emission data,” and we strongly support EPA’s proposed determination consistent with this understanding.

EPA’s proposed determination that equation inputs are “emission data” is likewise consistent with past EPA interpretations. For instance, in its Notice of Policy on Public Release of Certain Data Elements Submitted under CAA sections 110 and 114, 56 Fed. Reg. 7042 (Feb. 21, 1991), EPA concluded that, while confidentiality determinations are typically made on a case-by-case basis, certain types of data would always be “emission data” within the meaning of section 114. See 56 Fed. Reg. at 7043. Included in this subset of data, EPA determined that emission parameters like emission rate, concentration, boiler or process design capacity, and emission estimation method were emission data. *Id.* Moreover, EPA explicitly concluded that the list was not exhaustive and that in context of future rulemakings, other data might be found to constitute emission data. *Id.* The 1991 notice provides the groundwork for EPA’s determination here that all inputs to emissions equations as emission data.

Disclosure of all input data is likewise consistent with past EPA policies and programs. Data submitted to EPA’s Acid Rain program, for instance, included data used to calculate annual CO<sub>2</sub> emissions. Facilities did not make confidentiality claims on this data, and EPA has made all of the data public. EPA’s proposal to determine that equation inputs are emission data covers similar data to the information that EPA has made publicly available under the Acid Rain program. EPA’s disclosure practices under this program, then, provide further support for EPA’s proposed disclosure of all equation inputs as emission data.

Defining equation inputs as emission data and requiring their disclosure also reinforces the policies at the heart of the reporting rule. In past initiatives like the Acid Rain program, EPA noted that disclosure of emission data would help to “ensure transparency and promote public confidence in the accuracy and completeness of the data.” 75 Fed. Reg. at 39103. Transparency, accuracy, and completeness are equally critical with respect to the reporting rule. Moreover, the structure of the reporting rule – both in terms of its economy-wide coverage and in terms of its

flexible emissions calculation procedures – makes transparency essential to ensure that the public can confidently make comparisons among diverse facilities using different emissions calculation procedures.

As both a legal and policy matter, then, EPA should finalize its determination that all equation inputs constitute emission data.

**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 16**

**Comment:** Mexichem planned to use the mass-balance approach proposed under Subpart L. However, if Mexichem chooses to use that method, the following information would be made available to the public, according to the Memorandum “Data Category Assignments for Reporting Elements.”

1. Data used in calculating the absolute uncertainties, including quantities and their uncertainties.
2. Data used in calculating the relative uncertainties, including quantities and their uncertainties.
3. Total mass of each reactant fed into the production process.
4. Total mass of each reactant permanently removed from the production process.
5. Total mass of the F-GHG product removed from the production process and destroyed.
6. Mass of each by-product generated.
7. Mass of each by-product destroyed at the facility.
8. Mass of each by-product recaptured and sent off-site for destruction.
9. Mass of each by-product recaptured for other purposes.

If Mexichem chooses to use one of the proposed emission factor methods to determine emissions, the following information would be made available to the public, according to the Memorandum “Data Category Assignments for Reporting Elements.”

- 1) The activity used to estimate emissions (e.g., tons of product or tons of reactant consumed).
- 2) Emission factor for each process vent.

It is clear that the EPA understands the need to maintain confidentiality of production/throughput data and raw materials consumed, as indicated on pages 39115 and 39116 of the proposed rule and the fact that production/throughput data for most suppliers is proposed to be considered as confidential business information. In fact, the EPA states, “Disclosing a facility’s production/throughput data could be detrimental to a firm’s competitiveness by revealing confidential process information and operational and marketing strategies” and in regards to raw materials that “disclosure of these data could cause substantial harm to the competitive position of businesses reporting these data.” The above-referenced data that Mexichem would be

required to report is raw materials consumed and data that can be used to determine production/throughput. Mexichem understands that the EPA proposes to determine that production/throughput and raw materials consumed that are not inputs to emission equations are not "emission data" and therefore confidential business information under section 114 of the CAA. However, the data are what they are, regardless of whether they are inputs to calculations or not and their disclosure to the public has the potential to be detrimental to our competitiveness.

**Commenter Name: Dave Stirpe**

**Commenter Affiliation: Alliance for Responsible Atmospheric Policy**

**Document Control Number: EPA-HQ-OAR-2009-0924-0050.1**

**Comment Excerpt Number: 5**

**Comment:** The fluorochemical industry manufactures various HFCs (and may manufacture PFCs or SF<sub>6</sub>, and HFOs in the future) using highly specific and selective chemical processing. These chemical formulations are extremely confidential and proprietary, and provide substantial economic and competitive advantages to industry participants. Manufacturing and processing of these proprietary formulas generate the desired products as well as various other byproducts and co-products, all of which may be present in process vent streams. Some of the raw materials used may also exist in vent streams from processing units. In fact, any chemical that exhibits a nontrivial vapor pressure will be present in a vent.

EPA's proposal to classify "inputs to Emissions Equations" as non Confidential Business information (CBI) would, by necessity, require public disclosure of all of these various components, and details of the manufacturing processes, allowing process backward-engineering by any party wishing to access the information. The implications are profound for the fluorochemical industry. Any competitor could access, and may be able to duplicate, any other competitor's confidential and proprietary manufacturing knowledge and trade secrets, such as chemical composition of the stream(s), flow rates, pressures, temperatures, etc. The by-product profile can easily be used by one skilled in the art to decipher the catalyst used and operating conditions.

Compromising traditional CBI information, and expanding the definition of "emission data" in this manner will encourage, and provide competitive advantage to facilities outside the United States where such knowledge is protected, or will enable companies operating in countries where intellectual property rights are not respected to simply appropriate proprietary trade secrets. EPA's collection of this in-process information may be the largest expansion ever of CBI information collected under the Clean Air Act. EPA's disclosure proposal of this proprietary and confidential information would negatively impact many US industries and goes far beyond EPA's Congressional mandate to publicly release emissions data.

EPA's proposed rules will require fluorochemical information (See EPA GHG Climate Change Reporting Rules, in particular subparts 00 and L; Subpart L is still pending.) that goes far beyond that currently contained in air permits. The proposal to make this information public may be appropriate for processes where the specific chemical methods are not protected as proprietary trade secrets, but it creates a significant concern for specialty chemicals manufacturing where the specific chemical methods are closely guarded trade secrets. EPA proposes to require that inputs

to emission control devices be provided, and that those inputs be classified as "Inputs to Emissions Equations" and therefore not CBI.

To illustrate the concerns noted above, assume the following hypothetical reaction components:

- 1) Raw materials RMI and RM2 are reacted to create the Product P1;
- 2) Byproducts BP1 and BP2 are also created;
- 3) Co product C1 is also created;
- 4) The reaction efficiency is X%, with the corresponding yield of P1 at Y% and C1 at Z%.

Note that ratios and efficiencies would all vary by reaction and conditions. The vent stream from this reaction process would contain RM1, RM2, P1, BP1, BP2 and C1 depending on their partial pressures and react-ability. Reaction components RM1 and RM2 would be present based on the reaction efficiency. P1 and C1 would be present based on their relative production. A Mass Balance methodology would reveal all these components by volume or weight and, as Inputs to Emissions Equations, would be made public. An Emissions Factor methodology would require consideration of other inputs such as pressures and temperatures of both the reaction and the vent streams.

Of course, the actual conditions and number of chemicals produced are much more complex and numerous than the example above. However, the sheer quantity of chemicals in the various steams would, if revealed, convey even more specificity about the proprietary chemical technology employed. In a normal operation, this vent stream would be combined with several others as input to an emissions control device, but the disaggregated and individual streams would be evaluated separately making that specific information an "Input to Emissions Equations."

Under current Air Permits, only the final emissions are considered non-CBI. An outside entity considering the above information would be able to ascertain:

- 1) raw materials being used and their relative proportions;
- 2) reaction efficiency ( $X=Y+Z$  in the example above), which would also potentially provide data related to which catalyst was used;
- 3) C1 ,BP 1 ,BP2 relative amounts;
- 4) specific reaction operating conditions.

A skilled chemist would have little difficulty duplicating the complete reaction conditions. Further, competitors could compare their own processes with any other process to determine economies and, therefore, their competitive position. Since mass flows would also be available through either of the calculation methods, complete production and sales mass would no longer be subject to CBI. These are key components of competitive chemical manufacturing for U.S. markets, frequently leading to a competitive "edge" for one manufacturer versus another. This CBI issue does not exist with chemicals imported into the U.S. market.

The Alliance requests that EPA reconsider its determination that "inputs to Emissions Equations" be considered non-CBI, since the release of such information would irreparably harm the US domestic fluorochemical manufacturing industry. We believe that CBI protection for this information is critical for competitive positions in the US.

**Commenter Name: Lorraine Gershman<sup>77</sup>**

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 7**

**Comment:** Subpart EE – Titanium Dioxide Production. We oppose EPA’s proposal not to treat several data elements as CBI, including:

...

(2) [Monthly] Calcined petroleum coke consumption

...

(4) Monthly carbon content factor of petroleum coke

...

Each of the highlighted data elements above should be designated as CBI. By making such information publicly available, competitors would be able to “reverse engineer” and calculate the titanium dioxide production at each facility.

**Commenter Name: Lorraine Gershman<sup>78</sup>**

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 13**

**Comment:** Subpart X – Petrochemical Production. We oppose EPA’s proposal not to treat several data elements as CBI, including:

(1) Monthly volume or mass of each gaseous, liquid and solid feedstock and product [40 CFR 98.246(a)(4)]

(2) Monthly carbon content of each gaseous, liquid and solid feedstock and product [40 CFR 98.246(a)(4)]

(3) Monthly molecular weight of each gaseous feedstock and product [40 CFR 98.246(a)(4)]

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<sup>77</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

<sup>78</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

Each of the highlighted data elements above should be designated as CBI. By making such information publicly available, competitors would be able to “reverse engineer” and calculate the petrochemical production operation at each facility.

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 22**

**Comment:** Subpart EE – Titanium Dioxide Production. There is significant competitive business risk from leakage of confidential information on the DuPont titanium dioxide production process if that information is not adequately protected. We know that competitive TiO<sub>2</sub> manufacturers (in China, for example) are actively seeking insight into chloride TiO<sub>2</sub> technology, knowledge they do not have today. Furthermore there are different types of chloride technology, and to maintain our competitiveness, we guard our own approaches even from other chloride producers. Eventually others, such as foreign manufacturers, may gain an understanding and master it in some form, but we as a nation should not hasten that day.

The U.S. Government may be unwittingly conspiring in industrial espionage benefiting foreign powers by relaxing CBI considerations. The chloride process for TiO<sub>2</sub> manufacture was invented on U.S. soil and is today the source of employment for thousands of U.S. workers and millions of dollars of U.S. exports. . . .

The following items should not be made available to the public for the reasons stated:

. . .

2) §98.316(b)(6) –Calcined Petroleum Coke Consumption: Consumption data can be used by our competitors to ascertain cost and other confidential aspects of our operations and should therefore be held as trade secret information. Three rows above, EPA lists "Annual consumption of calcined petroleum coke (No CEMS)" as CBI. It's conflicting why this line item should be made available to public.

. . .

4) §98.316(b)(9) –Monthly Carbon Content Factor of Petroleum Coke: We successfully utilize special coke in our processes. Release of the carbon content factor would allow our competitors to determine both the type and probable suppliers of the coke used by DuPont, to our potential detriment.

**Commenter Name: Karin Ritter<sup>79</sup>**

**Commenter Affiliation: American Petroleum Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**

**Comment Excerpt Number: 1**

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<sup>79</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

**Comment:** The proposed rule incorrectly determines that all of the data elements in the "Inputs to Emission Equations" category are "emissions data." In fact, many of the data elements labeled "inputs to emissions equations" are not emissions data at all, but instead constitute detailed facility process and operational information, including information about fuel supplies (quantity and origin), unit throughput, and production volumes. These data elements cannot be considered "emissions data" because they provide no information regarding the characteristics of any actual emissions nor do they provide information about the particular identity or location of the emission source. Because these data elements instead divulge sensitive business information, . . . they must be protected.

Section 114(c) of the CAA requires that "[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by a person that records, reports, or information, or particular part thereof, (other than emission data) if made public, would divulge methods or processes entitled to protection as trade secrets, the Administrator shall consider such record, report or information or particular portion thereof confidential .... " EPA has interpreted this statutory requirement "to afford confidential treatment to both trade secrets and confidential business information." 75 Fed. Reg. at 39100.

The CAA and EPA's implementing regulations provide for a narrow exclusion of confidential treatment for information that is strictly deemed "emission data." *See* CAA § 114(c), 42 U.S.C. § 7414(c); 40 C.F.R. § 2.301(e). EPA's proposed rule is fundamentally flawed as it would unlawfully and without precedent expand the type of information that constitutes "emission data," thereby enabling the release of CBI.

EPA's regulations, purporting to interpret the Clean Air Act, define emission data as: "(A) Information *necessary to determine* the identity, amount, frequency, concentration, or other characteristics ... of any emission which has been emitted by the source ... ; (B) Information *necessary to determine* the identity, a mount, frequency, concentration, or other characteristics ... of the emissions which ... the source was authorized to emit ... ; and (C) A general description of the location and/or nature of the source to the extent *necessary to identify* the source and distinguish it from other sources ...." 40 CFR § 2.301 (a)(2)(i)

In addition, certain information: "shall be considered to be emission data only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

(A) Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and (B) Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used." 40 C.F.R. § 2,301(a)(2)(ii).

EPA's interpretation in the proposed rule providing for the release of confidential inputs to emissions equations violates the Clean Air Act, and must be reconciled with both the Act and the regulations. Such an expansive interpretation under the existing regulations necessarily would render the regulations inconsistent with the Act itself.



At the outset, API agrees with EPA's finding that "because there are no established GHG emission limits for the facilities subject to Part 98," the type of information that qualifies as emissions data under part (B) of the regulation, namely "emissions that sources are *authorized* to emit," *id.* § 2.301(a)(2)(i)(B) (emphasis added), does not apply. 75 Fed. Reg. at 39100.

Thus, data reported under the MRR will only properly be considered emissions data if it fits within part (A) or (C) of the above regulatory definition, namely if it is "necessary to determine the identity, amount, frequency, or concentration of the emission emitted by the reporting facility, or if it provides a description of the source's location or nature, which helps identify and distinguish it from other sources." 40 C.F.R. § 2.301(a)(2)(i)(A),(C). EPA has misapplied and gone far beyond the scope of this regulatory definition with respect to the direct emitter category called "Inputs to Emissions Equations."

Many of the data elements in the "Inputs to Emissions Equations" category do not provide information that is necessary to determine the characteristics of emissions emitted by the direct emitter or the source's location or nature. There is a clear distinction between facilities' actual emissions, which may not be subject to CBI, and EPA's requested information on, for example, annual throughput information and production rates. This information, which is among the elements categorized as "inputs to emissions equations," is not "necessary to determine" the characteristics of any emissions or the identity of the source. *See* 40 C.F.R. § 2.301(a)(2)(i)(A), (C). Importantly, before concluding that the requested information is "necessary" to determine emissions or source, EPA must consider all relevant factors, "including available alternatives, so that release of information claimed to be proprietary could be avoided unless required by statute." *RSR Corp. v. EPA*, 588 F. Supp. 1251, 1256 (D.C. Tex. 1984) (remanding to EPA to determine if information was "necessary to determine" emissions). A "strict interpretation of the 'necessary to determine' requirement is warranted in order to ensure that the exception does not swallow the rule." *NRDC v. Leavitt*, Civ. No. 04-01295, 2006 WL 667327, at \*4 (D.D.C. March 14, 2006).

For these reasons, EPA's proposed rule would unlawfully expand what constitutes "emissions data" beyond the scope of the regulations.

**Commenter Name:** Karin Ritter<sup>80</sup>  
**Commenter Affiliation:** American Petroleum Institute  
**Document Control Number:** EPA-HQ-OAR-2009-0924-0057.1  
**Comment Excerpt Number:** 2

**Comment:** The Clean Air Act Does Not Support the Expansive Inclusion of All Data Elements In the Inputs to Emissions Equations Category.

EPA cannot promulgate or interpret regulations in a manner that violates the Clean Air Act. Although the Clean Air Act requires that "emission data" be made available to the public, it does not define "emission data." EPA has stated that it "believes that the purpose of this statutory disclosure requirement is to enable members of the public to inform themselves in order that they

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<sup>80</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

may initiate, or participate on an informed basis in, proceedings by which standards and limitations under the Act are enforced." 41 Fed. Reg. 36902,36922 (Sept. 1, 1976). EPA in the proposed CBI rule, however, goes far beyond the language of the Clean Air Act and its own prior interpretations.

In promulgating its regulations governing confidentiality determinations, EPA made clear that the definition of emission data should further the purpose of this statutory requirement. *See id.* Under EPA's regulations, emission data includes only "data concerning actual (experienced) emissions, data needed to calculate emissions that were allowable under standards or limitations (to determine compliance)[, which EPA has determined is not applicable here,] and information necessary to specify the identity and location of the source." *Id.* Because the type of detailed facility process and operational information that EPA has categorized as "inputs to Emissions Equations" is not related to actual, experienced emissions and is not necessary to specify the identity or location of the relevant source, it does not fall within EPA's regulatory definition. Instead, much of this data is exactly what EPA *describes-inputs* to emissions equations that will be used for verification, not emissions data itself. This distinction is significant as the former reveals sensitive and confidential business information regarding critical plant processes and operations without providing the public any additional relevant information regarding the scope of the emissions themselves. Notably, to the extent that EPA may believe that the requested information could be determined to fit within the existing regulatory definition of "emission data," the existing regulation exceeds EPA's statutory authority by establishing an unreasonably broad definition of "emission data."

**Commenter Name: Lorraine Gershman**<sup>81</sup>

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 15**

**Comment:** Subpart N – Glass Production We oppose EPA’s proposal not to treat several data elements as CBI under this subpart, including: . . .

(2) Annual quantity of carbonate based-raw material charged (§98.146(b)(2)). This information could be used directly to determine the production throughputs and manufacturing scheme since it provides specific information on raw material additions.

(3) Carbonate-based mineral mass fraction of carbonate-based raw material charged to a furnace (§98.146(b)(3)). This information could be used directly to determine the production throughputs and manufacturing schemes as it provides the fraction of certain raw materials that is provided.

(4) Fraction of calcination for carbonate-based raw materials (§98.146(b)(4)). This information could be used in conjunction with other information to determine production throughputs.

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<sup>81</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), PPG Industries, Inc. (EPA-HQ-OAR-2009-0924-0040), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

**Commenter Name: Lorraine Gershman<sup>82</sup>**  
**Commenter Affiliation: American Chemistry Council (ACC)**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**  
**Comment Excerpt Number: 2**

**Comment:** Subpart TT – Industrial Waste Landfills. There are several data elements in industrial waste landfills that EPA has deemed as non-CBI that we believe should be CBI. Unlike municipal waste landfills, industrial landfills are usually created to dispose of certain process waste. Knowing key information about waste streams would allow a competitor to determine production information at the affected facility. These elements are: . . .

(3) Under equation TT-2, waste disposal and production quantity by year

(4) Under equation TT-2, average disposal factor.

**Commenter Name: Robert A. Reich**  
**Commenter Affiliation: DuPont Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0030**  
**Comment Excerpt Number: 15**

**Comment:** We are addressing the three subparts related to fluorinated gases, Subparts L, O and OO in this single section of comments as they are interrelated. DuPont believes that its Fluorochemical and Fluoropolymer operations data should be considered business confidential. Production rates, raw material identities, and flow rates, impurity generation, product or raw material yield rates, and the type of process are all information that DuPont treats as CBI.

In the Fluorochemical and Fluoropolymer industry, production capacity or actual production rates are not published. If competitors have access to our production rates, in conjunction with market demand they can ascertain our idle capacity, and assess our pricing strategy. Competitors can then set their prices based on knowledge of DuPont pricing. Customers will be able to assess how tight DuPont supply is, and negotiate price accordingly. Fluorochemical and Fluoropolymer supply and demand is not published. EPA's proposal would allow foreign nations such as China insight into our business' supply and demand profile, better enabling them to design and install optimum sized facilities that would likely impact U.S. manufacturing market share. Knowledge of the raw materials and/or type of process operated, yield information, and details on by-product generation rates will enable competition to ascertain our cost to manufacture, and enjoy an unfair advantage in setting price. For example, DuPont Fluorochemicals and Fluoropolymers insist on confidentiality agreements with all our major suppliers so that raw material identities are protected. Many products can be manufactured from a variety of feedstocks. For instance HFC-152a can be manufactured from vinyl chloride or acetylene. Knowledge of the raw material

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<sup>82</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

feedstock provides competitors key insight into our process, our cost to manufacture, and associated pricing.

The following is a list of DuPont Fluorochemicals and Fluoroproducts specific confidentiality concerns with the proposed CBI definitions along with an explanation of the sensitive nature of the information. . . .

10) Subpart O – §98.156(b)(1) – Annual mass of HFC-23 fed into the thermal oxidizer – Destruction of HFC-23 is equivalent to production which can correlate to HCFC-22 production quantity. Subpart OO includes as confidential.

11) Subpart O – §98.156(a)(7) to (a)(11) – Annual mass of HFC-23 emitted – DuPont agrees that emissions of HFC-23 are not CBI, but data and calculations used to derive the emissions should be as it is with TRI, and other Air Programs.

12) Subpart O – §98.156(a)(2) – Loss Factor used to account for the loss of HCFC-22 upstream of the measurement – Emission factors in conjunction with TRI emissions of HCFC-22 can be used to back calculate production, or other production activity which is CBI. Competitors can gain unfair advantage in understanding our market competitiveness.

**Commenter Name: Karin Ritter<sup>83</sup>**

**Commenter Affiliation: American Petroleum Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**

**Comment Excerpt Number: 6**

**Comment: "Inputs to Emissions Equations" Contain Highly Sensitive Operational Information That Are CBI.**

Many of the data elements that EPA includes in its "Inputs to Emissions Equations" category are CBI.

These data elements divulge information about facility processes and operations, including information about fuel supplies, unit throughput, and production volumes. Disclosing these data elements would reveal confidential business information related to ownership interests, processes employed by individual facilities, and business practices at individual facilities. If a competitor is provided access to this information, it can obtain a competitive advantage over the facility by reverse engineering information about the facility's operations and business strategies. This competitive information must be protected as CBI in the final rule. All five elements for evaluating whether information is entitled to confidential treatment are satisfied. *See* 40 C.F.R. § 2.208.

First, with these comments, API members are properly asserting their business confidentiality claim with respect to this information. *Id.* § 2.208(a). Second, API members have taken and will continue to take reasonable measures to protect the confidentiality of the data elements in this category. *Id.* § 2.208(b). Notably, the Department of Energy's Energy Information

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<sup>83</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

Administration (EIA) appropriately provides confidential treatment for facility-level fuel production and distribution information. *See* Petroleum Supply Monthly, Appendix B:

Explanatory Notes, March 2007. Indeed, EIA is prohibited from making public or sharing disaggregated or entity-specific fuel use or distribution data. *See* 44 U.S.C. § 3501 note at Sec. 208 (preventing disclosure of information in identifiable form where information was submitted under a pledge of confidentiality). In addition, voluntary GRG inventory programs-such as the Department of Energy's Voluntary Reporting of Greenhouse Gases Program, authorized by Section 1605(b) of the Energy Policy Act of 1992, The Climate Registry, and the California Climate Action Registry-do not require reporting facilities to disclose the details behind their GRG emissions data. Very limited information beyond the emissions results, are made available to the public. The detailed information is, however, subject to third party verification, and it is the verification process that provides confidence in the information.

Third, EPA could not otherwise obtain this data without the consent of the relevant businesses. 40 C.F.R. § 2.208(c). The cost or difficulty associated with obtaining information is an important consideration in assessing whether it is "reasonably obtainable." *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45,52 (D.C. Cir. 1981). These data are not reasonably obtainable. For example, the quantity of fuel gas combusted in each combustion unit or group of combustion units is not information that is routinely reported and is not currently available to the public. Under the California reporting rule, for instance, fuel quantity for each combustion device is recognized as CBI. API members are claiming fuel quantity as CBI in their California emissions report. Fourth, "[n]o statute specifically requires disclosure of the information" included in the "Inputs to Emissions Equations" category. 40 C.F.R. § 2.208(d). Indeed, EPA has not asserted that the requested information is required by statute.

Fifth, disclosure of the requested information is likely to cause substantial harm to API members' competitive positions. *Id.* § 2.208( e). The disclosure of process-specific information and production volumes would reveal sensitive process capabilities and operational limits. In addition, if that information were combined with other publicly available information, disclosed under air quality permits and CAA Section 112(r) hazard assessments, competitors would have a detailed picture of a facility's operational capabilities. This information could expose a facility's business position, weaknesses, or vulnerabilities, which could then be used by competitors to disadvantage the reporting facility. For example, the disclosure of unit-specific throughputs and unit-specific fuel use could give competitors a detailed understanding of a facility's process capability and create an advantage in optimizing future crude or product supply. Disclosure of fuel use and process volumes would also reveal a refinery's process operational capacity, limits, bottlenecks, and options to reconfigure in response to market change.

Finally, the disclosure of operational data and throughputs would enable equipment/technology providers to quantify the facility's capabilities. This information could be used against the refiner in future negotiations to upgrade or replace its equipment. For these reasons, the "inputs to emission equations" data requested of petroleum refineries should receive confidential treatment.

...

The data elements in [the inputs to emissions equations] category that have been incorrectly identified as emissions data and categorized as "not CBI" . . . include:

- 1) From Subpart A - General Reporting Requirements: any facility operating data or process information used for the GHG emission calculations [40 CFR 98.3(d)(v)];
- 2) From Subpart C - Stationary Combustion: the total quantity, HHV, carbon content, and molecular weight of each type of fuel combusted (as required by Sections 98.36(e)(2)(i), 98.36(e)(2)(ii)(A), 98.36(e)(2)(ii)(C), 98.36(e)(2)(iv)(A), and 98.36(e)(2)(iv)(C));
- 3) From Subpart P - Hydrogen Production: monthly consumption of fuels and feedstocks by type, used for hydrogen production [40 CFR 98.166(b)(2)]; monthly analyses of carbon content for fuels used in hydrogen production [40 CFR 98.166(b)(5)]; monthly analyses of carbon content for feedstocks used in hydrogen production [40 CFR 98.166(b)(5)]; monthly analyses of the molecular weight of gaseous fuels [40 CFR 98.166(b)(6)]; monthly analyses of the molecular weight of gaseous feedstocks [40 CFR 98.166(b)(5)];

...

For Subpart C, the proposed rule would require the disclosure of the quantity of each fuel combusted and the HHV, carbon content and molecular weight of each fuel where emission calculation methodology Tier 2 or 3 is used. This information along with the identification and maximum rate heat capacity of each combustion unit provides competitors valuable trade information by knowing utilization rates of combustion units. Knowing the capacity utilization of energy, competitors could then calculate the production output of production units and of that facility. Competitors could use this information along with the maximum rated and/or annual throughput required to be reported under some subparts to evaluate whether a facility has existing capacity available to increase production and market share or is already at their maximum production and would need to invest capital to expand capacity in order to produce more. Having such information could give competitors insights to make competitive decisions on expanding their own production rates or altering their pricing strategies to the detriment of the reporting company. Further, composition of fuels is sometimes used between fuel producers and customers to determine the value of the fuel and is considered propriety business information.

**Commenter Name: Kevin M. Dempsey**

**Commenter Affiliation: American Iron and Steel Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0048.1**

**Comment Excerpt Number: 5**

**Comment:** The proposed interpretation of the term "emissions data" to include "all data elements that are inputs to equations" under Part 98 is arbitrary and capricious. That interpretation would mandate the public disclosure of highly sensitive information regarding each key input into many iron and steelmaking processes. For example, the Proposed Rule would force the public disclosure of the nature, carbon content, and throughput of molten iron, ferrous scrap, flux, carbonaceous materials, steel produced, slag produced, and other process inputs and outputs of steelmaking furnaces that are using the material balance method in 40 CFR 98.173(b)(ii). Such information is central to determining the performance characteristics of our steel, and the raw materials, additives, and processes used by each company to produce steels with those characteristics is critical to the ability of each company to compete and remain economically viable in today's international marketplace. Deeming that broad range of process information "emissions data" would contradict the established definition of that term. "Emissions

data” is expressly defined to mean “information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission....” 40 CFR 2.301(a)(2)(i).

Precedent confirms that “a strict interpretation of the ‘necessary to determine’ requirement is warranted in order to ensure that the exception does not swallow the rule.” *Natural Resources Defense Council v. Leavitt*, 2006 U.S. Dist. LEXIS 13326 at \*14 (D.D.C. Mar. 14, 2006). But that is exactly what deeming comprehensive information on each input and output to key steelmaking operations to be “emissions data” would accomplish. That information is not “necessary to determine” the “amount, frequency, concentration or other characteristics” of carbon dioxide (CO<sub>2</sub>) emissions from steelmaking units. Rather, total carbon input and output data is all that is “necessary to determine” CO<sub>2</sub> emissions. Only that narrower approach to “emissions data” comports with *RSR Corporation v. EPA*, 588 F. Supp. 1251 (N.D. Tex. 1984). That case involved a request to release process information regarding a secondary lead smelter, including emissions reports and depictions of process flow, emissions points and controls at the facility. EPA determined that information was “emissions data” (and thus not subject to CBI protections) on the theory that it would provide the basis for a “material balance calculation” to determine lead emissions from the smelter. *Id.* at 1255. Emphasizing the “necessary to determine” language, the Court held that decision was arbitrary and capricious. The parallel between that ruling and Proposed Rule’s attempt to deem raw material balance inputs “emissions data” is unmistakable and confirms that modification of the Proposed Rule is required. A narrower approach to “emissions data” is also far more consistent with the purpose of the GHG Mandatory Reporting Rule and obligations established under similar reporting programs. The Reporting Rule is focused on obtaining high-level GHG emissions information to inform policy-level decisions.

**Commenter Name: William C. Herz**

**Commenter Affiliation: The Fertilizer Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 11**

**Comment:** EPA’s assertion that it is acting consistent with its 1991 policy is incorrect. EPA states in the preamble that its proposed determination that all inputs to emissions calculations are emission data is consistent with the Agency’s Policy. 75 Fed. Reg. at 39,109. Notably, the table of emission data fields in the February 21, 1991 Policy does not identify inputs to emission equations as emission data. Rather, it provides that the “emission estimation method” is a type of emission data and, in turn, defines the emission estimation method as “the method by which an emission estimate has been calculated such as material balance, source test, use of AP-42 emission factors, etc.” 56 Fed. Reg. at 7042-7043. This makes sense, as the calculation method is useful to evaluate the precision and accuracy of the reported emissions data (in other words, how emissions are determined can [have a] significant affect the numbers). In contrast, what particular numbers were input to the equation used to make the calculation would seem less crucial.

In the context of the Greenhouse Gas Reporting Rule, the emission equations are a type of “emission estimation method” for greenhouse gases similar to the examples provided in the Policy of material balances and AP-42 emission factors. Thus, applying the 1991 Policy to the Greenhouse Gas Reporting Rule, a source’s method of determining its reported greenhouse gas

emissions (e.g., a monitoring method or an equation) is not subject to confidential treatment by EPA, but the Policy is silent on whether the inputs to the equations are protected from disclosure. If EPA wanted to also provide that the inputs used in the emission estimation method are also emission data and not eligible for disclosure protection, it could have done so in the same section of the Policy. Because it did not, TFI concludes that in 1991, EPA did not envision individual inputs to emission estimation methods as constituting emission data subject to disclosure.

This conclusion is reasonable because the “emission estimation method” in the 1991 Policy is included under the heading of “emissions parameters” that the Agency believes constitute emission data. EPA defines this category of information as being “needed to establish the characteristics of emissions.” 58 Fed. Reg. at 7042. Presumably, this is short hand to mirror the regulatory text that emission data includes “information necessary to determine the identity, amount, frequency, concentration, or other characteristics . . . of any emission which has been emitted by the source . . . .” 40 C.F.R. § 2.301(a)(2)(i). In the context of emissions, the 1991 Policy makes clear that only the “emission estimation method,” and not the inputs to that method, is the “information necessary to determine the . . . characteristics . . . of any emission which has been emitted by the source.” *Id.* As such, EPA’s conclusion that all inputs to the Greenhouse Gas Reporting Rule emission equations are emission data based on reliance of the 1991 Policy is misplaced. In order to proceed with such a revision to the 1991 Policy, EPA must engage in notice and comment rulemaking to afford regulated parties an opportunity to comment on EPA’s change in its long-standing position.

**Commenter Name: Keith McCoy**

**Commenter Affiliation: National Association of Manufacturers**

**Document Control Number: EPA-HQ-OAR-2009-0924-0044.1**

**Comment Excerpt Number: 3**

**Comment:** EPA’s regulations do not support the expansive inclusion of inputs to emissions equations. At the outset, Manufacturers agree with EPA’s finding that “because there are no established GHG emission limits for the facilities subject to Part 98,” the type of information that qualifies as emissions data under part (B) of the regulation, namely “emissions that sources are authorized to emit,” *id.* § 2.301(a)(2)(i)(B), does not apply. 75 Fed. Reg. at 39100. Thus, data reported under the proposed MRR would only properly be considered emissions data if it fits within part (A) or (C) of the above regulatory definition, namely if is necessary to determine the identity, amount, frequency, or concentration of the emission emitted by the reporting facility, or if it provides a description of the source’s location or nature, which helps identify and distinguish it from other sources. 40 C.F.R. § 2.301(a)(2)(i)(A),(C). EPA has misapplied and gone far beyond the scope of this regulatory definition with respect to the direct emitter category called “Inputs to Emissions Equations,” thus failing to properly protect confidential and sensitive business data.

Many of the data elements in the “Inputs to Emissions Equations” category do not provide information that is necessary to determine the characteristics of emissions emitted by the direct emitter or the source’s location or nature. There is a clear distinction between facilities’ actual emissions, which may not be subject to CBI, and EPA’s requested information on, for example, annual throughput information and production rates. This information, which is among the elements categorized as “inputs to emissions equations,” is not “necessary to determine” the characteristics of any emissions or the identity of the source. See 40 C.F.R. § 2.301(a)(2)(i)(A),



(C). Importantly, before concluding that the requested information is “necessary” to determine emissions or source, EPA must consider all relevant factors, “including available alternatives, so that release of information claimed to be proprietary could be avoided unless required by statute.” RSR Corp. v. EPA, 588 F. Supp. 1251, 1256 (D.C. Tex. 1984) (remanding to EPA to determine if information was “necessary to determine” emissions). A “strict interpretation of the ‘necessary to determine’ requirement is warranted in order to ensure that the exception does not swallow the rule.” NRDC v. Leavitt, Civ. No. 04-01295, 2006 WL 667327, at \*4 (D.D.C. March 14, 2006). For these reasons, EPA’s proposed rule would unlawfully expand what constitutes “emission data” beyond the scope of the regulations.

**Commenter Name: Lorraine Gershman**<sup>84</sup>

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 6**

**Comment:** The Clean Air Act, EPA’s regulations, and the 1991 EPA notice support a narrow interpretation of “emissions data” for purposes of Part 98. The purpose of Section 114, in pertinent part, is to allow EPA to require a party to provide information to assist the Agency in developing or implementing an implementation plan under Section 110, emission standards under Sections 111 or 112, etc., or to determine if a person is in violation of those standards or implementation plan. It is not the purpose of Section 114 for EPA to require the submittal of voluminous amounts of data, including CBI, so that EPA can release all of that data to the public in a misguided effort to be “transparent.” Section 114(c) of the CAA requires that “[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) \* \* \* if made public, would divulge methods or processes entitled to protection as trade secrets \* \* \*, the Administrator shall consider such record, report, or information or particular portion thereof confidential \* \* \*.” Congress clearly understood and recognized in Section 114 (c) the importance of protecting trade secret information, specifically stating that methods and processes can be claimed confidential. EPA has correctly interpreted Section 114(c) of the CAA “to afford confidential treatment to both trade secrets and confidential business information.” 75 Fed. Reg. at 39100. Only “emission data” collected by the Agency under Section 114(a) is an exception to the ability to claim information as trade secret. EPA defines “emission data” at 40 CFR Section 2.301(a)(2)(i) as:

Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions, which, under an applicable

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<sup>84</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), PPG Industries, Inc. (EPA-HQ-OAR-2009-0924-0040), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).”

EPA last clarified the type of information that EPA generally considers to be “emission data,” and which cannot qualify as confidential under either Section 114(c) or Section 110, in a notice published almost twenty years ago. In a February 21, 1991 Federal Register notice (56 Fed. Reg. 7042), EPA listed the specific data fields that it considered to be emission data. EPA first identified the data fields related to facility identification, which we do not address in these comments. EPA then listed the data fields needed to establish the characteristics of the emissions or “emission parameters”:

- 1) Emission type (e.g., nature of emissions such as CO<sub>2</sub>)
- 2) Emission rate (e.g., amount released to the atmosphere over time)
- 3) Release height
- 4) Description of terrain and surrounding structures
- 5) Stack or vent diameter at point of emissions
- 6) Release velocity
- 7) Release temperature
- 8) Frequency of release
- 9) Duration of release
- 10) Concentration
- 11) Density of the emissions stream or average molecular weight
- 12) Boiler or process design capacity
- 13) Emission estimation method
- 14) Percent space heat

Hourly maximum design rate

At the end of the Federal Register notice, EPA noted that “after consideration of comments on this policy, a revised policy/determination may be published.” We have been unable to locate the comments submitted on this notice (they are not available electronically and could not be located at EPA) to inform ourselves of the issues raised by commenters for EPA’s consideration. However, it does not appear any revised policy determination has ever been published. ACC notes that the information needed to establish “emission parameters” and therefore is “emission data” includes the emission rate, but not the inputs to the calculation that determines the emissions rate. However, EPA now proposes that all “inputs to emission equations” constitute “emission data,” thereby expanding its interpretation for purposes of the MRR. Contrary to EPA’s instincts to expand its interpretation, ACC believes that the language of CAA Section 114(c), as well as federal case law interpreting that language and the federal regulations, support a more narrow reading of “emission data”, especially when applied to the unprecedented and voluminous amounts of information EPA is requiring to be submitted under Part 98. Moreover, we question the basis for the 1991 Federal Register proposed policy that the “emission rate,” voluminous amounts of information EPA is requiring to be submitted under Part 98. Moreover, we question the basis for the 1991 Federal Register proposed policy that the “emission rate,”

“hourly maximum design rate,” and “boiler or process design capacity” should be considered “emission data.” These pieces of information can be trade secrets, because they can show the amount of production or capacity by a source. Additionally, the submittal of this data is not necessary for a source to comply with Part 98’s reporting of GHG emissions, and the information is not necessary to determine actual emissions or facility identity. If EPA determines this data must be submitted pursuant to Part 98, it should be identified as CBI and protected from public disclosure.

Case law supports a narrow interpretation of “emission data.” We believe that Section 114(c) and case law reviewing EPA’s regulations implementing that section show that Congress tried to strike a balance between the public’s right to access records, reports or other information obtained by EPA pursuant to Section 114(a) and a person’s right to protect certain records, reports or other information from public disclosure because it is CBI. In *RSR Corp. v. EPA*, 588 F. Supp. 1251 (N.D. Tex. 1984) the federal district court took a careful look at CAA Section 114(c) and the definition of “emission data” in 40 CFR Section 2.301(a)(2)(1). The court emphasized the “necessary to determine” portion of Section 2.301(a)(2)(i) in quoting the definition, as follows: “(A) Information necessary to determine the identity, amount, frequency, concentration or other characteristics . . . of any emission . . . ; (B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics . . . of the emissions . . . ; and (C) A general description of the location and/or nature of the source to the extent necessary to identify the source and distinguish it from other sources . . .” 588 F. Supp. 1251, 1255 . In *RSR Corp.*, EPA had claimed that certain documents were disclosable “emission data” because they were necessary to determine emissions through a material balance calculation. The court concluded that EPA’s decision was arbitrary and capricious (and therefore improper) because EPA did not provide any information that EPA considered alternative methods of identifying or measuring pollutants, “so that the release of information claimed to be proprietary could be avoided unless required by statute.” 588 F. Supp. at 1256. The court emphasized the word “necessary” in 40 CFR Section 2.301(a)(2)(i). According to the court, only if certain information is really “necessary” to determine emissions should it be considered “emission data,” and the Agency should consider alternative methods of identifying information to determine emissions, so that confidential information is not compromised. See *NRDC v. Leavitt*, 2006 WL 667327 (D. D.C. 2006) (citing *RSR* and adopting a strict interpretation of the “necessary to determine” requirement).

Of the voluminous amounts of information that EPA is requesting in Part 98, very little rises to the level of information “necessary to determine” actual emissions or facility identity. First, unlike the situation with most EPA air emission rules, Part 98 merely requires the reporting of GHG emissions, not compliance with an emission limit or standard. EPA has neither proposed nor established emission limits or standards for GHGs. Accordingly, much of the data that EPA is requiring facilities to submit to the Agency is not “necessary” pursuant to 40 CFR Section 2.301(a)(2)(i)(A) and (C). Nonetheless, EPA is requiring a facility to submit this additional information, rather than allowing the information to remain onsite and subject to request or review by the Agency as needed. Because this information is not “emission data” and is sensitive information related to chemical manufacturing and production, it is entitled to confidential treatment because disclosure is likely to cause substantial harm to the competitive position of the facilities required to report this information.

We agree with EPA's conclusion that because there are no established GHG emission standards or limitations for the facilities subject to Part 98, §2.301(a)(2)(i)(B) does not apply. 75 Fed. Reg. at 39100. Similarly, because there are no proposed or existing standards or limitations, we believe that the provisions in §2.301(a)(2)(ii) do not apply. However, we note that in subsection (a)(2)(i)(B), EPA allows for a "description of the manner or rate of operation" to be considered "emission data" but only "to the extent necessary" to determine emissions which, "under an applicable standard or limitation, the source was authorized to emit." Subsections (a)(2)(i)(A) and (C), which are applicable to Part 98, do not include as "emission data" the "description of the manner or rate of operation." We therefore may conclude that this arguably sensitive information is only to be considered "emission data" "to the extent necessary" to determine a source's compliance with an applicable standard or limitation.

The proposed rule includes "inputs to emissions equations" as a data field and proposes all of these inputs be considered "emission data." This is a dangerous and totally unnecessary expansion of EPA's interpretation of what constitutes "emission data." These "inputs" are data elements related to process and operational information (e.g., fuels, raw materials, unit throughput, production rates, operating data, process data, etc.) and are not "...necessary to determine the identity, amount, frequency, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source." See §2.301(a)(2)(i)(A). Nor are these inputs relevant to "[a] general description of the location and/or nature of the source to the extent necessary to identify the source and distinguish it from other sources..." Id. at (a)(2)(i)(C). The inputs must be determined to be CBI and protected because they reveal sensitive business information that if publicly disclosed would divulge methods or processes entitled to protection as trade secrets. Moreover, before EPA can conclude that these inputs to emission equations are "necessary" to determine emissions or source, EPA must consider all relevant factors, "including available alternatives, so that release of information claimed to be proprietary could be avoided unless required by statute." RSR Corp. at 1256. A "strict interpretation of the 'necessary to determine' requirement is warranted in order to ensure that the exception does not swallow the rule." NRDC at \*4.

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 6**

**Comment:** In a February 21, 1991 FR notice (56 FR 7642), EPA identified the specific data that it determined to be "emission data." To our knowledge, EPA never published any revisions or retractions to that determination. In that notice, EPA determined that the following business information was considered "emission data" or "emission parameters:" 1) Emission type; 2) Emission rate; 3) Release height; 4) Description of terrain and surrounding structures; 5) Stack or vent diameter at point of emissions; 6) Release velocity; 7) Release temperature; 8) Frequency of release; 9) Duration of release; 10) Concentration; 11) Density of the emissions stream or average molecular weight; 12) Emission estimation method; 13) Percent space heat; 14) Hourly maximum design rate. It is noteworthy that EPA did not include raw data inputs to the calculations used to calculate emission rates or methods, nor did it include key process design variables, key raw material inputs, process efficiencies or yield.

We also believe that it is clear that Congress intended business to be protected from releasing the type of information that EPA is proposing to make publically available. The Agency itself discussed Congressional intent in its response to comments in the preamble to its 1976 confidentiality rules [FOOTNOTE: 41 Federal Register p36922, column 2, Comment 53]: “In order that the actual emissions during a period may be compared with the allowable emissions, it is necessary to know how many input or output units were processed by the facility during the period in question. Otherwise, a person would not know whether or not a source had complied with the emission limitation. In Section 110(a)(2)(F) of the Clean Air Act, as amended, 42 U.S.C. 1857c-5 (a) (2)(F), Congress required that emission data concerning stationary sources be correlated with applicable emission standards or limitations and be made available for public inspection. [A similar provision, requiring that effluent data be "related to" applicable standards or limitations, is found in Section 308( b) of the Federal Water Pollution Control Act, 33 U.S.C. 1318(b).] The Administrator finds that Congress, by employing such language, desired that members of the public be able to know not only the actual emission figures, but also the emissions allowable under applicable standards and limitations.” Thus, the Agency response clarified that production data, raw material feed, etc., would only need be non-CBI if an emission standard or limitation were in that format. The current proposal does not relate to an emission limit or standard, but rather exceeds Congressional intent to include a reporting requirement.

**Commenter Name: William C. Herz**

**Commenter Affiliation: The Fertilizer Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0024.1**

**Comment Excerpt Number: 10**

**Comment:** EPA’s application of the definition of “emission data” to inputs to emission equations is overly broad and leads to inconsistent results. The Fertilizer Institute (TFI) also does not believe that the Agency can make a blanket conclusion that all data elements in the “Inputs to Emission Equations” Category are emission data and not subject to protection from disclosure. EPA generally defines this Category as “data elements such as raw materials consumed, unit/process characteristics, and production/throughput data that are used by a reporting facility as inputs to an emission equation.” 75 Fed. Reg. at 39,108. Continuing on, EPA concludes that because these data elements “are ‘necessary to determine’ the sources’ emissions,” they are “‘emission data’ as defined in 40 CFR 2.301(a)(2)(i).” Id. at 39109. Although not defined in CAA § 114(c), EPA’s confidentiality regulations define “emission data” to include “information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or any pollutant resulting from any emission by the source), or any combination of the foregoing.” 40 C.F.R. § 2.301(a)(2)(i)(A). EPA’s policy has been that the calculation methods -- i.e. the equations used to determine emissions -- must not be kept trade secret but not that underlying production information used to make those calculations must be disclosed. Nor is it apparent what benefit would flow from disclosure of such information, or how that could outweigh the clear interest and purpose of Congress in protecting valuable trade secrets. (Of course, we must presume that there is such trade secret value, since otherwise there is no trade secret to protect and no confidentiality question at all.)

**Commenter Name: Paul Noe**

**Commenter Affiliation: American Forest & Paper Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0034.1**

**Comment Excerpt Number: 4**

**Comment:** EPA has Not Properly Balanced the Benefits of Requiring Input Data Disclosure Against Its Costs.

Even if we concede, for the sake of argument, that the term “emission data” may be ambiguous, that does not give EPA unfettered power – as the proposal suggests – to give it any conceivable meaning. Instead, EPA must strike a reasonable balance between the benefits of a sweeping definition and its costs in damage to other statutory goals.

### The Benefits

In this particular context, the benefits are small. Specifically:

1. GHG emissions have essentially no local or even regional impacts. Accordingly, particularized local data is not needed to evaluate the problems they raise.
2. EPA’s prescribed methods of computing GHG releases from fuel and other material inputs rest on well known sampling and computation techniques. There is no reason to suppose sources will make many mistakes in using them, and no reason to doubt the ability of EPA oversight to provide quality control adequate to the purposes for which the data is collected.
3. “Benchmarking” the GHG emissions performance of one source against another is not a permissible ground for gathering information under §114 and thus not a permissible ground for disclosing it.
4. EPA’s GHG disclosure program will contribute massive amounts of new information to the public debate even without disclosing computation input information. There is no need to push for automatic disclosure of that information without waiting to see whether the other data slated for disclosure will be sufficient.

### (2) The Costs

In judging the reasonableness of EPA’s very aggressive interpretation of “emission data,” we must consider not just the small benefits of that approach but the damage that it would do to the values that CBI protections were established to protect. Here, EPA’s proposal already concedes that the damage would be significant. It does so in two stages. First, in order to be able to make generic decisions on disclosure the Agency assumes in advance that reporting companies have properly claimed CBI status for all the information involved, that they are taking reasonable steps to protect this data, and that no statute specifically requires disclosure of the data. 75 Fed. Reg. 39101. [Footnote: The exact language is as follows: “Because EPA proposes to determine the CBI status of Part 98 data in advance of their submission, EPA assumes in this proposal that the data meet the criteria at 40 CFR 2.208(a) and (b). Specifically, EPA assumes that the reporting facilities have asserted confidentiality claims. EPA further assumes that the reporting facilities are taking and will continue to take reasonable measures to protect the data. The data elements at issue also meet the criterion at 40 CFR 2.208(d).”] No one during the promulgation of the Reporting Rule claimed that the information at issue was available by other means. Indeed, if it had been, EPA would not have had to promulgate the Reporting Rule. Accordingly,

EPA's fourth condition, as set out in 40 CFR 2.208(c), has also been met. In other words, through generic decisions EPA has narrowed the questions it must answer to deny CBI status down to one, namely whether "disclosure of the information is likely to cause substantial harm to the business's competitive position" 40 CFR 2.208.(e). Yet even there, EPA's proposal concedes that the detailed information on fuel use, fuel characteristics, unit activity, and production levels that the Reporting Rule's emission equations require would qualify as CBI if it were not labeled as "emission data." That proposal repeatedly concludes that CBI protections validly apply to information on "actual production data (e.g. raw material consumed or quantity of product produced), or operating efficiency (e.g. amount of product produced per amount of raw material consumed)", 75 Fed. Reg. 39113, see also p. 39103, or on the amount of feedstock consumed broken down by process, see 75 Fed. Reg. 39116. These are precisely the types of verification information required by Subparts C and AA of the Reporting Rule. AF&PA and its members fully agree with these EPA conclusions. Disclosure of this data raises two primary concerns. First is when a competitor knows or can discern the fuels fired at a mill making a competitive product, the amounts actually fired and the firing capacities for each fuel. Generally fuel price is known from general commerce. Knowing fuel price and quantity determines the magnitude of the cost component. Energy is 10 percent (roughly) of the cost of paper and fuel mix (or fuel cost) is therefore a major variable cost. More specific information (i.e., by unit) allows the competitor more discernment. Knowing cost components can give a competitor an unfair competitive advantage in a given market segment. The second concern is that fuel suppliers can use knowledge of energy requirements and fuel firing capabilities to drive up fuel price or fuel contract price during negotiations, affecting the competitiveness of the final product. Against this background, EPA cannot proceed with a generic denial of CBI claims for such data.

**Commenter Name: Keith McCoy**

**Commenter Affiliation: National Association of Manufacturers**

**Document Control Number: EPA-HQ-OAR-2009-0924-0044.1**

**Comment Excerpt Number: 2**

**Comment:** EPA must adopt an appropriate definition of "emission data" to avoid an overly broad and unsupportable loophole that would reveal otherwise protected CBI. The proposed rule unlawfully expands "emission data" to include confidential and protected "inputs to emission equations". The proposed rule incorrectly determines that all of the data elements in the "Inputs to Emission Equations" category are "emissions data." In fact, many of the data elements labeled "inputs to emissions equations" are not emissions data at all, but instead constitute detailed facility process and operational information, including information about fuel supplies (quantity and origin), unit throughput, and production volumes. These data elements cannot be considered "emissions data" because they provide no information regarding the characteristics of any actual emissions nor do they provide information about the particular identity or location of the emission source. Because these data elements instead divulge sensitive business information, they must be protected. Section 114(c) of the CAA requires that "[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by a person that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets . . . , the Administrator shall consider such record, report or information or particular portion thereof confidential . . ." EPA has interpreted this statutory requirement "to afford confidential treatment to both trade secrets

and confidential business information.” 75 Fed. Reg. at 39100. The CAA and EPA’s implementing regulations provide for a narrow exclusion of confidential treatment for information that is strictly deemed “emission data.” See CAA § 114(c), 42 U.S.C. § 7414(c); 40 C.F.R. § 2.301(e). EPA’s proposed rule is fundamentally flawed as it would unlawfully and without precedent expand the type of information that constitutes “emission data,” thereby enabling the release of CBI. EPA’s regulations, purporting to interpret the Clean Air Act, define emission data as: “(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics . . . of any emission which has been emitted by the source . . .; (B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics . . . of the emissions which . . . the source was authorized to emit . . .; and (C) A general description of the location and/or nature of the source to the extent necessary to identify the source and distinguish it from other sources . . . .” 40 C.F.R. § 2.301(a)(2)(i) [Footnote: In addition, certain information shall be considered to be emission data only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation: (A) Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and (B) Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.” 40 CFR 2.301(a)(2)(ii)] EPA’s interpretation in the proposed rule providing for the release of confidential inputs to emissions equations violates the Clean Air Act, and must be reconciled with both the Act and the regulations. Such an expansive interpretation under the existing regulations necessarily would render the regulations inconsistent with the Act itself.

**Commenter Name: M. Lindsay Ford**

**Commenter Affiliation: Parsons, Behle & Latimer on behalf of Utah Business Change Coalition**

**Document Control Number: EPA-HQ-OAR-2009-0924-0028.1**

**Comment Excerpt Number: 1**

**Comment:** The Coalition urges EPA to adopt a narrower interpretation of the definition of “emission data” that does not include all inputs to equations. As EPA recognizes in the preamble, the “Inputs to Emission Equations Category for direct emitters includes all data elements that are inputs to equations; and for some source categories this includes data such as production and raw material quantities and compositions that may be considered sensitive by businesses.” 75 Fed. Reg. at 39105. For example, inputs to the Tier 1, 2 and 3 methodologies for general stationary combustion sources include annual mass or volume of fuel combusted and fuel type. See 40 CFR § 98.33(a)(1)-(3). This information could be used to deduce a facility’s cost structure. Facility level cost structure data is typically considered to be highly sensitive and proprietary. Publication of this type of information can factor into a firm’s competitiveness in the market place and may implicate anti-trust issues. For example, trade associations are required to keep company specific production data confidential and may publish such information only when combined with at least three companies to ensure confidentiality and comply with antitrust laws. Failure to adopt a narrower interpretation of emission data could lead to the publication of information that these associations themselves do not publish in compliance with antitrust laws. We urge EPA to adopt



a narrower interpretation of “emission data” that does not include inputs to emission equations used to calculate GHG emissions. Not all data inputs to GHG emissions calculations would be sensitive for all facilities and not all would meet the confidential business information (CBI) criteria of 40 CFR § 2.208. The EPA, however, should not use a regulatory definition for “emission data” that automatically disqualifies any data inputs from confidential treatment. A narrower interpretation would be a reasonable accommodation between the competing goals of data transparency and protection of sensitive business information. In this case, the potentially severe economic harm, including potential loss of jobs, that could be incurred by businesses if sensitive information is disclosed, together with potential antitrust concerns, outweigh the public’s need for data that do not constitute actual emission data. The narrower interpretation would be sufficient for purposes of Part 98 because the public still would have access to data regarding actual GHG emissions. Moreover, EPA would have access to the inputs to the GHG emission equations and could verify the accuracy of emission calculations.

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 1**

**Comment:** Clean Air Act (CAA) §114 (c) specifically allows a confidential business information (CBI) determination for information other than emissions data (that is, data for actual emissions to the environment) The plain language of the statute expressly provides protection for data “(other than emission data), to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person,…” In claiming broad interpretive authority to make public any information used to calculate actual emissions in addition to the actual emissions values the Agency is overreaching. Sources have consistently labeled critical information as CBI in response to CAA §114 requests for relevant process and production data during development of standards and emission limitations under CAA §111, 112, etc. Moreover, the sorts of process and production data that EPA is proposing to be made public does, in our view, little or nothing to expand the public’s understanding of greenhouse gas emissions. Thus EPA is proposing to take actions that will clearly harm U.S. business and advantage our offshore competition while providing no meaningful environmental benefit.

**Commenter Name: Robert P. Strieter**

**Commenter Affiliation: Aluminum Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0021.1**

**Comment Excerpt Number: 3**

**Comment:** The Aluminum Association disagrees with the Agency's determination in the GHG confidentiality proposal to fail to protect production related data as Confidential Business Information (CBI). While direct emission data is not CBI protected, the Agency takes a great leap to assert that other data related to emissions, such as production levels, should be treated similarly. Production data and related metrics relate mainly to economic performance and competitive interests that the Aluminum Association, and its member companies, believes should be protected at the discretion of the reporting entity. As a trade association, the Aluminum Association goes to considerable lengths to make such company specific data confidential. Furthermore, such data must be protected to avoid anti-trust issues.

Under the proposed rule for GHG reporting (74 Federal Register at 56416, October 30, 2009 under §98.66), the following data elements are required for Primary Aluminum Production facilities, and are utilized to calculate and report emissions (therefore not considered under the EPA proposal to be CBI protected):

§98.66 Data reporting requirements

- (a) Annual aluminum production in metric tons. . .
- (c) The following PFC-specific information on an annual basis: . . .
  - (2) Anode effect minutes per cell-day (AE-mins/cell-day), anode effect frequency (AE/cell-day), anode effect duration (minutes). (Or anode effect overvoltage factor ((kg CF<sub>4</sub>/metric ton Al)/(mV/cell day)), potline overvoltage (mV/cell day), current efficiency (%).)
  - (3) Smelter-specific slope coefficients (or overvoltage emission factors) . . .
- (e) The following CO<sub>2</sub>-specific information for prebake cells:
  - (1) Annual anode consumption. . .
- (f) The following CO<sub>2</sub>-specific information for Soderberg cells:
  - (1) Annual paste consumption. . .
- (g) Smelter-specific inputs to the CO<sub>2</sub> process equations (e.g., levels of sulfur and ash) that were used in the calculation, on an annual basis. . .

Of these reporting elements, the following are considered by the Aluminum Association and its members as potentially CBI for the Primary Aluminum industry reporters: (a),

. . . (c)(2), (c)(3), . . . , (e)(1), (f)(1), and (g). These elements are of CBI concern for the following reasons:

Annual Aluminum Production – is a key indicator of economic performance for companies. The Aluminum Association never publishes company specific production data, and strives to publish such statistics only when combined for at least three companies in order to insure confidentiality and compliance with the antitrust laws. In effect, the EPA proposal to make public aluminum primary production data will lead to the publication of information that the Aluminum Association itself does not publish in compliance with the antitrust laws. PFC Specific Information and Measurement Method – the combination of PFC specific information and the method used to measure such emissions would lead to the ability of competitors to easily back-calculate production levels for primary aluminum companies. In effect, it is essentially the same as publishing production data itself. Annual Anode Production Paste Consumption and Other Smelter Specific Inputs – aluminum production is directly related to the amount of anode consumed during the production process. Reporting of anode consumption data is therefore

equivalent to reporting aluminum production levels. Paste production is the direct input data for calculating anode manufacturing and therefore relates to anode consumption. Similarly, specific metrics such as sulfur and ash, components of paste, also relate directly with anode manufacturing.

**Commenter Name: Bryan Brendle**

**Commenter Affiliation: Portland Cement Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0045.1**

**Comment Excerpt Number: 3**

**Comment:** In the proposal, EPA proposes to classify five data categories as “emission data,” and therefore not subject to CBI protections. With respect to the five categories proposed as “emissions data,” many PCA members are concerned that although the disclosure of specific data points may not, in isolation, raise competitiveness concerns, that “stitching together” certain data over a period of time, including but not limited to unit/process operating characteristics that are inputs to emission equations, may pose competitiveness concerns for cement manufacturers. Portland Cement Association (PCA) opposes disclosure of information which will give market competitors a clear picture of the cost structure associated with a specific product manufactured by a given plant. Disclosure of information, especially related to fuel use, will not only help competitors determine investment obligations and market advantages/disadvantages confronted by other companies, but such disclosure might also raise anti-trust legal issues. The public disclosure and therefore sharing of certain data outlining a company’s operational costs and investment obligations could have the unintended consequence of harmonizing investment decisions among specific companies that otherwise compete in a free market. PCA therefore urges EPA to consider potential impacts on compliance with other federal laws, including anti-trust statutes, when determining the CBI-status of so-called “emissions data.” With respect to the five proposed categories of emission data, for the reasons outlined above, PCA urges EPA to consider that disclosing certain data that are classified as “emission data,” could lead to competitive concerns. Because of these potential challenges, PCA opposes a broader interpretation of what constitutes “emission data.” An expanded interpretation of “emission data” would unnecessarily narrow the number of potential CBI protections.

**Commenter Name: Dave Stirpe**

**Commenter Affiliation: Alliance for Responsible Atmospheric Policy**

**Document Control Number: EPA-HQ-OAR-2009-0924-0050.1**

**Comment Excerpt Number: 1**

**Comment:** In section 114(c) of the Clean Air Act (CAA) of 1970, Congress instructed EPA to protect trade secret and confidential business information (CBI) from public disclosure. Congress included a parenthetical exclusion for "emission data" from trade secret and CBI data to allow EPA and the states to implement the Act using actual emissions information. EPA could not possibly manage several CAA programs, such as the National Ambient Air Quality Standards (NAAQS) and New Source Review (NSR) programs, without accurate emissions information. Congress provided that EPA could determine what regulated materials are being emitted into the atmosphere, but did not give EPA authority to also collect data on materials not emitted into the atmosphere or internal parameters associated with the underlying process operations.

However, nowhere in section 114(c) did Congress instruct EPA to collect onerous amounts of trade secret and confidential data. To the contrary, section 114(c) directs the EPA to preserve as confidential information that "if made public would divulge methods or processes entitled to protection as trade secrets". The fact that emissions exception, relied upon so heavily in this proposed rulemaking, was published by Congress almost as an afterthought as a parenthetical, instead of within the main sentence structure, indicates that EPA should presume Congressional intent that trade secret and CBI must be protected. EPA has not consistently presumed Congressional intent in the current proposed rule.

On page 39101, EPA correctly notes that "emissions data" must be "necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality)." (Citing 40 CFR 2.301(a)(2)(i)) However, EPA does not establish that intrusive manufacturer data is "necessary" for emissions quantification. In *RSR Corp. v. EPA* (588 F.Supp.1251 (N.D. TX 1984)), the court required EPA to establish that a data request for mass balance information was the only method to determine emissions before it allowed EPA to collect mass balance information from a manufacturing facility. Outside of the optional Subpart L mass balance approach, EPA has not made, or even proposed, any justification for requiring Subpart L facilities to report any information other than the amount and composition of materials emitted from an affected source. Certainly, no justification has been presented for requiring the reporting and public disclosure of detailed manufacturing and production information through an unprecedented expansion of the definition of emissions data.

**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 1**

**Comment:** Mexichem believes that the EPA's interpretation of "emission data" is excessively broad. Mexichem believes that most of the data required to be reported under 40 CFR Part 98 is more than "emission data," is not necessary for the Agency to determine emissions, and supersedes the type of information reported under existing equivalent reporting programs such as the Toxic Release Inventory. The EPA proposes to determine, on page 39100 of the proposed rule, that "GHG emissions to be reported by direct emitters, as well as those data that are required to perform the emissions calculations specified in the direct emitter subparts (i.e., inputs to equations/calculations as well as information otherwise needed to calculate or determine emissions), meet the definition of "emission data at 40 CFR 2.301(a)(2)(i)(A)" Sub paragraph A provides that emission data is "information necessary to determine the identity, amount, frequency, concentration...of any emission which has been emitted...". It is not necessary for the EPA to calculate emissions. The burden of performing the calculations lies with the affected person and the liability of ensuring that those calculations are accurate lies with the certifying official. Mexichem believes that actual emissions of greenhouse gases alone are sufficient for the EPA to determine the parameters set forth in subparagraph A, with the possible exception of frequency.

**Commenter Name: Karin Ritter<sup>85</sup>**  
**Commenter Affiliation: American Petroleum Institute**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0057.1**  
**Comment Excerpt Number: 7**

**Comment: "Inputs to Emissions Equations" Contain Highly Sensitive Operational Information That Are CBI.**

Many of the data elements that EPA includes in its "Inputs to Emissions Equations" category are CBI.

These data elements divulge information about facility processes and operations, including information about fuel supplies, unit throughput, and production volumes. Disclosing these data elements would reveal confidential business information related to ownership interests, processes employed by individual facilities, and business practices at individual facilities. If a competitor is provided access to this information, it can obtain a competitive advantage over the facility by reverse engineering information about the facility's operations and business strategies. This competitive information must be protected as CBI in the final rule. All five elements for evaluating whether information is entitled to confidential treatment are satisfied. *See* 40 CFR § 2.208.

First, with these comments, API members are properly asserting their business confidentiality claim with respect to this information. *Id.* § 2.208(a). Second, API members have taken and will continue to take reasonable measures to protect the confidentiality of the data elements in this category. *Id.* § 2.208(b). Notably, the Department of Energy's Energy Information Administration (EIA) appropriately provides confidential treatment for facility-level fuel production and distribution information. *See* Petroleum Supply Monthly, Appendix B:

Explanatory Notes, March 2007. Indeed, EIA is prohibited from making public or sharing disaggregated or entity-specific fuel use or distribution data. *See* 44 U.S.C. § 3501 note at Sec. 208 (preventing disclosure of information in identifiable form where information was submitted under a pledge of confidentiality). In addition, voluntary GRG inventory programs-such as the Department of Energy's Voluntary Reporting of Greenhouse Gases Program, authorized by Section 1605(b) of the Energy Policy Act of 1992, The Climate Registry, and the California Climate Action Registry-do not require reporting facilities to disclose the details behind their GRG emissions data. Very limited information beyond the emissions results, are made available to the public. The detailed information is, however, subject to third party verification, and it is the verification process that provides confidence in the information.

Third, EPA could not otherwise obtain this data without the consent of the relevant businesses. 40 C.F.R. § 2.208(c). The cost or difficulty associated with obtaining information is an important consideration in assessing whether it is "reasonably obtainable." *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45,52 (D.C. Cir. 1981). These data are not reasonably obtainable. . . .Fourth, "[n]o statute specifically requires disclosure of the information" included in the "Inputs to

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<sup>85</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

Emissions Equations" category. 40 CFR § 2.208(d). Indeed, EPA has not asserted that the requested information is required by statute.

Fifth, disclosure of the requested information is likely to cause substantial harm to API members' competitive positions. *Id.* § 2.208( e). The disclosure of process-specific information and production volumes would reveal sensitive process capabilities and operational limits. In addition, if that information were combined with other publicly available information, disclosed under air quality permits and CAA Section 112(r) hazard assessments, competitors would have a detailed picture of a facility's operational capabilities. This information could expose a facility's business position, weaknesses, or vulnerabilities, which could then be used by competitors to disadvantage the reporting facility. For example, the disclosure of unit-specific throughputs and unit-specific fuel use could give competitors a detailed understanding of a facility's process capability and create an advantage in optimizing future crude or product supply. Disclosure of fuel use and process volumes would also reveal a refinery's process operational capacity, limits, bottlenecks, and options to reconfigure in response to market change.

Finally, the disclosure of operational data and throughputs would enable equipment/technology providers to quantify the facility's capabilities. This information could be used against the refiner in future negotiations to upgrade or replace its equipment. For these reasons, the "inputs to emission equations" data requested of petroleum refineries should receive confidential treatment.

...

The data elements in [the inputs to emissions equations] category that have been incorrectly identified as emissions data and categorized as "not CBI" ... include: ...

4) From Subpart Y - Petroleum Refineries:

Catalytic cracking units, traditional fluid coking units, and catalytic reforming units:

...

annual throughput of unit and average carbon content of coke (as required by Section 98.256(f)(9));

activity data for calculating emissions and annual quantity of coke burned (as required by Section 98.256(f)(10) and (f)(11));

... average carbon content of the coke (as required by Section 98.256(f)(12));

Flexicoking units:

Same as the aforementioned incorrectly identified data elements for catalytic cracking units, traditional fluid coking units, and catalytic reforming units in 98.256(f)(7)-(f)(12)) (as required by Section 98.256(g));

Sulfur recovery plants:

annual volumetric flow to the sulfur recovery plant, annual volume of recycle tail gas, and annual average mole fraction of carbon in the sour gas and recycled tail gas (as required by Section 98.256(h)(4) and (h)(5));

### Coke calcining units

annual mass and carbon content of green coke fed to the unit, and annual mass and carbon content of marketable coke produced (as required by Section 98.256(i)(5));

### Asphalt blowing operations:

quantity of asphalt blown (as required by Section 98.256(j)(2));

### Delayed coking units:

. . . dimensions of coke drum or vessel, typical gauge pressure of the coking drum when first vented, typical void fraction of coke drum or vessel, . . . annual number of coke-cutting cycles of coke drum or vessel, . . . height and diameter of the coke drums, cumulative number of vessel openings for all delayed coking drums in the set, typical venting pressure, void fraction, and mole fraction of methane in coking gas (as required by Section 98.256(k)(3) and (k)(4));

### Storage tanks:

total quantity of crude oil plus the quantity of intermediate products received from offsite, and the quantity of unstabilized crude oil received during the calendar year, the average pressure differential and the mole fraction of CH<sub>4</sub> in the vent gas from the unstabilized crude tank, and the tank-specific methane composition data and gas generate rate data (as required by Section 98.256(0)(3), (0)(6) and (0)(7));

### Loading operations:

quantity . . . of materials loaded by vessel type and the type of vessel into which the material is loaded [40 CFR 98.256(p)(2)].

**Commenter Name: Bryan Brendle**

**Commenter Affiliation: Portland Cement Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0045.1**

**Comment Excerpt Number: 2**

**Comment:** In the proposal, EPA proposes to classify five data categories as “emission data,” and therefore not subject to CBI protections. With respect to the five categories proposed as “emissions data,” many PCA members are concerned that although the disclosure of specific data points may not, in isolation, raise competitiveness concerns, that “stitching together” certain data over a period of time, including but not limited to unit/process operating characteristics that are inputs to emission equations, may pose competitiveness concerns for cement manufacturers. Portland Cement Association (PCA) opposes disclosure of information which will give market competitors a clear picture of the cost structure associated with a specific product manufactured by a given plant. Disclosure of information, especially related to fuel use, will not only help competitors determine investment obligations and market advantages/disadvantages confronted by other companies, but such disclosure might also raise anti-trust legal issues. The public disclosure and therefore sharing of certain data outlining a company’s operational costs and investment obligations could have the unintended consequence of harmonizing investment decisions among specific companies that otherwise compete in a free market. PCA therefore

urges EPA to consider potential impacts on compliance with other federal laws, including anti-trust statutes, when determining the CBI-status of so-called “emissions data.” With respect to the five proposed categories of emission data, for the reasons outlined above, PCA urges EPA to consider that disclosing certain data that are classified as “emission data,” could lead to competitive concerns. Because of these potential challenges, PCA opposes a broader interpretation of what constitutes “emission data.” An expanded interpretation of “emission data” would unnecessarily narrow the number of potential CBI protections.

**Commenter Name: Ray Niemiec**

**Commenter Affiliation: Texas Instruments Incorporated**

**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**

**Comment Excerpt Number: 11**

**Comment:** As EPA admits, the scope of reporting and the amount of CBI required to be reported under the MRR is unprecedented – EPA states that “. . . the number of data elements reporters would request be considered CBI would be much higher under Part 98 [than under the Toxics Release Inventory program].” (75 Fed. Reg. 39102). No other Clean Air Act reporting program identified by TI requires a similar broad scope of process data to be reported that TI and many businesses would consider CBI. TI (and EPA) see the value in reporting GHG emissions and limited details regarding the sources of such emissions, but it is difficult to identify (and EPA has provided no insight into) why the public at large would have an interest in the underlying inputs, i.e., the raw data and mathematical equations, that go into determining GHG emissions.

**Commenter Name: Lorraine Gershman<sup>86</sup>**

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 8**

**Comment:** In the preamble, EPA cites the need to include the “inputs to emission equations” as “emission data” primarily to enable emissions verification, as well as to support analysis of GHG emissions for future CAA policy and program development. 75 Fed.Reg. at 39105. However, the MRR requires facility self-certification with EPA emissions verification. The final MRR states that: “In implementing the emissions verification under this rule, EPA envisions a two step process. First, we will conduct an initial centralized review of the data which will be largely automated. EPA intends to build into the data system an electronic data QA program for use by reporters and EPA to help assure the completeness and accuracy of data. In addition, to verify reported data and ensure consistency, EPA may review facility-level monitoring plans and procedures, and will perform detailed, automated checks on data utilizing recent and historical data submittals, comparison against like facilities and/or other electronic audit tools where appropriate. Second, EPA intends to follow-up with facilities should potential errors, discrepancies, or questions arise through the review of reported data and conduct on-site audits of selected facilities. The on-site audits may be conducted by private verifiers contracted by

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<sup>86</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), PPG Industries, Inc. (EPA-HQ-OAR-2009-0924-0040), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).



EPA or by Federal, State or local personnel, as appropriate. We plan to coordinate closely with the States to develop an efficient approach toward on-site auditing that can meet the needs of multiple programs. We do not anticipate conducting on-site audits of every facility every year.” 74 Fed.Reg. at 56282, October 30, 2009.”

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 10**

**Comment:** The American Chemistry Council has correctly noted that the most comprehensive and comparable emissions database to the Mandatory Reporting Rule is EPA’s own Toxics Release Inventory (TRI) program. TRI has been successfully in application for nearly 25 years, and has been revised as warranted. Facilities may use direct measurement, pollutant monitoring data, emissions factors, parametric data monitoring, engineering estimates and mass balance calculations in order to determine reported emissions. A facility is required to report only the method that it utilized to determine the majority of its reported emissions, and the measured/calculated emissions data for each chemical. Sound record-keeping practices are essential for accurate and complete TRI reporting. It is in the facility’s best interest, as well as EPA’s, to maintain records properly, and the facility must maintain copies of each report filed for at least three years from the date of submission. A facility also maintains supporting documentation, calculations, worksheets and other forms they used to gather information for these reports. In the event of a question with any data element on a facility’s submitted Form R or Form A report, EPA may request documentation from the facility that supports or further substantiates the information in question. EPA may also conduct data quality reviews of Form R or Form A submissions. An essential component of this TRI process involves reviewing a facility’s records for accuracy and completeness.

This same reporting philosophy and methodology is applicable and appropriate for GHG reporting and CBI determinations. It is disingenuous for EPA to claim that inputs to emissions calculations are now considered to be “emission data” and therefore not subject to CBI protection when those same inputs are not publicly reported under TRI. Both databases (TRI and GHG MRR) result in the release of emissions data to the public, and both have/will be used to inform EPA’s policy-making process. There is no compelling reason why EPA should now require facilities to release information that could compromise the business competitiveness of facilities, particularly process-specific raw material inputs, process parameters (e.g., yields) and production technologies.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**

**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**

**Document Control Number: EPA-HQ-OAR-2009-0924-0067.1**

**Comment Excerpt Number: 1**

**Comment:** The Federal Trade Commission (“FTC”), in comments filed October 28, 2010, relies upon consumer protection concerns to urge the EPA to significantly limit public disclosure of data collected under the Mandatory Greenhouse Gas Reporting Rule. Cf. 75 Fed. Reg. 39,094 (July 7, 2010) (proposed confidentiality determinations). Although we appreciate the FTC’s

efforts to protect consumers, its proposed solutions are not available under the Act, and, in any event, do not consider other important public interests that warrant broad disclosure.

The Clean Air Act, and the statutes directing and funding the reporting rule's development, establish the public's right to transparent, accurate, and complete information on air pollution.[Footnote: Our earlier comments, filed August 26, 2010, and September 7, 2010, discuss this underlying authority in detail and are incorporated by reference.]

All emission data collected under Section 114 of the Clean Air Act "shall be available to the public," without exceptions. 42 U.S.C. § 7414(c). Other data also must be released, save only a strong showing that it contains trade secrets. *Id.* The FTC, nonetheless, posits that some classes of data – most notably, the inputs to emissions equations which are necessary to calculating a facility's emissions – are somehow not "emission data," and so need not be publicly shared. See FTC Comments at 12-14. It suggests that EPA might, instead, share only the outputs of these equations, leaving the actual reported data it uses in its calculations confidential. This information comprises the vast bulk of information submitted under the reporting rule, so the FTC's approach would radically shrink the scope of the rule.

The FTC's policy concerns might or might not direct this approach in a vacuum, as we later discuss, but EPA's regulations make clear that the Clean Air Act does not allow it. Emission data is defined broadly as including "Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing." 40 C.F.R. § 2.301(a)(2)(i)(A). This definition does not merely focus upon the final emission figure, as the FTC posits, but the "information necessary to determine" that figure, and many other, broadly-defined, "characteristics" of a source's emissions. This active, process-focused language makes clear that the inputs to emission equations are clearly emission data. This is the information which any party – including EPA – must use to characterize emissions, which is, in other words, the information necessary to determining them. As a practical matter, reviewing equation inputs is also the only way for members of the public to independently analyze emissions sources and their operations, and the only way to check EPA's verified figures independently. Thus, this data must be released, even if EPA also releases verified final emissions figures.

Emission data also includes data necessary to determine emissions "which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source)." 40 C.F.R. § 2.301(a)(2)(i)(B). Sources emitting greenhouse gases will be subject to such "applicable standard[s] or limitation[s]" no later than this January, as EPA has explained. See, e.g., 75 Fed. Reg. 17,004 (Apr. 2, 2010). To assure that facilities are complying with greenhouse gas permitting limits, both EPA and the public will need to carefully assess emission reports, especially inputs to emission equations. The ability to review such inputs is critical in identifying discrepancies between reported emissions and a facility's likely operations. It will also aid in tracking changes in a facility's behavior overtime, which may indicate that equipment failures or operator errors are moving it towards noncompliance.

Because these broad disclosures are so central to ensuring accurate data, and driving compliance, EPA cannot and should not depart from the broad emission data disclosure mandate. The FTC’s proposal frustrates the statute and the basic goals of the reporting rule.

Even if the law did not foreclose the FTC’s favored approach, its policy claims are open to question. The FTC focuses on the possibility that greater disclosure will allow some companies to collude, or coordinate their actions, in ways that harm consumers. See, e.g. FTC Comments at 8-12. But the FTC does not provide substantial evidence that this harm will occur in any specific case – much less sufficiently broadly as to warrant rewriting the rule – and its comments ignore the many public policy benefits associated with transparent emissions reporting.

The FTC is primarily concerned that firms could use data on production “capacity and capability” to anticipate their rivals’ behavior. See *id.* at 10-11. As a result, the FTC suggests, firms might more accurately coordinate their prices and other market behavior to consumers’ detriment. *Id.* The FTC therefore cautions against EPA’s legally required efforts to “increase transparency.” *Id.* at 10.

Initially, these concerns are only vaguely expressed, without any detailed market analysis. This vagueness is a problem, because the very guidance documents that the FTC cites to justify its position recognize that collaborations between competitors “often are not only benign but procompetitive” and works to dispel the “perception” that such collaborations are always disfavored, or necessarily harmful to consumers. [Footnote: FTC/DOJ Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), Preamble, at 1.]

Thus, the FTC emphasizes that the antitrust agency itself must undertake a “flexible inquiry” into the “nature of the relevant agreement,” including “defin[ing] relevant markets and calculate[ing] market shares and concentrations,” before it decides that there is some potential for competitive harm. [Footnote: *Id.* at § 1.2; see also FTC/DOJ Horizontal Merger Guidelines (Aug. 19, 2010) § 7 (explaining that coordinated interactions arising from mergers is assessed through a detailed analysis of a given market).]

Indeed, the FTC’s own comments likewise acknowledge that “[t]he potential for information disclosure to harm competition will depend on the structure of the affected market and the type of information disclosed.” FTC Comments at 9. Yet, departing from its own procedures, the FTC urges EPA to decline to disclose an entire, economy wide, class of emission data simply because some speculative competitive harm might occur in some limited subset of industries. [Footnote: The FTC, in fact, would go further, and urges EPA not even to release data which is several years old, just in case some firms may still use that information. See FTC Comments at 11-12. The EPA’s rules, instead, make clear that confidentiality concerns lessen with time, as our Sept. 7, 2010 comments discuss. See Comments of Sierra Club et al. (Sept. 7, 2010) at 8-11.]

EPA should not alter the broad structure of its rulemaking to address these limited, specific instances, and particularly not because the FTC’s own guidance makes clear that not all such information disclosures are harmful. [Footnote: The Energy Information Administration (“EIA”) confidentiality system that the FTC forwards as an alternative does not support its position, as that system focuses on protecting very specific fuel and commodity cost and sales information and even then emphasizes that any protection must depend upon a “highly fact-specific” analysis to show that any harm “flow[s] from the affirmative use of proprietary information by the

competitors.” The EIA emphasizes that exemptions from disclosure are “narrow” and will not be granted based upon a “mere negative effect alone” or “conclusory allegations of harm,” and that the “burden is on the entity seeking protection of the data”. See <http://www.eia.doe.gov/electricity/forms/sselecpower98.html>.]

Moreover, the FTC comments focus entirely upon one class of harms that may arise from EPA’s confidentiality determinations, without acknowledging the many benefits of open access. Congress struck the balance in favor of disclosure because transparent,

Readily-available, information allows the public, regulators, analysts, and advocates to comprehensively, understand and control the sources of air pollution. Emission equation inputs are particularly important to this endeavor because they are the core of the emissions reporting system. With these inputs, interested parties can develop significant insights into the factors driving emissions, monitor compliance, and advocate specific reductions. Without them, the reporting rule is a black box, and loses much of its utility. Although we share the FTC’s concern that the reporting rule ought not to cause unintended harm to consumers, we do not believe that either the law, or public policy, dictate cloaking much of the reported data. EPA should not deviate from the course it set in its proposed confidentiality determinations in the ways the FTC forwards.

APPENDIX B:  
LIST OF COMMENTS FOR 40 CFR PART 98, SUBPARTS I, L, W, DD,  
RR, SS, UU, AND QQ

In this appendix, we provide a list of public comments we received regarding the proposed category assignments and confidentiality determinations for data elements from several subparts that had been proposed but not yet finalized when the CBI proposal was published (see 75 FR 39094, July 7, 2010). These subparts are I (Electronics Manufacturing), L (Fluorinated Gas Production), W (Petroleum and Natural Gas Systems), DD (Electrical Transmission and Distribution Equipment Use), QQ (Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment or Closed-Cell Foams), RR (Geologic Sequestration of Carbon Dioxide), SS (Electrical Equipment Manufacture or Refurbishment), and UU<sup>87</sup> (Injection of Carbon Dioxide). These eight subparts were subsequently finalized in three separate rulemakings (see 75 FR 74458, November 30, 2010; 75 FR 74774, December 1, 2010; and 75 FR 75060, December 1, 2010). Although confidentiality determinations for these subparts were proposed in the July 7, 2010 CBI proposal, EPA decided not to finalize the determinations for these subparts for the reasons outlined in Section I.A.3 of the preamble to the final rule. EPA intends to undertake a separate action to determine the confidentiality status for data elements to be reported under subparts I, L, W, DD, QQ, SS, RR, and UU. We plan to issue the re-proposal and finalize the confidentiality determinations before the March 31, 2012 reporting deadline for these subparts.

Where possible, EPA separated comments on specific topics into their respective data categories by editing individual excerpts. However, in some cases, commenters made broad statements about groups of data elements from various categories or general comments on the approach that could not be easily separated by topic or data category without potentially affecting the intended meaning of the commenter's statements. In such cases, we listed the comment excerpt related to subparts I, L, W, DD, QQ, SS, RR and UU in their entirety in this appendix and in the relevant sections of this document. For the response to any comments in this appendix regarding issues or data elements that are not related to subparts I, L, W, DD, QQ, SS, RR, and UU, please see the appropriate section of this document.

**Comments Specific to 40 CFR Part 98, Subpart I:**

**Commenter Name: Scott J. DeBoer**

**Commenter Affiliation: Micron Technology, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0063.1**

**Comment Excerpt Number: 1**

**Comment:** Micron is primarily a global manufacturer and marketer of semiconductor memory devices. Micron's process for manufacturing semiconductor products is extremely complex, involving a number of precise steps, including wafer fabrication, assembly and test. A large semiconductor fabrication facility has hundreds of individual tools, process steps, and recipes

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<sup>87</sup> The reporting rules for CO<sub>2</sub> injection and sequestration were initially proposed under a single subpart (subpart RR). However, EPA later decided to separate subpart RR into two subparts: Geologic Sequestration of Carbon Dioxide (subpart RR) and Injection of Carbon Dioxide (subpart UU).

[Footnote: see Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2008, EPA 430-R-10-006, April 15, 2010, at 4-65; see also IPCC Good Practice Guidance and Uncertainty Management in National Greenhouse Gas Inventories, PFC, HFC, NF<sub>3</sub>, and SF<sub>6</sub> Emissions from Semiconductor Manufacturing, 2001.] Micron aims to continually introduce new generations of products that offer lower costs per unit and improved performance characteristics. Efficient production requires utilization of advanced manufacturing techniques and effective deployment of these techniques across multiple facilities. Micron is continually enhancing its production process, reducing die sizes and transitioning to higher density products. Since inception, the Company has engaged in extensive efforts at considerable expense to enhance its manufacturing processes, methods, and techniques.

The semiconductor memory industry is characterized by rapid technological change, short product life cycles, frequent product introductions and enhancements, difficult product transitions, and volatile markets. The company's semiconductor memory products are essentially interchangeable with and have similar functionality to products offered by the competition. Micron faces intense competition in the semiconductor memory markets from Elpida Memory, Inc., Hynix Semiconductor, Inc., Samsung Electronics Co., Ltd., SanDisk Corporation, and Toshiba Corporation. All are foreign companies except for SanDisk. Rapid technological change and intense price competition place a premium on new product and new process development. The company's continued ability to compete in the semiconductor memory market depends in part on its ability to continue to develop technologically advanced products and processes.

Current manufacturing processes, methods, and techniques are the result of over thirty years of effort. Micron makes significant ongoing investments to develop proprietary product and process technology designed to facilitate transition to next generation products, which a primary determinant to survival in the semiconductor manufacturing business. Additional process technology R&D efforts include the development of new manufacturing materials. Micron's research and development expenses were \$647 million, \$680 million, and \$805 million, in 2009, 2008, and 2007 respectively. The result of this tremendous financial investment is the creation of valuable intellectual property such as patents and trade secrets. In recent years, Micron has been recognized as a leader in volume and quality of patents issued. As of September 3, 2009, Micron owned over 17,300 U.S. patents and 2,900 foreign patents.

Micron also maintains its market position and derives independent economic value from certain information not being known to or readily ascertainable by the competition, including but not limited to, chemical identity and amounts, process recipes, process configuration, and production in terms of substrate surface area. This information is trade secret and confidential business information protected by the Clean Air Act (CAA) and other federal and state laws.

**Commenter Name: Scott J. DeBoer**

**Commenter Affiliation: Micron Technology, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0063.1**

**Comment Excerpt Number: 3**

**Comment:** Since 1996, Micron has been voluntarily reporting emissions of certain fluorinated compounds annually as a member of EPA's PFC Reduction/Climate Partnership for the Semiconductor Industry, even though Micron and the semiconductor industry as a whole account

for only about 0.1% of the GHG inventory in the U.S. Under the “Memorandum of Understanding (MOU) Between the Semiconductor Industry Association (SIA) and EPA,” 2001, the detailed information that Micron collects and reports is managed as confidential business information “due to its potential competitive significance.” [www.epa.gov/semiconductor-pfc](http://www.epa.gov/semiconductor-pfc). See also “Emission Factors for Semiconductor Manufacturing” Draft Report, Prepared for Scott Bartos, EPA; Prepared by C. Shephard Burton, Ph.D., February 2006 (“All of the information required to develop emissions factors for semiconductor manufacturing is ... proprietary.”).

**Commenter Name: Scott J. DeBoer**

**Commenter Affiliation: Micron Technology, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0063.1**

**Comment Excerpt Number: 5**

**Comment:** We expect that Micron’s flagship research and development facility in Boise, Idaho may be subject to the Mandatory Greenhouse Gas Reporting Rule when the requirements for the Electronics Manufacturing category are finalized. Research and development information is inherently sensitive and is entitled to an extra measure of protection from disclosure under EPA’s confidential business information regulations and other laws. 40 CFR 2.301(a)(2)(ii).

**Commenter Name: Ray Niemiec**

**Commenter Affiliation: Texas Instruments Incorporated**

**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**

**Comment Excerpt Number: 1**

**Comment:** TI believes that its competitive position is likely to be seriously harmed if certain confidential and trade secret data (i.e., CBI) required to be reported under the MRR is made public. Competition is intense among semiconductor manufacturers and trade secret process technology information is frequently the topic of industrial espionage cases [Footnote: See, e.g., [http://www.tradingmarkets.com/news/stock-alert/amat\\_hxsey\\_defendants-in-samsung-case-deny-industrial-espionage-charges-844054.html](http://www.tradingmarkets.com/news/stock-alert/amat_hxsey_defendants-in-samsung-case-deny-industrial-espionage-charges-844054.html)] Semiconductor companies, many of whom are TI’s competitors, will go to great lengths and even resort to illegal activities to obtain trade secret process technology and manufacturing information from their competitors in order to gain market share and improperly disadvantage their competitors.[See, e.g., <http://www.eetimes.com/electronics-news/4121034/-b-Analysis--b-plot-thickens-in-TSMC-SMIC-IP-suit>] TI’s competitors, especially its overseas competitors who are not subject to the MRR and who already enjoy certain cost and other business advantages, would certainly welcome much of the information TI is required to report under the MRR. A substantial likelihood exists that TI’s competitors would use such information to their advantage, resulting in harm to TI’s competitive position. As discussed below, the focus of TI’s concern regarding the public release of CBI is the “inputs to emission equations” data category. This is type of information is highly sensitive that, for the reasons described below, is CBI and should never be released publicly.

While TI has, for many years, reported the majority of its GHG emissions under various voluntary programs [Footnote: TI is a participant in the Memorandum of Understanding between the Semiconductor Industry Association and EPA, under which TI reports certain GHG emissions. TI prepares an annual corporate citizenship report in which it reports world-wide GHG emissions. Further, TI discloses certain GHG emissions as a participant in the Carbon

Disclosure Project.] TI was surprised at the scope and breadth of the data required to be reported under the MRR. Along with the Semiconductor Industry Association (SIA), TI submitted general comments to EPA on the re-proposal of the electronics MRR expressing its concerns regarding the very broad set of data required under the MRR, particularly data that TI and SIA consider to be CBI [Footnote: TI and SIA submitted separate comments on June 11, 2010 to EPA's proposed rule "Mandatory Reporting of Greenhouse Gases; Additional Sources of Fluorinated GHGs." 75 Fed. Reg. 18652 (April 12, 2010). ]. Accordingly, TI appreciates EPA efforts to develop a proposal to specifically address the submittal of CBI under the MRR. TI incorporates herein both TI's and SIA's previous general comments concerning CBI and adds the following comments specifically concerning the Proposed CBI Rule.

**Commenter Name: Ray Niemiec**

**Commenter Affiliation: Texas Instruments Incorporated**

**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**

**Comment Excerpt Number: 5**

**Comment:** [I]n the shallow trench isolation (STI) process, if gas consumption from this process is reported as an input to an emission equation, then it would be straightforward for a competitor to derive the number of wafers started in any given location. This information would likely harm TI's competitive position because competitors could negotiate lower pricing levels with their customers and undercut TI's pricing to the same customers. This has happened in the past, where to exclude competitors from a market, a company will steeply reduce its prices to its customers, effectively shutting out any business that cannot meet progressively lower prices. Specifically, it is well understood that a typical gas flow in an etch process may range from 500 sccm to 700 sccm. If the aggregate data reports out 36,600 metric tons of CO<sub>2</sub> equivalent from C<sub>2</sub>F<sub>6</sub> with a known Global Warming Potential (GWP) of 12,200 a competitor can calculate that 3,000 kg of C<sub>2</sub>F<sub>6</sub> was consumed. At 500 sccm per wafer this translates to ~677,000 wafers.

**Commenter Name: Ray Niemiec**

**Commenter Affiliation: Texas Instruments Incorporated**

**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**

**Comment Excerpt Number: 6**

**Comment:** Disclosing an emission equation input not itself CBI (except for emission factors provided by EPA) creates the likelihood of competitors discovering trade secret information because CBI can be derived using GHG emissions and non-CBI inputs by simple mathematical processes. For example, if heel factors, which may otherwise not be CBI, were required to be reported and default EPA values were used for other inputs in the equation, then competitors could discover information on volume of gas purchased by process type. With that information, a competitor could constrain TI's supply of gas by locking up supplies of such gas if they know TI's purchase volume, which would reduce TI's maximum production, raise TI's cost, make TI less competitive on the market, or require TI to use engineering time to convert to other available gases. These issues would be likely to substantially harm TI's competitive position.

**Commenter Name: Ray Niemiec**

**Commenter Affiliation: Texas Instruments Incorporated**

**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**

**Comment Excerpt Number: 8**



**Comment:** Specifically with respect to 40 CFR Part 98, Subpart I, emissions data should not include the following CBI data required to be reported under 40 CFR 98.96 that would be used by a reporting entity to derive inputs to emission equations or that would be part of an emission equation required to be used by 40 CFR Part 98, Subpart I:

Emission factors used for process utilization and by-product formation rates and the source for each factor for each fluorinated GHG and N<sub>2</sub>O. 98.96(d). These data are CBI because they are internally developed and supplier emission factors are CBI because of the cost of development and potential for competitors to use the data to estimate pricing models, business loadings, plant capacities, process technologies, and technical capabilities. This would likely substantially harm TI's competitive position because the specific gas ratios used in a process are modified from the Original Equipment Manufacturer's (OEM) Best Know Method (BKM) to improve defectivity, process yield, and operational costs. If a competitor to TI could discern specific gas ratios, it could modify its process to match TI's, ultimately improving process performance without any development expense and no delay. By-product formation rates are CBI because a competitor could discern the gas ratios used in the TI-specific recipes from the by-product formation information. With this information, competitors could then adjust their processes to improve process performance for yield, cycle time, and capacity. Such actions by competitors would likely substantially harm TI's competitive position because TI has spent substantial engineering time and money to develop the processes and recipes that are key to TI's success in the market and market share. TI considers these data to be CBI and protect such information with Memorandums of Agreement (MOAs) with all of our original equipment manufacturers (OEMs). In the STI process, if gas consumption from this process is reported as an input to an emission equation, then it would be simple for a competitor to derive the number of wafers started in any given location. This information would be likely to harm TI's competitive position because competitors could negotiate lower pricing levels with their customers to attempt to undercut TI's pricing to the same customers. This has happened in the past, where to exclude competitors from a market, a company will steeply reduce its prices to their customers, effectively shutting out any business that cannot meet progressively lower prices. For example, TI is in the process of developing an edge cleaning process and TI would consider gas usage for its edge cleaning process to be CBI. Making public the gas type and volume used in TI's edge clean process could provide competitors with knowledge of which specific process and tool are used and how to increase semiconductor yield at the edge of wafer. Semiconductor yield at the edge of the wafer is an extremely important production efficiency metric, and semiconductor companies are competing to develop the best technology to produce more semiconductors per wafer. In addition, competitors with such knowledge could identify production-ready [high-yield] edge clean tools to purchase, which could deplete the market of such tools and exclude TI from purchasing such tools, thereby increasing competitor's output and reducing TI's yield per wafer and, in turn, its market share. Further, overseas semiconductor manufacturing facilities do not have to report their gas usage and TI would never disclose such information publicly and such information is not reasonably obtainable without TI's specific consent and entering into a Non-disclosure Agreement with TI.

For each fluorinated GHG and N<sub>2</sub>O, annual gas consumed during the reporting year and facility-wide gas-specific heel-factors used. 98.96(f). These data are CBI because competitors can use the usage of specific chemicals to estimate pricing models, business loadings, plant capacities, process technologies, and technical capabilities.

The apportioning factors for each process category (i.e., fractions of each gas fed into each individual process or process category used to calculate fluorinated GHG and N<sub>2</sub>O emissions) and a description of the engineering model used for apportioning gas usage per 98.94(c). If the method used to develop the apportioning factors permits the development of facility-wide consumption estimates that are independent of the estimates calculated in Equation I-10 of subpart I (e.g., that are based on wafer passes for each individual process or process category), report the independent facility-wide consumption estimate for each fluorinated GHG and N<sub>2</sub>O. 98.96(g). These data are CBI because in combination with emission factors, these data can be used to calculate gas usage on each tool and to specify the recipe details for a specific process, which is key trade secret information. Recipes on tools are not best known methods from the original equipment manufacturer. Rather, processes are specially developed and modified by TI to provide improved process performance across wafer uniformity, particle performance, cost of ownership, etc. These metrics drive yield, pricing, cost, and are key trade secret information that goes to the heart of TI's competitive position and provides TI with a distinct competitive advantage in the marketplace. Allowing competitors access to this CBI would likely harm TI's competitive position because competitors could improve production yields to better compete with TI, and as a result, TI's competitive position would suffer. This information is not available to anyone outside of TI without some type of third-party agreement. In limited instances, TI maintains Memoranda of Agreements including non-disclosure provisions and separately negotiated non-disclosure agreements that directly prohibit our suppliers from divulging this information to our competitors.

Fraction of each gas fed into each process type that is fed into tools with abatement systems. 98.96(h). These data are CBI because in combination with emission factors these data can be used to calculate gas usage on each tool and to specify the recipe details for a specific process, which is key trade secret information. Recipes on tools are not BKMs from the original equipment manufacturer. Rather, processes are specially developed and modified by TI to provide improved process performance across wafer uniformity, particle performance, cost of ownership, etc. These metrics drive yield, pricing, cost, and are key trade secret information that goes to the heart of TI's competitive position and provides TI with a distinct competitive advantage in the marketplace. Competitors can use such data to estimate pricing models, business loadings, plant capacities, process technologies, and technical capabilities. Again, TI maintains Memoranda of Agreements that directly prohibit our suppliers from divulging this information to our competitors.

**Commenter Name: Ray Niemiec**

**Commenter Affiliation: Texas Instruments Incorporated**

**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**

**Comment Excerpt Number: 14**

**Comment:** Due to the potential that trade secret information may be captured by two other proposed categories, TI believes that EPA should allow semiconductor-specific confidentiality determinations to be made within those categories. Those categories are "Unit/Process "Static" Characteristics that are Not Inputs to Emission Equations" and "Unit/Process Operating Characteristics that are Not Inputs to Emission Equations." TI's review of example data elements within those two categories (75 Fed. Reg. 39111-113) identified little information that TI and other semiconductor businesses would be required to report under the MRR. However, to

the extent that any CBI TI (and other semiconductor businesses) would be required to report under the MRR would ultimately fall into those categories, such CBI should be identified as CBI within such categories and afforded appropriate confidentiality protection. Accordingly, EPA should develop source (industry) category-specific confidentiality determinations within those two proposed data categories.

**Commenter Name: Thomas P. Diamond<sup>88</sup>**

**Commenter Affiliation: Semiconductor Industry Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**

**Comment Excerpt Number: 5**

**Comment:** [A]ll of the data elements specified in 98.96 that are inputs to the GHG emission equation specified in Subpart I (see 98.93) have been determined to be “emission data (made available to the public).” This includes several data elements that the semiconductor industry considers highly confidential information, including: “annual gas consumed during the reporting year,” ( 98.96(f)), “the apportioning factors (i.e., fraction of each gas fed into each individual process or process category used to calculate fluorinated GHG and N<sub>2</sub>O emissions” ( 98.96(g), and “fraction of each gas fed into each process type that is fed into tools with abatement systems” ( 98.96(h)).

Like the Preamble to the Proposed CBI Rule, The Data Element Memorandum provides absolutely no analysis, discussion, or explanation of EPA’s proposed determinations for the Subpart I data elements.

**Commenter Name: Thomas P. Diamond<sup>89</sup>**

**Commenter Affiliation: Semiconductor Industry Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**

**Comment Excerpt Number: 6**

**Comment:** In the early 1990’s, SIA member companies joined with EPA to form the “PFC Emission Reduction Partnership for the Semiconductor Industry.” This Partnership was formalized in a 1996 Memorandum of Understanding (MOU) under which the participating companies agreed to:

1. endeavor to reduce the absolute and normalized rate of PFC emissions from U.S. semiconductor manufacturing operations;
2. share non-confidential information about technologies for reducing PFC emissions;
3. implement a comprehensive system for reporting their PFC emissions to EPA; and

undertake a research and development effort to determine whether it would be appropriate for the industry to set specific goals for PFC reduction.

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<sup>88</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

<sup>89</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

The semiconductor industry has consistently applied its emission reduction and reporting efforts to a “basket” of gases relevant to our operations, which includes the GHGs covered under the GHG Reporting Rule (e.g., perfluorocarbons (CF<sub>4</sub>, C<sub>2</sub>F<sub>6</sub>), SF<sub>6</sub>, HFCs (e.g. CHF<sub>3</sub>), and also NF<sub>3</sub>).

As the 1996 MOU was being finalized with EPA, U.S. semiconductor manufacturers also entered into discussions with manufacturers worldwide, which led to the formation of the World Semiconductor Council (WSC) in 1996. One of the first cooperative projects undertaken by the WSC was the adoption, in 1999, of a voluntary global PFC emission reduction program with a goal of reducing absolute emissions to 10% below each association’s baseline emission level by the year 2010.

In 2000, SIA memorialized this PFC emission reduction undertaking by entering into a second MOU with EPA, in which participating SIA member companies committed to reduce their aggregate PFC emissions by 10% below 1995 levels. As of 2010, the MOU participants have reduced their absolute PFC emissions by more than 40% relative to 1995 levels.<sup>7</sup> In the 2009 reporting year, the participating companies reported PFC emissions totaling 0.51 MMTCE (million metric tons of carbon equivalents).

Under both the 1996 and 2000 MOUs, participating companies have reported to EPA annual GHG emissions in the aggregate as well as individual participating company’s emissions and emission calculation methodologies. (MOU participants have primarily used Intergovernmental Panel on Climate Change (IPCC) Tier 2 calculation methodologies.) The aggregate emissions figure for all MOU participants is made publicly available. However, due to the highly sensitive nature of the company-specific emissions information, the MOUs contain provisions to protect the confidentiality of this information. Specifically, each year, participating companies submit their individual PFC emissions for the previous year to an independent Third Party that is mutually acceptable to both MOU Partners (i.e., SIA and EPA) (Since the 1996 MOU, the Third Party has been Latham & Watkins LLP.). The Third Party then compiles the individual company emission data and sums the companies’ emissions into an aggregate emission figure (for each individual gas and all gases in total), which it provides to EPA in an annual report (See Section IV.B of the 2000 MOU, available at: <http://www.epa.gov/semiconductor-pfc/documents/mou.pdf>.)

In addition, each participating company prepares and submits to the Third Party a written explanation of the methodology it used to estimate its PFC emissions (hereinafter referred to as a ‘Methodology Write-Up’). Section IV.C of the 2000 MOU includes the following procedures to “allow the Partners to have continued confidence in the reliability of the Annual PFC Emissions Reports”: the Third Party will make available for review by EPA on the Third Party’s premises (1) the Methodology Write-Ups and (2) the PFC emissions estimate for each company. In order to address the confidentiality concerns of the participating companies, the Third Party will remove company-identifying information from all such documents before making them available for EPA review.

Thus, for more than a decade under its MOUs with SIA, EPA has recognized the highly sensitive nature of PFC emission data and calculation methodology information to the semiconductor industry, and has explicitly endorsed a comprehensive procedure to maintain its confidentiality. Indeed, under Section V.B of the 2000 MOU, EPA committed to “In all cases . . . work to ensure

that emissions are evaluated and reported in such a way as to protect confidential business information.”

**Commenter Name: Thomas P. Diamond<sup>90</sup>**

**Commenter Affiliation: Semiconductor Industry Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**

**Comment Excerpt Number: 7**

**Comment:** The GHG usage and emission data sought by EPA under subpart I is considered highly sensitive by the semiconductor industry.

As explained at length in our previous comments, the semiconductor industry is in a unique position among industries covered by the GHG Reporting Rule because much of the information that would have to be submitted under Subpart I (see 40 C.F.R. 98.96) is competitively sensitive and highly-guarded information. Unlike GHGs emissions in other industries, the GHGs used in the semiconductor industry are high-value gases used for specific purposes in the production of semiconductors; they are not like typical pollutants (“conventional” or GHG) such as waste gases, products of fuel combustion, or an amalgam of gases (such as VOCs), which provide little or no specific information about proprietary manufacturing processes or production levels of various products. As such, a unique tension exists within the industry between its commitment to provide the public with information on GHG emissions and its need to protect what is legitimately highly confidential business information.

As also described in our previous comments, information about which gases a facility uses in which processes and in what amounts, if made public, would reveal competitively valuable, trade secret information. Indeed, such details of GHG usage and emissions by process would provide those familiar with our industry specific knowledge of proprietary device designs and manufacturing processes, and also effectively may reveal customer sensitive product information based on manufacturing loadings. This is especially true of the re-proposed GHG Reporting Rule, since it would require semiconductor fabrication facilities (fabs) to apportion fluorinated GHG consumption into nine process categories and subcategories, as defined in 98.93(a)(1)(i) through (a)(1)(iii), or by individual process using a facility-specific engineering model based on wafer passes.” (In summary, the process categories are defined as four etch processes (oxide, nitride, silicon, and metal), three CVD chamber clean processes (in-situ plasma, remote plasma, and thermal), and two wafer cleaning processes (bevel cleaning and ashing) for a total of nine process categories and subcategories, as well as for a 10th “N<sub>2</sub>O Other” category.

75 Fed. Reg. 18662.) . . . the amount of gas used in each of these processes has been determined by EPA to be an “input to emission equations” and thus would be classified as “emission data” to be made publicly available. Consequently, the apportionment of gases among processes would provide a great deal of information on the specific uses of GHGs at a fab that, if made public, would reveal competitively sensitive information about operations at the fab.

**Commenter Name: Thomas P. Diamond<sup>91</sup>**

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<sup>90</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

**Commenter Affiliation: Semiconductor Industry Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**  
**Comment Excerpt Number: 8**

**Comment:** “Inputs to Emission Equations” EPA has Determined to be “Emission Data”

(a) 98.96(d) – Emission factors used for process utilization and by-product formation rates and the source for each factor for each fluorinated GHG and N<sub>2</sub>O (provided by Texas Instruments, Inc., an SIA member company)

Internally developed and supplier emission factors are CBI because of the cost of development and potential for competitors to use the data to estimate pricing models, business loadings, plant capacities, process technologies, and technical capabilities. This would likely substantially harm Texas Instrument’s (TI’s) competitive position because the specific gas ratios used in a process are modified from the Original Equipment Manufacturer’s (OEM) Best Know Method (BKM) to improve defectivity, process yield, and operational costs. If a competitor to TI could discern specific gas ratios they could modify their process to match TI’s ultimately improving process performance without any development expense and no delay.

By-product formation rates are CBI because a competitor could discern the gas ratios used in the TI-specific recipes from the by-product formation information. With this information, competitors could then adjust their processes to improve process performance for yield, cycle time, and capacity. Such actions by competitors would likely substantially harm TI’s competitive position because TI has spent substantial engineering time and money to develop the processes and recipes which are key to TI’s success in the market and TI’s growing market share. We considered this CBI and protect such information with Memorandums of Agreement (MOAs) with all of our original equipment manufacturers (OEMs)

(b) 98.96(f) – Annual Consumption of Each GHG

Section 98.96(f) of the Reporting Rule, if finalized, will require submission of the following information: “for each fluorinated GHG and N<sub>2</sub>O, annual gas consumed during the reporting year.” This information, if made public, would harm semiconductor manufacturers’ competitive position. The price that semiconductor manufacturers pay their suppliers for the gases they use depends on many factors, including the supplier’s perception of a company’s overall gas needs, and the needs of competitors. To maintain leverage in negotiations with suppliers, semiconductor manufacturers keep confidential their total annual gas usage and purchase information. As a result, suppliers do not know the total amount of a particular gas that a semiconductor manufacturer uses in a year; they know only the amount the company purchases from the particular supplier. If such annual gas usage data were made public, gas suppliers could use this information to dictate prices in negotiations, causing semiconductor manufacturers to lose substantial negotiating leverage, thus harming their competitive position.

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<sup>91</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).

(c) 98.6(g) - Apportionment Factor for Each GHG (provided by Texas Instruments, Inc., an SIA member company)

In combination with emission factors, these data can be used to calculate gas usage on each tool and to specify the recipe details for a specific process, which is key trade secret information. Recipes on tools are not best known methods (BKM) from the original equipment manufacturer. Rather, processes are specially developed and modified by TI to provide improved process performance across wafer uniformity, particle performance, cost of ownership, etc. These metrics drive yield, pricing, cost, and are key trade secret information that goes to the heart of TI's competitive position and provides TI with a distinct competitive advantage in the marketplace. Allowing competitors access to this CBI would likely harm TI's competitive position because competitors could improve production yields to better compete with TI, and as a result, TI's competitive position would suffer. This would likely substantially harm TI's competitive position because the specific gas ratios used in a process are modified from the Original Equipment Manufacturer's (OEM) Best Know Method (BKM) to improve defectivity, process yield, and operational costs. If a competitor to TI could discern specific gas ratios they could modify their process to match TI's, ultimately improving process performance without any development expense and no delay.

(d) 98.96(g) – Apportionment Factor for Each GHG Combined with Annual Consumption of Each GHG

98.96(f) - Data Elements EPA has Classified as “Non-CBI,” which Are in Fact Highly Confidential CBI

Section 98.96(g) of the Reporting Rule, if finalized, will require the submission of the following information: “The apportioning factors for each process category (i.e., fractions of each gas fed into each individual process or process category used to calculate fluorinated GHG and N<sub>2</sub>O emissions)” for nine separate process categories – four etch categories, three chamber clean categories, and two wafer clean categories. The combination of gas-specific consumption data required under 98.96(f) with gas-specific apportionment to processes categories is highly guarded information because, to a person with sufficient knowledge of semiconductor fabrication plant (or “fab”) operations, it can be used to deduce the production rate of different technologies (i.e., wafer types) being manufactured at the fab.

For example, gas-specific apportionment data coupled with consumption data can be combined by a knowledgeable person to deduce the specific CVD chamber tool set (i.e., brands/models) that a company is running in a fab. CVD chambers have relatively standard and well-known chamber clean recipes, such that one with knowledge of those tools' operation can determine production levels based on their gas consumption rates. Because specific CVD tools are associated with particular technologies, one could then determine production levels of those technologies. Similarly, for etch tools, because 98.93 requires submission of gas apportionment data, a knowledgeable person could analyze the ratios of gases used in each process category and deduce both the types and production volumes of different wafer films and metal layers that a fab is producing and specific etch process the fab is running. Further, if the etch category is split into four subcategories, as currently required in the GHG Reporting Rule, the information becomes even more potentially sensitive. Fab production levels of various technologies is obviously highly sensitive information that a semiconductor manufacturer would never reveal to

a customer, let alone competitors, as it would cause substantial harm to the company's competitive position. EPA has acknowledged as much in its exemption of "production in terms of substrate surface area" ( 98.96(c)) from disclosure as CBI.

In a similar fashion, tool manufacturers and customers also could deduce the tool set being run by a fab, which would put the semiconductor manufacturers in a poor negotiating position with both groups. Semiconductor manufacturers do not share tool set information with tool manufacturers because they can use this information to influence pricing and availability in contract negotiations for the purchase of new tools. Likewise, customers generally do not know a semiconductor manufacturer's production capacity when negotiating purchase agreements. Knowledge of the semiconductor manufacturer's tool set would give their customers a reasonable estimate of its production capacity, which would harm the semiconductor manufacturers' position in negotiations with customers.

(e) 98.96(h) – Fraction of each gas fed into each process type that is fed into tools with abatement systems.

In combination with emission factors these data can be used to calculate gas usage on each tool and to specify the recipe details for a specific process, which is key trade secret information. Recipes on tools are not BKMs from the original equipment manufacturer. Rather, processes are specially developed and modified by TI to provide improved process performance across wafer uniformity, particle performance, cost of ownership, etc. These metrics drive yield, pricing, cost, and are key trade secret information that goes to the heart of TI's competitive position and provides TI with a distinct competitive advantage in the marketplace.

**Commenter Name: Thomas P. Diamond<sup>92</sup>**

**Commenter Affiliation: Semiconductor Industry Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**

**Comment Excerpt Number: 9**

**Comment:** Data Elements EPA has Determined to be "Not CBI" which is in fact Sensitive CBI

In addition to the above data that EPA has classified as "emission data," certain data elements that EPA has determined to be "not-CBI" is in fact sensitive CBI that is highly-guarded within the industry.

(a) 98.96(i) – Description of Abatement Systems

For example, 98.96(i), if finalized, will require the submission of a "Description of all abatement systems through which fluorinated GHGs or N<sub>2</sub>O flow at your facility, including the number of devices of each manufacturer [and] model numbers. . . ." Abatement devices are typically linked to a particular type of manufacturing tool, such that the number and models of such devices can, when combined with certain of the other information required to be submitted under Subpart I, such as process and gas-specific usage data, could be used to discern sensitive information about manufacturing processes and production rates. In addition, similar to the

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<sup>92</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).



situation with divulging information on the tool set a fab is running, providing abatement system manufacturers with detailed information on the number and types of abatement systems running in a fab would put the companies in a poor bargaining position.

(b) 98.96(j)(2) – Abatement System Uptime

The examples above describe “direct” harm to a company’s competitive position that can occur when CBI submitted under Subpart I is released to a competitor. As explained below, in addition to such direct competitive harm, many semiconductor manufacturers have unique business arrangements with their customers such that customer relationships can be harmed by the release of certain information, such as Abatement System Uptime data, that would initially not appear to be particularly sensitive.

Due to the critical applications in which many of its products are used, the semiconductor industry is intensely focused on quality and “zero defectivity” in its products. Many customers’ businesses, such as the automotive industry, are so dependent on our products working flawlessly, that our contracts with customers often allow them to frequently audit and inspect our manufacturing facilities to ensure that operations and equipment maintenance are working “perfectly.” Any perceived imperfections in our operations -- even something as seemingly trivial as an unaccounted-for tank of gas -- can be interpreted as a more systemic “problem” that could affect product quality. As an example, the required submission under 98.96(j)(2) of “uptime” data for each abatement system installed at a fab could, if less than 100%, be misinterpreted by customers as indicating problems with manufacturing. Any such misinterpretations could disrupt our customer relationships and harm our competitive position in negotiations with those customers.

**Commenter Name: Scott J. DeBoer**

**Commenter Affiliation: Micron Technology, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0063.1**

**Comment Excerpt Number: 7**

**Comment:** In the context of the semiconductor industry, [reverse engineering] involves an arduous and expensive process, including the purchase of several computer chips of a competitor, cutting cross-sections of chips and analyzing elemental materials through sophisticated atomic-level analytical techniques, stripping layers, photographing the circuitry of each layer through a scanning electron microscope, dissecting the chip to discover the layout design, constructing an electrical schematic of the circuitry, and then drawing inferences about the technical process used to make the device. The information that EPA has proposed to disclose (chemical identities, amounts, emitted, apportionment by process type, facility-wide consumption, annual gas consumption) is the type of information that would aid a competitor by short circuiting the time, effort, and money necessary to conduct reverse engineering or to conduct its own research and development.

Moreover, many of the specific details EPA has proposed semiconductor manufacturers to report might not be discerned from reverse engineering. And, the details at issue here are not for sale or otherwise available to the competition at a price. Keeping the details of valuable processes secret is critical to maintaining a competitive edge. This type of information is trade secret. *People v. Gopal*, 171 Cal. App. 3d 524, 539 (1985) (information that would substantially reduce

reverse engineering time is a trade secret). The manufacturing processes, materials, methods and techniques employed by Micron are among the key factors that distinguish the Company from the competition and enable cost efficiency. Processes, methods, and techniques include recipes, formulas, and machines. Such information is unavailable to the competition. The company derives independent economic value from this information not being known to and readily ascertainable by the competition. This is the type of information that would allow a competitor to bypass the substantial time and costs involved in research and development, thus saving months or years of time and millions of dollars. This information is essential to the company's continued profitability, and would, if known to Micron's competitors, enable the competitor to obtain unfair advantage over Micron, usurp Micron's market share, and reap profits that rightly belong to Micron. Micron, thereby, would be substantially harmed.

A trade secret is presumed to be secret if the owner, like Micron, takes measures to prevent it from becoming available to persons other than those selected by the owner. *People v. Gopal*, 171 Cal. App. 3d 524, 537-538 (1985). Micron not only takes reasonable but extraordinary measures to protect its process and other trade secrets. Micron requires its employees to execute a confidentiality agreement prohibiting the unauthorized disclosure of such information. Micron permits the dissemination of its trade secrets among its employees only on a "need to know" basis. Micron has constructed a fence around its facilities, posted signs restricting access to its facilities to authorized personnel, and employed security guards to prevent unauthorized entry. Within its facilities, Micron maintains a system of alarms and security badges to detect the presence of persons who are neither employees nor authorized visitors. Employee access to various buildings and areas with Micron's facilities is restricted to employees whose duties require them to have access to those areas and buildings. Micron requires employees to keep confidential technical information in locked files. Micron not only requires visitors at its facilities to sign its visitors' log and to wear badges but also requires them to be escorted by an authorized Micron employee. Suppliers must sign an agreement acknowledging that they must assist Micron in taking these reasonable safeguards to protect the confidentiality of Micron's technical information. As demonstrated by the facts and authorities cited above, the information subject to the confidential and trade secret claim qualifies for protection under the Idaho Trade Secrets Act, Idaho Code §48-801, et seq. and other laws, and should, therefore, not be disclosed. *Worthington Compressors, Inc. v. Costle*, 662 F. 2d 45, 51-54 (D.C. Cir. 1981)(competitors are not entitled to a windfall for the price of FOIA retrieval; summary and judgment in favor of EPA decision to disclose trade secrets under FOIA, reversed and remanded.

**Commenter Name: Scott J. DeBoer**

**Commenter Affiliation: Micron Technology, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0063.1**

**Comment Excerpt Number: 2**

**Comment:** Micron objects to EPA's proposed determination that all of the following information is "emission data" and not subject to protection as confidential information at all times:

The following data elements from 40 CFR 98.3(c); 74 Fed. Reg. 56260, 56379 (Friday, October 30, 2009):

(E) Each fluorinated GHG (including those not listed in Table A-1 of this subpart). (iv) Emissions and other data for individual units, processes, activities, and operations as specified in the "Data reporting requirements" section of each applicable subpart of this part. The following data elements from 40 CFR 98.92; 75 Fed. Reg. 18652, 18698 (April 12, 2010):

- (1) Fluorinated GHGs from plasma etching.
- (2) Fluorinated GHGs from chamber cleaning.
- (3) Fluorinated GHGs from wafer cleaning.
- (4) N<sub>2</sub>O from chemical vapor deposition and other manufacturing processes.
- (5) Fluorinated GHGs from heat transfer fluid use.

The following data elements from 40 CFR 98.96; 75 Fed. Reg. 18652, 18702 (April 12, 2010):

- (a) Annual emissions of each fluorinated GHG and N<sub>2</sub>O emitted from each individual process, process category, or process type as applicable and from all heat transfer fluid use as applicable.
- (b) The method of emissions calculation used in 98.93.
- (c) Production in terms of substrate surface area (e.g., silicon, PV-cell, LCD).
- (d) Emission factors used for process utilization and byproduct formation rates and the source for each factor for each fluorinated GHG and N<sub>2</sub>O.
- (e) Where process categories for semiconductor facilities as defined in 98.93(a)(1)(i) through (a)(1)(iii) are not used, descriptions of individual processes or process categories used to estimate emissions.
- (f) For each fluorinated GHG and N<sub>2</sub>O, annual gas consumed during the reporting year and facility-wide gas specific heel-factors used.
- (g) The apportioning factors for each process category (i.e., fractions of each gas fed into each individual process or process category used to calculate fluorinated GHG and N<sub>2</sub>O emissions) and a description of the engineering model used for apportioning gas usage per 98.94(c). If the method used to develop the apportioning factors permits the development of facility-wide consumption estimates that are independent of the estimates calculated in Equation 1-10 of this subpart (e.g., that are based on wafer passes for each individual process or process category), you shall report the independent facility-wide consumption estimate for each fluorinated GHG and N<sub>2</sub>O.
- (h) Fraction of each gas fed into each process type that is fed into tools with abatement systems. Except for "heat transfer fluid use, "the" method of emission calculation" (without the specific inputs to the calculation), "heel factors," and " N<sub>2</sub>O gas consumed,"

[T]he information above that EPA has proposed to collect is sensitive confidential process information that in Micron's case has economic value, is currently kept confidential, and is not

available to competitors. Micron would be substantially harmed if this information were disclosed by EPA.

**Comments Specific to 40 CFR Part 98, Subpart L:**

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 17**

**Comment:** We are addressing the three subparts related to fluorinated gases, Subparts L, O and OO in this single section of comments as they are interrelated. DuPont believes that its Fluorochemical and Fluoropolymer operations data should be considered business confidential. Production rates, raw material identities, and flow rates, impurity generation, product or raw material yield rates, and the type of process are all information that DuPont treats as CBI.

In the Fluorochemical and Fluoropolymer industry, production capacity or actual production rates are not published. If competitors have access to our production rates, in conjunction with market demand they can ascertain our idle capacity, and assess our pricing strategy. Competitors can then set their prices based on knowledge of DuPont pricing. Customers will be able to assess how tight DuPont supply is, and negotiate price accordingly. Fluorochemical and Fluoropolymer supply and demand is not published. EPA's proposal would allow foreign nations such as China insight into our business' supply and demand profile, better enabling them to design and install optimum sized facilities that would likely impact U.S. manufacturing market share. Knowledge of the raw materials and/or type of process operated, yield information, and details on by-product generation rates will enable competition to ascertain our cost to manufacture, and enjoy an unfair advantage in setting price. For example, DuPont Fluorochemicals and Fluoropolymers insist on confidentiality agreements with all our major suppliers so that raw material identities are protected. Many products can be manufactured from a variety of feedstocks. For instance HFC-152a can be manufactured from vinyl chloride or acetylene. Knowledge of the raw material feedstock provides competitors key insight into our process, our cost to manufacture, and associated pricing.

The following is a list of DuPont Fluorochemicals and Fluoroproducts specific confidentiality concerns with the proposed CBI definitions along with an explanation of the sensitive nature of the information.

1. Subpart L – §98.126(b)(1) – The data used in calculating the absolute uncertainties, including quantities and their uncertainties. – Air permit calculations, including production and raw materials, are handled as confidential at our sites. Competitors can determine market share, cost structure and other vital aspects of the business with this information. Subparts O and OO describe this information as confidential [FOOTNOTE: That is, data similar to that used to calculate absolute and relative uncertainties; e.g., production and raw material information. While Subparts O and OO do not require uncertainty calculations, they do require reporting of information similar to that used in Subpart L uncertainty calculations. In those subparts, this information is classified as CBI.]. Need the same for subpart L.

- 2) Subpart L – §98.126(b)(1) – The data used in calculating the relative uncertainties, including quantities and their uncertainties. – Same concern as above.
- 3) Subpart L – §98.126(b)(3) – Total mass of each reactant fed into the production process. – Same concern as above.
- 4) Subpart L – §98.126(b)(2) – Balanced chemical equation describing the reaction used to manufacture the F-GHG product (specifically, the equation that provides the stoichiometric coefficients in Equation L-7). – Manufacturing technology at one of our sites and catalysts used at another site are confidential and can not be disclosed. Chemical reactants, and stoichiometry are likewise confidential. Competitors may adopt our competitive process if disclosed. If a competitor knows specific stoichiometry, that assists in determining our cost to manufacture and cost structure.
- 5) Subpart L – §98.126(d) – Method used to estimate the missing data – Production data may need to be used to estimate missing data that can not be publicly released.
- 6) Subpart L – §98.126(a)(5) – Chemical formula of each F-GHG gas. – Listed as CBI – but required to list emissions for each FGHG – Since a chemical name relates to its formula, chemical names associated with disclosure of emission information should be allowed to be generalized, into a category – such as “fluorinated greenhouse gas”. The facility can submit a confidential version of required reports utilizing the chemical name and/or formula, and a non-confidential version for public dissemination with broad chemical categories used.
- 7) Subpart L – §98.126(b)(6) – Mass of each by-product generated – With by-product names, the type of operation used would be made known to competitors, and they would be able to determine some operating cost information. Recommend if by-product name is CBI, allow the name to be redacted or use generalized by-product categories.
- 8) Subpart L – §98.126(c)(1) and §98.126(b)(4) to §98.126(d) – The activity used to estimate emissions (e.g., tons of product or tons of reactant consumed) for §98.123(b)(3) – The activity in combination with the emission factors and emissions can easily back calculate production, or other production activity value. Production can be used by competitors to gauge our competitiveness in the marketplace (e.g., for setting price, building new supply).
- 9) Subpart L – Stack Test Reports w/ Emission Factors – Production data usually part of the stack test report. Handled as CBI with Air program

**Commenter Name: Lorraine Gershman<sup>93</sup>**

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 17**

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<sup>93</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

**Comment:** Subpart L – Fluorinated Gas Production Based on the way EPA proposes to classify data as CBI according to the June 28, 2010 memo accompanying this CBI proposal, facilities subject to reporting under subpart L will not be able to utilize the mass balance equation because all inputs would be made publicly available. This option was added following the comments received on the first proposed subpart L in March 2009, but now is of no value to us if we need to sacrifice trade secret information to be able to use it. ACC strongly advises that only the following emissions information be made publicly available:

- (1) Method used to determine the emissions of each F-GHG (§98.126(a)(4))
  - (2) Absolute uncertainties calculated under §§98.123(a)(1) through (a)(4) (§98.126(b)(1))
  - (3) Relative uncertainties calculated under §§98.123(a)(1) through (a)
  - (4) (§98.126(b)(1)) (4) Reason the data were missing (§98.126(d))
  - (5) Length of time the data were missing (§98.126(d))
  - (6) Method used to estimate the missing data (§98.126(d))
  - (7) Monitoring results for the destruction device that are deviations from the monitoring limit set during the emissions test (§98.126(e))
  - (8) Destruction efficiency of each destruction unit, determined from the emission test conducted every 5 years (§98.126(f)(1))
  - (9) Test methods used to determine the destruction efficiency of each destruction unit (§98.126(f)(2))
  - (10) Methods used to record the mass of F-GHG destroyed (§98.126(f)(3))
- (11) Name of all applicable federal or state regulations that may apply to the destruction process (§98.126(f)(5)) The reasons that other data elements should be considered CBI are discussed below. The location of the process of emissions stream(s) that were analyzed under the initial scoping test of fluorinated GHGs (F-GHGs) at §98.124(a) and §98.126(a)(2) should be considered CBI if it is process or vent specific. This information in conjunction with other data could be used to determine production capacities and throughputs.

The “function” of the process or emissions stream(s) that were analyzed under the initial scoping test of F-GHGs at §98.124(a) and §98.126(a)(2) is not emission information and could be used in conjunction with other information to determine the manufacturing scheme since the functions of most process streams would become publically available. Annual equipment leak emissions of each F-GHG for the facility (§98.126(a)(3)) by process could provide very detailed information on the content of process streams since the “emissions” would be based on process streams compositions. Various methods are provided in the Protocol for Equipment Leak Emission Estimates (EPA Publication No. EPA-453/R-95-017) for converting equipment leak measurements to emission values. The emission value usually will be based on the process stream contents. While the quantity of these emissions will be extremely low, the distribution of stream constituents may be identical to the product contents. This information, in conjunction with the production throughputs reported elsewhere under this subpart, could be used to determine the product contents and quantities. These emissions will be minor and a single aggregated value based on CO<sub>2</sub>-equivalents, similar to the current practice in California, should be sufficient.

The activity used to estimate emissions for §98.123(b)(3) (§98.126(c)(1)) is CBI since the emissions and the emission factor will be used to determine the amount of the activity which would be directly related to the production throughputs. The emissions quantity, the emission

factor, and the production activity easily can be used to determine the production throughput. Values will be provided for every process that manufactures an isolated intermediate and final product. This will provide a very comprehensive map of a facility's products and processes capabilities. For these reasons, the emission factor for each process vent for §98.123(b)(3) (§98.126(c)(2)) should be treated as CBI since it can be used in conjunction with emissions to determine the production throughput. Finally, the activity used to estimate emissions for §98.123(b)(4) (§98.126(c)(1)) should be treated as CBI since it can be used to determine the amount of product that is made. The emission factor for each process vent for §98.123(b)(4) (§98.126(c)(2)) is CBI since it could be used to determine production amount.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 9**

**Comment:** Destruction Device Monitoring. Arkema understands that EPA is interested in understanding when a destruction device system is not operating within specified control device operating ranges. Requiring a list of those events where the device operated outside the ranges is appropriate, but with some limitations. If a destruction device was operating outside appropriate ranges while no FGHG materials were routed to the device, no reporting should be necessary. EPA's concern is in tracking actual emissions, not control device performance during periods of non-operation of the underlying process equipment. Second, if a destruction device excursion does not cause a change in the expected abatement efficiency, no reporting should be necessary. In other Clean Air Act authorities, EPA often requires reporters to show, under an affirmative defense doctrine, that excursions do not negatively impact the environment. As there is not compliance demonstration here, just reports of actual emissions, reporting events that do not impact actual emissions is not necessary. Third, EPA should provide Part 98 reporters, instead of reporting excursions of operating rates, to demonstrate upon EPA audit that any reduced control efficiency operating events were incorporated into the actual emissions calculations. Upon a showing that a reporter properly accounted for decreased operating efficiency events, § 98.126(e) reporting should become CBI. In a regulatory scheme where reporters would become subject to substantive GHG regulation, the proposed deviation reporting system may be more appropriate. However, as EPA is only concerned with annual GHG emissions, any system where a reporter accurately reports GHG emissions satisfies Part 98. Reporters should not be burdened with additional reporting obligations that do not impact accurate GHG emissions reporting.

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 17**

**Comment:** The detailed data used to calculate the production rates have not been considered "emission data" per these established reporting requirements. That data does not have to be submitted to the regulatory agencies as part of the emissions report, and it should not be now.

Similarly, the detailed data used to calculate GHG emissions for the purpose of the GHG MRR should not be determined to be “emission data.” To the contrary, this data is required for permitting purposes and periodic verification efforts. Speciated differential of pollutants and emission rates expressed in kgs/hr, kgs/yr, lbs/hr, lbs/yr or lbs-pollutant/lb-production (i.e., an indexed rate) provide sufficient data for public review, evaluation and comparison. “Emission data” consists of very distinct pieces of information as discussed and defined in 40 CFR 2.301(a)(2)(i)(A). The information used to calculate emission data (in lieu of collecting empirical data through discrete measurement devices such as CEMS, for example) consists of fundamental information including actual flow rates, concentrations, and frequency/duration. This fundamental information is first calculated, for the purposes of Subpart L, using a variety of production and process data including: 1) Actual periodic production volumes by individual product; 2) Actual periodic sales volumes by individual product; 3) Chemical compositions of individual products, by-products, reactants and wastes; 4) Actual periodic volumes of reactants fed into an individual production process; 5) Stoichiometric coefficients of reactants, by-products and co-products; 6) Concentrations of non-GHG trace by-products; 7) Yield and yield loss stated in terms of product and by-product; and, 8) Efficiency ratios (e.g., moles of reactant/by-product/product per mole of by-product/product).

This production and process data has not been considered “emission data” per the current (i.e., pre-GHG Reporting Program) established reporting requirements. This data has not been submitted to the regulatory agencies as part of emissions reports. Similarly, the production and process data used to calculate flow rates, concentrations and frequency/duration for the purpose of the GHG MRR should not be determined to be “emission data.” To the contrary, this data is required for permitting purposes and periodic verification efforts, and it should be afforded the appropriate disclosure protections because it may be detrimental to our company’s competitiveness by revealing confidential unique process information and operational and marketing strategies.

Disclosure of production quantities and process-specific data can be used in conjunction with other publicly available data such as emission rates, production capacity or production rates to gain insight into our company’s operational strengths and weaknesses, to assemble financial and market strength, to estimate recent production tempo. This information could allow competitors to more effectively adjust their pricing structure, formulate new marketing strategies or make capital project decisions that they could not do in the absence of this unique information.

Air Products is the primary manufacturer of  $\text{NF}_3$  in the U.S., and the  $\text{NF}_3$  production process is the single largest source of fluorinated-GHG emissions at the facility. Reporting  $\text{NF}_3$  production and process data as proposed by this rule essentially discloses all  $\text{NF}_3$  data critical to Air Products’ competitive position.

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 5**

**Comment:** Air Products proposes that only the following emissions information be publicly disclosed under Subpart L, regardless of whether it is determined to be CBI or non-CBI:



- 1) Location of the process of emission stream(s) that were analyzed under the initial scoping test of F-GHG at §98.124(a) and §98.126(a)(2), provided it is not process- or vent-specific since that information, when used with other data, could be utilized to determine production capacities and throughputs;
- 2) Function of the process or emissions stream(s) that were analyzed under the initial scoping test of F-GHG at §98.124(a) and §98.126(a)(2), but this must be properly managed (possibly as CBI) since it could be used in conjunction with other reported information to determine manufacturing schemes;
- 3) Annual emissions of each F-GHG for the facility (§98.126(a)(3));
- 4) Method used to determine the emissions of each F-GHG (§98.126(a)(4));
- 5) The activity or activity factor used to estimate emissions (§98.126(c)(1));
- 6) Emission factor for each process vent (§98.126(c)(2));
- 7) Reason for missing data (§98.126(d));
- 8) Length of time data were missing (§98.126(d));
- 9) Method used to estimate missing data (§98.126(d));
- 10) Monitoring results for the destruction device that are deviations from the monitoring limit set during the emissions test (§98.126(e));
- 11) Destruction efficiency of each destruction unit, determined from the emissions test conducted every 5 years (§98.126(f)(1));
- 12) Test methods used to determine the destruction efficiency of each destruction unit (§98.126(f)(2));
- 13) Methods used to report the mass of F-GHGs destroyed (§98.126(f)(3)); and,
- 14) Name of all applicable federal or state regulations that may apply to the destruction process (§98.126(f)(5)).

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 6**

**Comment:** EPA has proposed to subject all mass balance data, reportable per proposed § 98.126(b), as emission data. None of the information required in the proposal for mass balance reporting, other than possibly the absolute and relative calculation uncertainties, should be released to the public to protect CBI. Were EPA to finalize Subpart L and the CBI rule substantively as proposed, no facility could possibly utilize the mass balance approach. The mass balance reporting data set would allow a competitor to exactly replicate a manufacturing unit, providing such detailed information as to be able to optimize the design while evaluating

the data. Reporting mass balance data will destroy any trade secret protection that a manufacturer may have attempted to assert over their operating history in one report.

**Commenter Name: Stephen H. Bernhardt**

**Commenter Affiliation: Honeywell**

**Document Control Number: EPA-HQ-OAR-2009-0924-0019.1**

**Comment Excerpt Number: 1**

**Comment:** In this proposed rule, EPA's position is that the inputs to emission equations [in subpart L] that are part of emission data are not entitled to Confidential Business Information (CBI) treatment. To calculate emissions, it would be necessary to disclose chemical composition of the stream(s), flow rates, pressures, temperatures, etc. The by-product profile can easily be used by one skilled in the art to decipher the catalyst used and operating conditions. This would allow back-engineering of the process and enable competitors, both domestic and foreign, access to process information and know-how to the competitive detriment of the US reporter. Other producers could be able to determine operating rate, yields, cost calculations and other such proprietary competitive information. This can be used in determining market share, profitability, etc. which is business confidential information. EPA should allow reporting of the HFCs being emitted and allow the support information to be CBI subject to EPA review.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 7**

**Comment:** In the emission factor reporting at § 98.126(c), EPA proposed to require reporting of the several emission factors used to estimate emissions, and process throughputs used in the actual emissions calculations. Either of these data points, in conjunction with actual emissions calculations and production data from Subpart OO, would allow a competitor to deduce the actual production rates as well as typical process yields and process stream efficiencies from each fluorochemical process unit reporting into EPA.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 10**

**Comment:** Destruction Device Testing and Destruction of Previously Produced Fluorinated GHGs. These last two data categories are generally considered publicly available information. Destruction efficiencies and amounts of FGHG material returning from commerce do not generally represent CBI.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 8**

**Comment:** The missing data reporting requirements at § 98.126(d) include some CBI. While the reason for missing data, the length of time missing data was used, and the missing data

determination method are arguably not CBI, the value of missing data would be CBI if the data it replaces would have otherwise been CBI. EPA has no need for reporters to report the value of missing data unless the annual emission amount is the missing data point. Because courts have instructed EPA to construe the definition of emission data narrowly, EPA may not publicly report data, even if it is an estimate to backfill for missing information, which does not meet the narrow emission data definition. Reporting proxy CBI is no less harmful to competitive interests than is reporting actual CBI. Because detailed discussions of what data was missing, why it was missing, and how a facility generated proxy data can teach more about underlying process operations than disclosure of certain process data, Arkema is concerned about disclosure under § 98.126(d).

A better way to look at the missing data reporting system would be to treat missing data determinations in a manner similar to how EPA manages a number of maximum achievable control technology (“MACT”) periodic reports. For example, the required reporting for the Hazardous Organic NESHAP (“HON”), 40 CFR 63.152(c)(2)(iii) requires that owners and operators report the name of the parameter for which data was missing and the duration of missing data. Historically, EPA has not required facilities to report missing data estimates under the MACT program, especially for the HON and the Miscellaneous Organic NESHAP (“MON”) at 40 CFR 63 Subpart FFFF, the standards regulating fluorochemical manufacturing sources. The proposed missing data standards seem to resemble those standards applicable to electricity generating units (“EGU”) regulated under 40 CFR 75. These regulations only apply to a very small fraction of facilities and businesses reporting in the Part 98 system. EPA should provide Part 75 facilities the option to synchronize their reporting with their existing requirements, but should not force facilities who have already built MACT-based reporting systems, like the entire Subpart L source category, into the very different EGU reporting system. The missing data handling process is a very small example of the differences between the EGU and MACT compliance systems. EPA should, instead of relying on EGU regulatory concepts to educate Part 98 reporting requirements, reevaluate the data needs to better conform to systems reporters use to comply with Part 63 (and Parts 60, 61, 64, and/or 65) requirements. Reporting of missing data estimates does not fit into the Subpart L system as it may for other subparts.

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 19**

**Comment:** Air Products considers the following data elements CBI for the following reasons: §98.123(b)(3)(i) The process activity, such as process feed rate or process production rate, must be measured for the process-vent-specific emission factor method. The activity used to estimate is CBI since the emissions and emission factor will use the activity factor to calculate the emission rate and associated emissions, and the activity will directly or indirectly related to production throughputs for each individual process and process vent. This information will provide a very comprehensive map of a facility’s process and production capabilities, and it could be used by our competitors to better understand our production technologies, capacities and pricing structure, all of which is extremely sensitive business information. In lieu of reporting the process activity, facilities should be provided with the option to report a process

activity factor that indexes or otherwise parametrically represents process feed rates or production rates in terms without disclosing the actual sensitive data.

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 24**

**Comment:** Air Products considers the following data elements CBI for the following reasons: §98.123, 98.126 and 98.3(c)(4)(iv) The proposed rule requires reporting of total mass of fluorinated GHG produced, total mass of each reactant fed into the production process, total mass of each reactant permanently removed from the production process, total mass of the fluorinated GHG product removed from the production process and destroyed, mass of each by-product generated, mass of each by-product destroyed, mass of each by-product recaptured and mass of each fluorinated emitted [98.126(a)]. Air Products recognizes that data must be collected to complete the mass-balance calculations for the emissions estimate prescribed at 98.123. The Agency surely recognizes that this data is extremely sensitive and confidential business information, which can be utilized to deduce process costs, efficiencies and competitive strategies. In certain instances, this data can be proprietary or protected by patent. Air Products recommends that rather than submitting this information as part of the annual report, this data shall be maintained at the respective facility and available for review at the facility, if necessary, as provided in 98.3(f) and 98.127. In lieu of this data submission, the final rule should recognize and allow self-verification and certification similar to the Title V Operating Permit program where facilities represent their compliance with applicable regulations and permit requirements without submission of the detailed data supporting that certification. In other cases, it may be preferable to utilize third-party auditors or CEMS in lieu of publicly disclosing data, such as raw material inputs and mass of by-products and products, which would expose trade secrets to competitors.

**Commenter Name: Michael Tiller**

**Commenter Affiliation: Compressed Gas Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0020.1**

**Comment Excerpt Number: 9**

**Comment:** The GHG MRR requires (in 40 CFR 98.3(c)(4)(iv) and 98.126) reporting of total mass of fluorinated GHG produced, total mass of each reactant fed into the production process, total mass of each reactant permanently removed from the production process, total mass of the fluorinated GHG product removed from the production process and destroyed, mass of each by-product generated, mass of each by-product destroyed, mass of each by-product recaptured and mass of each fluorinated emitted (see 98.126(a)). Additionally, full explanation for the reason and length of time quality-assured parametric data was missing, as well as the information required by 98.125 and 98.126(b). This data must be collected to complete the mass-balance calculations for the emissions estimate prescribed in 98.123. The Agency surely recognizes that this data is extremely sensitive and confidential business information that can be utilized to deduce process costs, efficiencies, and competitive strategies. In certain instances, this data can be proprietary or protected by patent. CGA recommends that rather than submitting this information as part of the annual report, this data be maintained at the respective facility and available for review at the facility, if necessary, as provided in 98.3(f) and 98.127. In lieu of this

data submission, the final rule should recognize and allow self-verification similar to the Title V Operating Permit Program where facilities represent their compliance with applicable regulations and permit requirements without submission of the detailed data supporting that certification.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 12**

**Comment:** Arkema operates process units subject to proposed 40 CFR 98 Subpart L, Fluorinated Gas Production. Because of the complex nature of the fluorochemicals manufacturing industry, Subpart L is necessarily complex in its structure and reporting obligations. For example, in Table 4 of the preamble (75 Fed. Reg. 39119), EPA correctly removes individual facility Industrial GHG supply rates from public disclosure. EPA eloquently explains why production-level throughput data should be held as CBI for Subpart OO and QQ supplier reporters. (75 Fed. Reg. 39122, Table 5) EPA appropriately proposes to only report nationally aggregated data, and permanently hold the disaggregated data as CBI. For domestic producers, disaggregated data includes facility and production unit production data. However, for those Industrial GHGs made in Subpart L reporting facilities, EPA proposes to require reporting of the exact same data, GHG production, as emission data. (75 Fed. Reg. 39100-01) EPA's flawed rationale attempts to establish that the data elements used to determine direct emissions, which necessarily includes production rates, become emission data for domestic producers but not for foreign producers not operating under Subpart L. EPA should recognize the inconsistency between the supplier and producer subpart CBI requirements, where foreign producers not reporting process level throughput in Subpart OO immediately gain a competitive advantage over domestic providers supplying the information to the public in Subpart L.

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 19**

**Comment:** Air Products considers the following data elements CBI for the following reasons: §98.126(a)(3) Annual equipment leak emissions for each F-GHG at the facility by process would provide very specific information on the constituent concentrations of individual process streams since the leak (fugitive) emissions would be representative of the process stream itself. Notwithstanding that these equipment leak emissions would be very low in volume; the characterization of the stream constituents may be identical to the process stream as produced. This information in conjunction with production throughputs reported elsewhere under Subpart L could be then utilized to determine process and product constituents and quantities. Alternatively, reporting these equipment leak emissions only for F-GHG and GHG constituents as CO<sub>2</sub>e should be acceptable for reporting and policy-making purposes.

**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 3**

**Comment:** Some of the data that Mexichem would be required to report would be considered confidential business information under one subpart, but be made available to the public under another. Mexichem is a manufacturer of a fluorinated greenhouse gas as well as a supplier of industrial greenhouse gases. As such Mexichem is subject to Subparts L and OO of 40 CFR Part 98. The following data is required to be reported under these subparts and according to the Memorandum “Data Category Assignments for Reporting Elements” would be given the confidentiality status shown [SEE DCN:EPA-HQ-OAR-2009-0924-0055 for Table comparing data elements in Subpart L and Subpart OO]. §98.416a3, a4, a6, & a7 are applicable to F-GHG destroyed at the facility or sent to another facility for destruction. While we understand, but do not necessarily agree with, the EPA’s logic in determining what constitutes emission data and therefore what can be designated as confidential business information, we cannot understand how the EPA can designate the same information as confidential under one subpart and not so under another. Release of this information has the potential to harm Mexichem’s competitive position regardless of whether it is considered emission data or not.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 13**

**Comment:** At 75 Fed. Reg. 39099, EPA notes its commitment to transparency in the GHG reporting process. All stakeholders, the public, industry, other branches of government, states and local air agencies, and EPA, agree that regulatory activities should be conducted as transparently as possible. However, Congress has established that EPA may not sacrifice CBI or trade secrets in search of such transparency. Many of the data elements that EPA requires to be reported in Part 98 would damage the competitive position of any Subpart L reporter. Anyone reviewing a Subpart L Part 98 submittal would immediately learn exactly how the producer manufactures their products, what capacity it utilized in the last year, and, to some extent, the unit maintenance schedule. EPA should not release such critical information to competitors.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 11**

**Comment:** Congress, the courts, and prior EPA policy require EPA to read “emission data” narrowly, where only data describing actual emissions is subject to public view. For Subpart L, all required reporting data other than the mass emission rate of actual emissions would subject damaging CBI to public disclosure. However, due to the very small number of Subpart L affected sources, even mass emission rates of actual GHG emissions may provide substantial trade secret information to potential competitors. EPA may be able to better shield CBI data by aggregating producer data, as we recommend for the supplier Subparts.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 5**

**Comment:** Concerning the scoping test report, the § 98.126(a)(3) actual emissions reporting and the § 98.126(a)(4) determination method requirement are clearly emission data. EPA cannot hold this data as CBI. However, the chemical identities of the contents of each process stream (§ 98.126(a)(1)), the location functions of each stream analyzed in the scoping test (§ 98.126(a)(2)), and the chemical formula and total mass produced by chemical and process (§ 98.126(a)(5)) represent information that fluorochemical manufacturers would never report in light of CBI considerations. Anyone wishing to reverse engineer a manufacturing facility could determine all required information concerning the subject process, from throughput rates, reaction yields, catalyst type and age, to process performance, through reading one scoping test report. Any reporter submitting the scoping test report would be immediately subjected to competitive, most likely offshore, reverse engineering, where competitors not subject to American competition law could construct a newer version of an existing United States manufacturing facility without the burden of developing a process design.

**Comments Specific to 40 CFR Part 98, Subpart W:**

**Commenter Name:** Karin Ritter<sup>94</sup>

**Commenter Affiliation:** American Petroleum Institute

**Document Control Number:** EPA-HQ-OAR-2009-0924-0057.1

**Comment Excerpt Number:** 3

**Comment:** . . . API notes here that the proposed rule incorrectly categorizes the following two data elements from Subpart W as "inputs to emission equations:" (1) total throughput of compressors whose wet seals are connected to the degassing vent; and (2) total throughput of the reciprocating compressor whose rod packing emissions is being reported. This information is neither "inputs to emissions equations" nor "emissions data." These data elements are throughput data, but are not inputs to any emissions equations. Rather, the data represents direct measurements of these source types. Compressor emissions are determined based on direct measurement as specified in Sections 98.233(0) and 98.233(p). Throughput data is not a required input in equations W-16 or W-17. As such, API believes these data elements should instead be in the category entitled "Production/Throughput Data that are Not Inputs to Emission Equations," and, accordingly, be provided CBI status.

**Commenter Name:** Karin Ritter<sup>95</sup>

**Commenter Affiliation:** American Petroleum Institute

**Document Control Number:** EPA-HQ-OAR-2009-0924-0057.1

**Comment Excerpt Number:** 10

**Comment:** The data elements . . . that have been incorrectly identified as emissions data and categorized as "not CBI" . . . include: . . .

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<sup>94</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

<sup>95</sup> Comments submitted by the American Petroleum Institute were incorporated by reference by the National Petroleum and Refineries Association (EPA-HQ-OAR-2009-0924-0036).

3) From Subpart W - Petroleum and Natural Gas Systems: immediate upstream separator temperature; immediate upstream separator pressure; sales oil API gravity; estimate of individual tank or tank battery capacity in barrels; total throughput of the reciprocating compressor whose rod packing emissions is being reported. . .

Comments Specific to 40 CFR Part 98, Subpart QQ:

**Commenter Name: Jennifer Cleary**

**Commenter Affiliation: Association of Home Appliance Manufacturers**

**Document Control Number: EPA-HQ-OAR-2009-0924-0051.1**

**Comment Excerpt Number: 6**

**Comment:** AHAM also questions the necessity of submitting data regarding the identity of the parent companies, their percentage of ownership, import and export dates, and port of import and export. If EPA requires these data to be reported under Subpart QQ, then, as discussed above, it should be classified as CBI.

**Commenter Name: David B. Calabrese**

**Commenter Affiliation: Air Conditioning, Heating and Refrigeration Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0032.1**

**Comment Excerpt Number: 3**

**Comment:** AHRI does not believe that the confidential treatment of information submitted in compliance with Subpart QQ of the rule should be time limited. The release of such CBI would enable competitors (both domestic and abroad) to determine production data for importers and exporters of these products. Furthermore, as EPA acknowledges, the disclosure of this CBI might also reveal a company's market strength and position or enable competitors to "infer production costs and pricing structures." 75 Fed. Reg. 39,122-23 (July 7, 2010). There is no time after which this data could be released and avoid these potential competitive ills or antitrust concerns.

**Commenter Name: David B. Calabrese**

**Commenter Affiliation: Air Conditioning, Heating and Refrigeration Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0032.1**

**Comment Excerpt Number: 7**

**Comment:** The EPA has proposed to classify the country of import and/or export for pre-charged equipment and products containing closed-cell foams as CBI. If EPA mandates that this information still be provided under Subpart QQ, then AHRI supports EPA's decision to classify customer and vendor information as CBI. Companies that import and export pre-charged equipment and closed-cell foams do not typically make the identities of their customers or vendors available to the public. Making this information publically available would jeopardize each company's customer base, market share, and competitive positions with respect to pricing and other business strategies. If EPA requires that these details be provided, EPA should ensure that customer and vendor information submitted to comply with Subpart QQ is protected as CBI.

**Commenter Name: Dave Stirpe**

**Commenter Affiliation: Alliance for Responsible Atmospheric Policy**

**Document Control Number: EPA-HQ-OAR-2009-0924-0050.1**



**Comment Excerpt Number: 2**

**Comment:** EPA has proposed to classify the country of import and/or export for pre-charged equipment and products containing closed-cell foams as CBI. We question the necessity of submitting this information under Subpart QQ regarding the country of import and export. The originating country where appliances or closed-cell foams containing GHGs were manufactured or the location to which American-made appliances or foams will be exported is not relevant to the purpose of EPA's goal of gathering "accurate and timely information on GHG emissions" in order to inform "future climate change policy decisions." 74 Fed. Reg. at 56, 265 (Oct. 30, 2009). EPA's Section 114 authority does not extend so far as to provide EPA with independent authority to gather data that will not be used toward the furtherance of these goals. If EPA's intent in gathering supplier data is to determine the net supply of GHGs in the U.S. and production that might have been offset by importing pre-charged equipment, knowing the country of import and export will not further this goal. Hence, this data should not be required under Subpart QQ of the mandatory reporting rule. However, if EPA mandates that this information still be provided under Subpart QQ, then we support EPA's decision to classify customer and vendor information as CBI. Companies that import and export pre-charged equipment and closed-cell foams do not typically make the identities of their customers or vendors available to the public. Making this information publicly available would jeopardize each company's customer base, market share, and competitive positions with respect to pricing and other business strategies. If EPA requires that these details be provided, EPA should ensure that customer and vendor information submitted to comply with Subpart QQ is protected as CBI.

**Commenter Name: Jennifer Cleary**

**Commenter Affiliation: Association of Home Appliance Manufacturers**

**Document Control Number: EPA-HQ-OAR-2009-0924-0051.1**

**Comment Excerpt Number: 8**

**Comment:** EPA proposed to classify the country of import and/or export for pre-charged equipment and products containing closed-cell foams as CBI. AHAM questions the necessity of submitting this information under Subpart QQ regarding the country of import and export. If EPA nevertheless mandates that this information be provided under Subpart QQ, then AHAM agrees with EPA's decision to classify customer and vendor information as CBI. Companies that import and export pre-charged equipment and closed-cell foams do not typically make the identities of their customers or vendors available to the public. Making this information publically available would jeopardize each company's customer base, market share, and competitive positions with respect to pricing and other business strategies. If EPA requires that these details be provided, EPA should ensure that customer and vendor information submitted to comply with Subpart QQ is protected as CBI.

**Commenter Name: Sean Mackay**

**Commenter Affiliation: Whirlpool Corporation**

**Document Control Number: EPA-HQ-OAR-2009-0924-0046.1**

**Comment Excerpt Number: 3**

**Comment:** There should be no time limit for the confidential treatment of information supplied for subpart QQ. The release of this information, even at a later date, would allow competitors to determine production data for importers and exporters of pre-charged equipment and/or products containing closed cell foam.

**Commenter Name: Sean Mackay**  
**Commenter Affiliation: Whirlpool Corporation**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0046.1**  
**Comment Excerpt Number: 1**

**Comment:** Association of Home Manufacturers (AHAM) has already commented to the EPA on May 26, 2010 and June 1, 2009, that the industry strongly opposes importers and exporters of pre-charged equipment and closed-cell foams being required to report their imports and exports that contain fluorinated GHGs. This requirement is unnecessary and costly given the negligible amount of GHGs that escape from these hermetically sealed products. These leaks are well below the proposed threshold of 25,000 metric tons of CO<sub>2</sub> equivalent that the Agency has proposed in the rule given that these products for home use contain a few ounces in the refrigerant charge and only a few pounds in the insulating foam. We continue to view this reporting as burdensome although if the agency determines that this data is necessary it is imperative that the confidential nature of competitive business information be protected by the agency.

**Commenter Name: Dave Stirpe**  
**Commenter Affiliation: Alliance for Responsible Atmospheric Policy**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0050.1**  
**Comment Excerpt Number: 10**

**Comment:** We do not believe that the confidential treatment of information submitted in compliance with Subpart QQ of the rule should be time limited. The release of such CBI would enable competitors (both domestic and abroad) to determine production data for importers and exporters of pre-charged equipment and/or products containing closed-cell foam. Furthermore, as EPA acknowledges, the disclosure of this CBI might also reveal a company's market strength and position or enable competitors to "infer production costs and pricing structures." 75 Fed. Reg. 39,122-23 (July 7, 2010). There is no time after which this data could be released and avoid these potential competitive ills or antitrust concerns.

**Commenter Name: Jennifer Cleary**  
**Commenter Affiliation: Association of Home Appliance Manufacturers**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0051.1**  
**Comment Excerpt Number: 7**

**Comment:** AHAM does not believe that the confidential treatment of information submitted in compliance with Subpart QQ of the rule should be time limited. The release of such CBI would enable competitors (both domestic and abroad) to determine production data for importers and exporters of pre-charged equipment and/or products containing closed-cell foam. Furthermore, as EPA acknowledges, the disclosure of this CBI might also reveal a company's market strength and position or enable competitors to "infer production costs and pricing structures" [See 75 Fed. Reg. 39,122-23 (July 7, 2010)]. There is no time after which this data could be released and avoid these potential competitive concerns.

**Commenter Name: David B. Calabrese**  
**Commenter Affiliation: Air Conditioning, Heating and Refrigeration Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0032.1**

**Comment Excerpt Number: 1**

**Comment:** The EPA has proposed that none of the data in the 11 categories of supplier data qualify as emission data. The importance of this determination is that by definition, emissions data cannot constitute CBI. However, data that is not emissions data can either be treated as CBI or not CBI. AHRI is supportive of this decision and agrees that data provided by suppliers are not emissions data. Moreover, EPA's rationale regarding supplier data affirms the comments AHRI submitted in a prior letter dated June 11, 2010: that requiring importers and exporters to report fluorinated-GHGs contained in equipment or pre-charged foams as emissions under Subpart QQ is factually and legally not correct. In sum, AHRI is not opposed to reporting data required by the mandatory reporting rule, but wants to ensure that all data required under Subpart QQ be treated as CBI.

**Comment. Commenter Name: Sean Mackay**

**Commenter Affiliation: Whirlpool Corporation**

**Document Control Number: EPA-HQ-OAR-2009-0924-0046.1**

**Comment Excerpt Number: 5**

**Comment:** EPA further proposes to release such data [production and throughput quantity and composition data] in aggregated form for importers and exporters of fluorinated GHGs contained in pre-charged equipment or closed-cell foams, proposed 40 CFR Part 98, subpart QQ. Whirlpool Corporation agrees that if such data is to be released, it must be aggregated in order to maintain its confidentiality. However, we are concerned that the EPA has not provided enough clarity on how they intend to collect and ensure this anonymity of the data. Whirlpool Corporation suggests that AHAM should provide this aggregated data to the EPA as they have past experience providing data for EPA and Department of Energy (DOE) programs.

**Commenter Name: Jennifer Cleary**

**Commenter Affiliation: Association of Home Appliance Manufacturers**

**Document Control Number: EPA-HQ-OAR-2009-0924-0051.1**

**Comment Excerpt Number: 5**

**Comment:** [We support EPA's proposal that] individual shipment amounts will not be released.

...

**Comments Specific to 40 CFR Part 98, Subparts RR and UU:**

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**

**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**

**Document Control Number: EPA-HQ-OAR-2009-0924-0053.2**

**Comment Excerpt Number: 8**

**Comment:** EPA seeks comment on various aspects of its proposed confidentiality determinations with respect to information submitted by geologic sequestration ("GCS") facilities. As we have noted throughout these comments, EPA's determination must prioritize, in accordance with section 114 of the Act, transparency and public disclosure of information to the maximum extent permitted.

EPA requests comment on the data format of non-CBI information to be disclosed as a general matter. 75 Fed. Reg. at 39,100. With respect to non-CBI data submitted by GCS facilities, we encourage EPA to require that public data always be disclosed as raw data. Public availability of raw data will provide the most transparency and ability to verify the performance of these facilities. However, supplementary graphics may also be helpful.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.2**  
**Comment Excerpt Number: 9**

**Comment:** We support EPA’s proposal that all information submitted in a GCS facilities Monitoring Reporting and Verification plans (“MRV plans”) will be made publicly available. Id. at 39,110. Specifically, EPA proposes that data elements falling within “The Calculation Methodology and Methodological Tier Category” should be “emission data” and must be made available to the public. Id. Pursuant to this determination, EPA proposes to make available to the public the following information from the MRV plans submitted by geologic carbon sequestration (GS) facilities:

- (1) Methods for detecting and quantifying any carbon dioxide leakage to the surface;
- (2) Methods assessing the risk of leakage of carbon dioxide to the surface;
- (3) Methods for establishing pre-injection environmental baselines;
- (4) Location and depth of all potential leakage pathways;
- (5) Qualitative descriptions of each potential leakage pathway;
- (6) Methods used to characterize the site;
- (7) Any data required by an approved MRV plan to be submitted to EPA in the annual report;
- (8) Any other information included in the MRV plan.

We support EPA’s determination that information listed above is to be “emission data” because it is indeed, as EPA correctly recognizes, “information necessary for the reporter to actually calculate the emissions and for EPA and the public to verify that an appropriate method was used.” Id. Further, we support EPA’s proposal that “in addition to the methods included in the MRV Plans, . . . supporting documentation (e.g., location and description of potential leakage pathways, frequency of monitoring, and the strategy for detecting leaks)” also constitute emission data. Id. at 39,111.

Again, we applaud EPA’s proposed definition of “emission data,” particularly with respect to MRV plans submitted by GCS facilities. EPA requests comment on whether any information in the MRV plan or supportive documentation should not be considered “emission data.” Id. As with all other information submitted by reporters pursuant to this rule, EPA should only determine that information in and supportive documentation for MRV plans is not “emission data” or entitled to protection as CBI only upon a “satisfactory” showing by the reporter, as

required by section 114 of the Act. In addition, we note that any information entitled to protection as CBI upon submission should lose that status once disclosure is no longer necessary.

APPENDIX C:  
LIST OF COMMENTS ON APPROACHES TO PUBLISHING PART 98  
DATA

In this appendix, we provide a list of public comments we received regarding the approaches to publishing Part 98 data, including comments on approaches to aggregating data (e.g., publishing data by industry or by geographic location). These comments were received during the 60-day public comment period following publication of the July 7, 2010 CBI proposal (see 75 FR 39094, July 7, 2010). EPA is not making any final decisions regarding formats for publishing Part 98 data. However, EPA will take into consideration all of the comments and recommendations submitted by stakeholders when deciding on the appropriate format for publishing Part 98 data and will ensure that data that has been determined to be CBI is not disclosed to the public. Regardless of the format EPA may choose to publish Part 98 data, EPA notes that it must release data elements determined in this final rule to be emission data or otherwise non-CBI data in response to FOIA requests.

Where possible, EPA separated comments on specific topics into their respective data categories by editing individual excerpts. However, in some cases, commenters made broad statements about groups of data elements from various categories or general comments on the approach that could not be easily separated by topic or data category without potentially affecting the intended meaning of the commenter's statements. In such cases, we listed the comment excerpt related to publication and approaches to aggregation in its entirety in this appendix and in the relevant sections of this document. For the response to any comments in this appendix regarding issues or data elements that are not related to approaches to publishing Part 98 data, please see the appropriate section of this document.

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 7**

**Comment:** In certain instances, most notably for supplier data categories, EPA proposes to make available to the public aggregated data rather than individual site or supplier data. DuPont concurs with this approach if the information is provided in such a way that the individual value cannot be surmised; e.g., by a competitor. EPA recognizes that if a product is produced by only one or two companies, then at least one entity can ascertain the production level of another company. However, even if there are nominally three or more producers, if only one or two are recognized to comprise the vast majority of the production, release of the aggregated data would not effectively maintain confidentiality. These pitfalls aside, DuPont supports *the concept of aggregation of sensitive data that will be released to the public. The aggregations* should be made at the highest level possible while still meeting the Agency's purpose. Such aggregation might include aggregation of all emissions of each GHG from a facility. That is, emission of each individual GHG might be reported, but not separated by emission source or fuel type. In this manner, it would become more difficult for an expert in competitive intelligence to ascertain sensitive information such as production, capacities, etc.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**  
**Commenter Affiliation: Clean Air Task Force, Natural Resources Defense Council**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0053.2**  
**Comment Excerpt Number: 12**

**Comment:** Remaining CBI should be declassified quickly. Pending full release, EPA should still present as much of the data as possible, albeit shielded to conceal details which could cause “substantial harm to [a] business’s competitive position.” EPA proposes several such aggregation approaches, and we think them worth exploring. See 75 Fed. Reg. at 39,100, 39,120. Some approaches may be more useful for some data elements, and different data presentations will have different uses, so we believe EPA should go forward with multiple shielding methods to provide maximum public access.

We are particularly interested in approaches which would present CBI by range (e.g., EPA might announce that a given gas was in a reporter’s product at a concentration of between 5 and 7 mg/l, yielding total emissions of between 150 and 160 tons). EPA should set these ranges by determining the minimum width possible that will still protect facilities from substantial competitive harm. The breadth of the reporting range should, generally, be quite narrow – and particularly so where competition is at its fiercest. In those industries, if the market is reasonably efficient, competitors will be nearly equally matched, with only slight variations in production processes separating rival firms. Small differences will often drive competitive advantage. Put differently, the basic production process for a given fluorinated gas is likely to be quite similar from factory to factory – it is the small improvements in a given facility that count. As a result, EPA can report production data with only limited shielding, as the slight competitive variations that make economic differences will appear only at the margin. Moreover, these differences may already be public knowledge, and so not CBI, in many instances, as companies will often promote themselves on the basis of such differences.

It would also be useful for EPA to report, without any distortion, the actual range of emissions, by product, across all reporters, along with the total emissions of each product. See 75 Fed. Reg. at 39,120. Understanding the variation across firms supplying greenhouse gases into the economy will help EPA and the public consider ways to regulate the greenhouse gas market, as they will better understand the market’s fluctuations and participants.

Aggregating data is also a useful approach. We agree with EPA that aggregating data by product is useful, and will help track which products and fuel types produce the lion’s share of emissions. See *id.* We would also be interested in aggregation at various corporate levels. EPA recently proposed limited corporate structure reporting, which we support. For supplier companies, identifying emissions by both individual companies and corporate parents would aid investors making carbon risk decisions, as well as the general public.

Geographic aggregation is also helpful, as it will help show which states and regions are contributing heavily to greenhouse gas supplies, and which are not – useful information for regulators designing regional and national policy. Reporting by state would be a good start, along with reports by Petroleum Administration for Defense District (“PADD”).

In sum, EPA’s guiding principle should be that the substance of CBI data should be reported to the public, shielded only sufficiently to prevent substantial competitive harm.

**Commenter Name: Juanita M. Bursley**  
**Commenter Affiliation: Graf Tech International Holdings, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0052.1**  
**Comment Excerpt Number: 3**

**Comment:** EPA proposes to determine product-specific GHG data at the facility and importer/exporter level to be CBI, other than the four noted exceptions. EPA also proposes to aggregate these GHG data, by gas, for each product and release the aggregated data by source category. In some cases, there may be limited number of competitors in a specific supplier or direct emitter category, so that aggregating the data for reporting purposes may not provide as much of a veil as intended by EPA. This could cause substantial harm to suppliers reporting these data elements.

**Commenter Name: Thomas P. Diamond<sup>96</sup>**  
**Commenter Affiliation: Semiconductor Industry Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0039.1**  
**Comment Excerpt Number: 2**

**Comment:** Such solutions [for avoiding disclosure of CBI] might include, but would not be limited to the following:

Making aggregated emissions profiles available to the public for each industry sector. These profiles could be designed with the regulatory “emission data” definition in mind by explaining how emissions generally were calculated for the sector and providing a qualitative description of information that would be “necessary” to determine emissions for the sector.

Requiring each covered facility to complete both a confidential and a simplified public reporting form. The public form would present the emissions calculation input at a more general level that avoids revealing the facility’s confidential information, such as by reference to a range or a not-to-exceed figure.

**Commenter Name: Jennifer Cleary**  
**Commenter Affiliation: Association of Home Appliance Manufacturers**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0051.1**  
**Comment Excerpt Number: 3**

**Comment:** EPA proposes to determine that reported facility level and importer/exporter level production and throughput quantity and composition data are Confidential Business Information (CBI). EPA further proposes to release such data in aggregated form for importers and exporters of fluorinated GHGs contained in pre-charged equipment or closed-cell foams, proposed 40 CFR Part 98, subpart QQ. AHAM agrees that if such data is to be released, it must be aggregated in order to maintain its confidentiality. EPA should, however, more clearly state its proposed procedure for aggregating data it has determined to be CBI. It is critical that the aggregated reports be presented in a way that protects the anonymity of the data. The proposed rule does not

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<sup>96</sup> Comments submitted by the Semiconductor Industry Association were incorporated by reference by the Micron Technology, Inc. (EPA-HQ-OAR-2009-0924-0063).



provide enough detail on EPA's planned process for aggregating and reporting CBI for stakeholders to effectively comment. When aggregating data, EPA must consider whether the aggregation will effectively protect the reporting companies.

1. EPA should not make aggregated reports public if there are fewer than three companies reporting data in any particular category. If there are only two reporters, each reporting company can subtract out its own data and determine the other company's data, which undermines the purpose of aggregating the data—to protect each company's confidential information and competitive position. EPA has stated an intent to provide aggregated data under these conditions in other parts of the rule, and it should expressly do so for data reported under Subpart QQ as well [See 75 Fed. Reg. at 39,120].

2. The aggregated CBI may only be disclosed if it is presented in such a way that it provides a national snapshot of the amount of GHGs used in appliances and closed-cell foams. It should not be disclosed in a way that discloses company or facility-specific information. Accordingly, AHAM opposes presenting supplier data on a facility or company-specific basis, including through the use of numerical ranges. Even if numerical ranges were used, in some instances, it may be possible for competitors to identify certain company's data based upon the disparity of the ranges between large and small manufacturers.

3. Similarly, data should be released on a product basis, not a product class basis (e.g., no more granular than by refrigerator, refrigerator-freezer, freezer, room air conditioners, dehumidifiers, portable room air conditioners, etc.). Breaking down data in smaller sub-categories than that will not aid in the distribution of accurate and timely information on GHG emissions. And, it may allow competitors to identify certain company's data based on which manufacturers make each class of product.

**Commenter Name: Stephen H. Bernhardt**

**Commenter Affiliation: Honeywell**

**Document Control Number: EPA-HQ-OAR-2009-0924-0019.1**

**Comment Excerpt Number: 3**

**Comment:** On pg 39100, EPA states that CBI data will be aggregated to protect confidentiality of data elements. We suggest EPA follow the example of the former AFEAS project where such aggregation would require at least three manufacturers with production levels of any aggregated HFC to be greater than 1000 metric tones each for that compound. Should fewer be used, those producing would be aware of competitive operating rates and they would also have good information if it is known that one of three manufacturers was producing only token volumes.

**Commenter Name: Ray Niemiec**

**Commenter Affiliation: Texas Instruments Incorporated**

**Document Control Number: EPA-HQ-OAR-2009-0924-0038.1**

**Comment Excerpt Number: 2**

**Comment:** TI believes that any data deemed CBI should never be made public in any form, especially if aggregated at anything at the company level or below (e.g., site or facility levels). Making CBI available to the public, in any form, would likely render CBI accessible, contrary to section 114(c) of the Clean Air Act. Once divulged, the CBI information would likely lead to

substantial competitive harm because savvy and intelligent competitors have the requisite knowledge and tools to dissect and interpret what CBI data means in terms of trade secret information such as capacity, pricing, product yields, and unique processes.

Aggregate data or numerical ranges could be determined to be from a specific fab or company due to the high percentage attributable to such company. When aggregate numbers ultimately report any single company's usage or other process data, data that can be used by a competitor to the data owner's disadvantage is created. For example, as older fabs are bought or closed and number of fabs decrease, the percentage of aggregate data attributable to one company grows, which could provide trade secret data to competitors, particular overseas competitors not subject to the MRR. In that case, leakage of U.S.-based semiconductor manufacturing is likely to occur due to the absence of the requirement to report CBI and the ability of overseas fabs to gain market share by learning U.S. fab's trade secrets and ultimately undercutting volume and pricing of U.S. fabs.

In addition, there exists the risk that new processes or process chemicals used by a company, unique to the industry, would generate CBI data to which aggregation would be meaningless, yet for which EPA would attempt to aggregate using "0" as a value for other companies. Aggregated data may also lead to price manipulation as a company that comprehends the total market gains a negotiating advantage over smaller consumers of specific chemicals.

Once CBI data is released to the public, there is no "clawback" mechanism, as may exist with, for example, privileged documents in a litigation context. As a result, even if CBI is aggregated or otherwise "masked" by being publicly presented in a numerical range or other format, once a competitor is able to dissect or "unmask" CBI, there is no legal mechanism to stop the use of such CBI to the competitive detriment of the CBI owner. Further, there is no way to know at the time CBI would be made public whether any aggregation or "masking" technique would actually work to safeguard against underlying individual company CBI being discovered. Much like software makers who seek to safeguard their software upon its initial release to the public, there are frequently "hackers" who will find ways to penetrate such safeguards and "hack" the software in the future. Likewise, EPA's aggregation or masking technique could be penetrated, leading to the future acquisition and use of CBI by competitors.

**Commenter Name: Craig H. Segall, Helen Silver, and Meleah Geertsma**

**Commenter Affiliation: Clean Air Task Force, Natural Resources Defence Council**

**Document Control Number: EPA-HQ-OAR-2009-0924-0018.1**

**Comment Excerpt Number: 6**

**Comment:** Because fluorinated gases are powerful global warming agents, with global warming potentials tens or hundreds of times that of carbon dioxide, we do not support shielding this information from public view. . . . EPA should determine the resolution at which concentration data could cause competitive harm. At some level of granularity, companies will have sufficiently similar products as to remove any risk. EPA should determine this data range and then report this data within that range (e.g., a reporter might announce that a given gas was in its product at a concentration of between 5 and 7 mg/l). This data can be reported immediately, pending full release once the market has moved on.

Finally, to supplement this ranged reporting, EPA should aggregate reporting data to ensure that some information still reaches the public. Geographic reporting, by state or by PADD, would help the public track where fluorinated gases are being produced and how industries and regions are likely to be affected by controls on these gases.

**Commenter Name: Michael Tiller**

**Commenter Affiliation: Compressed Gas Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0020.1**

**Comment Excerpt Number: 4**

**Comment:** EPA is specifically soliciting suggestions on approaches to aggregating CBI data that would provide useful information to the public without disclosing data determined to be CBI. CGA believes that data once determined to be CBI, is just that, and legally should not be disclosed unless there is compelling reason to do so.

**Commenter Name: David B. Calabrese**

**Commenter Affiliation: Air Conditioning, Heating and Refrigeration Institute**

**Document Control Number: EPA-HQ-OAR-2009-0924-0032.1**

**Comment Excerpt Number: 4**

**Comment:** EPA has proposed to release the following Subpart QQ data by nationally aggregating it: the mass of each fluorinated gas imported or exported in pre-charged equipment or closed-cell foams; the quantity of F-GHGs contained in the foam in each type of appliance imported or exported; the density of the F-GHGs contained in closed-cell foams that are not inside appliances; and the quantity of foam imported or exported for each type of closed-cell foam. AHRI believes that this data should only be publicly disclosed if it is presented in a manner that provides a national snapshot of the amount of GHGs used in appliances and closed-cell foams, rather than in a manner that discloses company or facility-specific information. To disclose this data in a more granular manner will raise potential competitive and antitrust concerns. Therefore, AHRI strongly opposes the suggestion that nationally aggregated data should be presented in any format that might allow comparison of data between facilities because to do so undermines the entire point of aggregating data – to provide a level of anonymity and protect the confidentiality of such data. AHRI, thus, opposes presenting supplier data on a facility or company-specific basis, including through the use of numerical ranges. Even if numerical ranges were used, in some instances, it may be possible for competitors to identify certain companies based upon the disparity of the ranges between large and small manufacturers.

**Commenter Name: Juanita M. Bursley**

**Commenter Affiliation: Graf Tech International Holdings, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0052.1**

**Comment Excerpt Number: 6**

**Comment:** EPA appears to recognize that the potential for this information being damaging to competitive advantage increases with the fewer reporters in a certain supplier category. GrafTech agrees with this observation. However, EPA suggests in the preamble that such data may be released safely to the public as a national aggregation for products where there are three or more reporters. GrafTech believes this assessment is not sufficiently conservative to protect CBI, and recommends that EPA instead only disclose such data in industries that have 10 or

more reporters within a source category or NAICS code. In particular, GrafTech believes there are few importers of petroleum products and coal-based liquid fuels in the U.S. that use these products as a raw material for the manufacture of carbon and graphite products and, therefore, disclosing importer-level data on quantities and compositions of products imported by importers of coal-based liquid products and petroleum products may be too revealing of its production, operating capacities, etc. Furthermore, to protect CBI, GrafTech recommends that EPA only release national aggregation data from reporters for total supplier categories, e.g. petroleum products, and not for individual petroleum products within the category, e.g. petroleum coke and petroleum pitch. While it may be true for facility-level GHGs reported, GrafTech does not believe EPA's presumption that all suppliers import or export "a number of different products for sale or delivery" and, therefore, the release of these data elements, which represent the aggregated emissions from a mixture of products supplied to the economy by each supplier, would be potentially damaging to those reporting entities. GrafTech imports a very limited number of products covered under subparts MM and LL. When limited products are imported or exported, the likelihood that the data could be used to back-calculate sensitive production information is much greater. As mentioned previously, when a company routinely imports and meets its reporting obligations to the EIA through brokering contracts, this data is not already readily available to the public in its own business entity's name.

**Commenter Name: None**

**Commenter Affiliation: The Federal Trade Commission**

**Document Control Number: EPA-HQ-OAR-2009-0924-0065.1**

**Comment Excerpt Number: 10**

**Comment:** If the EPA were to treat the capacity data as confidential, the information might be made publicly available in nationally aggregated form [Footnote: It is important to keep in mind that there may be few firms in some geographic regions or in some industries, which would raise the concern that publishing even aggregate data might decrease competition. The Energy Information Administration developed rules to make the public release of data less likely to lead to such undesirable results. See U.S. ENERGY INFORMATION ADMINISTRATION, DISCLOSURE POLICY FOR EIA POWER SURVEYS, (updated June 30, 2010) (explaining that certain firm-specific data will not be disclosed), available at <http://www.eia.doe.gov/electricity/forms/sselecpower98.html>.]. Delaying release of the data for an extended period could also alleviate competition concerns, but only if the historical data no longer reflected current capacity or current plant capabilities.

**Commenter Name: Vickie Patton**

**Commenter Affiliation: Environmental Defense Fund**

**Document Control Number: EPA-HQ-OAR-2009-0924-0047.1**

**Comment Excerpt Number: 6**

**Comment:** Plainly Identify What Data Elements Are Withheld: EPA has indicated that it will disclose emissions data on its website. See 75 Fed. Reg. at 39,097 ("In an effort to promote transparency, EPA intends to publish on EPA's Web site much of the Part 98 data that we determine to be emission data or not otherwise entitled to confidential treatment pursuant to CAA section 114(c)"). Where a company relies on CBI to withhold information, the data elements that are withheld should be plainly identified for the public as part of the website database.

**Commenter Name: Michael Tiller**  
**Commenter Affiliation: Compressed Gas Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0020.1**  
**Comment Excerpt Number: 7**

**Comment:** EPA recognizes the sensitivity of much of the requested reported data. The preamble states, “Given the importance of this data, we are publishing data elements that are emission data or are determined not be not CBI. EPA intends to publish the data only where they can be aggregated in a manner to protect the confidentiality of these data elements.” But then, EPA goes on to note that, “There are a number of different formats in which both CBI and non-CBI could be published using tables, graphs, charts, and other graphical methods. For example, EPA could publish tables or bar charts showing the emission data for individual facilities to allow comparison of data between facilities within a source category.” This seems to directly contradict EPA’s recognized sensitivity of the reported data. CGA prefers EPA’s alternative approach to publish charts of emission data by geographical region to allow comparison of data between different industry sectors or locations.

**Commenter Name: Gregory M. Scott**  
**Commenter Affiliation: National Petrochemical & Refiners Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0036.1**  
**Comment Excerpt Number: 7**

**Comment:** The DOJ and FTC have jointly issued guidelines that set forth their recommendations and statements of enforcement intent that address information reporting and exchange. See DOJ and FTC Statement of Enforcement Policy in Health Care (2007) (also applicable outside of health care for issues such as information exchange guidelines). In those guidelines, the agencies set forth safeguards for participants in information reporting and exchange programs to alleviate antitrust risk. Summarizing, the agencies suggest aggregation, masking and lagging (rendering data anonymous, aggregating it so it is not facility-specific, and engaging in at least 90 days and possibly 1 year time delay until public release). All would be appropriate mechanisms for use by EPA in the instant situation. NPRA requests that for any data categories listed above in this comment, for which EPA does not provide CBI treatment, that EPA employ aggregation, masking, and time lag mechanisms at least to the level suggested in the DOJ/FTC guidelines.

**Commenter Name: Dave Stirpe**  
**Commenter Affiliation: Alliance for Responsible Atmospheric Policy**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0050.1**  
**Comment Excerpt Number: 8**

**Comment:** EPA appropriately proposes to protect individual company Subpart OO and QQ supplier reports from public disclosure. NRDC v. EPA (2006 U.S. Dist. LEXIS 13326, (D.D.C. 2006)) supports the proposal on page 39120 that individual supplier production and sales data should be held as confidential. In NRDC, the court held that individual methyl bromide suppliers were not required to release production or inventory data to the public. EPA was able to maintain CBI treatment of disaggregated data, perform the appropriate aggregation, and release industry-wide data. Here, EPA proposes an aggregation system that would, if implemented substantially as proposed, satisfy the NRDC criteria.

EPA appropriately proposes to protect individual company Subpart OO and QQ supplier reports from public disclosure. We suggest EPA follow the example of the former Alternative Fluorocarbon Environmental Acceptability Study (AFEAS) project where such aggregation would require at least three manufacturers with production levels for a particular HFC greater than 1000 metric tonnes each. Should fewer be used, those producing would be aware of competitive operating rates and they would also have good information if it is known that one of three manufacturers was producing only token volumes.

**Commenter Name: Keith Adams and Brian Keck**  
**Commenter Affiliation: Air Products and Chemicals, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**  
**Comment Excerpt Number: 8**

**Comment:** Air Products does support EPA's alternative approach to publish charts of emission data by geographical region to allow comparison of data between different industry sectors or locations.

**Commenter Name: E. Donald Elliott**  
**Commenter Affiliation: Bloomberg, LP**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0033.1**  
**Comment Excerpt Number: 2**

**Comment:** To facilitate investment decisions, EPA should report data in a format that identifies and aggregates GHG emissions data at the parent and holding company levels, as well as by individual facilities. Investors do not invest in "facilities," but in publicly-traded parent companies. They need information about what companies own the facilities, as well as facility-specific emissions data. Based on Bloomberg's experience in making GHG data available to the business and financial community since 2005, the single most important thing that EPA could do to facilitate access to GHG data by the public - and to maximize the incentives to develop a lower GHG economy -- would be to aggregate the data from facilities, up through divisions to parent companies and holding companies, which is the level of organization at which financial and investment decisions are made. It is understandable that EPA requires reporting on a facility-by-facility basis, for enforcement and regulatory purposes. Bloomberg supports reporting and making available facility-specific data, which is useful for some purposes, such as informing the neighborhood and for more detailed, local level operational, reputational and regulatory risk assessment by investors. But GHG are also a worldwide issue, and GHG data should also be aggregated to the company or even holding company level, so that investors may make comparative decisions, and competitive pressures can be brought to bear on companies to reduce GHG emissions. Under the present system, Bloomberg is forced to spend a great deal of time and money trying to relate facility-specific data to the companies that own and operate these facilities. The necessary data to make the translation is not always easily available. EPA should make GHG data available not only in a facility-by-facility format, but also aggregated into investable units, such as parent companies.

**Commenter Name: Michael Tiller**  
**Commenter Affiliation: Compressed Gas Association**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0020.1**  
**Comment Excerpt Number: 8**

**Comment:** EPA suggests that there may be value in publishing data elements within numerical ranges to maintain the confidentiality of the actual reported values. CGA supports this approach for reporting and publicly disclosing non-CBI “emission data” in a similar manner to that afforded the regulated community required to report hazardous materials inventory data in the annual Tier 2 reports required by EPCRA. Alternatively, rather than reporting individual data required to complete the emission calculations required by the various GHG MRR subparts, perhaps the data could be aggregated at a higher level, such as a discrete phase of the production process that would still allow emission calculations by the public without disclosure of the sensitive individual data elements.

**Commenter Name: Keith Adams and Brian Keck**

**Commenter Affiliation: Air Products and Chemicals, Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**

**Comment Excerpt Number: 9**

**Comment:** EPA is specifically soliciting suggestions on approaches to aggregating CBI data that would provide useful information to the public without disclosing data determined to be CBI. Air Products believes that data once determined to be CBI, is just that, and legally should not be disclosed unless there is compelling reason to do so. EPA does suggest that there may be value in publishing data elements within numerical ranges to maintain the confidentiality of the actual reported values. Air Products supports this approach for reporting and publically disclosing non-CBI “emission data” in a similar manner to that afforded the regulated community required to report hazardous materials inventory data in the annual Tier 2 reports required by EPCRA. Alternatively, rather than reporting individual data required to complete the emission calculations required by the various GHG MRR subparts, data could be aggregated at a higher level, such as a discrete phase of the production process, which would still allow emission calculations by the public without disclosure of the sensitive individual data elements.

**Commenter Name: Lorraine Gershman<sup>97</sup>**

**Commenter Affiliation: American Chemistry Council (ACC)**

**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**

**Comment Excerpt Number: 11**

**Comment:** In many situations, ACC supports EPA providing emissions data on an aggregate basis when it is done carefully so as not to reveal confidential information. By aggregating the emissions data, the public will be better able to interpret the large amount of data reported under the rule. ACC does not support aggregation in every case, however. EPA should follow the example in current GHG inventory reporting. There, where there are only a few suppliers of a particular chemical or a facility produces only one chemical, EPA does not aggregate by chemical, but aggregates by combining several chemicals. See the tables starting on page 4-61 at the following link (which includes a section for “others,” a grouping of a number of chemicals): [http://www.epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-2010\\_Report.pdf](http://www.epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-2010_Report.pdf).

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<sup>97</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), PPG Industries, Inc. (EPA-HQ-OAR-2009-0924-0040), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

**Commenter Name: Dave Stirpe**

**Commenter Affiliation: Alliance for Responsible Atmospheric Policy**

**Document Control Number: EPA-HQ-OAR-2009-0924-0050.1**

**Comment Excerpt Number: 12**

**Comment:** EPA proposes to determine to be Confidential Business Information (CBI) reported facility level and importer/exporter level production and throughput quantity and composition data. The alliance agrees that such information should be considered CBI. EPA further proposes to release such data in aggregated form for importers and exporters of fluorinated GHGs contained in pre-charged equipment or closed-cell foams, proposed 40 CFR Part 98, subpart QQ. The alliance agrees that if such data is to be released, it must be aggregated in order to maintain its confidentiality. EPA should, however, more clearly state its proposed procedure for aggregating data it has determined to be CBI. It is critical that the aggregated reports be presented in a way that protects the anonymity of the data. The proposed rule does not provide enough detail on EPA's planned process for aggregating and reporting CBI for stakeholders to effectively comment. When aggregating data, EPA must consider whether the aggregation will effectively protect the reporting companies. For example:

1. EPA should not make aggregated reports public if there are fewer than three companies reporting data in any particular category. If there are only two reporters, each reporting company can subtract out its own data and determine the other company's data, which undermines the purpose of aggregating the data-to protect each company's confidential information and competitive position. EPA has stated its intent to provide aggregated data under these conditions in other parts of the rule, and it should expressly do so for data reported under Subpart QQ as well. See, e.g., 75 Fed. Reg. at 39,120 ("As another example, EPA would also release the total amount of each GHG supplied in the U.S. by all suppliers of industrial gases in cases where the gas is produced at three or more facilities.") (emphasis added).
2. The aggregated CBI may only be disclosed if it is presented in such a way that it provides a national snapshot of the amount of GHGs used in appliances and closed-cell foams. It should not be disclosed in a way that discloses company or facility-specific information. To disclose this data in a more granular manner will raise potential competitive concerns. Furthermore, as stated above, releasing aggregated data in any format that would allow comparison of data between facilities undermines the purpose of aggregating data-to provide anonymity and protect the confidentiality of the data. Accordingly, we oppose presenting supplier data on a facility or company-specific basis, including through the use of numerical ranges. Even if numerical ranges were used, in some instances, it may be possible for competitors to identify certain company's data based upon the disparity of the ranges between large and small manufacturers.
3. Similarly, data should be released on a product basis, not a product class basis (e.g., no more granular than by refrigerator, refrigerator-freezer, freezer, room air conditioners, dehumidifiers, portable room air conditioners, water heater, etc.). Breaking down data in smaller sub-categories than that will not aid in the distribution of accurate and timely information on GHG emissions. And, it may allow competitors to identify certain company's data based on which manufacturers make each class of product.



**Commenter Name: Leslie S. Ritts<sup>98</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 16**

**Comment:** EPA proposes that it may be possible to aggregate certain data, presumably including input data, thereby shielding CBI information in a way that validates the emission information that the Agency wants to post on the web. It is impossible to comment on this idea, however, since it is not a concrete proposal. Therefore, any effort to create aggregation mechanisms as part of the final rule will violate section 307(b) of the Clean Air Act, which requires EPA to propose ideas with enough specificity to provide notice and the opportunity for public comment.

**Commenter Name: Leslie S. Ritts<sup>99</sup>**

**Commenter Affiliation: The National Environmental Development Association's Clean Air Project**

**Document Control Number: EPA-HQ-OAR-2009-0924-0056.1**

**Comment Excerpt Number: 17**

**Comment:** Although in theory, aggregation may sound like a reasonable approach, we have no suggestions about how data could be aggregated. In particular, aggregating smaller groups of sources by either geography or industry type will still be subject to the same confidentiality concerns. For example, if a facility is one of three producing a particular product in the U.S., no amount of aggregation will be sufficient. EPA must continue to protect this information and only allow access for legitimate reasons by allowing the owner of the information the ability to assert a CBI claim where appropriate.

**Commenter Name: Rich Raiders**

**Commenter Affiliation: Arkema Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**

**Comment Excerpt Number: 16**

**Comment:** EPA appropriately proposes to protect individual company Subpart OO and QQ supplier reports from public disclosure. NRDC v. EPA supports the proposal at 75 Fed. Reg. 39120 that individual supplier production and sales data should be confidential. In NRDC, the court held that individual methyl bromide suppliers were not required to release production or inventory data to the public. EPA was able to maintain CBI treatment of disaggregated data, perform the appropriate aggregation, and release industry-wide data. Here, EPA proposes an aggregation system that would, if implemented substantially as proposed, satisfy the NRDC criteria.

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<sup>98</sup> Comments submitted by the National Environmental Development Association's Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).

<sup>99</sup> Comments submitted by the National Environmental Development Association's Clean Air Project were incorporated by reference by the Weyerhaeuser Company (EPA-HQ-OAR-2009-0924-0041).

**Commenter Name: Rich Raiders**  
**Commenter Affiliation: Arkema Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**  
**Comment Excerpt Number: 2**

**Comment:** Aggregation becomes a particularly important issue in the public reporting question now before EPA in the CBI rule. EPA proposed to aggregate supplier data for a number of subparts, including Subpart OO. Arkema supports aggregating supplier data for public reporting to the maximum feasible extent. However, aggregating data consisting of a mix of Table A-1 compounds and non-Table A-1 compounds becomes difficult. EPA's appropriate approach to aggregate data doesn't protect individual market participants from CBI exposure when only a small handful of companies participate in a market for a specific HFC (or other GHG). EPA should consider a two-stage aggregation: A GWP-weighted aggregation for Table A-1 compounds, and a mass total of non-Table A-1 compounds.

EPA may find cause to aggregate specific non-Table A-1 compounds when a multitude of market participants manage a specific GHG. EPA should not, however, publicly report discrete GHG for individual GHGs where less than three market participants use, emit, import and/or export material.

**Commenter Name: Rich Raiders**  
**Commenter Affiliation: Arkema Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0035.1**  
**Comment Excerpt Number: 3**

**Comment:** To further protect industrial GHG producer CBI, EPA should aggregate Subpart L production and emission data in a manner consistent with the proposed Subpart OO and QQ supplier aggregation system. Aggregating both data sets allows consistently direct comparisons for the fluorinated GHG marketplace. The Alternative Fluorocarbon Environmental Acceptability Studies ("AFEAS") group publishes annual HCFC production and sales information for each HCFC. ([www.afeas.org](http://www.afeas.org)) EPA should use the AFEAS model for public fluorinated GHG reporting for both the Subpart L producer category and the Subparts OO and QQ supplier categories. The voluntary AFEAS reporting system addresses both the CBI and aggregation questions.

**Commenter Name: Keith Adams and Brian Keck**  
**Commenter Affiliation: Air Products and Chemicals, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0058.1**  
**Comment Excerpt Number: 22**

**Comment:** EPA also discusses aggregated reporting of production data and suggests that data in this category (C.10. (Raw Material Consumption)) could be released in aggregated format to maintain the confidentiality of the data. Air Products disagrees since in some product lines, there are a limited number of companies that manufacture the product, while for other product lines there are a limited number of technologies known, and in use, to manufacture the product. Reporting this data in aggregated format would unnecessarily present the opportunity for affected companies to discern sensitive data about their competitors. EPA recognizes this situation elsewhere in the proposed rule.

**Commenter Name: Lorraine Gershman<sup>100</sup>**  
**Commenter Affiliation: American Chemistry Council (ACC)**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**  
**Comment Excerpt Number: 23**

**Comment:** We believe that EPA has properly classified most of the required information as CBI and non-CBI in Subpart OO. However, we have several concerns with the manner in which aggregated data will be reported and we believe that EPA should allow for greater discretion in how this is aggregated. For example, in Table 4, under “Suppliers of Industrial GHGs (subpart OO): Producers,” GHG and product emissions would be reported as a national aggregate in those cases where there was three or more reporters. In cases where there are three or less producers, or only one major producer, it may be necessary to maintain this information as CBI. This may only be understood after these reports are submitted to EPA. The effectiveness of the aggregation methodology may not be known until these reports are made. However, as a protective measure ACC recommends that aggregation of larger chemical groups be considered. This approach would be consistent with existing EPA reports, e.g. EPA 430-R-10-006, “Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2008” (see Table 4-85 or 4-86).

**Commenter Name: Tom Siegrist**  
**Commenter Affiliation: Koch Nitrogen Company, LLC**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0025.1**  
**Comment Excerpt Number: 8**

**Comment:** If EPA rejects [our] suggestion [to allow case-by-case CBI determinations], KNC in the alternative urges EPA to make inputs to emissions calculations available only as annual figures rather than monthly figures, only on a facility level rather than a unit-specific level, and only after a one-year delay from the date of reporting. The information disclosed would still be sensitive, but aggregating it on a yearly and facility basis and delaying its disclosure would provide competitors less information about a particular company’s operations. Thus, this approach would help to partially alleviate the competitive harm that EPA’s proposal would cause to fertilizer manufacturers.

**Commenter Name: Robert A. Reich**  
**Commenter Affiliation: DuPont Company**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0030**  
**Comment Excerpt Number: 10**

**Comment:** The Federal Register notice stated that “EPA intends to publish on EPA’s Web site much of the Part 98 data that [it] determine[s] to be emission data or not otherwise entitled to confidential treatment...” [FOOTNOTE: Ibid, p39097, column 3]. This approach will provide to foreign governments and foreign competitors easy access to sensitive business and process information that in some cases U.S. corporations could not share with such entities in certain countries legally themselves, under the Export Administration Regulations (15 CFR Part 730-

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<sup>100</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

774). Even if EPA is able to justify that the value of sharing an item of sensitive information outweighs the value of protecting a company's knowledge resources (see comments in II.E of DCN:EPA-HQ-OAR-2009-0924-0030, EXT:1), such information should only be shared in response to a Freedom of Information Act (FOIA) request. In this way EPA would be able to protect that information at least from foreign competitors and foreign governments, until and unless a FOIA request response is later posted on the internet by the recipient of the response. At least the information would be more difficult to obtain or piece together outside the U.S.

One of our Company's GHG managers in Europe investigated the types of information about DuPont (and presumably its competitors) that is publicly available on the internet as a result of GHG or general environmental reporting in the European Union. He noted that one could find the following details about individual sites: permit number, company name, address, location, sector (e.g., "Chemicals"), permitted installation (primarily for combustion installations >20 MW), annual emissions allocation, annual actual emissions and compliance status. He noted that for many countries additional information could be obtained through freedom of information requests, but he could not find additional details about sites on-line. EPA certainly should not provide easy internet access to sensitive information on U.S. companies that is not being provided similarly on foreign competitors.

**Commenter Name: Paul Noe**

**Commenter Affiliation: American Forest & Paper Association**

**Document Control Number: EPA-HQ-OAR-2009-0924-0034.1**

**Comment Excerpt Number: 7**

**Comment:** EPA's proposed disclosure program will qualify as a massive social change even without disclosing computation input data. That is particularly true given EPA's intention to make data readily available on the internet. This is unprecedented with respect to the volumes of detailed information currently proposed for release. Past non-CBI data has generally been available only through specific request rather than provided within an online searchable database as currently proposed. Even given EPA's view of the world, there is no way to know now how or whether disclosure of computation inputs will be useful to the functioning of the program, how well the program will work without it, or how much demand for those inputs there will be. There is absolutely no good reason to move forward with required disclosure before waiting to see whether time will give us the answer to these questions.

**Commenter Name: Vickie Patton**

**Commenter Affiliation: Environmental Defense Fund**

**Document Control Number: EPA-HQ-OAR-2009-0924-0047**

**Comment Excerpt Number: 1**

**Comment:** We respectfully encourage the Agency to consider convening an expert panel – with extensive expertise on (a) information technology including web-based social media outreach, (b) consumer-based communication, and (c) the utility of benchmarking greenhouse gas emissions data by facility, company and sector in the marketplace and for policy-makers – to inform the Agency's design of its data management and communication initiative associated with the greenhouse gas emissions inventory and reporting program.

**Commenter Name: Vickie Patton**  
**Commenter Affiliation: Environmental Defense Fund**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0047.1**  
**Comment Excerpt Number: 9**

**Comment:** EPA should convene an expert panel to elicit input on the format and outlets for disclosure, and EPA must commit to disclosure by a binding deadline. We urge EPA to address two key pillars of an effective greenhouse gas emissions reporting program by establishing a firm deadline for the Agency to publicly disclose the annual data reported to EPA, and by convening an expert panel to elicit input on the formatting, design and outlets for publicly disclosure. The greenhouse gas reporting rule will be fundamentally thwarted without a clear, firm deadline by which EPA will commit to make the reported information available annually.

Similarly, the Agency should tap into 21st Century information technologies and pertinent experts to ensure the information is effectively presented, disseminated, and to ensure the statute's aim for transparency is achieved in practice. In developing EPA's recent proposed labels for new passenger vehicles, the Agency brought together a panel with expertise on consumer information communication and dissemination. Here an expert panel – with extensive expertise on (a) information technology including web-based social media outreach, (b) consumer-based communication, and (c) the utility of benchmarking greenhouse gas emissions data by facility, company and sector in the marketplace and for policy-makers – could greatly inform the Agency's design of its data management and communication initiative. See the Agency's expert panel report for the recent labeling proposal [see EPA-HQ-OAR-2009-0924-0047.2].

**Commenter Name: John M. Batt**  
**Commenter Affiliation: Airgas, Inc.**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0022.1**  
**Comment Excerpt Number: 3**

**Comment:** In addition, as with the “Facility-level GHG quantities, by gas from subpart OO” which are appropriately held as CBI, the “Import/exporter level GHG quantities, by gas from subpart OO” should also be annotated to include the same footnote “f” indicating “For 40 CFR part 98, subpart OO, national aggregation would be released only for products where there are three or more reporters.”

**Commenter Name: Lorraine Gershman<sup>101</sup>**  
**Commenter Affiliation: American Chemistry Council (ACC)**  
**Document Control Number: EPA-HQ-OAR-2009-0924-0031.1**  
**Comment Excerpt Number: 24**

**Comment:** In Table 4 under “Suppliers of Industrial GHGs (subpart OO): Importers and Exporters,” we believe that the CBI protocol should be the same as for producers. In many cases

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<sup>101</sup> Comments submitted by the American Chemistry Council were incorporated by DuPont Company (EPA-HQ-OAR-2009-0924-0031), Mexichem Fluor Inc. (EPA-HQ-OAR-2009-0924-0055), and the Alliance for Responsible Atmospheric Policy (EPA-HQ-OAR-2009-0924-0050).

the producer also will be the exporter, much or all of the produced material will be exported, and the production may be by a sole producer. Under these circumstances, the CBI protection being afforded to the producer would be eliminated if the material was exported. Finally, it is not clear how this would impact CBI concerns of foreign producers of these materials who may manufacture and export (to the US) unique chemicals. For all of these reasons it is important that exporters and importers be afforded the same protection as producers listed under footnote f of Table 4 . . .

**Commenter Name: Robert A. Reich**

**Commenter Affiliation: DuPont Company**

**Document Control Number: EPA-HQ-OAR-2009-0924-0030**

**Comment Excerpt Number: 18**

**Comment:** We do concur with EPA's proposed plan to release national aggregate data only when there are three or more suppliers. We caution, however, that if there are very minor suppliers of a given product, these should not be included in determining whether there are at least three suppliers. Examples would include situations in which a supplier of one F-GHG product must report on small quantities of another F-GHG that is either a contaminant or a material added as a product enhancement. Such minor quantities may not be sufficient to adequately mask the production levels of two other suppliers.

**Commenter Name: Joel R. Hall**

**Commenter Affiliation: Mexichem Fluor Inc.**

**Document Control Number: EPA-HQ-OAR-2009-0924-0055**

**Comment Excerpt Number: 8**

**Comment:** Mexichem requests that the EPA consider only releasing national aggregation in terms of CO<sub>2</sub>e and not by GHG and product aggregated for facilities covered by subpart OO. Industrial greenhouse gas markets are continually evolving and new products are being developed. In addition, some suppliers supply a limited number of products. Reporting by GHG and product will allow competitors to gain insight into new product development and marketing strengths and weaknesses. Competitors can use this information to the detriment of these suppliers. Releasing national aggregation data meets the intent of the CAA in terms of making emission data available to the public.