**Clean Air Task Force * Environmental Defense Fund *
Natural Resources Defense Council * Sierra Club**

March 7, 2011

Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mailcode 2822T
Attention Docket ID No. OAR-2010-0929
1200 Pennsylvania Ave NW
Washington, DC, 20004

Re: Proposed Deferral of Greenhouse Gas Reporting and Call for Information (Docket ID Nos. EPA-HQ-OAR-2010-0929 and EPA-HQ-2010-0964)

Dear Administrator Jackson:

Thank you for accepting these comments on behalf of the Sierra Club, Clean Air Task Force, Environmental Defense Fund, Natural Resources Defense Council, and their hundreds of thousands of members.[1] We are writing because the EPA's proposal to defer collecting critical greenhouse emissions data until 2014, 75 Fed. Reg. 81,350 (Dec. 27, 2010), is both unwarranted and contrary to EPA's nondiscretionary duty to "not later than June 26, 2009 [publish the final reporting rule], and begin implementation [ ] to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States." Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 6, div. F, tit. II, 121 Stat. 1844, 2128 (2008); Consolidated Appropriations Act of 2009, Pub. L. No. 111-8, §5, div. E, tit. II, 123 Stat. 524, 729 (2009). The proposed deferral also raises serious questions as to EPA's compliance with section 114 of the Clean Air Act, 42 U.S.C. § 7414, and with the agency's own regulations.

EPA need not and should not take this course. As we discuss in detail below, the deferral would seriously degrade the reporting system's data quality, deny the public its legal right to this vital emission data, and disrupt other reporting programs. It would do so in response to vague industry concerns which EPA itself acknowledges were "only general statements that inputs to emission equations can be sensitive and should be held confidential." 75 Fed. Reg. 81,366, 81,368 (Dec. 27, 2010) (call for information). EPA is required to conduct an extensive investigation before it waives public access to even a single data point, with industry bearing the burden for showing competitive harms, *see* 40 C.F.R. pt. 2 ("Confidentiality of Business

[1] These comments are timely filed because EPA has extended the comment deadlines to March 7, 2011, for both its proposed rule and the related Call for Information ("CFI"). 75 Fed. Reg. 3,062 (Jan. 19, 2011). They should be considered with regard to both the proposed rule and the CFI, and filed in the dockets for both actions.

Exhibits to these comments are attached in electronic format, as the proposals allow. Please contact us immediately if any exhibit is unreadable, or if EPA otherwise would appreciate paper copies.

Information"), but here the agency proposes to block access to thousands of data elements in response to nothing more than these unsubstantiated claims. Thus, though EPA purports to need a three-year deferral in order to evaluate these concerns, in practice, the proposed deferral arbitrarily departs from EPA practice and cancels enforcement of large sections of the reporting rule for years without further investigation.

In these comments, we explain why the proposal is not warranted on both legal and empirical fronts. We discuss EPA's nondiscretionary duties, and why the deferral, the damage it will do to data quality, would undermine the Agency's mandate. In particular, focusing on EPA's flawed verification plans during the deferral, we show why failing to collect emission equation inputs will lead to unacceptable data quality. These shortcomings will also cause problems for state reporting programs and others using EPA's reporting program and its data. We also observe that the rule, which already provides protocols for direct emissions measurement, gives reporters the option of avoiding reporting *any* supposedly confidential information in emissions equations by directly measuring their emissions instead.

While the public does not bear the burden of showing why data is *not* confidential, we demonstrate why this deferral is also unwarranted on practical terms. As it turns out, the data elements industry claims are "confidential," including those which EPA has proposed to defer, are almost universally already publicly reported, or simply not of any competitive business relevance.

If EPA nonetheless does persist in this unwise course, it must target its overbroad action to the specific data elements it believes implicate valid confidentiality concerns and leave the remainder of the program undisturbed. EPA should leave the burden of proof on complaining reporters, as its regulations require. Where the agency determines a deferral is warranted, it should tailor the delay to be as short as possible. Critically, EPA must require third-party verification for any deferred data elements.

Although any deferral here is impermissible, if EPA maintains its present course it should act quickly. EPA should complete its review by the August 31, 2011, date in its interim final rule accompanying the proposed three-year deferral. *See* 75 Fed. Reg. 81,338 (Dec. 27, 2010).[2] Commenters demonstrate below that the number of potentially sensitive data elements is exceedingly small, and thus can be assessed by this summer at the latest.

At bottom, EPA has proposed a change in course that is both barred by law and unsupported by the record. As EPA has frequently said, "Accurate and timely information on GHG emissions is

[2] Commenters do not concede that the final interim rule is legally valid. However, a summer reporting deadline for all data elements may be practicably acceptable given the agency's recent announcement that it will extend the deadline for reporting to summer 2011 to ensure a workable electronic reporting system, " *See* EPA Announces Next Steps for Greenhouse Gas Emissions Reporting System," attached as Ex. 1. Commenters further challenge this announcement, independently, because EPA may not change the reporting rule deadline, promulgated as part of the existing rules, absent notice and comment and a reasoned explanation for doing so, under section 304 of the Clean Air Act.

essential for informing many future climate change policy decisions," 74 Fed. Reg. 56, 260, 56,265 (Oct. 30, 2009)(final reporting rule). The deferral will clog this critical flow of information. The climate crisis worsens every day. If policymakers and the public are to work to protect the planet, they must be able to develop targeted, effective, emissions reductions policy. EPA's unnecessary delay jeopardizes these vital purposes.

I. The Proposed Deferral is Contrary to EPA's Binding Legal Obligations

A. *Congress Directed EPA to Create an Effective, Public Reporting System by 2009 – not 2014*

Congress gave EPA a clear mandate to complete the reporting system, and to begin implementation, by 2009. Delaying data collection for thousands of emitters and data elements until 2014 is not consistent with Congress's mandate, which was intended to benefit the public and policymakers confronting global warming.

Faced with the growing climate crisis, Congress since 2008 has pressed EPA to complete its work on the reporting system. The Consolidated Appropriations Act of 2008 directed EPA to "develop and publish a draft rule not later than 9 months after the date of enactment of this Act, and a final rule not later than 18 months after the date of enactment of this Act, to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States." 121 Stat. at 2128; *see also* House Appropriations Committee Print, Consolidated Appropriations Act, at 1197, 1254-55 (explanatory statement).[3] EPA did not act quickly, and in the Consolidated Appropriations Act of 2009, Congress again set a "June 26, 2009, deadline to promulgate the final rule, as required by law." House Appropriations Committee Print, Consolidated Appropriations Act of 2009, 1144;[4] *see also* 123 Stat. at 729. It explained that it had "directed EPA" to use its Clean Air Act authority to require greenhouse gas reporting "in all sectors of the economy" and stated that the "Committees are dismayed that the Agency" had missed its deadline to promulgate the draft rule. Appropriations Act of 2009 at 1144. EPA, too, has repeatedly acknowledged the need to put this rule in place, to prevent further delay in data collection and reporting.[5]

This sense of urgency is appropriate. As Representatives Baldwin, Waxman, Inslee, and Holt explained in a letter to EPA, "accurate measurements, consistent reporting, and a publicly available database of our emissions levels" are essential to any effort to control climate change.

[3] Attached as Ex 2. *See also* § 4 of the Consolidated Appropriations Acts of 2009 and 2008 (endorsing these explanatory statements and giving them effect).

[4] Attached as Ex 3.

[5] In a hearing on the 2009 Act, then-Administrator Johnson acknowledged that EPA had a "mandate" to meet the "congressionally directed schedule." *Dep't of the Interior, Env't, and Related Agencies Appropriations for Fiscal Year 2009: Hearing before a Subcomm. Of the Comm. On Appropr.*, 110 Cong., Sen. Hrg. 110-648, 38-39 (Mar. 4, 2008), attached as Ex 4. Then, when EPA still had not completed the rule in 2009, Administrator Jackson wrote to Congress that she "shared [its] sense of urgency in issuing the proposed and final rule," indicating that EPA was "making every effort" to begin data collection in 2010. Letter from Lisa P. Jackson to Reps. Jay Inslee, Sens. Dianne Feinstein, et al. (Mar. 6, 2009), attached as Ex. 5.

Letter from Reps. Inslee et al. to Lisa Jackson (Feb. 17, 2009). [6] The United States "currently lacks the complete, accurate, consistent, and reliable greenhouse gas data that is necessary for the long-term success of our climate policy," with dangerous consequences:

> A well-designed greenhouse gas registry rule is necessary to ensure that this critical data is being tracked, reported, and verified. Such a registry would ensure comprehensive emissions reporting nationwide. It is well known that the collapse of the allowance price under the European Union's Emissions Trading Scheme has been linked to a lack of reliable emissions information. Our nation has certainly learned from this mistake.

Id. Indeed, EPA itself has often expressed the critical importance of creating a transparent, public database of greenhouse gas emission data. In the final reporting rule itself, for instance, EPA explained that:

> …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).

74 Fed. Reg. at 56,265. Indeed, in its proposed confidentiality determinations themselves, EPA again strongly stated that "[p]ublic 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." 75 Fed. Reg. 39,094, 39,099 (July 7, 2010) (proposed CBI rule). EPA went on to emphasize that such information was vital to "policy makers, the public, and industry" as they all work to understand and control emissions. *Id.* The agency, in short has, in line with its statutory mandates, made unequivocal pledges of public disclosure and public participation in developing and sharing reporting rule data, and must see them through. We have, of course, emphasized as much in our many earlier comments to EPA on this matter, which we incorporate by reference into these comments.[7]

Section 114 of the Clean Air Act further reinforces EPA's authority and obligation to the public in regard to the data collected under the GHG reporting rules. Under section 114, EPA has

---

[6] *See id.*

[7] *See, e.g.*, Comments of Sierra Club et al. on the Proposed Reporting Rule at 3-10 (June 8, 2009), attached as Ex. 6 Comments of Sierra Club et al. (Aug. 26, 2010), attached as Ex. 7; Comments of Sierra Club et al. (Sept. 7, 2010), attached as Ex. 8; Comments of Sierra Club et al. (Nov. 23, 2010), attached as Ex. 9.

broad authority to collect data and information in order to carry out the purposes of the Clean Air Act. For example, it grants EPA broad authority to require reporting in order to develop any state or federal implementation plan or any new source performance standard, or to carry out any other provision of the Clean Air Act, provided that that data EPA seeks is "information necessary for the purposes set forth in this subsection," 42 U.S.C. § 7414(a). Here, EPA is seeking further to develop and to maintain greenhouse gas control policies now in force, including under the preconstruction permitting program for greenhouse gases,[8] and the new source performance standards for major sources, now under development,[9] as well as numerous other necessary greenhouse gas policies under development and consideration. Thus, to the extent EPA seeks to use section 114 to meet its reporting rule mandate, the information it collects must usefully inform and support the Clean Air Act's greenhouse gas pollution control objectives.

This information generally must be publicly available. Section 114 provides that "[a]ny records, reports or information" EPA obtains "shall be available to the public." 42 U.S.C. § 7414(c). The only instance in which EPA may withhold any data is when a reporter makes a satisfactory showing that this information, if disclosed, would "divulge methods or processes entitled to protection as trade secrets."[10] *Id.* EPA carefully scrutinizes such claims, which require extensive evidentiary support to succeed. *See e.g.* 40 C.F.R. § 2.204 *et seq.* The Act directs that all "emission data" must be disclosed even if it might otherwise be treated as a trade secret. 42 U.S.C. § 7414(c); 40 C.F.R. § 2.301(f).

These statutory and regulatory mandates combine to bind EPA in several regards. First, EPA was not simply mandated to establish, for the public, Congress, and policymakers generally, a greenhouse gas reporting system "in all sectors" of the U.S. economy in name only, but actually to implement that system by 2009, and then to require data collection and public reporting to avoid missing additional years' worth of data. EPA must ensure that this system produces sufficiently robust data to support the development and enforcement of greenhouse gas control policies by Congress, the states, and the public. Second the public is entitled by law to the data the rule generates, including all emission data. The system, in sum, must be speedily implemented, well built, and transparent.[11]

The proposed deferral violates these basic requirements and is contrary to the intent of the 2008 and 2009 Appropriations Acts and the plain language of section 114. EPA is proposing to

---

[8] .*See generally* 74 Fed. Reg. 66,496 (Dec. 15, 2009) (endangerment finding triggering statutory preconstruction permitting requirements); 75 Fed. Reg. 31,514 (June 3, 2010) (tailoring rule, describing how the statutory preconstruction program will be implemented).

[9] *See generally* http://www.epa.gov/airquality/ghgsettlement.html (describing EPA's plans for greenhouse gas new source performance standards, as required by the Clean Air Act).

[10] Section 208 of the Clean Air Act, 42 U.S.C. § 7542, which gives EPA authority for some of its data collection efforts in the reporting system contains identical provisions. Our arguments with regard to portions of the rule supported by section 114 of the Act thus apply equally to portions of the rule supported by section 208.

[11] *Cf. Center for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1119-20 (N.D. Cal. 2007) (emphasizing the strong public interest in information on climate change).

delay data collection to 2014 in 34 industry sectors, including major greenhouse gas emitters such as stationary boilers, petroleum refining, cement production, iron and steel production, and oil and gas systems. 75 Fed. Reg. at 81,353 (Table 2). The deferral touches the heart of the system – emissions equations inputs vital to calculating facilities' emissions - and would block collection of 365 of the rule's approximately 1,500 data elements. Doing so would leave EPA, and the public unable to confirm or verify the accuracy of their calculations, and in the dark as to which data elements have the greatest relevance for emissions. Not only does this threaten public confidence in the system, it also creates a significant incentive for industry, whether negligently or intentionally, to take liberties in data collection and reporting of the primary numbers, because the delay proposed for reporting the verification data elements means that *no one* will be looking over industry's shoulders. As we next discuss, EPA cannot legally take this course.

B. EPA is Improperly Proposing to Withhold Emission Data from the Public.

The proposed deferral illegally withholds emission data from the public, even though the Clean Air Act provides that this information "shall" be disclosed. 42 U.S.C. § 7414(c). EPA has acknowledged that inputs to emissions equations – the data category which comprises essentially all of the deferred data elements – are emission data, which it must disclose to the public. *See, e.g.*, 75 Fed. Reg. at 39,108 *et seq.* EPA may not short-circuit its disclosure obligations by proposing not to collect this data.

Emission data is broadly defined as any "[i]nformation necessary to determine the identity, amount, frequency, concentration, or other characteristics . . . of any emission which has been emitted," or information necessary to determine the characteristics of any emissions which "under an applicable standard or limitation" a source may emit, or even "[a] general description of the location and/or nature of the source." 40 C.F.R. § 2.301(a)(2)(i). Notably, the regulations provide that this definition may be read narrowly only for data pertaining to research and development processes. 40 C.F.R. § 2.301(a)(2)(ii). Beyond this very limited category, "emission data" is to be interpreted comprehensively, to fulfill the public purposes of the Act and regulations.

Under any reading of the regulations and statute, emissions equations inputs (and data needed to verify emissions) are "emission data." It is these data, after all, which EPA and the public must rely upon to determine emissions because reporters using equations are, by definition, not directly measuring their emissions. The *only* emission data available to EPA are the inputs and verification data. As EPA explained, "once a facility selects a calculation method [using emissions equations], then the equation becomes the only way for determining such emissions," and so "these inputs to the equation are information 'necessary to determine' the calculated emissions." 75 Fed. Reg. at 39,109.

Nor can EPA avoid this conclusion by refusing to finalize its emission data determination, as it suggests it may do. *See, e.g.*, 75 Fed. Reg. at 81,353. EPA's mandates are self-executing, and the regulations do not require that EPA affirmatively determine information is "emission data"

before disclosing it. Instead, the rules simply provide that emission data "shall be available to the public notwithstanding any other provision of this part." 40 C.F.R. § 2.301(f). EPA cannot stave off disclosures by refusing to acknowledge its obligations to collect the data in the first place.

EPA's obligations are clear. Because it must require reporting from all sectors of the economy, EPA must collect emission data from all sources above reporting thresholds in those sectors. Once it has collected that data, it must disclose it to the public. There is no room in this simple system for EPA's "deferral." EPA cannot avoid its basic public disclosure requirements by refusing to collect information at all. Such a refusal subverts the spirit of its reporting rule mandate and is contrary to the plain text of Section 114 of the Clean Air Act. Congress explicitly directed EPA "to use its existing authority under the Clean Air Act," thus incorporating section 114 into the regulatory mandate. 2008 Appropr. Act. explanatory statement at 1254; 2009 explanatory statement at 1144. EPA's charge from Congress thus plainly includes its intention that EPA collect and then fully disclose to the public the greenhouse gas emission data collected, as section 114(c) requires. Moreover, section 114 directs that this data must usefully support air pollution control, while EPA's proposal would undermine those purposes. Indeed, it is unclear what purpose the collection of these data could serve, if the statute were interpreted as allowing industry to keep these data private, rather than being shared both with the public and with policymakers.

Notably, EPA does not, and cannot, justify its deferral with reference to its rules (which are not at issue in these actions) defining emission data. Instead, EPA writes only that it received "serious concerns regarding the public availability of data in the inputs to emission equations category." 75 Fed. Reg. at 81,354. Some businesses posited that disclosures could "cause serious competitive harm," *id.*, albeit in "general statements" offered without specific proof, 75 Fed. Reg. at 81,368. Those factors are not lawful considerations except to the extent industry can meet the confidential business information standard for non-disclosure of non-emission data under section 114 and its regulations. As commenters demonstrate below, industry cannot and EPA has not done so. Therefore, EPA must not delay data collection and disclosure. Although EPA claims it needs to stop data collection in order to develop a "well-balanced" program, addressing disclosure needs and competitiveness concerns, *see* 75 Fed. Reg. at 81,355, Congress has already struck that balance by mandating public disclosure of emission data. Section 114, its implementing regulations, and the reporting rule charge mandates disclosure of emission data. EPA has no authority to question that choice.

C. EPA is Not Following its own Procedures for Determining CBI Claims

Even if some portion of the deferred data elements were *not* 'emission data,' under Section 114, EPA's actions would still not be legally supportable. EPA is refusing to collect and disclose critical emissions information from thousands of sources. Its refusal to disclose the data (or, indeed, even to collect it) is contrary to its own rules.

EPA's general rules covering CBI claims, at 40 C.F.R. Pt. 2, require a detailed, case-by-case, evaluation of each confidentiality claim before EPA may withhold data from the public. In particular, each emitter must assert a confidentiality claim showing, among other requirements, that it has taken "reasonable measures to protect" the information it claims as CBI, and that the data "is likely to cause substantial harm to the business's competitive position." 40 C.F.R § 2.208. EPA's evaluation of these claims is fact-intensive and requires several layers of agency review and public comment. *See* 40 C.F.R. §§ 2.205-2.206.

No such process occurred before EPA issued the proposed deferrals, which effectively prevents public disclosure of the hundreds of data elements they cover. On the contrary, EPA characterized industry statements requesting protection as "general," and criticized them for usually failing to provide a "supporting rationale regarding how the public availability of individual data elements would cause harm to their competitive positions." 75 Fed. Reg. at 81,368. For numerous types of data, EPA requested public comment but *received no complaints at all* from industry suggesting that it had *any concerns* that the release of these data would cause competitive harm.

But while the burden of proof for every CBI claim is on the claimant, EPA reacted to the failure of proof of these generalized claims by proposing to grant them. EPA proposes to spend three years considering "which, if any, inputs to equations could result in the harmful consequences described by the [industry] commenters if made available to the public." 75 Fed. Reg. at 81,355. In essence, it proposes to withhold information from the public *before* determining whether disclosure will cause any harm, *without any evidence suggesting that these data might actually cause competitive consequences*. Indeed, as best as we have been able to determine, EPA has not even received *general* allegations of harm on many – and perhaps the majority -- of the data elements it proposes to defer. Instead, EPA has proposed deferring *all* "inputs to emission equations for direct emitters," 75 Fed. Reg. at 81,354, regardless whether it has received any complaints, or has any reasonable basis for believing that such complaints may be substantiated.

The process EPA suggests is the opposite of the one set out in its regulations which place the default on public disclosure, until industry proves otherwise. Instead, EPA may only withhold non-CBI data if a reporter has "satisfactorily shown" that harm will occur. 40 C.F.R. § 2.208. . Even assuming EPA could take this responsibility for industry, it cannot erase the evidentiary burden that must be met to satisfy the existing regulations, which legally bind EPA. Because, as EPA itself admits, this showing currently before it is either unsatisfactory or absent in essentially all cases, it must not withhold this information. If EPA finalizes its blanket deferral, it will have acted arbitrarily, capriciously, and contrary to law.

II. The Proposed Deferral Further Violates EPA's Legal Obligations By Undermining Greenhouse Gas Data Quality

The proposed deferral is not merely procedurally barred. It also has major negative substantive consequences for EPA's reporting system. Without emissions inputs, EPA cannot reliably verify greenhouse gas emissions figures. That failure imperils the data quality of the rule as a whole.

The reporting system is complex, and implementing it will be a novel experience for many reporters. It is highly likely that many reporters will make errors in their emissions reports, and these errors may substantially skew the emissions figures which they finally report to EPA. In our earlier comments on the rule, we documented many incidents where emissions equation estimates were 25% or more off from the correct figures.[12] We incorporate those comments, and their attachments, by reference here. As those comments discuss, such flaws seriously undermined the European Union's greenhouse gas control system,[13] and have the potential to undercut EPA's emissions control efforts as well. If EPA is unable to determine how reporters calculated their emissions, it will be unable to effectively detect errors, under-reporting, fraud, bias, and inaccuracies in its methodologies, and so will be unable to effectively improve the reporting system.

EPA has provided no evidence that its verification system can effectively accommodate the proposed deferral. Instead, EPA's deferral takes away an essential check in the system at the very point in time when it most matters – as industry is starting to collect data that should be used to develop the critical level of baseline greenhouse gas emissions for each facility. Failing to verify these data from the beginning threatens to cause severe delay in creating a functional reporting system that the public, and industry itself, can rely on as an accurate starting point for greenhouse gas policies.

The threat is even more pressing because, despite critical comments from states, regulators, and public interest groups[14] expressing serious concern that EPA would be unable to adequately verify emissions information without employing third-party verifiers, EPA opted to verify data itself. EPA has not since clearly described its verification system, but the preamble to the final reporting rule outlines a system largely dependent on computerized reviews of data elements:

> 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

[12] *See* Ex. 6, and referenced attachments, at 17-29.
[13] *See id.* at 27-28.
[14] *See, e.g.*, Ex. 6, at 50-57.

> conduct on-site audits of selected facilities. The on-site audits may be conducted by private verifiers contracted by 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 56,282. EPA's program, in other words, relies upon statistical analyses of all reported data elements to spot and diagnosis problems, and adds only limited on-site visits, very likely due to limited EPA resources for a comprehensive site-specific inspection program.

Whether or not this program would have worked with emission equation input reporting, it certainly will not function properly with the deferral. Emissions equation inputs are not just prerequisites to emissions figures; they are the only empirical data on emissions which EPA receives from facilities using equation-based reporting. It is *these* data points that EPA must analyze to spot errors, fraud, and biases. If it looks only to the final emissions figure, which is the product of many different underlying inputs, EPA will be unable to pinpoint which emission input is being mismeasured (if it can spot a problem at all), and so will not be able to target resources to correct errors. Absent correction, industry will continue reporting flawed data, and the true baseline level of emissions for many facilities may not be correctly calculated, leading to years of delay in accurate reporting and effective policymaking.

EPA's proposed deferral gives these problems unduly short shrift. Although EPA proposes delaying reporting of the core data elements it would have used for verification, it maintains that it will continue to follow its "two-step process." 75 Fed. Reg. at 81,355. EPA suggests that it will solve this problem by temporarily "plac[ing] additional emphasis on the second step of the process, direct follow-up with facilities," *id.*, but this suggestion is not at all compelling for several reasons.

First, direct facility visits are the *second* step of a process that begins with electronic verification, and EPA will not have the data it needs to conduct this first step. EPA attempts to brush away this objection by pointing out that it will still have some other sorts of information, *see id.*, but it does not succeed. First, EPA states it will know which "calculation methodologies" deferred sources used, but this is not helpful: the "calculation methodology" will tell EPA *which* equation is being used, but, as EPA will not know the inputs to the equations, it will not do much good. Similarly, EPA may find out which "test methods" were used to measure inputs, but again, knowing how an unknown quantity is measured will not help EPA determine whether the actual measurements are in error. Further, information on whether "missing data procedures were used" is largely useless: it tells EPA that one set of data which it will not see has been replaced by another set of data which it will not see. And, finally, information on "plant and equipment capacity and production rates" might help EPA work out whether given emissions figures are plausible across broad classes of plants, but will not meaningfully help EPA determine whether emissions figures are accurate within a class of facilities, or show how it can correct the problem. EPA has offered no evidence that its computerized detection

system will work without equation inputs, or be able to spot all – or even a meaningful handful – of errors.

If anything, EPA raised fresh doubts as to the utility of its computerized system, when it announced that it would delay the initial reporting deadline for all sectors of the rule from March 14, 2011, to summer 2011 in order to work out kinks in the computer program.[15] Again, EPA designed this system to verify data using all elements required to be reported under the rule. Even if the system worked well now, it would likely struggle to function during the deferral without the data it was designed to use. Given that the computer program apparently already does not work properly, EPA's expectations that it will work smoothly for verification during the deferral are patently unreasonable.

Second, even supposing that EPA's computerized system can function without the inputs for which it was designed, EPA has not demonstrated that site visits can solve its verification problem, or, especially, translate into rule-wide improvements. EPA has not demonstrated that it has the resources to visit all – or most -- of the facilities at which it suspects errors have occurred. EPA does not appear to have such resources, particularly in this time of straitened budgets, so its efforts to step up second-step visits are very likely to fail.

Even if EPA somehow did muster the resources, its visits would very likely be ineffective. If EPA verifiers do *not* collect inputs into emission calculations on site visits, their visits will be fruitless as they will not be able to determine how a site calculated its emissions and correct any errors. Nor will they be able to share common errors with EPA headquarters and other reporters to help correct them generally. But if EPA verifiers *do* collect such information, then they will have to disclose it, creating the very alleged CBI problems that EPA is attempting to solve with the deferral itself. In sum, EPA's system may even lead to greater industry confusion and unnecessary resources spent at facilities where there is no problem, because of the difficulty EPA will have in figuring where it truly needs to focus its attention, while simultaneously undermining the public's access to the data and the integrity of the program.

EPA will also, notably, be acting contrary to its own verification and data quality guidance. EPA's Data Quality Policy, CIO 2106.0,[16] provides that EPA data provided to external users "must be [of a quality] appropriate for their intended use." *Id.* at 2. The "intended use" of greenhouse gas reporting data is to provide facility-specific, economy-wide data of sufficiently high quality as to support a broad range of public policies. Unverified or poorly-verified data does not meet this use. EPA, in fact, recognizes as much, stating, in its *Guidance on Environmental Quality Data Validation and Verification, EPA QA/G-8* at iii (Nov. 2002),[17] that "[d]ata verification and data validation are important steps in the project life cycle, supporting its ultimate goal of defensible products and decisions."

[15] *See* Ex. 1.
[16] Attached as Ex. 10.
[17] Attached as Ex. 11; *see also* EPA Memo reissuing and reaffirming this policy (Nov. 2008), attached as Ex. 12.

In its verification guidance, EPA further explains that "the purpose of data verification is to ensure that the records associated with a specific data set actually reflect all of the processes and procedures used to generate them, and to evaluate the completeness, correctness, and compliance of the data set against the applicable needs or specifications," *id.* at 35, and is necessary to produce reliable data. The "first step" in data verification is identifying the "location and source" of all relevant data records, *id.*, followed by a careful record review to catch errors, *id.* at 54-55. Needless to say, EPA cannot conduct such reviews if it cannot review the underlying emission equation records.

As John Bosch, former chief of EPA's own National Air Data Branch explains:

> Over the years I have reviewed and checked annual emissions-submittals from tens of thousands of facilities submitting annual emissions to EPA. I quickly learned that the following condition was absolutely essential: it was necessary to have all the actual inputs of throughputs, emission factors, and control efficiencies used in the emission-calculating process. If this information was not supplied alongside the reported emissions values, it was completely impossible for anyone to cross-check for arithmetic mistakes, incorrect throughputs, and improper equipment ranges. Further, if these checks were not done when the emissions were reported, the chance for later corrections of errors was highly unlikely. In fact, even under the ideal condition of having all input parameters immediately available for cross-checking, EPA studies have shown that the calculated emissions using emission factors normally are only 20-30% of the actual measured emissions. (There are a number of logical reasons for this and all are well-documented in the literature and in EPA reports.)
>
> The build-up of accumulated errors in calculated emission-estimates will inevitably degrade emission inventories, pollution control strategies, regulatory emission limits, and virtually all modeling results. It is thus essential for the regulating agency to simultaneously collect and analyze all emission-calculation input parameters along with the reported emissions value and use them to cross-check the correctness of the submitted numbers. Otherwise, scientific integrity and credibility of the entire regulatory program could be strained and adversely affected.[18]

Notably, all credible emissions reporting systems have likewise concluded that effective verification is necessary to produce valid emissions figures. Our comments on the proposed reporting rule discuss these determinations in detail and the California Air Resources Board ("CARB") usefully summarizes this collective conclusion as follows:

> Independent verification of reported GHGs is expected under international standards and is integral to many existing GHG reporting programs, including the California Climate Action Registry's voluntary program. By their nature, calculating and reporting of GHG emissions can be a complex exercise in tracking emissions sources, applying appropriate emission

[18] Mr. Bosch's report is attached as Ex. 13, and his resume is attached as Ex. 14.

> factors and methods, and tracking financial records. Calculation and verification of GHG emissions requires a systematic approach. ARB staff is proposing to use independent third-party verification, consistent with CCAR (CCAR 2005) and international standards. International guidance reports developed by the International Organization for Standardization (ISO) and the European Union require third-party verification to address the need for consistency and a high level of confidence in calculating tonnes of GHG emissions.

CARB, *Staff Report: Initial Statement of Reasons for Rulemaking; Mandatory Reporting of Greenhouse Gas Emissions* (Oct. 19, 2007) at 55.[19] EPA has already diverged from internationally accepted best practices by attempting to verify reporting rule data itself without sufficient resources to do so. Indeed, CARB recently declined to follow EPA's lead, writing:

> Staff reviewed the current verification process in the U.S. EPA regulation before proposing that California stay with its existing process of independent, third-party verification. The U.S. EPA regulation contains a verification process that relies on automated routines to screen submitted emissions data reports for inconsistencies and flag data that do not meet certain criteria. Although this process is termed "verification" by U.S. EPA, it is inconsistent with the international standard for verification of GHG emissions data reports. Experience with California's existing regulation has shown that errors are very common in emissions data reports and that third-party verification is important in the submittal of an accurate emissions data report, especially to ensure that all required sources are included in the emissions data report. Having a third-party verifier review each reporting entity's emissions data report ensures a careful and thorough review of all data submitted to ARB. Under the staff proposal, ARB would continue to rely on the international standard of third-party verification to ensure credible and accurate reporting to support the cap-and-trade program. As such, ARB staff has rejected this alternative.

Id. at 133. EPA is traveling even further afield with the deferral, which undermines its earlier unorthodox decision to verify its own figures. CARB highlighted the magnitude of EPA's task

[19] Attached as Ex. 15; *see also* CARB, *Staff Report: Initial Statement of Reasons for Rulemaking; Revisions to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions* at 88 (Oct. 2010), attached as Ex. 16, in which CARB reaffirms its conclusion:

> The existing GHG reporting regulation contains third-party verification requirements for all reporting entities. Independent verification of reported GHGs is expected under international standards (ISO 2006a) and is integral to many existing GHG reporting programs, including The Climate Registry's voluntary program (TCR 2010) and the European Union Emissions Trading Scheme (EU ETS 2007). The Western Climate Initiative (WCI) also requires all participating jurisdictions to adopt regulations that include third-party verification for a regional cap-and-trade program (WCI ERMR 2009). By their nature, calculating and reporting of GHG emissions can be a complex exercise in tracking emissions sources, applying appropriate emission factors and methods, and tracking financial records. Calculation and verification of GHG emissions requires a systematic approach. International guidance reports developed by the International Organization for Standardization (ISO) (ISO 2006a) lay out best practices that require third-party verification to address the need for consistency and a high level of confidence in calculating and reporting ton of GHG emissions.

CARB's final statement of reasons, adopting the verification system it outlines, is attached as Ex. 17.

when it estimated that using its own staff to conduct verifications just for facilities in California would require"150 dedicated positions would be needed to spend the time required for site visits to examine sources, draw up sampling plans and risk assessments, check emissions calculations, and develop and issue verification reports and opinions." CARB, *Staff Report: Initial Statement of Reasons for Rulemaking; Revisions to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions* at 132-33 (Oct. 2010). Especially during this time of budget cuts and federal hiring freezes, EPA cannot hope to muster even greater resources to verify all the sources in the national reporting system, especially if it cannot examine emission equation inputs.

If EPA allows the reporting program's verification system to collapse in this way, it will be acting contrary to binding law.[20] EPA was directed to construct an effective data collection system to support policy-making on the nation's most pressing environmental crisis, and to grant data to the public to allow concerned citizens to play a meaningful role in addressing this problem. If that data is unreliable, as it will be for the majority of large stationary sources if the deferral is finalized, EPA will have failed in its duties.

III. The Lengthy Proposed Deferral is Unnecessary

Even if EPA had legal authority to defer reporting, doing so is inequitable and unnecessary. Companies concerned with reporting emission equation inputs can cure their own problems without undermining the rule, because they are free to directly measure their emissions and could have prepared to do so years ago. The public should not suffer to protect companies with poor business judgment.

EPA proposed the reporting rule in spring 2009, 74 Fed. Reg. 16,448 (Apr. 10, 2009) and finalized the rule that autumn, 74 Fed. Reg. 52, 260 (Oct. 30, 2009).). Since that time it has finalized additional elements of the rule, to address sectors initially missing from the October 2009 rule. Final Rule, 75 Fed. Reg. 39,736 (July 12, 2010) (Magnesium Production, Underground Coal Mines, Industrial Wastewater Treatment, and Industrial Waste Landfills); Final Rule, 75 Fed. Reg. 74,458 (Nov. 30, 2010) (Petroleum and Natural Gas Systems); Final Rule, 75 Fed. Reg. 75,060 (Dec. 1, 2010) (Injection and Geologic Sequestration of Carbon Dioxide). During that process, industry groups generally urged EPA to avoid requiring them to purchase and install continuous emissions monitoring systems ("CEMS") or other direct measurement devices, preferring to report using relatively less expensive emissions equations-based approaches. *See, e.g.*, 74 Fed. Reg. at 56,280. EPA dismissed objections that a move away from direct measurement could imperil the rule's accuracy, and followed the course industry preferred,

[20] Even if these serious verification problems were not at issue, deferring reporting on data elements further undermines the rule by making it impossible to determine which aspects of industrial processes are primarily driving emissions sources. One of the virtues of equation-based reporting is that it breaks down industry systems into component parts, and may be useful in determining which of these parts most strongly influence emissions. This information is useful for reporters, and for policymakers and the public, as it allows them to target resources at the most polluting sections of their processes.

writing:

> [T]he selected monitoring approach that combines direct measurement and facility-specific calculations is warranted even though the rule does not contain any emissions limits or emissions reduction requirements. EPA remains convinced that this approach strikes an appropriate balance between data accuracy and cost. It makes use of existing data and methodologies to the extent feasible, and avoids the cost of installing and operating CEMS at numerous facilities.

Id. Reporting industries thus received significant regulatory relief. If they opted not to install CEMS – and most did so – EPA would allow them to estimate their emissions with equations instead. But, having received this relief, the polluters now push farther, to argue that they should *both* be allowed to avoid direct measurement with emissions equations *and* render the equations unreliable by refusing to share their measured inputs with EPA or the public. It is inequitable, and illegal, for EPA to grant both favors.

Some reporters nonetheless told EPA that "had they known that EPA would later propose that inputs to emission equations qualify as emission data that must be made available to the public," they would have "commented more critically" on the proposed rule, or installed CEMS. 75 Fed. Reg. at 81,354. By July 2010, when EPA proposed its CBI determinations, industry commenters complain, it was too late to install CEMS for 2010, and so they were "locked in" to reporting emissions inputs. *Id.* These complaints are disingenuous in the extreme.

EPA's determination that emissions equation inputs were "emission data" was utterly unsurprising. As we have outlined above, these inputs are obviously "necessary to determine" emissions, and so necessarily must be publicly disclosed. Industry could have gathered as much from the regulations – and certainly should have so concluded based on Congress's mandate for a public and transparent reporting system and EPA's many statements in the proposed and final rules that it was driving towards maximum public disclosure. Only the very unobservant could possibly have been startled when EPA continued in the same course it had been following since its first draft rule. If a company has erred in this way, it is not EPA's responsibility to fix its problems, and such errors cannot justify violating the public's statutory right to vital information under section 114.

But even if EPA had the discretion to come to the aid of companies which failed to take sensible precautions, deferring all data collection until 2014 makes no sense at all. The reporting rule already contains direct measurement provisions for each industry it covers. All reporters need do to correct their problems is to switch to this tier of reporting. They may do so with no regulatory action from EPA, beginning with the 2011 reporting year. At the most, then, if EPA could defer reporting, it might do so only for the 2010 year – not for subsequent years, when direct measurement is available.

If EPA, in the meanwhile, wishes to tweak the reporting rule in other ways so as to make emissions equation less demanding, it can then do so without any further deferral. While EPA

conducts any subsidiary rulemaking, direct emissions measurement will continue, solving any CBI concerns.

In the meantime, if EPA leaves the deferral in place, the public, including the undersigned organizations and their members, will suffer. Even if EPA eventually releases the deferred data, recognizing that they are not CBI, the denial of access to these data for three years, beyond the delay that had already occurred to finalize the rules in the first place, will leave critical gaps in our understanding. We and policymakers need these data now in order to begin analyzing 2010 emission data and using this to take action to protect our communities from global warming. For instance, we intend to analyze greenhouse gas preconstruction permits to determine whether sufficiently rigorous controls are being required. This task requires considering the emissions of other facilities in a given industry sector, and will be significantly more difficult if we cannot reliably determine those emissions, or analyze their sources. EPA, and other permitting agencies, will likely have similar difficulties. We cannot effectively advocate for greenhouse gas controls without accurate information on the sources of these emissions – as Congress recognized when it directed EPA to develop the reporting system.

IV. Other Environmental Reporting Systems Provide Further Evidence that EPA's Proposal Has No Rational Basis

Some industry commenters[21] urge that because California's greenhouse gas reporting system and EPA's own Toxic Releases Inventory ("TRI") do not make emission equation inputs public, EPA need not do so here. These criticisms are not compelling because they ignore the very different structures of those systems. Indeed, if anything, EPA's proposed deferral is more likely to damage the California system than to emulate it.

The TRI is a very poor model for the reporting rule. Most notably, the Emergency Planning and Community Right-to-Know Act ("EPCRA"), which created the TRI, does not contain an explicit statutory command to make all toxics data publicly available regardless of its putative trade secret status, unlike the Clean Air Act's "emission data" provision. Further, EPCRA allows for somewhat more coarse data quality than does the greenhouse gas reporting system. The statute requires companies to provide an "estimate" of the "maximum amount (in ranges)" of the toxic chemicals at their facilities, not the precise figures necessary for effective greenhouse gas control. 42 U.S.C. § 11023(g)(1)(C)(ii). Similarly, the statute authorizes operators to use "readily available data" or "reasonable estimates" to assemble these figures, and explicitly provides that "[n]othing in this section requires the monitoring or measurement [of toxics]… beyond that . . . required under any other provisions of law or regulation." 42 U.S.C. § 11023(g)(2); *see also* 40 C.F.R. § 372.85 (again requiring "estimate[s]" of toxic releases).

The TRI program, in short, produces relatively general information, based upon existing measurements, without the precision or transparency mandates of the reporting rule. As well, though chemical releases may be difficult to track, the TRI system lacks the notably complex

[21] *See, e.g.*¸ Comments of NEDA/CAP (Sept. 7, 2010); Comments of PPG Industries (Sept. 7, 2010).

regulatory infrastructure of the reporting rule, with its multiple tiers of reporting and detailed regulatory directives designed to ensure proper data collection. The reporting rule is more ambitious than the TRI and, potentially, more prone to reporter errors. To operate the reporting system, EPA must, therefore, take commensurately greater steps to ensure data quality, including collecting and analyzing emission equation inputs (or otherwise ensuring that they are properly verified). Experiences with poor data quality and errors in the TRI system are abundant, including Geographic Information System coordinates showing a facility located in a lake, emission rates that are identical from year to year where varying emissions are expected based on facility operation, emissions that are off by an order of magnitude, and zero emission rates where emissions are expected. These problems demonstrate that a more robust system is necessary from a practical perspective as well.

The distinctions between EPA's approach and CARB's program likewise do not argue against disclosure. Although commenters are correct that CARB does not provide emission equation inputs to the public, it is not required by statute to do so. More importantly, CARB can properly treat these inputs differently because CARB does not verify emissions reports itself, instead relying upon third-party verifiers.[22] With this extensive third-party verification system in place, CARB is less dependent upon its own review of input data. Because EPA opted to verify emissions figures itself, it does not enjoy this advantage, and so must collect and disseminate emissions equations inputs. If EPA switched to a third-party verification system, it might be able to avoid disclosing input data, but it cannot do so under the existing rule.

Ironically, CARB's robust emissions reporting and verification system would be threatened if EPA moved forward with its proposed deferral. CARB has recently proposed to revise its reporting rule to allow most reporters to fulfill their obligations by complying with EPA's rule. As CARB explains, "[i]n order to ease confusion for reporters and to help ensure good data quality, the proposed regulation directly references the U.S. EPA requirements, telling reporters where they must comply with specific applicable sections of the federal rule to meet ARB requirements. We then stipulate any needed limitations, modifications, or additions." Ex. 16 at 5-6.

This rule, in other words, assumes that EPA will fully enforce the federal system. If EPA instead defers reporting, CARB will not be able to go forward with its rulemaking efforts to reduce regulatory burdens. EPA claims to be "committed to working with State and regional programs to coordinate implementation of reporting programs, reduce burden on reporters, provide timely access to verified emissions data, establish mechanisms to efficiently share data, and harmonize data systems to the extent possible." 74 Fed. Reg. at 56,266. It should not undermine that commitment here.

V. The Deferral Is Not Supported by the Record

[22] *See generally* Exs. 15-17.

Although industry groups claim that disclosure of some data elements pursuant to the reporting rule would divulge CBI to the public, a close review of the rule's data elements shows otherwise. Thus, EPA cannot justify this rule proposal based on evidence in the record. Our review, informed by extensive expert analysis, demonstrates that all or most of the data elements are either already in public view in some capacity or competitively irrelevant. Though the burden of justifying nondisclosure falls upon industry, not the public, our analysis shows why industry cannot carry its burden. Any industry complaint of embarrassment or discomfort with the disclosure of data, or industry preference not to share data, simply cannot justify its non-disclosure in view of the robust public reporting requirement of section 114 of the Clean Air Act.

Generally, the data elements EPA proposes to defer do not qualify as a "trade secret" or "confidential business information." Under FOIA, 5 U.S.C. § 522(b)(4), which provides relevant precedent for EPA's interpretation of section 114(c) of the Clean Air Act, 40 C.F.R. § 2.201(e),[23] a "trade secret" is "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Gr. v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *see also Nw. Coal. for Alternatives to Pesticides v. Browner*, 941 F. Supp. 197 (D.D.C. 1996). This term "incorporate[s] a direct relationship between the information at issue and the productive process." *Id.* Commercial information is "confidential" under FOIA if disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. *Nat'l Parks & Conserv. Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). As the D.C. Circuit has further explained, to be exempt from disclosure as a trade secret under FOIA exemption four, "an identified harm must 'flow[ ] from the affirmative use of proprietary information by competitors.'" *United Technologies Corp. v. U.S. Dept. of Defense*, 601 F.3d 557 (D.C. Cir. 2010) (quoting CNA, 830 F.2d at 1154). FOIA exemption four provides the test for 40 C.F.R. § 2.208. *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 52 (D.C. Cir. 1981) (comparing FOIA exemption 4 and this regulation and explaining that "although the substantive criteria set forth in the regulations do not exactly mirror those relevant under Exemption 4, the essential test is the same: whether release of the requested information, given its commercial value to competitors and the cost of acquiring it through other means, will cause substantial competitive harm to the business that submitted it.").[24]

Industry has not passed these substantial hurdles and cannot do so, as the data at issue does not meet these legal definitions. Below, we focus on several important industry sectors to show how thoroughly EPA and industry have failed to justify the proposed deferral.

[23] "Reasons of business confidentiality" is defined in the regulations to mean "trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information," and "to encompass any concept which authorizes a Federal agency to withhold business information under 5 U.S.C. 552(b)(4)..." 40 C.F.R. § 2.201(e).

[24] To consider the "substantial competitive harm" test, "[t]he court considers how valuable the information will be to the requesting competitors and how much this gain will damage the submitter." *Worthington*, at 51.

A. Review of the Stationary Combustion Source (Subpart C), Cement (Subpart H), Iron and Steel (Subpart Q), and Petroleum Refinery (Subpart Y) Rules Shows that CBI Concerns Are Not Present

Dr. Ranajit Sahu, a mechanical engineer with over twenty years of experience in these industry sectors and a frequent technical consultant to EPA, reviewed the data elements in the above-referenced subparts, which cover sectors with particularly large greenhouse gas emissions.[25] He concluded that EPA's proposed deferral is unjustified. We include his general comments here and attach spreadsheets he prepared which consider each data element in each of these rules.[26] As the spreadsheets show, Dr. Sahu has in certain instances found that EPA's proposed deferrals cover information that is already publicly disclosed, , and in others has shown why a deferral is not appropriate. We incorporate Dr. Sahu's report by reference, including his analysis of each and every data element listed therein.

i. Dr. Sahu's General Conclusions

Dr. Sahu's general analysis of the rule is attached as Ex. 36. Dr. Sahu concludes that EPA's rule is "a misguided effort with poor support." He explains that, in most cases:

> - data elements themselves or very close variants (typically the same quantity but over a smaller or larger time interval) have been available/are available in prior reporting to agencies and the public. They are available by routine searches of public databases or the internet;
> - data elements have been reported in other countries by similar industries . . .;
> - data elements have been reported to the US government pursuant to ICR requests, responses to which are available on public dockets such as EPA dockets for rule making;
> - data elements (such as location information, emissions unit identification, and actual production rates during representative time periods) are routinely available publicly in documents such as source test reports submitted to various agencies;
> - data elements are reported in industry statistical publications (example PCA ER393 for the cement industry);
> - data elements are reported to industry associations, which potentially provides access to direct competitors. For example, the API and the SMA collect and provide summary statistical data, and the underlying data is available to members of these trade associations;
> - data elements (such as molecular weights, heating values, etc.) can be obtained from standard references;
> - data elements can be inferred from other data elements by reasonably familiar technically knowledgeable individuals using standard rules of thumb (for example, making estimates of raw materials, clinker produced, or cement produced in cement kilns; or steel production versus raw materials usage) [that is, even if EPA shields some data elements, industry experts will be able to infer them];

[25] Dr. Sahu's resume is attached as Ex. 18.

[26] Attached as Exs. 19-22. Each spreadsheet references several documents as examples, which are also attached.

- data elements (such as source dimensions) have been reported since they are inputs for other analyses such as dispersion modeling.

He adds that:

> Some of the data elements (examples include rates of usage of raw materials or rates of production) can be estimated using direct surveillance of incoming deliveries (types and frequencies and changes of these over time), outgoing transfers, and/or inventory buildup – even by members of the public.
>
> Of course, there are still other gauges of overall business health such as staff additions/reductions, resources spent on maintenance, etc. that can provide clues to the discerning competitor.

Thus, as the attached spreadsheets show in detail, EPA is, for the most part, proposing to defer collecting data that is already publicly available. Even where it is not, Dr. Sahu emphasizes that the deferral does not make economic sense because "it is naïve to believe that direct competitors do not have knowledge of basic business aspects of their competitors in the following areas":

- production processes (from presentations at technical meetings, trade association meetings, memberships in standards organizations, industry publications, suppliers, vendors, data provided to other governmental agencies such as OSHA, SEC, etc.);
- raw materials used (from suppliers and transporters);
- capital projects planned (from vendors and suppliers);
- energy sources and usage (from utility company negotiations and records);
- innovative practices (from customers and suppliers, technology licensors, patent filings, marketplace shifts, etc.); and
- business risks (from SEC filings or other filings for public companies).

He notes that "[t]he general mobility of the workforce (particularly the technically trained workforce in the US and abroad), especially within each industry, contributes to dissemination of business information" and "[e]xcept for a few industries, non-disclosure agreements are rare," as are legal actions to enforce such agreements. "That is because, as mature industries, almost all aspects of manufacturing and production are well known within each industry."

Dr. Sahu adds that the absence of competitive harm is particularly clear for the steel and cement sectors, because they "by their nature tend to have captive geographic markets." He explains that players in these industries can "rarely penetrate a geographically distant market since it is very difficult to overcome the transportation advantages afforded to a more local supplier." As a result, operators in these industries may seek to emulate each other, but are rarely in direct competition in ways that would raise competitiveness concerns.

Dr. Sahu therefore concludes:

> Thus, deferring the data elements at question does nothing to increase business risk. It is misguided in that regard. EPA is simply throwing more road-blocks in the ability of the public and community stakeholders to obtain basic data relating to calculating, estimating, or verifying emissions that are reported by these industries. Given the known imprecision of emissions estimates, the present and likely future understaffing at regulatory agencies, and the rates of errors in the current reporting of emissions (say, pursuant to requirements in operating permits, etc.) EPA should welcome and encourage more reporting of these data elements (and not less) in order that reported emissions are verifiable and accurate.

Dr. Sahu's sector by sector analysis documents his conclusions.

ii. Dr. Sahu's Conclusions on Subpart C

Dr. Sahu's review of Subpart C,[27] covering general stationary combustion sources, demonstrates that the deferred data elements are not CBI. Many of the deferred data elements are plainly not of competitive relevance, including data points noting the hours a particular monitoring device operates, or are already being reported. Publicly available data elements include fuel consumption and heat rate figures, which are widely reported in permitting documents.

As Dr. Sahu explains, "[i]n a few instances, where "production related" elements are required, they are generally fuel use related where the type and quantity of fuel used is requested. This is basic utility data, often incidental to the main production process, where the combustion unit serves a secondary purpose such as in providing hot water or steam or serves as a heat exchanger, etc."

iii. Dr. Sahu's Conclusions on Subpart H

Like Subpart C, data elements covering the cement industry are publicly available or competitively irrelevant.[28] For example, information on clinker composition has already been reported to EPA as a part of an information collection request, clinker recycling rates are also publicly known, and monthly clinker production has already been reported by companies operating in Europe. Notably, the cement industry comments do not seriously contest any of these findings;[29] its comments offer no direct demonstrations that these specific data elements are CBI. General assertions of nonspecific harms and opposition to "disclosure of information" do not suffice.

iv. Dr. Sahu's Conclusions on Subpart Q

[27] Ex. 19.
[28] Dr. Sahu's analysis is attached as Ex.20.
[29] *See, e.g.*, Comments of the Portland Cement Association on the proposed CBI rule.

The same analysis applies with regard to iron and steel production. Once again, Dr. Sahu's analysis[30] demonstrates that the data elements EPA seeks to defer are actually either in public view or of no business importance.

Certainly, the industry itself has raised no specific concerns. The comments of the U.S. Steel Corp., for instance, decry EPA's reporting system as a departure from previous practice, and claim some information is "private" but do not cite a single specific data elements.

Nor can they: as Dr. Sahu shows, EPA is not trenching on CBI in this subpart. In particular, Dr. Sahu shows that data on the carbon content of inputs to the iron and steel production process, which are the subpart's primary focus, can readily be calculated from public figures, rendering efforts to protect these inputs unnecessary. As he explains, a reasonably experienced engineer can determine a facility's carbon use rates from reviewing its material safety data sheets to determine which fuels are being used, and estimating fuel use rates based on overall production figures, which are publicly available. As he explains:

> Although a detailed mass balance can require multiple inputs and associated carbon contents, it is usually possible to achieve reasonable accuracies by neglecting contributions from smaller carbon input and output streams in the mass balance. Thus, the burden for data element reporting should not be very high. As an example, from an electric arc furnace, the vast majority of the CO2 comes from the addition of direct carbon via coke or coal, the electrode consumption, and the use of any natural gas. Almost all of the carbon ends up as CO2, with small amounts transforming to CO or partitioning to the carbon content of the steel. As a first approximation, converting all input carbon to CO2 provides a reasonable estimate. And, this can be determined from Material Safety Data Sheets (for example, for coal or coke). These are not business secrets. Nor is the carbon content of natural gas a business secret. Thus, only the actual quantities of usage of these needs to be known. A reasonably experienced practitioner can estimate these from the production rate, knowing the general type of process, which is publicly reported, for example in permits. Thus, deferring reporting of these is meaningless and has no business value.

v. Dr. Sahu's Analysis of Subpart Y

Once again, on analysis, the deferred data elements in the refinery sector proved to be publicly available or not of business relevance.[31] For instance, some of the deferred elements are simply constant conversion factors that would not vary from facility to facility, *see, e.g.*, 40 C.F.R. §§ 98.256(e)(6), 98.256(f)(7), while others, such as the number of carbon-containing compounds in the flare stream, *see, e.g.*, 40 C.F.R. § 98.256(e)(7), are already reported to permitting authorities. EPA's deferral is, in other words, badly over-broad.

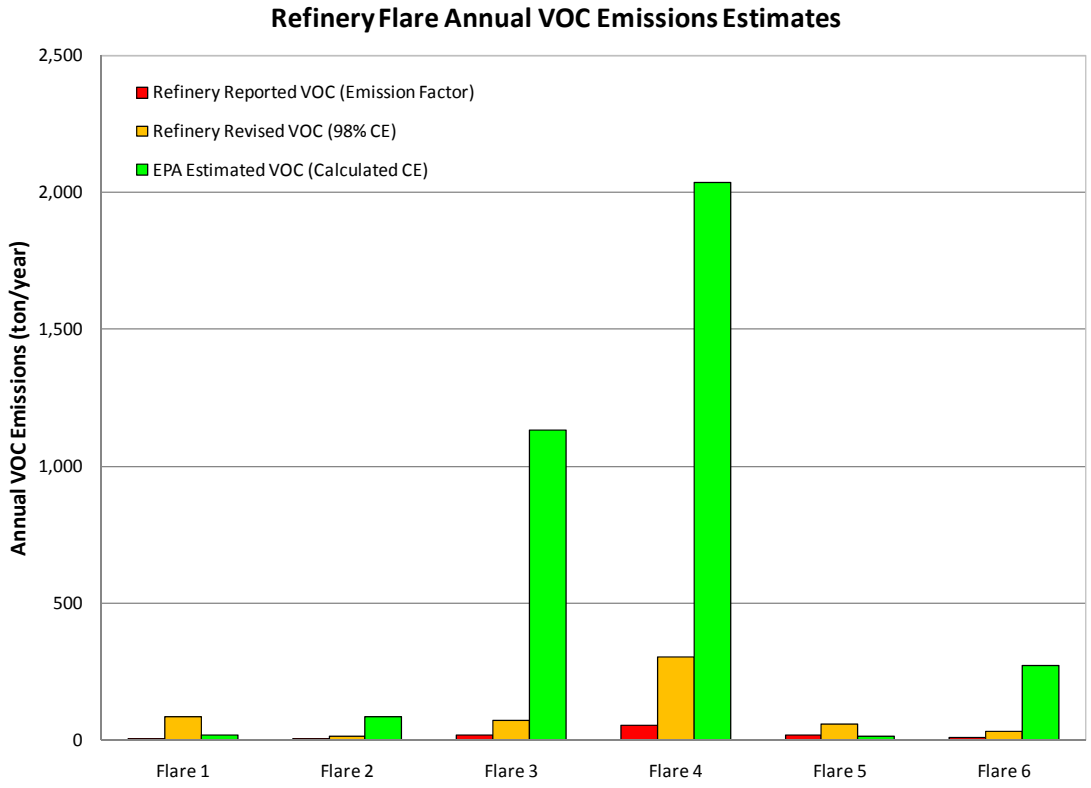
[30] Ex. 21.

[31] Dr. Sahu's analysis is attached as Ex. 22.

Even if inputs are not otherwise being reported, EPA should not allow industry to avoid reporting. As Dr. Sahu notes, even petroleum industry executive recognize that reporting systems must be complete, transparent, and accurate.[32] Representatives of the American Petroleum Institute, Chevron, and others argue that a work-able system must:

> Ensure that GHG emissions are neither systematically over- nor –under-estimated, as far as can be determined, and that uncertainties are quantified and reduced as far as practicable. Sufficient accuracy is needed to enable users to make decisions with reasonable assurance as to the integrity of the reported GHG information.[33]

We agree. EPA's reporting requirements here are reasonable, necessary, and not of competitive relevance. Indeed, EPA itself recognizes that unverified industry estimates are frequently badly off. For instance, in a February 2011 presentation, EPA showed that industry had to revise its own estimates of volatile organic compounds in flare emissions upwards by 7 times – but that these revised estimates were themselves roughly half as low as direct measurement showed for several measured flares.[34] Table 1, below, summarizes these results:



[32] *See, e.g.*, Ritter et al., *Ensuring Consistent Greenhouse Gas Emissions Estimates*, Chemical Engineering Progress Magazine (Sept. 2005), attached as Ex. 23.
[33] *Id.* at 31.
[34] *See* EPA, Petroleum Refinery Enforcement Emerging Issues (Feb. 2011), attached as Ex. 24.

Note that, in every case, the refinery's initial reports are well below – and sometimes orders of magnitude below – actual emissions. In these circumstances, any alleged CBI concerns are vastly outweighed by the pressing public need to accurately characterize refinery emissions. Industry commenters have not met their burden in this sector either.

B. CBI Concerns Are Not Present for Oil and Gas Systems (Subpart W)

Susan Harvey, an oil and gas expert with decades of experience in the industry and in environmental compliance, reviewed the industry's claims for confidentiality under subpart W.[35] Her report and accompanying documentation are attached and incorporated by reference.[36] Ms. Harvey's report collects literally dozens of examples where industry already publicly discloses information it now seeks to protect as CBI. Once again, as Ms. Harvey compellingly demonstrates, industry demands for protection are groundless.

C. CBI Concerns Are Not Present for Pulp and Paper Production (Subpart AA)

Neither the record nor EPA present any justification for deferring the reporting requirements of data elements used as inputs to emissions equations for subpart AA (Pulp and Paper Manufacturing). These data elements undoubtedly constitute "emission data" that must be disclosed once reported to EPA pursuant to § 114 of the Clean Air Act. Moreover, there is no evidence to support a determination that disclosure of these data elements would present a risk of competitive harm – much less a "substantial risk" as required by EPA regulations, 40 C.F.R. § 2.208(e)(1) – to justify an exclusion of these elements from the public disclosure requirements of the Act.

In this rulemaking EPA proposes to defer reporting of the data elements listed at 40 C.F.R. 98276(b)-(i). 75 Fed. Reg. at 81,361. These pertain mainly to data elements used to calculate emissions from chemical recovery and lime kiln pulp processes, *see, e.g.*, 40 C.F.R. 276 (b)-(i), and clearly constitute "emission data" that must be made publicly available.

Nothing in the record justifies excluding these data elements from public disclosure. The Federal Register notice for the proposed rulemaking does not include any explanation of why such data elements would constitute sensitive business information. Moreover, the docket for the July 2010 CBI determination likewise contains no evidence to support a deferral of these reporting requirements. Only one set of comments in that docket even arguably addresses the pulp and paper manufacturing industry: the comments of Weyerhaeuser, an international forest products company that owns pulp mill within the U.S.[37] Nothing in the comments by

[35] Susan Harvey's resume is attached as Ex. 25.

[36] Ex. 26. Note that, for completeness, Ms. Harvey covers some aspects of enhanced oil recovery operations, which we do not understand EPA to have proposed to defer.

[37] Letter from EHS&S, Regulatory Affairs, Weyerhaeuser Company, Sep. 7, docket No. EPA-HQ-OAR-2009-0041.1. Because of the ambiguity of Weyerhaeuser's comments, we do not concede that the comments alone were sufficient to exhaust the issue of whether inputs to emission equations pursuant to the requirements of subpart

Weyerhaeuser, however, specifically addresses the data elements of contained at 40 C.F.R. 276 (b)-(i) would pose, much less explain why such elements constitute sensitive business information. [38]

The data elements contained at 40 C.F.R. 276 (b)-(i) undoubtedly constitute emission data. Moreover, there is no overriding concern that disclosure would result in competitive harm to the pulp and paper industry. For these reasons, EPA's deferral of reporting of this information is unwarranted.

D. CBI Concerns are Not Present for Underground Coal Mines (Subpart FF)

Many of the data elements EPA proposes to defer in this category, such as the methane concentration, are themselves simply GHG emissions, and so arguably cannot even plausibly be shielded from public disclosure.[39] But, even if they were not, many of these elements also are

---

AA of 40 C.F.R. 98.270 et al. or any other part of the GHG mandatory monitoring and reporting requirements was sufficient to exhaust this issue

[38] Or, for that matter, the comments submitted by the National Environmental Development Association's Clean Air Project. Docket No. EPA-HQ-OAR-2009-0056.

[39] Data that EPA wants to delay as possible CBI are bolded. Each measurement of methane "liberated" or destroyed, and of the concentration and flows of methane all are plainly emission data.

> 40 C.F.R Part 98 subpart FF
> § 98.326 Data reporting requirements.
> In addition to the information required by § 98.3(c), each annual report must contain the following information for each mine:
> **(a) Quarterly CH4 liberated from each ventilation monitoring point (CH4Vm)(metric tons CH4).**
> **(b) Weekly CH4 liberated from each degasification system monitoring point (metric tons CH4).**
> **(c) Quarterly CH4 destruction at each ventilation and degasification system destruction device or point of offsite transport (metric tons CH4).**
> (d) Quarterly CH4 emissions (net) from all ventilation and degasification systems (metric tons CH4).
> (e) Quarterly CO2 emissions from onsite destruction of coal mine gas CH4, where the gas is not a fuel input for energy generation or use (e.g., flaring) (metric tons CO2).
> (f) **Quarterly volumetric flow rate for each ventilation monitoring point (scfm),** date and location of each measurement, and method of measurement (quarterly sampling or continuous monitoring).
> (g) **Quarterly CH4 concentration for each ventilation monitoring point,** dates and locations of each measurement and method of measurement (sampling or continuous monitoring).
> (h) **Weekly volumetric flow used to calculate CH4 liberated from degasification systems (scf)** and method of measurement (sampling or continuous monitoring).
> (i) Quarterly CEMS CH4 concentration (%) used to calculate CH4 liberated from degasification systems (average from daily data), or quarterly CH4 concentration data based on results from weekly sampling data) (C).
> **(j) Weekly volumetric flow used to calculate CH4 destruction for each destruction device and each point of offsite transport (scf).**
> **(k) Weekly CH4 concentration (%) used to calculate CH4 destruction (C).**
> **(l) Dates in quarterly reporting period where active ventilation of mining operations is taking place.**
> (m) Dates in quarterly reporting period where degasification of mining operations is taking place.
> (n) Dates in quarterly reporting period when continuous monitoring equipment is not properly functioning, if applicable.

required to be reported already. For example, the Mine Health & Safety Administration tests methane emissions rates at each coal mine on a quarterly basis. As EPA has stated in a July 2010 report:

> MSHA conducts quarterly methane sampling at gassy underground coal mines in the United States. In that sampling program, MSHA measures and records both methane concentrations and ventilation exhaust airflows. Air sampling is conducted by MSHA inspectors using air bottles at a mine's main fans, along with a total quantity air ventilation volume reading. The sample bottles are sent to the MSHA lab for analysis, and the results are provided back to the MSHA district offices for inclusion in the inspection report. Air samples and ventilation readings are taken annually at mines with emission rates below 100,000 standard cubic feet per day (mines with such low VAM emission rates are not suitable for today's VAM mitigation technologies). According to Section 103 (i) of the Federal Mine Safety & Health Act of 1977 (Public Law 95164), MSHA conducts quarterly sampling at mines liberating more than 100,000 cubic feet of CH4 per day. If emission levels are greater than 200,000 cubic feet per day, more frequent inspections are mandated (with the frequency determined by the daily CH4 liberation rate calculated for the mine). In most cases, gassy mines with methane liberation rates in the millions of cubic feet per day are required to sample VAM on a monthly basis.[40]

As the EPA 2010 report notes, a review of these data show that underground coal mines already are required to report information on air flow and methane concentration.

> **(o) Temperatures (°R) and pressure (atm) at which each sample is collected.**
> (p) For each destruction device, a description of the device, including an indication of whether destruction occurs at the coal mine or off-site. If destruction occurs at the mine, also report an indication of whether a backup destruction device is present at the mine, the annual operating hours for the primary destruction device, the annual operating hours for the back-up destruction device (if present), and **the destruction efficiencies assumed (percent**).
> (q) A description of the gas collection system (manufacturer, capacity, and number of wells) the surface area of the gas collection system (square meters), and the annual operating hours of the gas collection system.
> (r) Identification information and description for each well and shaft, indication of whether the well or shaft is monitored individually, or as part of a centralized monitoring point. Note which method (sampling or continuous monitoring) was used.
> (s) For each centralized monitoring point, identification of the wells and shafts included in the point. Note which method (sampling or continuous monitoring) was used.

[40] EPA, U.S. Underground Coal Mine Ventilation Air Methane Exhaust Characterization 2 (July 2010) (describing data reviewed on individual mine); *see also* EPA, Identifying Opportunities for Methane Recovery at U.S. Coal Mines: Profiles of Selected Gassy Underground Coal Mines 2002-2006, EPA 430-K-04-003, at 4-1, 4-4 (Jan. 2009), http://www.epa.gov/cmop/docs/profiles_2008_final.pdf (explaining that "[t]he mines that are profiled were selected primarily on the basis of their annual methane emissions from ventilation systems as recorded in a Mine Safety and Health Administration database (MSHA, 2004)" and discussing methane release data).

In addition, because methane emissions have no relation at all to the production of an underground coal mine, none of these data elements could be considered CBI. The methane is simply emitted as a by-product of mining, and as such, it creates an additional environmental harm beyond the harm caused by the coal mining and future burning of that coal. The methane emissions do not bear significantly upon a coal company's ability to perform its primary commercial purposes of mining and selling coal. The data elements listed for the GHG reporting rule implicate no trade secrets or competitive risks at all for the company.

Finally, it is unclear that EPA has even received any comments contending or demonstrating that these data should be considered CBI. Absent a reasonable basis for believing that there is likely to be reason to conclude that any of these elements are CBI, EPA can have no rational justification for delaying the reporting date now. EPA should also consult with the Mine Safety and Health Administration before it bars the reporting of any of the above data elements because methane is explosive and poses serious safety concerns which monitoring may help detect and avert.

E. CBI Concerns Are Not Present for Municipal Landfills (Subpart HH)

In its July CBI determination, EPA found that reporting of a number of data elements for landfills under subpart HH would not pose competitive harms. EPA explained that:

> The number of wells in a gas collection system is not proprietary or sensitive information. It does not reveal any information about manufacturing processes or products and is unlikely to reveal any proprietary information on the design or operation of a landfill gas collection system. The landfill design capacity is routinely included in State solid waste permits and Part 70 operating permits so is often already publicly available.

75 Fed. Reg. 39094, 39112 (July 7, 2010). Similarly, "[s]urface area containing waste can be readily observed, *e.g.,* from touring the landfill or aerial photos, so is already available and not entitled to confidential treatment." *Id*. at 39113. EPA also found that a number of elements for landfills falling into the "Test and Calibration Methods Category" – e.g., estimating municipal waste composition from other or more refined waste categories and whether the fraction of CH4 in landfill gas was determined based on measured values or the default value – do not warrant confidential treatment. *Id*. at 39114. As EPA explained:

> The data elements in this category consist of general descriptions of methods and the frequency of conducting performance tests or sample analysis for the purposes of determining values used as inputs to equations. The data elements in this category do not reveal the numerical results of such tests. The data elements do not reveal any proprietary information or any other information that would likely provide insight for competitors to gain an advantage.

EPA also notes in the current proposed rulemaking that the general concerns about inputs to emission equations noted by commenters likely do not apply to subpart HH sources, as "municipal landfill data are generally available in public records." See 75 Fed. Reg. at 81354.

We agree with EPA's initial determination that none of these elements pose confidentiality concerns. The information is either readily available through state solid waste or local land use permitting, or is not competitively sensitive. For example, an application for a solid waste management facility permit in Massachusetts must contain a number of plans – including a site plan, facility design plan, and operation and maintenance plan – that provide the state with detailed information about the facility. This information includes, among other things, "a detailed description of the type and size of the proposed facility" and "the nature and amount of refuse to be handled on a daily and weekly basis," 310 CMR 19.030(3)(c)(3), i.e., capacity and disposal quantity information analogous to that in 40 C.F.R. 98.346(a). The state's operating permit program requires similar information. *See* 310 CMR 19.042. In addition, for all active and inactive landfills, Massachusetts requires reporting of and makes publicly available the year in which each landfill first accepted waste and the last year it accepted waste, two data elements in 40 C.F.R. 98.346(a) that EPA proposes to defer.[41] Landfills must make annual reports to the state that include tonnage of waste accepted by type,[42] again information required by 40 C.F.R. 98.346(c) that EPA proposes for deferral, 75 Fed. Reg. at 81362 (all of 98.346(c), waste composition for each year, proposed for deferral).

Other states have similar requirements. The following data elements on EPA's list are required to be reported or are regularly reported to meet federal or state requirements.

1. The New Source Performance Standard ("NSPS") and Emission Guidelines for MSW Landfills, 40 C.F.R. Part 63 subparts Cc, WW, require that an operator submit an initial design capacity report, within 90 days of construction, modification, or reconstruction that provides: (i) "[a] map or plot of the landfill, providing the size and location of the landfill, and identifying all areas where solid waste may be landfilled according to the permit issued by the State, local, or tribal agency responsible for regulating the landfill," (ii) the maximum design capacity of the landfill. It further provides that "[t]he State, Tribal, local agency or Administrator may request other reasonable information as may be necessary to verify the maximum design capacity of the landfill." 40 C.F.R. § 60.757(a). As this information is required to be reported, clearly the "capacity of the landfill," as well as the surface area or "size, location . . . [and] areas," may not be considered CBI. These standards further require that the operator submit an amended design capacity report "within 90 days of an increase in the maximum design capacity of the landfill to or above 2.5 million megagrams and 2.5 million cubic meters."

[41] *See* Ex. 27, Massachusetts Department of Environmental Protection, Solid Waste Program, "Active Landfills," available at http://www.mass.gov/dep/recycle/actlf.pdf, and Ex. 28, same, "Inactive Landfills," available at http://www.mass.gov/dep/recycle/inactlf.pdf

[42] *See Annual Solid Waste Facility Reports:* Landfill Summary, Calendar Year 2009.

2. The State of Illinois collects data and provides an annual report on specific landfills, including facility-specific numbers of "waste received" and remaining available waste capacities.[43] The most recent full report (2008) is available from the state.[44] This report also includes information on whether the landfill accepts in-state or out-of-state waste, and population statistics associated with various landfills. As another example, California also provides a publicly available database of MSW landfills that contain many of these data elements, including the surface area of the landfill, including total acreage and disposal acreage.[45] These example state reports demonstrate that the surface area, waste or waste disposal quantity and capacity are data elements already required to be reported, and EPA cannot consider this CBI. These state reports also include "operating hours." Although this is not broken out to describe whether this refers to operating hours of the gas collection system or destruction device, EPA may rely on this to find that this information is either required to be publicly reported, or is not considered to be confidential.

3. According to the 2010 State of Garbage in America Report, at 16, based on 2008 data, "at least 15 states require waste management companies and local government agencies to report annual tonnages" of MSW landfilled.[46] Therefore, EPA cannot treat the amount of waste as CBI.

4. If a facility uses a landfill gas collection system to comply with the NSPS/Emission Guidelines, it is required to meet a certain level of efficiency, and based on this, it is unclear how EPA can determine that the level of gas control system efficiency is CBI.

Further, the fraction of methane contained in the landfill gas is itself a measurement of GHG emissions, and so is emission data which must be disclosed.

The Federal Register notice for the proposed deferral does not include any explanation for deferring the subpart HH elements listed in the table accompanying the proposal. Thus, it is difficult to ascertain the basis for the proposed deferral, especially in light of EPA's earlier finding. The docket for the July 2010 CBI determination also is exceedingly thin on any justification for now considering this subpart HH information sensitive. We identified one set of comments by Weyerhaeuser, a company in the wood products business, that raised a single concern with reporting hours of operation based on the claim that hours of operation is a direct measurement of production.[47] However, it is not clear that this comment is directed specifically

[43] *See* Ex. 29, http://www.epa.state.il.us/land/landfill-capacity/2008/appendix-a.pdf and Ex. 30, http://www.epa.state.il.us/land/landfill-capacity/2008/appendix-b.pdf.
[44] Ex. 31, http://www.epa.state.il.us/land/landfill-capacity/2008/report.pdf.
[45] *See, e.g.*, Cal. Solid Waste Information System, Facility/Site Listing, http://www.calrecycle.ca.gov/SWFacilities/Directory/SearchList/List?FAC=Disposal&OPSTATUS=Active&REGSTATUS=Permitted; http://www.calrecycle.ca.gov/SWFacilities/Directory/01-AA-0008/Detail/.
[46] Ex. 32, Rob van Haaren, Nickolas Themelis and Nora Goldstein, BioCycle (2010), The State of Garbage in America: 17th Nationwide Survey of MSW Management in the U.S, http://www.seas.columbia.edu/earth/wtert/sofos/SOG2010.pdf
[47] Letter from EHS&S Regulatory Affairs, Weyerhaeuser Company, September 7, 2010, docket no. EPA-HQ-OAR-2009-0924-0041.1.

at landfills (although the commenter mentions surface area of the landfill in the same sentence): EPA is only proposing to defer operating hours for destruction devices at subpart HH facilities, which is not related to production. In addition, there can be no justification for treating a data element as CBI simply because that data is related in some way to the total production of a facility. The production level of a landfill does not meet the narrow definition of trade secret. Further, as even this comment admits, "Title V permits may have a maximum limit on hours of operation." *Id.* This limit assumes that a regulator can require reporting of the hours of operation in order to determine compliance with that requirement. The letter does not make a case for protecting any of the other subpart HH data elements; indeed, Weyerhaeuser agrees that test and calibration elements are not CBI.

Comments apparently challenged the requirement to report the local population and types of waste because operators would need to figure out this information based on the community they serve.[48] This suggests that landfill operators may consider this requirement to require some research on their part, not that they would consider these data to be confidential.

In sum, deferral of the subpart HH elements based on CBI concerns is improper and otherwise unsupported by the administrative record.

F. CBI Concerns Are Not Present for Additional Sources of Fluorinated Gases (Subparts I, L, DD, and SS)

EPA has proposed to defer a wide range of emission data from sources of fluorinated greenhouse gases, including data elements from Electronics Manufacturing (Subpart I), Fluorinated Gas Production (Subpart L), Electrical Transmission and Distribution Equipment Use (Subpart DD), and Electrical Equipment Manufacture (Subpart SS).

Specifically, for Electronics Manufacturing, EPA has proposed to defer reporting of estimated input fluorinated GHGs and by-product fluorinated GHGs in the etching and cleaning processes, which would allow for estimation of fluorinated GHG emissions from these processes. 40 C.F.R. Part 98.96(f)(1), (g)-(l), (n), (o). The Fluorinated Gas Production data elements EPA has proposed to defer include data inputs necessary to determine emissions using both a mass balance approach, *e.g.*, 40 C.F.R. Part 98.126(b)(1), and an emission factor approach, *e.g.*, 40 C.F.R. Part 98.126(c)(1). Likewise, for Electrical Transmission and Distribution Equipment Use and for Electrical Equipment Manufacture, EPA has proposed to defer data elements necessary to complete mass-balance calculations. *E.g.*, 40 C.F.R. Part 98.306(a)(2); 40 C.F.R. Part 98.456(a).

There is no evidence of comments in the record that indicate any specific concern, or, indeed, any concern at all in disclosing the data elements EPA proposes to defer for Electrical Transmission and Distribution Equipment and Electrical Equipment Manufacture. Absent any

[48] *See* Ex. 33, EPA Response to Comments 83 (Sept. 2009), http://www.epa.gov/climatechange/emissions/downloads09/documents/SubpartHH-Landfills.pdf.

evidence that disclosure of these data elements could cause covered facilities competitive harm, EPA can have no rational justification for delaying the reporting date.

VI. Any Deferral Must Be Carefully Tailored

Although EPA should not defer reporting at all, and need not do so, we understand that the agency believes some deferral is warranted. If EPA does pursue this unwise course, it should strictly limit any delays, and work to protect data quality in the interim, and ensure the deferral covers only those data elements that are highly likely to be determined to be CBI at the end of the deferral, based on evidence in the record.

A. The Proposed Deferral is Over-Broad

Initially, the deferral is far longer and far broader than it needs to be under any plausible reading of industry's concerns. The deferral is longer than it took EPA to develop the entire reporting rule – less than two years from the first Consolidated Appropriations Act to the final rule. Having conducted the research necessary to develop multiple tiers of reporting for each industry category, establish document review and verification systems, and to begin implementing the rule, EPA is well-placed to quickly make mid-stream corrections. EPA has canvassed the field of possible reporting methods, from purely default emission factor based approaches all the way to direct measurement, and included all these methods in the rule as it stands. The agency cannot justifiably take three years to make small adjustments to this work, particularly in view of the harm that this delay will cause to the public and GHG policy.

Moreover, the rule sweeps far more broadly than could possibly be necessary. EPA appears to have proposed to defer every data element in the rule which involves an emission equation for direct emitters, whether or not it received any specific evidence that these data elements implicated any CBI concerns. This over-broad approach departs entirely from EPA's usual element-by-element reviews under 40 C.F.R. Pt. 2, and cannot be sustained in the final rule. Even assuming that EPA could ever defer collecting and disclosing emission data, which it cannot, unless EPA receives specific evidence that a given (non-emission data) data point raises such compelling CBI problems that EPA is likely to find it to be CBI, it may not defer that element of the rule.

Indeed, the rule is so over-broad that it purports to defer some data elements without even specifying what they are. The proposal notes that some elements of Subparts D and RR may be deferred, *see* 75 Fed. Reg. at 81,353 (Table 2), but does not list any data elements in these subparts in Table A-6, which specifies deferred data elements, *see id.* at 81,357. Needless to say, EPA may not finalize deferrals of data elements when the public has had no opportunity to comment upon them. Although EPA should simply abandon deferrals in these subparts, if it does opt to defer data elements outside the proposal, it must first issue a draft rule for notice and comment.

This slap-dash approach to the deferral is troublingly inconsistent with EPA's congressional mandate to develop and operate the reporting system pursuant to the Clean Air Act, including its public disclosure requirement, without delay. EPA surely cannot justify acting to shut down public access to critical greenhouse gas emission data without any evidence.

B. EPA Must Focus Its Deferrals and Ensure Data Quality During Any Deferrals

We expect the agency to use the data adduced in its call for information to defer only those data elements which raise genuine CBI problems, and then to constrain the deferrals themselves to the minimum time necessary for reporters in each sector to switch to direct measurement. Due to the lack of supporting information in the record for the current proposed over-broad deferral, should EPA move forward with deferral of specific data elements in the current Table A-6, it must re-propose such deferrals accompanied by information supporting the deferrals and subject the proposal to notice and comment.

During the deferral, EPA cannot rely only upon its own, ineffective, verification system, which cannot operate properly without emission equation inputs. Instead, it should require deferred operators to contract with third-party verifiers to check their data. Although developing this verification system is a significant task, EPA cannot responsibly leave emissions reports from key sectors effectively unverified for years. Resources are available: To establish the system, EPA can draw upon an extensive network of third-party verifiers already trained and accredited for CARB's and other state and private registries.[49] Even allowing for resource challenges, EPA should be able to put third-party verification in place by the second year of its proposed deferral. If it cannot, the deferral should not continue. Using these verifiers at least during any deferral is far superior to having no verification process at all and EPA cannot justify a deferral without appropriate verification in place.

Further, EPA should commit to carefully review post-deferral data for consistency with data submitted during the deferral. If a company's emissions are notably different during the deferral period, EPA should require that emitter immediately to submit any deferred records in order to investigate any errors or fraud.

VII. Conclusion

The proposed deferrals are contrary to statute, unsupported by the record, and bad public policy. EPA should not finalize its proposal and, instead, move forward with data collection, as Congress directed.

Sincerely,

Craig Holt Segall Peter Zalzal

[49] CARB's accredited verifier list is attached as Ex. 34. Its verification experience is summarized in a presentation, attached as Ex. 35.

Attorney
Sierra Club Environmental Law Program
408 C St. NE
Washington, DC 20002
(202)-548-4597
(202)-547-6009 (fax)
Craig.Segall@sierraclub.org

Helen D. Silver
Attorney
Clean Air Task Force
18 Tremont St., Suite 530
Boston, MA 02108
(617)-624-0234
(617)-624-0230(fax)
hdsilver@catf.us

Attorney
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
(303) 440-4901
pzalzal@edf.org

Meleah Geertsma
Attorney
Natural Resources Defense Council
1200 New York Ave, Suite 400
Washington, DC 20005
(202)-289-2382
(202)-289-1060 (fax)
mgeertsma@nrdc.org