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September 7, 2010

VIA E-DOCKET

U.S. Environmental Protection Agency
Air & Radiation Docket
1200 Pennsylvania Ave. NW, Mail Code 6102T
Washington, DC 20460

Re: EPA-HQ-OAR–2009-0924
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. 39,094 (July 7, 2010)

Dear Sir or Madam:

The Council of Industrial Boiler Owners ("CIBO") appreciates the opportunity to comment on the United States Environmental Protection Agency's ("EPA's") 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. 39,094 (July 7, 2010).

CIBO is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and university affiliates with members representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information within the industry and between industry and government relating to energy and environmental equipment, technology, operations, policies, law and regulations affecting industrial boilers. Since its formation, CIBO has been active in the development of technically sound, reasonable, cost effective energy and environmental regulations for industrial boilers. CIBO supports regulatory programs that provide industry with enough flexibility to modernize – effectively and without penalty – the nation's aging energy infrastructure, as modernization is the key to cost-effective environmental protection.

SUMMARY OF THE PROPOSAL

This action proposes to determine the confidentiality status of data required to be reported under the Mandatory Greenhouse Gas Reporting Rule ("MRR"), 40 C.F.R. Part 98. The action describes EPA's proposed confidentiality determination for each category of information that

must be reported under the MRR. In addition, EPA proposes to categorically authorize whether to publicly release or withhold data reported under the MRR without taking additional procedural steps, including providing notice and opportunity for comment before making the information publicly available, as would be otherwise required under 40 C.F.R. § 2.301.

COMMENTS

In particular, CIBO's comments are directed at responding to the numerous individual CBI/non-CBI designations for Subpart C – General Stationary Fuel Combustion Sources as provided in the EPA Docket Memorandum, *Data category assignments for reporting elements to be reported under 40 CFR part 98 and its amendments* (June 28, 2010). Table A-1 of this document lists data that must be reported under the final and subsequently proposed GHG MRR for combustion sources. CIBO fully supports EPA's decision to designate as CBI the limited data categorized as such; however, CIBO opposes EPA's decision to deem nearly all of the data reported under Subpart C to be non-CBI.

I. EPA's PROPOSAL EXPANDS EMISSIONS DATA TO INCLUDE NON-EMISSIONS DATA.

The MRR requires the annual reporting of GHG emissions from all sectors of the economy, encompassing both direct emitters and suppliers to the market place of GHG-containing products. 74 Fed. Reg. 56,260, 56,266 (Oct. 30, 2009); *see also* 74 Fed. Reg. 16,448 (Apr. 10, 2009). In establishing the MRR, EPA is fulfilling Congress's directive in the 2008 Consolidated Appropriations Act that EPA establish a rule requiring the "mandatory reporting of GHG emissions." 75 Fed. Reg. 18,655 (Apr. 12, 2010). In the MRR preamble, EPA indicated that "[a]ccurate and timely information on GHG *emissions* is essential for informing many future climate change policy decisions." 74 Fed. Reg. at 56,265 (Oct. 30, 2009) (emphasis added). EPA also made clear in its Fact Sheet for the MRR that the rule requires reporting of GHGs "from large emission sources" to help create "policies and programs to reduce emissions."[1] Thus, the legal authority for the rule supports emissions data gathering and therefore, only *emissions data* should be publicly disclosed – not non-emissions data.

Under the applicable regulatory definition and caselaw developed long before the regulation of GHGs was contemplated, "emission data" must be information that is "necessary" to determine the emissions from a source. *RSR Corp. v. EPA*, 588 F. Supp. 1251, 1255 (N.D Tex. 1984). EPA's regulations define "emission data" as "any source of emission of any substance into the air" that is "necessary to determine the identity, amount, frequency. . . of any emission. . . emitted by the source." 40 C.F.R. § 2.301(a)(2)(i). Reporting mass data, for example, required to calculate emissions of conventional pollutants may be commonplace in existing EPA programs, but non-conventional GHG emissions reporting has other implications that EPA has failed to address.

However, now that EPA has proposed collecting emissions data for GHGs and making it publicly available on its website, EPA must reconsider how to treat non-emissions data submitted to comply with the MRR. Further, EPA is proposing to broaden the definition of emissions data and other data that is not entitled to CBI protections. Whereas EPA proposes that data regarding production or

[1] EPA, http://www.epa.gov/climatechange/emissions/downloads09/FactSheet.pdf (last visited Sept. 3, 2010).

throughput and raw materials consumed that are not used as inputs for emissions calculations would be CBI, that same sensitive data would not be provided CBI protection under the proposal if used in emission calculations. This disparity in treatment of the same data is not rational or defensible. Non-emission data used to calculate GHGs is a different type of data than that which has historically been reported under the CAA and made publicly available. For EPA to say that quantities such as fuel usage, for example, should be publicly available ignores the competitiveness implications of such disclosure. Now that EPA is mandating that non-emissions data must be submitted under the MRR, EPA's interpretation of what constitutes emissions data must change. Utilizing the old paradigm will cause direct harm to the ability of U.S. companies to compete in the global marketplace because EPA would make this information publicly available.

Therefore, CIBO urges EPA to interpret its regulations to ensure that all non-emission data – data utilized to calculate emissions, such as fuel usage, raw materials used, and process operating parameters – be classified per se as not constituting emissions data and therefore as qualifying for CBI treatment.

II. INPUT DATA AND OTHER N0N-EMISSIONS DATA MUST BE PROTECTED AS CBI AND MUST NOT BE MADE PUBLICLY AVAILABLE, IN ORDER TO PREVENT COMPETITIVE HARM TO U.S. BUSINESSES.

The CAA and its implementing regulations provide for the protection from public disclosure of data submitted by entities that is CBI. 42 U.S.C. § 114(c); 40 C.F.R § 2.301. Under longstanding law, commercial or financial information involuntarily submitted by a company to EPA is entitled to confidentiality if "disclosure of the information is likely to . . . cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (reaffirming the *National Parks* test for determining whether information submitted under compulsion is confidential); *see also* 40 C.F.R. 2.208(e)(1). Parties claiming confidentiality must show "actual competition and a likelihood of substantial competitive injury." *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987).

Notwithstanding these legal protections for CBI, under 40 C.F.R § 2, emissions data cannot be protected from disclosure as CBI. 40 C.F.R. § 2.301(e). Given this limitation on CBI protection, it is very important for EPA to precisely define the data it gathers.

If certain information collected through the MRR, such as input data used in emission equations and the calculations themselves, is released to the public, CIBO members would suffer substantial harm to their competitive position. *See Leavitt*, 2006 WL 667327 at *5 (EPA defending CBI claims because the disclosure of information "would result in a competitive disadvantage to the respective companies"). Here, if non-emission input and other data were made publicly available, competitors would be privy to their direct competitors' production data. The disclosure of this CBI might also reveal a company's market strength and position or enable competitors to "infer production costs and pricing structures." *See* 75 Fed. Reg. 39,122-23 (July 7, 2010). Knowledge of a competitor's production rates and other information that can be derived from the data to be reported, would harm the competitive position of any companies required to report this information. Hence, CIBO believes that some additional information should be protected as CBI. Examples of additional data that should be afforded CBI protection include process throughput information and fuel use rates. Protecting data

submitted under the MRR is of greatest importance to facilities that produce a single product, or a predominant product with lower volume secondary products. In such cases, publicly disclosing the specific energy use for such a facility may allow competitors to gain unfair intelligence regarding production capabilities, utilization, and costs. Knowing this information could enable competitors to calculate the production output and relative cost of manufacture at a particular facility.

The composition of emissions from individual process byproduct streams fed to combustion units could reveal confidential data. The capacity of process heaters, the type of fuel utilized in process heaters, and the calculation methodology utilized should be treated as confidential. Calculations have traditionally been treated as confidential because they utilize process data including fuel stream composition and maximum production rates in some instances. In contrast where the reporting methodology is based on either a CEMS, a stack test, or EPA identified factors, it is acceptable to not treat such calculations as CBI because of the availability of that information under other reporting requirements.

For some facilities, the use of specific fuels for combustion sources should be treated as CBI. Some facilities utilize non-traditional fuels whose composition and quantity are currently unknown among competitors, and release of such information could place the reporting entity at a competitive disadvantage.

Even the lapse of time does not diminish the sensitivity of this data to a company's market position. There is no time after which this data could be released that would avoid these potential competitive harms or antitrust concerns. Given these concerns, CIBO believes that the confidential treatment of non-emission input and other data should not be time limited.

The potential for harm is especially likely here, where domestic companies face strong domestic and international competition. EPA must err on the side of protecting such data as CBI, rather than jeopardizing the competitiveness of American companies and risking that harm will occur through its public disclosure. This is particularly true where as here, the key environmental data relevant to EPA's regulatory authority and to the public's interest is **emissions** data, which will be made publicly available. But non-emissions input and other data should be defined differently and protected from public disclosure.

III. CATEGORICAL CBI PROTECTION SHOULD BE GIVEN TO NON-EMISSION DATA.

As explained above, the type of information that EPA proposes to compel companies to report here is, by legal definition, CBI. 40 C.F.R. § 2.301(e) (allowing information to be designated as trade secret, proprietary, or company confidential). Therefore, EPA should develop CBI regulations that fully protect non-emission input and other data in order to avoid creating competitiveness concerns. In particular, EPA should propose CBI regulations that expressly define this data as CBI and require that confidential information be submitted separately from non-confidential information in order to reduce the risk of accidental disclosure. *See, e.g.,* 19 C.F.R. § 201.6(c) (requiring that CBI "be segregated from other material being submitted"). Such information should be maintained in confidence and not disclosed except as required by law. *See, e.g.,* 19 C.F.R. § 201.6(g).

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

Even if EPA provides CBI protections to input and other non-emission data, those protections are not necessarily complete or permanent because EPA has proposed making CBI determinations subject to reevaluation. *See* 40 C.F.R. § 2.301(d)(4)(ii). Specifically, EPA has proposed to provide the Office of General Counsel with authority to determine based on the criteria in 40 C.F.R. § 2.208 that CBI is no longer entitled to confidential treatment because of a change in applicable law or newly discovered or changed facts. *Id.* EPA has also proposed to provide companies with the opportunity to comment on any final decision issued by the Office of General Counsel reevaluating whether information should be afforded CBI protections. *Id.* CIBO supports the inclusion of these procedural protections because companies have a due process right to challenge the decision to waive CBI treatment of data and should be afforded the same opportunity to comment as provided under the current protections provided in 40 C.F.R. § 2.204(e). Furthermore, CIBO also supports giving companies the opportunity to judicially challenge the agency's final determination, as provided under 40 C.F.R. § 2.205(f).

Again, CIBO appreciates the opportunity to comment on this proposal. If you have any questions concerning our comments or require clarification, please contact me at 703.250.9042. Thank you for your consideration.

Sincerely yours,

/s/ Robert D. Bessette

Robert D. Bessette
President