



Sent electronically

September 7, 2010

EPA Docket Center
Mailcode 6102T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Proposed Confidentiality Determinations for Data Required Under the Mandatory Greenhouse Gas Reporting Rule and Proposed Amendment to Special Rules Governing Certain Information Obtained Under the Clean Air Act [EPA-HQ-OAR-2009-0924; 75 Fed. Reg. 39094, July 7, 2010]

The American Chemistry Council (ACC)¹ appreciates the opportunity to submit comments on Environmental Protection Agency's (EPA) Proposed Confidentiality Determinations for Data Required Under the Mandatory Greenhouse Gas Reporting Rule and Proposed Amendment to Special Rules Governing Certain Information Obtained Under the Clean Air Act (75 Fed. Reg. 39094, July 7, 2010).

Our detailed comments are attached for your review. If you would like to discuss any of the comments in more detail, please contact me at (202) 249-6411 or lorraine_gershman@americanchemistry.com.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lorraine Krupa Gershman".

Lorraine Krupa Gershman
Director, American Chemistry Council

¹ *The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care[®], common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$674 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.*



Executive Summary

ACC appreciates the opportunity to comment on the Environmental Protection Agency's (EPA) proposal concerning confidential business information (CBI) under the Part 98 greenhouse gas (GHG) mandatory reporting rule (MRR). Unfortunately, far from alleviating our concerns, the proposal raises our concerns for the protection of CBI even further.

Because EPA's CBI proposal follows the final MRR by a number of months, impacted facilities have not been afforded the opportunity to fully analyze reporting options, including some that might have protected more information as CBI.

EPA has interpreted the term "emission data" much more broadly than is necessary for this reporting rule. EPA should define "emission data" as the information that is necessary to determine emissions, and not include every piece of information or data upon which GHG emissions might be calculated. The MRR is simply a reporting rule -- there are no emission standards that apply to facility GHG emissions. In ACC's view, the weight of legal precedent supports a narrow interpretation of "emission data."

EPA should follow the model established in other reporting systems when determining what information should be publicly available. Both EPA's Toxics Release Inventory (TRI) and California's GHG reporting system release basic facility information, along with total emissions data. Neither system releases sensitive information such as inputs into equations used to calculate emissions.

ACC is also concerned about the lack of detail on EPA's process to protect CBI. EPA has not yet released the details on the electronic reporting tool, but it appears that EPA expects both non-CBI and CBI data to be transmitted using this tool. There will be volumes of data submitted that will need to be protected as CBI, yet EPA has failed to communicate how CBI data will be protected both in its transmittal to EPA and its storage on EPA servers. EPA needs to ensure that its practices for handling CBI are consistent with those practices utilized by the Agency's Office of Chemical Safety and Pollution Prevention under the Toxic Substances Control Act, and the Department of Commerce's approach for material and technologies/processes that are "export controlled."

Finally, we strongly agree with EPA's proposal that production and throughput data that are not inputs to emission equations should be CBI. However, we strongly believe that ALL production and throughput data should qualify for protection as CBI.

I. EPA's sequencing of its proposed and final MRR and proposed handling of CBI prejudiced facilities' ability to protect sensitive business material

ACC recognizes that EPA was under tremendous pressure and very tight Congressional deadlines to propose and finalize a MRR for GHG emissions. We acknowledge and appreciate all the work that has gone into this rulemaking to date. However, we are concerned that EPA issued this CBI proposal after it proposed and finalized the substantive reporting rule. At the time EPA proposed the MRR requirements, the regulated community had no idea how EPA would handle CBI. ACC's comments on the proposed substantive rule expressed our concern about the protection of CBI, based on the unprecedented and substantial amount of data EPA proposed to require for submittal to the Agency. See Appendix A for excerpts from ACC's previous MRR comments relating to CBI.

Without knowing what the final rule would require or how EPA would protect data and information for which CBI protection may be claimed, ACC was unable to consider, let alone include in our comments of the proposed MRR, specific alternatives to the submittal of all of that data and information.

For example, in lieu of reporting sensitive data such as raw material inputs that could expose trade secrets to the public, those commenting on the rule might have suggested and agreed to third-party audits, or to install continuous emission monitoring systems (CEMS) for those processes that are amenable to CEMS. Unfortunately, at the time comments were submitted on the MRR, the regulated community did not know then what it knows now. As a result, the industry has been disadvantaged by EPA's finalization of the substantive reporting rule before publication of its proposal on CBI.

In light of the many issues involved the CBI discussion and the unique issues that will impact individual source categories, ACC recommends that EPA revise the MRR rules so that they do not require the submittal of such extensive background information. The rules then would align with EPA's other reporting rules, e.g., TRI. EPA should have followed its past practice of either having facilities keep background information onsite, or of requesting information on a one-time basis for purposes of rule development.

The MRR rule ends up placing EPA in the position of having to safeguard substantial amounts of company trade secret information, which will be **submitted on an annual basis**. We question whether EPA has adequate safeguards to protect this information from disclosure, particularly in light of recent disclosures of national security information on the Internet. Revising the MRR rules to follow TRI practice would create significantly less burden for EPA and affected companies, and reduce the risk of disclosure of trade secret information, while still accomplishing the goal of facility reporting of GHG emissions. In addition, EPA should re-evaluate the type and amount of data required to be submitted after it reviews the 2010 data, and annually thereafter, to determine if all background data needs to be continually submitted year after year.

II. EPA should follow other established reporting systems to determine what information constitutes “emissions data” and therefore should be publicly available.

A. TRI

The most comprehensive and comparable emissions database to the MRR is EPA’s Toxic Release Inventory (TRI). TRI has been an effective reporting system for almost 25 years, in large part because it is periodically revised to address concerns about reporting burden and enhance the quality and utility of the database. The TRI data available to the public includes detailed information on both the facility and its emissions. Facilities are allowed to utilize direct measurement, monitoring data, emissions factors, engineering estimates, and mass balance calculations in order to determine emissions. Facilities are required to report only the principal calculation method that was utilized, and the measured/calculated emissions data for each chemical. The methods available for emissions calculations under TRI include CEMS, periodic monitoring, mass balance calculation, published emission factors, site-specific emission factors, and engineering calculations and best judgment, which closely mirror the various calculation methods in Part 98. (See EPA’s Toxic Chemical Release Inventory Reporting Forms and Instructions, Revised 2009 Version, EPA 260-R-09-006, at page 44 (October 2009)).

EPA’s TRI recordkeeping requirements are detailed and complex, but do not require the submittal of much of the data used to calculate the emissions data. Instead, that data must be available for inspection by EPA or other regulatory agencies as requested. EPA’s rationale is explained as follows:

Sound recordkeeping practices are essential for accurate and efficient TRI reporting. It is in the facility’s interest, as well as EPA’s, to maintain records properly. Facilities must keep a copy of each report filed for at least three years from the date of submission. These reports will be of use when completing future reports. Facilities must also maintain those documents, calculations, worksheets, and other forms upon which they relied to gather information for prior reports. In the event of a problem with data element on a facility’s Form R or Form A report, EPA may request documentation from the facility that supports the information reported. EPA may conduct data quality reviews of Form R or Form A submissions. An essential component of this process involves reviewing a facility’s records for accuracy and completeness. EPA recommends that facilities keep a record for those EPCRA Section 313 chemicals for which they did not file EPCRA Section 313 reports. A partial list of records, organized by year, that a facility should maintain include:

- Previous years’ EPCRA Section 313 reports;
- EPCRA Section 313 Reporting Threshold Worksheets;
- Engineering calculations and other notes;
- Purchase records from suppliers;
- Inventory data;

- EPA (NPDES) permits and monitoring reports;
- EPCRA Section 312 Tier II Reports;
- Monitoring records;
- Flowmeter data;
- RCRA Hazardous Waste Generator's Report;
- Pretreatment reports filed by the facility with the local government;
- Invoices from waste management companies;
- Manufacturer's estimates of treatment efficiencies;
- RCRA manifests;
- Process diagrams that indicate emissions and other releases; and
- Records for those EPCRA Section 313 chemicals for which they did not file EPCRA Section 313 reports. (*Id.* at pp 3-4.)

In the TRI program, EPA struck a sound balance between what limited data must be submitted to EPA and what data may remain onsite for potential EPA or State review. The data remaining on site normally would not be made public, although only some of it may be CBI. We can find no reason for EPA to depart from this approach in the implementation of the MRR. For example, EPA has presented no compelling reason why inputs to the emissions calculations are now considered to be "emissions data" and therefore not subject to CBI protection, when those same inputs are not publicly reported under TRI. Both databases result in the release of emissions data to the public, and have been/will be used to inform EPA policy. There is no justification for EPA to require facilities to release information that could compromise the business competitiveness of those facilities, e.g., process-specific, raw material inputs.

Furthermore, both the TRI and the MRR require a senior company official to sign off on the facility reports. Both the TRI's registered certifying official and the MRR's designated representative are responsible for ensuring that the information submitted is accurate, and face penalties if the information is incomplete or incorrect. Facilities have every incentive to submit accurate data under both the TRI and the MRR. In both cases, EPA has the ability to audit facility data to check for accuracy and completeness.

B. California GHG Emissions Reporting System

California's GHG emissions reporting tool allows the public to see facility location and emission data. However, that information is provided in an aggregated format. A facility information public report includes the facility name, ID, sectors, description, address, geographic location, facility contact name, email and phone number. The GHG emissions are reported as summed emissions data, for CO₂ eq., CO₂, CH₄, N₂O, biomass, HFCs, and SF₆, for stationary combustion and process emissions. Providing the public with GHG emissions information in such a way protects process specific information while still allowing the public to easily compare similar facility emissions. We strongly recommend that EPA consider presenting a facility's annual GHG emissions in an aggregated format to avoid the potential disclosure of sensitive information.

C. Acid Rain Program

In the preamble to this CBI proposal, EPA notes that the Acid Rain Program releases data to the public similar to the data collected under Part 98, including CO₂ emissions, as well as the data used to identify emission units and calculate the CO₂ emissions. However, the vast majority of units subject to the Acid Rain Program requirements utilize CEMS to report emissions data, and therefore do not need to report sensitive trade information such as the inputs to detailed emissions calculations. Furthermore, as EPA noted, the Acid Rain Program only applies to electricity producers, many of whom are publicly regulated and so the reported data is already in the public domain.

III. ACC is concerned about how EPA will handle CBI

For many facilities, the MRR imposes the first requirement to transmit CBI electronically. ACC has significant concerns regarding EPA's ability to protect the vast amount of trade secret information companies will be submitting if EPA's proposal is made final as drafted. ACC's concerns relate both to the protection of the CBI during electronic transmittal and the protection of the information once received by EPA.

Several questions – none of which are addressed in the proposed rule – are raised by the lack of detail on EPA's planned process. Will the CBI be submitted on a different form from other data? Will the CBI be housed on a secure server? Who will have access to the CBI data?

ACC and its members are concerned that EPA has not yet shared those details with companies reporting CBI. The comment period on this CBI proposal will close before those details are shared. Once again, the regulated community is put at a disadvantage because of the piece-meal approach to these very important regulatory actions.

As noted above, EPA's electronic reporting system for the MRR has not yet been made publicly available for review. Given the tight timing between now and January 1, 2011, we request that EPA strongly consider requiring only total GHG emissions by subpart be reported *electronically* for reporting year 2010, and allow facilities to submit all the required supporting materials by paper or other means. This initial approach would allow companies to protect CBI until EPA has demonstrated it can protect this information when transmitted and stored electronically. This would give companies time to become familiar with the reporting system, provide EPA with the summed emissions data electronically, and have EPA ensure that the necessary safeguards are in place to protect the CBI.

IV. EPA's proposed interpretation of "emission data" for purposes of Part 98 is overly broad and sweeps in CBI.

A. The Clean Air Act, EPA's regulations, and the 1991 EPA notice support a narrow interpretation of "emissions data" for purposes of Part 98.

The purpose of Section 114, in pertinent part, is to allow EPA to require a party to provide information to assist the Agency in developing or implementing an implementation plan under Section 110, emission standards under Sections 111 or 112, etc., or to determine if a person is in violation of those standards or implementation plan. It is not the purpose of Section 114 for EPA to require the submittal of voluminous amounts of data, including CBI, so that EPA can release all of that data to the public in a misguided effort to be "transparent."

Section 114(c) of the CAA requires that "[a]ny records, reports, or information obtained under [CAA section 114(a)] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) * * * if made public, would divulge methods or processes entitled to protection as trade secrets * * *, the Administrator shall consider such record, report, or information or particular portion thereof confidential * * *."

Congress clearly understood and recognized in Section 114 (c) the importance of protecting trade secret information, specifically stating that methods and processes can be claimed confidential. EPA has correctly interpreted Section 114(c) of the CAA "to afford confidential treatment to both trade secrets and confidential business information." 75 Fed.Reg. at 39100. Only "emission data" collected by the Agency under Section 114(a) is an exception to the ability to claim information as trade secret.

EPA defines "emission data" at 40 CFR Section 2.301(a)(2)(i) as:

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

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

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

EPA last clarified the type of information that EPA generally considers to be "emission data," and which cannot qualify as confidential under either Section 114(c) or Section 110, in a notice

published almost twenty years ago. In a February 21, 1991 Federal Register notice (56 Fed. Reg. 7042), EPA listed the specific data fields that it considered to be emission data. EPA first identified the data fields related to facility identification, which we do not address in these comments. EPA then listed the data fields needed to establish the characteristics of the emissions or “emission parameters”:

- Emission type (e.g., nature of emissions such as CO₂)
- Emission rate (e.g., amount released to the atmosphere over time)
- Release height
- Description of terrain and surrounding structures
- Stack or vent diameter at point of emissions
- Release velocity
- Release temperature
- Frequency of release
- Duration of release
- Concentration
- Density of the emissions stream or average molecular weight
- Boiler or process design capacity
- Emission estimation method
- Percent space heat
- Hourly maximum design rate

At the end of the Federal Register notice, EPA noted that “after consideration of comments on this policy, a revised policy/determination may be published.” We have been unable to locate the comments submitted on this notice (they are not available electronically and could not be located at EPA) to inform ourselves of the issues raised by commenters for EPA’s consideration. However, it does not appear any revised policy determination has ever been published.

ACC notes that the information needed to establish “emission parameters” and therefore is “emission data” includes the *emission rate*, but not the *inputs* to the calculation that determines the emissions rate. However, EPA now proposes that all “inputs to emission equations” constitute “emission data,” thereby expanding its interpretation for purposes of the MRR. Contrary to EPA’s instincts to expand its interpretation, ACC believes that the language of CAA Section 114(c), as well as federal case law interpreting that language and the federal regulations, support a more narrow reading of “emission data”, especially when applied to the unprecedented and voluminous amounts of information EPA is requiring to be submitted under Part 98.

Moreover, we question the basis for the 1991 Federal Register proposed policy that the “emission rate,” “hourly maximum design rate,” and “boiler or process design capacity” should be considered “emission data.” These pieces of information can be trade secrets, because they can show the amount of production or capacity by a source. Additionally, the submittal of this data is not necessary for a source to comply with Part 98’s reporting of GHG emissions, and the information is not necessary to determine actual emissions or facility identity. If EPA determines this data must be submitted pursuant to Part 98, it should be identified as CBI and protected from public disclosure.

B. Case law supports a narrow interpretation of “emission data.”

We believe that Section 114(c) and case law reviewing EPA’s regulations implementing that section show that Congress tried to strike a balance between the public’s right to access records, reports or other information obtained by EPA pursuant to Section 114(a) and a person’s right to protect certain records, reports or other information from public disclosure because it is CBI. In *RSR Corp. v. EPA*, 588 F. Supp. 1251 (N.D. Tex. 1984) the federal district court took a careful look at CAA Section 114(c) and the definition of “emission data” in 40 CFR Section 2.301(a)(2)(1). The court emphasized the “necessary to determine” portion of Section 2.301(a)(2)(i) in quoting the definition, as follows:

“(A) Information *necessary to determine* the identity, amount, frequency, concentration or other characteristics . . . of any emission . . . ;

(B) Information *necessary to determine* the identity, amount, frequency, concentration, or other characteristics . . . of the emissions . . . ; and

(C) A general description of the location and/or nature of the source to the extent *necessary to identify* the source and distinguish it from other sources”

588 F. Supp. 1251, 1255 (emphasis in the original). In *RSR Corp.*, EPA had claimed that certain documents were disclosable “emission data” because they were necessary to determine emissions through a material balance calculation. The court concluded that EPA’s decision was arbitrary and capricious (and therefore improper) because EPA did not provide any information that EPA considered alternative methods of identifying or measuring pollutants, “so that the release of information claimed to be proprietary could be avoided unless required by statute.” 588 F. Supp. at 1256.

The court emphasized the word “necessary” in 40 CFR Section 2.301(a)(2)(i). According to the court, only if certain information is really “necessary” to determine emissions should it be considered “emission data,” and the Agency should consider alternative methods of identifying information to determine emissions, so that confidential information is not compromised. See *NRDC v. Leavitt*, 2006 WL 667327 (D. D.C. 2006) (citing *RSR* and adopting a strict interpretation of the “necessary to determine” requirement).

Of the voluminous amounts of information that EPA is requesting in Part 98, very little rises to the level of information “*necessary to determine*” actual emissions or facility identity. First, unlike the situation with most EPA air emission rules, Part 98 merely requires the *reporting* of GHG emissions, not compliance with an emission limit or standard. EPA has neither proposed nor established emission limits or standards for GHGs. Accordingly, much of the data that EPA is requiring facilities to submit to the Agency is not “necessary” pursuant to 40 CFR Section 2.301(a)(2)(i)(A) and (C). Nonetheless, EPA is requiring a facility to submit this additional information, rather than allowing the information to remain onsite and subject to request or review by the Agency as needed. Because this information is not “emission data” and is sensitive information related to chemical manufacturing and production, it is entitled to confidential treatment because disclosure is likely to cause substantial harm to the competitive position of the facilities required to report this information.

We agree with EPA's conclusion that because there are no established GHG emission standards or limitations for the facilities subject to Part 98, §2.301(a)(2)(i)(B) does not apply. 75 Fed. Reg. at 39100. Similarly, because there are no proposed or existing standards or limitations, we believe that the provisions in §2.301(a)(2)(ii) do not apply. However, we note that in subsection (a)(2)(i)(B), EPA allows for a "description of the manner or rate of operation" to be considered "emission data" but only "to the extent necessary" to determine emissions which, "under an applicable standard or limitation, the source was authorized to emit." Subsections (a)(2)(i)(A) and (C), which are applicable to Part 98, do not include as "emission data" the "description of the manner or rate of operation." We therefore may conclude that this arguably sensitive information is only to be considered "emission data" "to the extent necessary" to determine a source's compliance with an applicable standard or limitation.

For the purpose of the MRR, Section 114 of the CAA, EPA's regulations and the case law all support a narrow reading of "emission data" that safeguards company trade secret information to the extent possible.

V. "Emission data" should not include "inputs to emission equations" which comprise data elements entitled to confidential treatment.

The proposed rule includes "inputs to emissions equations" as a data field and proposes all of these inputs be considered "emission data." This is a dangerous and totally unnecessary expansion of EPA's interpretation of what constitutes "emission data." These "inputs" are data elements related to process and operational information (e.g., fuels, raw materials, unit throughput, production rates, operating data, process data, etc.) and are not "...*necessary* to determine the identity, amount, frequency, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source." See §2.301(a)(2)(i)(A) (Emphasis added). Nor are these inputs relevant to "[a] general description of the location and/or nature of the source to the extent necessary to identify the source and distinguish it from other sources..." *Id.* at (a)(2)(i)(C). The inputs must be determined to be CBI and protected because they reveal sensitive business information that if publicly disclosed would divulge methods or processes entitled to protection as trade secrets.

Moreover, before EPA can conclude that these inputs to emission equations are "necessary" to determine emissions or source, EPA must consider all relevant factors, "including available alternatives, so that release of information claimed to be proprietary could be avoided unless required by statute." *RSR Corp.* at 1256. A "strict interpretation of the 'necessary to determine' requirement is warranted in order to ensure that the exception does not swallow the rule." *NRDC* at *4.

In the preamble, EPA cites the need to include the "inputs to emission equations" as "emission data" primarily to enable emissions verification, as well as to support analysis of GHG emissions for future CAA policy and program development. 75 Fed.Reg. at 39105. However, the MRR requires facility self-certification with EPA emissions verification.

The final MRR states that:

In implementing the emissions verification under this rule, EPA envisions a two step process. First, we will conduct an initial centralized review of the data which will be largely automated. EPA intends to build into the data system an electronic data QA program for use by reporters and EPA to help assure the completeness and accuracy of data. In addition, to verify reported data and ensure consistency, EPA may review facility-level monitoring plans and procedures, and will perform detailed, automated checks on data utilizing recent and historical data submittals, comparison against like facilities and/or other electronic audit tools where appropriate. Second, EPA intends to follow-up with facilities should potential errors, discrepancies, or questions arise through the review of reported data and conduct on-site audits of selected facilities. The on-site audits may be conducted by private verifiers contracted by EPA or by Federal, State or local personnel, as appropriate. We plan to coordinate closely with the States to develop an efficient approach toward on-site auditing that can meet the needs of multiple programs. We do not anticipate conducting on-site audits of every facility every year.” 74 Fed.Reg. at 56282, October 30, 2009.

Nowhere in the MRR does it state that EPA is now ceding its emissions verification responsibility to the public. To now suggest that the public needs access to the “inputs to emissions equations” in order to verify emissions data goes beyond what the MRR authorizes, and as such, requires a new MRR proposal.

VI. EPA recognizes that some data is highly confidential

In conjunction with this proposal, EPA also released a June 28, 2010 memo with the subject line “Data category assignments for reporting elements to be reported under 40 CFR Part 98 and its amendments.” By defining all inputs as “emission data,” EPA will be revealing information that to date has been confidential business information. Process emissions, by their very nature, result from a process used to create a product. Information about the process, and the raw materials used in the process, could be used by competing companies to gain valuable inside business information.

EPA acknowledges that production and throughput data that are not inputs to emission equations category should be CBI. 75 Fed. Reg. 39115-16. EPA proposes to determine “that the data elements in this data category are entitled to confidential treatment because disclosure of these production and throughput data is likely to cause substantial harm to the competitive position of businesses required to report these data elements under Part 98.” *Id.* EPA goes on to reason that, by having such production and throughput data, competitors would be able to gain insight into a firm’s operational strengths and weaknesses. EPA also reasons that having information about production quantities of each product and the product mix of a firm may enable competitors to determine the type of production processes used, as well as to reasonably infer the types and approximate amounts of feedstocks consumed. Yet EPA is requiring this same information –

production and throughput data – be made publicly available under a number of subparts because such information may be an input in calculating GHG emissions.

In other words, if a facility has a process that is amenable to a CEMS, its production and throughput data will not be “emission data” and will be protected as CBI. But a facility whose process is not amenable to a CEMS and uses production and throughput data to calculate its emissions for reporting under Part 98 will suffer the consequences of having this sensitive information being made public by EPA. There is no justification for EPA’s arbitrary determination that the use of this data determines whether it should be protected as CBI. In using the data to help establish GHG emissions, a facility is not treating this data as if it were no longer CBI – it is and always will be CBI and EPA must protect it from disclosure.

VII. ACC supports the aggregation of data, but objects to the future disaggregation of the same data

EPA solicited comments on the option of having EPA provide aggregate emission data and then releasing the disaggregated data sometime in the future (three to five years). In many cases, ACC member company facilities produce the same product at a relatively steady rate for a number of years, and releasing process-specific information even five years in the future would expose CBI.

However, in many situations, ACC supports EPA providing emissions data on an aggregate basis when it is done carefully so as not to reveal confidential information. By aggregating the emissions data, the public will be better able to interpret the large amount of data reported under the rule. ACC does not support aggregation in every case, however. EPA should follow the example in current GHG inventory reporting. There, where there are only a few suppliers of a particular chemical or a facility produces only one chemical, EPA does not aggregate by chemical, but aggregates by combining several chemicals. See the tables starting on page 4-61 at the following link (which includes a section for “others,” a grouping of a number of chemicals): http://www.epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-2010_Report.pdf.

VIII. EPA should allow facilities to petition for data to be CBI on a case-by-case basis

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

IX. Export Control Requirements

Information required to be disclosed under Part 98 includes information that is controlled for export by various U.S. agencies for reasons including, but not limited to, national security, anti-terrorism, nuclear non-proliferation, and chemical and biological weapons security. Once the Agency receives this information, it will become responsible to ensure that it controls this information in compliance with all U.S. export control regulations.

The Export Administration Regulations (EAR), managed by the U.S. Commerce Department and the International Traffic in Arms Regulations (ITAR), managed by the U.S. Department of State, are the two principal U.S. export control regimes. ITAR, applicable to those products and technical data that are specifically designed or modified for military use and are on the Munitions List, prohibits virtually all exports to every country without export authorization by the State Department, following review by the Departments of State and Commerce. The EAR controls products, intermediate materials, raw materials components and accessories, technology, software and manufacturing that meet very detailed specifications delineated in the EAR.

ITAR defines “technical data” as “information which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of “defense articles.” Similarly, the EAR prohibits the export of controlled “development,” “production” and/or “use” technology:

Development : “is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.”

Production: “means all production stages, such as: product engineering, manufacture, integration, assembly (mounting), inspection, testing, quality assurance.”

Use: means “operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing.”

For example, under EAR ECCN 1E001, the EAR prohibits the export of development and production technology for a wide number of products and intermediate materials that are EAR-controlled, including:

- components made from fluorinated compounds;
- composite structures or laminates made from certain organic, metal or carbon matrices;
- carbon filamentary materials, certain non-aromatic polyimides in film, sheet, tape or ribbon form;
- gas mask filter canisters and decontamination equipment for defense against biological agents radiological agents, chemical warfare agents or riot control agents;
- body armor;

- equipment and devices designed to initiate charges; and
- devices containing energetic materials.

This technology is expressly controlled for export due to national security, nuclear non-proliferation, anti-terrorism, missile technology, and other risks.

The prohibitions against exports include not only physical exports of product or technology, but also “deemed exports,” i.e., the sharing *within* the U.S. of controlled technology to those who are not U.S. citizens or permanent residents, refugees or asylees of the U.S. and possess citizenship of countries to which the technical data is controlled.

While it is possible to publish and make “publicly available” EAR-controlled technology without violating the EAR, to release to the public ITAR controlled technology requires the prior written approval of the appropriate government agency. In other words, to require the public release of ITAR controlled technology, the EPA or the company would first need to obtain the approval of the appropriate agency, which could vary depending on the information in question. See 22 CFR 120.11(a)(7) (definition of public domain) and http://www.aia-aerospace.org/assets/security_handbook_07.pdf (handbook explaining the process to get approval for public release of ITAR controlled technology).

In consideration of U.S. export control regulations, ACC member company scientists have evaluated the level and detail of emissions information currently required by Part 98, and advised that providing such emission information could constitute the disclosure of controlled production technology and, possibly, technical data to the EPA.

To remain in compliance with U.S. export control regulations, EPA personnel would need either to request authorization to publicly release such information, or implement an export control plan to assure compliance with all U.S. export control regulations. EPA would need to ensure that it can identify and segregate such information on U.S. based servers with restrictions on sharing internally and externally with anyone to whom the technology would be controlled. It would also need to put in place controls to protect against unauthorized disclosure by employees and others at the EPA. This would be a difficult and detailed process to implement and maintain. The difficulty would be compounded by the fact that EPA will not necessarily be in possession of the additional scientific information to enable it to evaluate which data it possesses that triggers the export control requirements.

Consequently, to mitigate risk to the U.S., such detailed emissions information should not be required for submittal under Part 98. To the extent that it is required, any controlled technology should be determined to be CBI for FOIA purposes, and EPA should also implement whatever additional restrictions are necessary to comply with export control regulations.

X. Import/Export Information

CBI practices that are contained for imports and exports should be consistent with those practices that are utilized by the Department of Commerce. It is ACC’s understanding that publicly

released import and export information is currently limited to the port of entry, date, and a very general commodities designation. Company names, addresses, and EIN should be protected as CBI. We are concerned that the information required to be submitted under the MRR and disclosed under this proposed rule, in conjunction with other information, could be used to determine the nature and quantity of a company's products imported and exported. We would point out that none of the import and export information is actual "emissions," nor is any of this information used to determine emissions. Accordingly, it should be determined CBI.

XI. Competitive Disadvantage

A fundamental problem with EPA's proposed CBI designations is that these determinations are based on the information being used for emission calculation and not on whether the information is actually confidential. In certain cases, significant amounts of information would become publicly available whereas for similar processes elsewhere much less information would be made available to outside parties. For example, under Subpart L, if a facility utilizes the mass balance method under Section 98.126(b), all information regarding process inputs and outputs would be made publicly available by EPA. However, all of this information is routinely protected by state agencies when contained in permit or emissions reporting documents. For those facilities able to utilize the methods that are contained in §98.126(c) (CEMS), much less information would become publicly available. The rule creates a competitive advantage for those companies that use the methods in §98.126(c) over the companies using the methods in §98.126(b), because the former set of companies can protect their trade secret information. EPA should determine that all of this information is business confidential, regardless of the method of calculating emissions.

More important than the inequity that may result from differences in the emissions calculation methods that are used at U.S. locations, is the fact that U.S. suppliers and manufacturers would be placed at a competitive disadvantage with foreign manufacturers and suppliers. ACC member companies have reviewed CBI practices at non-U.S. locations. Much more information will be submitted and disclosed under the MRR than is customarily released at non-U.S. locations. In addition, the CBI practices at foreign locations are much more protective of process information than what is being proposed in this rulemaking. In almost all cases, government agencies outside the U.S. limit the information requested so it does not implicate trade secret information.

XII. Subpart CBI/non-CBI designations

ACC members are concerned about a number of individual CBI/non-CBI designations in various subparts. We have included some of our concerns below. Please note that the majority of our concerns lie in the "inputs to emissions equations" category.

A. Subpart C – General Stationary Fuel Combustion Sources

Almost all of the data reported under subpart C is proposed to be treated as non-CBI. However, we believe that there is some information that should be protected. This information includes

throughput information, as competitors would be able to gain valuable trade information by knowing the capacity and utilization rates of combustion units. Knowing the capacity utilization of energy, competitors could then calculate the production output of that facility. We also believe that the composition of emissions from individual process vents can reveal similar confidential data.

B. Subpart L – Fluorinated Gas Production

Based on the way EPA proposes to classify data as CBI according to the June 28, 2010 memo accompanying this CBI proposal, facilities subject to reporting under subpart L will not be able to utilize the mass balance equation because all inputs would be made publicly available. This option was added following the comments received on the first proposed subpart L in March 2009, but now is of no value to us if we need to sacrifice trade secret information to be able to use it.

ACC strongly advises that only the following emissions information be made publicly available:

- Method used to determine the emissions of each F-GHG (§98.126(a)(4))
- Absolute uncertainties calculated under §§98.123(a)(1) through (a)(4) (§98.126(b)(1))
- Relative uncertainties calculated under §§98.123(a)(1) through (a)(4) (§98.126(b)(1))
- Reason the data were missing (§98.126(d))
- Length of time the data were missing (§98.126(d))
- Method used to estimate the missing data (§98.126(d))
- Monitoring results for the destruction device that are deviations from the monitoring limit set during the emissions test (§98.126(e))
- Destruction efficiency of each destruction unit, determined from the emission test conducted every 5 years (§98.126(f)(1))
- Test methods used to determine the destruction efficiency of each destruction unit (§98.126(f)(2))
- Methods used to record the mass of F-GHG destroyed (§98.126(f)(3))
- Name of all applicable federal or state regulations that may apply to the destruction process (§98.126(f)(5))

The reasons that other data elements should be considered CBI are discussed below. The location of the process of emissions stream(s) that were analyzed under the initial scoping test of fluorinated GHGs (F-GHGs) at §98.124(a) and §98.126(a)(2) should be considered CBI if it is process or vent specific. This information in conjunction with other data could be used to determine production capacities and throughputs. The “function” of the process or emissions stream(s) that were analyzed under the initial scoping test of F-GHGs at §98.124(a) and §98.126(a)(2) is not emission information and could be used in conjunction with other information to determine the manufacturing scheme since the functions of most process streams would become publically available.

Annual equipment leak emissions of each F-GHG for the facility (§98.126(a)(3)) by process could provide very detailed information on the content of process streams since the “emissions” would be based on process streams compositions. Various methods are provided in the *Protocol for Equipment Leak Emission Estimates* (EPA Publication No. EPA-453/R-95-017) for converting equipment leak measurements to emission values. The emission value usually will be based on the process stream contents. While the quantity of these emissions will be extremely low, the distribution of stream constituents may be identical to the product contents. This information, in conjunction with the production throughputs reported elsewhere under this subpart, could be used to determine the product contents and quantities. These emissions will be minor and a single aggregated value based on CO₂-equivalents, similar to the current practice in California, should be sufficient.

The activity used to estimate emissions for §98.123(b)(3) (§98.126(c)(1)) is CBI since the emissions and the emission factor will be used to determine the amount of the activity which would be directly related to the production throughputs. The emissions quantity, the emission factor, and the production activity easily can be used to determine the production throughput. Values will be provided for every process that manufactures an isolated intermediate and final product. This will provide a very comprehensive map of a facility's products and processes capabilities. For these reasons, the emission factor for each process vent for §98.123(b)(3) (§98.126(c)(2)) should be treated as CBI since it can be used in conjunction with emissions to determine the production throughput.

Finally, the activity used to estimate emissions for §98.123(b)(4) (§98.126(c)(1)) should be treated as CBI since it can be used to determine the amount of product that is made. The emission factor for each process vent for §98.123(b)(4) (§98.126(c)(2)) is CBI since it could be used to determine production amount.

C. Subpart N – Glass Production

We oppose EPA’s proposal not to treat several data elements as CBI under this subpart, including:

- Annual process emissions of CO₂ by process (§98.146(b)(1)). Process specific information could be used to determine manufacturing capacities and/or throughputs. Facility aggregation of CO₂ emissions would be more protective of this CBI information unless the facility contained a single production process.
- Annual quantity of carbonate based-raw material charged (§98.146(b)(2)). This information could be used directly to determine the production throughputs and manufacturing scheme since it provides specific information on raw material additions.
- Carbonate-based mineral mass fraction of carbonate-based raw material charged to a furnace (§98.146(b)(3)). This information could be used directly to determine the

production throughputs and manufacturing schemes as it provides the fraction of certain raw materials that is provided.

- Fraction of calcination for carbonate-based raw materials (§98.146(b)(4)). This information could be used in conjunction with other information to determine production throughputs.

D. Subpart P – Hydrogen Production

Some hydrogen plants are licensed by the hydrogen technology company to the merchant hydrogen producer or refinery, which operate the facilities required to report under this subpart. Such licenses prohibit the owners and operators of the hydrogen plant from divulging certain process information that is currently labeled as non-CBI. The quantity of each fuel and feedstock, the quantity of hydrogen and ammonia produced, and the carbon content and molecular weight of fuel and feedstocks, all of which is required to be reported under the GHG MRR, is CBI. If owners and operators of the hydrogen plants are required to report these data elements as non-CBI, they would be in a non-win situation, having to either risk being sued by the hydrogen technology company for divulging process information, or risk enforcement action by not reporting all required data elements under Subpart P.

E. Subpart V – Nitric Acid Production

We oppose EPA's proposal not to treat several data elements CBI, including:

- Annual nitric acid production from each train
- Annual nitric acid production from each train during with abatement technology is operating
- Annual nitric acid production for the facility
- Type of nitric acid process used for each nitric acid train
- Production rate during each performance test

Each of the highlighted data elements above should be designated as CBI. By making such information publicly available, competitors would be able to "reverse engineer" and calculate the nitric acid production at each facility.

F. Subpart X – Petrochemical Production

We oppose EPA's proposal not to treat several data elements as CBI, including:

- Monthly volume or mass of each gaseous, liquid and solid feedstock and product
- Monthly carbon content of each gaseous, liquid and solid feedstock and product
- Monthly molecular weight of each gaseous feedstock and product
- Annual quantity of each petrochemical produced

Each of the highlighted data elements above should be designated as CBI. By making such information publicly available, competitors would be able to “reverse engineer” and calculate the petrochemical production operation at each facility.

G. Subpart EE – Titanium Dioxide Production

We oppose EPA’s proposal not to treat several data elements as CBI, including:

- Annual production capacity of titanium dioxide
- Calcined petroleum coke consumption
- Monthly production of titanium dioxide
- Monthly carbon content factor of petroleum coke
- Number of separate chloride process lines located at the facility

Each of the highlighted data elements above should be designated as CBI. By making such information publicly available, competitors would be able to “reverse engineer” and calculate the titanium dioxide production at each facility.

H. Subpart OO – Suppliers of Industrial Greenhouse Gases

We believe that EPA has properly classified most of the required information as CBI and non-CBI in Subpart OO. However, we have several concerns with the manner in which aggregated data will be reported and we believe that EPA should allow for greater discretion in how this is aggregated. For example, in Table 4, under “Suppliers of Industrial GHGs (subpart OO): Producers,” GHG and product emissions would be reported as a national aggregate in those cases where there was three or more reporters. In cases where there are three or less producers, or only one major producer, it may be necessary to maintain this information as CBI. This may only be understood after these reports are submitted to EPA.

In addition, in Table 4 under “Suppliers of Industrial GHGs (subpart OO): Importers and Exporters,” we believe that the CBI protocol should be the same as for producers. In many cases the producer also will be the exporter, much or all of the produced material will be exported, and the production may be by a sole producer. Under these circumstances, the CBI protection being afforded to the producer would be eliminated if the material was exported. Finally, it is not clear how this would impact CBI concerns of foreign producers of these materials who may manufacture and export (to the US) unique chemicals. For all of these reasons it is important that exporters and importers be afforded the same protection as producers listed under footnote f of Table 4 with the exceptions that were noted above in the first paragraph of this section.

The effectiveness of the aggregation methodology may not be known until these reports are made. However, as a protective measure ACC recommends that aggregation of larger chemical groups be considered. This approach would be consistent with existing EPA reports, e.g. EPA 430-R-10-006, “Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2008” (see Table 4-85 or 4-86).

I. Subpart TT – Industrial Waste Landfills

There are several data elements in industrial waste landfills that EPA has deemed as non-CBI that we believe should be CBI. Unlike municipal waste landfills, industrial landfills are usually created to dispose of certain process waste. Knowing key information about waste streams would allow a competitor to determine production information at the affected facility.

These elements are:

- Description of each waste stream, if specific characterization is required
- Methods for estimating historical quantities of each waste stream (depending on the method, production data could be revealed)
- Under equation TT-2, waste disposal and production quantity by year
- Under equation TT-2, average disposal factor

APPENDIX A – Excerpts from previous ACC comments submitted on the MRR and CBI

ACC Comments Submitted June 9, 2009 (Docket ID EPA-HQ-OAR-2008-0508)

Executive Summary: Furthermore, EPA is requiring the submittal of large quantities of supporting data, much of which is considered Confidential Business Information (CBI), rather than allowing facilities to maintain such records and make them available to EPA upon request as has been the Agency's practice.

Overall comments: One of our major concerns is the protection of sensitive business information. Some of the supporting data submitted by companies will be CBI pursuant to 40 CFR Part 2, Subpart B. Because only emission data is required to be made public information, facilities are entitled to CBI protection, when claimed, for the supporting data. EPA acknowledges that the concern about CBI has been raised by stakeholders.^[1] However, the Agency does not discuss these concerns nor explain how they will be addressed, if at all. As stated in the preamble, when facilities make CBI claims under Part 98, EPA will address the issue pursuant to 40 CFR Part 2, Subpart B. Proper treatment of CBI information will increase the burden on the party asserting the claim and on EPA to receive, handle, and store the CBI. This will increase unnecessarily the overall costs of this rule.

We strongly recommend that EPA follow its existing practice in other rules and require only that the GHG emission data be submitted. EPA should require that the supporting data be maintained by the facility and made available to the Agency upon request.

Subpart C – Stationary Combustion: For §98.36(b) and (c), there are situations when the fuel-type might be CBI. In these instances, facilities will not want to report their fuel type, and EPA should not require it to be reported. This is especially true for §98.36(b)(5) for hydrogen production.

Subpart P – Hydrogen Production: The proposed rule describes the emission reporting obligation in §§98.162(a) and (b), separately, as the "CO₂ process emissions..." and "CO₂ ... emissions from the combustion of fuels..." respectively. It is not clear if EPA intended for these emissions to be reported separately or combined. In some emission calculation methods (most obviously in Tier 4 CEMS method), the calculation method does not distinguish between "process" CO₂ and "combustion" CO₂, so it is impractical to report these as separate, discrete emissions. Of even greater concern is the fact that through separate reporting of process vs. combustion CO₂ emissions, it is a relatively straightforward back-calculation to determine the process efficiency of the hydrogen production process. This is considered critical CBI that cannot be allowed to be revealed in reports accessible to domestic and international competitors and customers of the regulated source. ACC recommends that EPA should clarify the CO₂ emission reporting obligation as combined "process" and "combustion" CO₂ emissions, regardless of the calculation

method employed. If separate, discrete reporting of such emissions is actually required, provide explicit protection for this very critical confidential business information.

Subpart V – Nitric Acid Production: Section 98.226 lists specific data reporting requirements for nitric acid facilities. Annual production rates, capacity and operating hours are clearly CBI and would need to be classified as such. It is recommended that these items be removed from this section and only be required to be retained by the facilities and made available for review by EPA and the states

Subpart EE – Titanium Oxide Production: ACC also disagrees with the proposal to require the documentation records and data identified in §98.316 and referenced on pages 16552, section EE.5 of the preamble:

“In addition we propose that facilities report the following additional data used as the basis of the calculations to assist in verification of estimates, checks for reasonableness, and other data quality considerations. The data includes: annual production of titanium dioxide, annual amount of calcined petroleum coke consumed, and number of operating hours in the calendar year.”

We disagree that there is a need within the purposes of this rule for any of the information identified in §98.316 to be reported specifically by production line.

All of the aforementioned information is CBI that could be used by competitors (U.S. and foreign) and is unnecessary to carry out the purposes of this proposed regulation. This data should only be available on site or as requested for security cleared EPA personnel and their security cleared contractors where a need is demonstrated for the purposes of this inventory.

Subpart OO – Industrial GHG suppliers: In §§98.416(d) and (e), the proposed rule requires bulk importers and bulk exporters of fluorinated GHGs or nitrous oxide to submit an annual report summarizing their imports/exports at the corporate level, except for transshipments and heels. The report shall submit information including, but not limited to the following:

- total mass of each fluorinated GHG and nitrous oxide imported/exported in bulk;
- names and address of the importer/exporter and recipient of the shipment;
- quantity imported/exported by chemical; and,
- date of import/export.

This data should be reasonably available from currently required importing and exporting records; however, EPA surely recognizes that this data is CBI, which discloses customer base, market share and similar data that could be utilized to deduce cost/pricing structures, as well as competitive strategies. Furthermore, off-shore suppliers and customers may choose not to do business with U.S.-based companies if this information is made available in the public domain. ACC recommends that rather than submitting this information as part of the annual report, this data shall be maintained at the respective facility and available for review at the facility, if necessary, as provided in §§98.3(f) and 98.417.

ACC Comments on Proposed Subpart L Submitted on June 11, 2010 (Docket ID EPA-HQ-OAR-2009-0927)

Executive Summary: Furthermore, we continue to be very concerned about the required submission of CBI. The public release of some of the information that is required to be reported under this subpart jeopardizes our members' international competitiveness, in that it details how ACC member companies manufacture fluorinated GHGs. We urge EPA to release its proposal on handling CBI under the MRR as soon as possible so that ACC member companies may evaluate and gauge the protectiveness of EPA's proposed handling procedures before the sensitive information is submitted to the Agency.

Overall comments: As we noted in our June 2009 comments, we are concerned about the types of data that are required to be reported under this rule. Much of the required data in this subpart are considered confidential business information, and the release of such data to the public could jeopardize the international competitiveness of ACC member companies. We suggest that only emissions should be reported to EPA, and CBI used to calculate the emissions should be kept on-site available for EPA review. This is the practice used for CBI data in EPA's Toxics Release Inventory and we urge EPA to adopt that practice here.