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Environmental Protection Agency
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Proposed Rule on Mandatory Reporting of Greenhouse Gases
Docket EPA-HQ-OAR-2008-0508

To Whom It May Concern:

The following organizations (“the Associations”) submit these comments on the United States Environmental Protection Agency’s (“EPA’s”) Proposed Rule on Mandatory Reporting of Greenhouse Gases (GHGs), 74 Fed. Reg. 16448 (April 10, 2009):

American Chemistry Council
American Coke and Coal Chemicals Institute
American Iron and Steel Institute
American Petroleum Institute
Corn Refiners Association
CropLife America
National Association of Manufacturers
National Oilseed Processors Association
National Petrochemical and Refiners Association
Rubber Manufacturers Association

Collectively, the Associations represent a sizeable and diverse segment of the commercial interests of the United States, representing thousands of individual member companies.¹ Those companies will be directly and significantly impacted by the reach, scope and complexity of the Proposed Rule, should EPA promulgate it as a final regulation. The proposed requirements would result in significant cost and burden to the Associations’ members. Further, given the inadequate lead time to prepare for compliance by January 1, 2010, promulgation of the final rule as proposed could create significant enforcement risk for the Associations’ members unless EPA suspends the effective date of the rule as described below.

¹ An addendum to this letter contains a description of each of the Associations.

The Proposed Rule is both far-reaching and complex. In addition to the sector-specific concerns that the Associations have with the Proposed Rule,² there are a number of overarching issues that are of critical concern to all of the Associations and their members. Because the Associations believe these overarching issues are of great and common importance to all sectors of the Associations' industries and warrant significant reconsideration by EPA, they are submitting these comments as a group to emphasize the overriding critical nature of addressing the issues below.

These comments focus on seven primary concerns:

First, EPA should reconsider the timing for issuance and implementation of a final reporting rule. Industry must be provided sufficient lead time to adequately prepare to comply with the proposed requirements and with the risk of enforcement. Any implementation date before January 1, 2011 would be extremely and unduly burdensome and, in many instances, impossible to satisfy given that EPA is unlikely to finalize this rule until November 2009 at the earliest.

Second, the final rule must include safeguards for the handling and protection of confidential business information.

Third, the proposed rule's "once in, always in" approach is overly burdensome, unnecessary, does not promote any sound policy, and is inconsistent with virtually every other environmental reporting requirement. The Associations urge EPA to include a process whereby a facility that has emissions under the threshold for a specified period of time (e.g. three years) would become exempt from the reporting requirements.

Fourth, the Associations urge EPA to take measures to reduce the cost of compliance with the proposed rule and to eliminate the inappropriate double-reporting of emissions.

Fifth, because EPA's analysis of the proposed reporting thresholds lacks the proper statistical rigor, additional evaluation should be conducted.

Sixth, EPA should include a clear statement in the final rule that the rule's requirements do not make greenhouse gases ("GHGs") "subject to regulation" under the Clean Air Act ("CAA").

Seventh and finally, because there is a strong possibility that Congress will soon authorize Federal climate change legislation, the final rule should include a sunset provision.

² In addition to these comments, many of the Associations and their members are separately submitting detailed comments that focus on the aspects of the Proposed Rule that are of particular concern to their operations or industry.

- I. **EPA must postpone implementation of the reporting rule until January 1, 2011 at the earliest.**
 - A. **The proposed rule fails to provide adequate lead time for compliance.**

The proposed rule would require tens of thousands of sources to monitor GHG emissions under the rule beginning January 1, 2010—barely weeks after EPA plans to finalize this extraordinarily complex rule late in 2009. This is fundamentally inadequate and unfairly penalizes the regulated industry for EPA's delays in developing the rule. A more realistic schedule for implementation of the rule is essential. EPA should delay implementation of the rule for one year so that monitoring would be required no sooner than 2011, with the first annual report due in 2012.

EPA claims to have an “urgent need to complete this rulemaking in order to allow for 2010 data collection.” See Letter of EPA Office of Atmospheric Programs Director Brian J. McLean to The National Association of Manufacturers Energy and Resources Policy Director Bryan L. Brendle dated April 29, 2009 (“Extension Letter”) (denying request for extension of time to file comments). According to EPA, the Fiscal Year 2008 Consolidated Appropriations Act (the “Act”) requires EPA to issue a proposed rule by September 2008 and a final rule by June 26, 2009. *Id.* EPA already is at least six months behind this schedule, and should not penalize industry for delay for which industry is not accountable. Instead, to be fair and provide sufficient lead time, EPA must extend the implementation date.

Even if EPA were to publish its final rule by June 26th (based on EPA's reading of the Act), industry would only have about six months to prepare for a January 2010 implementation date. But with a comment period closing on June 9, EPA acknowledges that it will not meet that date notwithstanding the so-called “deadline.” Rather, EPA states that it plans to issue a final rule some time around mid-November. This would provide only **six weeks** for affected entities to prepare for implementation of the rule. Six weeks is a completely unrealistic and unworkable time to prepare for implementation of the rule, as proposed. Such a schedule would unfairly and unnecessarily place regulated parties at great risk despite best efforts.

Importantly, even under EPA's view of the deadlines in the Act, nothing in the appropriations bill requires that EPA begin *implementation* of the rule by any particular date. See Consolidated Appropriations Act, 2008, P.L. 110-161, 121 Stat. 1844, 2128 (2008). The Act does not override the well established principle that new regulations must provide adequate lead time for industry to come into compliance. *Cf. Nat'l Ass'n of Independent Television Producers & Distributors v. FCC*, 502 F.2d 249 (2d Cir. 1974) (holding that agency failed to allow adequate time to prepare for amendment to rule to become effective where television networks had only eight months' notice of informal report). Nor do any of EPA's stated purposes for the rule justify a need for

implementation in 2010 versus 2011, especially when those purposes are weighed against the burden that industry would face in compliance with the rule and the fact that EPA already has access to huge amounts of the data that would be collected under the rule. For example, the Administration recently announced that it will pursue GHG regulation of cars and light duty trucks, based on estimates detailing the contribution of emissions from vehicles to the nation's and the world's overall GHG footprint. See White House Office of the Press Secretary, *President Obama Announces National Fuel Efficiency Policy* (May 19, 2009). Clearly, the Administration believes itself to be in a position to decide a regulatory framework for GHG regulations at this time without the data that would be provided in this rule.

Adopting a more reasonable effective date also is critical to providing EPA adequate time to analyze and incorporate the views of commenters, which is the essential purpose of notice-and-comment regulation. This is an extraordinarily complex proposed rulemaking and EPA has stated throughout its preamble that the agency is considering numerous and varied potential alternatives to aspects of the proposal. Undoubtedly, members of the public will also provide detailed comments that will warrant full consideration and will help shape the final rule. EPA is obligated to give full and fair consideration to such comments. See *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) ("Notice and comment rulemaking procedures obligate the [agency] to respond to all significant comments, for 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public'"); *Rodway v. USDA*, 514 F.2d 809, 817 (D.C. Cir. 1975) (agencies have a duty to "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.").

Further, because EPA has indicated that the final rule may depart from the proposed rule in key aspects, the facilities impacted by this rule will need fair and reasonable time to review the final rule, analyze any changes that have been incorporated as a result of the public process, and assess how it will impact their operations as well as install any necessary equipment, train personnel, and set up other needed internal infrastructure to ensure compliance with the rule. Installing necessary equipment to comply with the rule may require time-consuming and costly process shutdowns for some facilities. For example, if a final rule were to require that certain facilities install fuel monitors, it would be extremely difficult at best to have such equipment installed, tested, and calibrated by January 2010. These types of engineering installations must happen while a facility is shut down, an infrequent and expensive occurrence. Similarly, it would be difficult to have other required instrumentation, such as data archiving systems, within such a short time frame. Facilities in many source categories would also need to establish management practices, to develop standard operating practices, sampling and analytical procedures and protocols, to acquire necessary analytical equipment where required, and to schedule and conduct testing. Notably, even abbreviated reporting of 2010 emissions would divert resources and attention away from the work necessary for

full rule implementation in subsequent years. For these reasons, even where the installation of new equipment would not be necessary, there will not be adequate time between a final rule and January 2010 for companies to properly begin assessing GHG emissions under the rule. The approximately six weeks lead time that EPA anticipates prior to January 1, 2010, is woefully inadequate and legally unsupportable.

Finally, regulated parties must be afforded the time to implement programs with care, not haste, in consideration of the potential enforcement consequences if implementation is not done correctly. Because there are no set deadlines for implementation of this rule, EPA should not rush forward with implementation before the regulated industry is ready and able to fully comply.

If, despite these objections, EPA selects an earlier implementation date, then at a *minimum* EPA should allow for a “phase-in period” of at least one year where best engineering estimates and best available data may be used until more robust systems are in place for full data collection and compliance. A phased approach to implementation, such as the one included in the California Air Resources Board’s AB-32 reporting rule, would lessen the burden on industry somewhat while still allowing for near-term data collection.

B. EPA should not subject specific sectors to monitoring and reporting requirements prior to identifying a regulatory framework for such sectors.

Implementing a reporting rule prior to the adoption of a specific regulatory policy for GHGs is both inefficient and inappropriate. Any reporting requirement broad enough to include all the data needed by all possible regulatory policies must include many items that will be unnecessary when one specific policy is adopted. As a result, many entities covered in such a reporting rule are likely to be required to make unnecessary expenditures on monitoring equipment and internal reporting systems, and some may then be required to install different equipment or modify reporting systems to comply with the requirements and standards set forth when a specific regulatory policy is adopted. Table A illustrates a range of policy types and their potential associated reporting and compliance systems needs.

Table A: Types of Reporting and Compliance Systems by Policy Type

Policy Type	Coverage	Reporting System	Compliance System
Upstream cap and trade system	Fuel producers and importers	Based on accounting records (fuel invoices) and standardized emission factors	Verification of reporting process is required as emissions are tied to financial instruments
Downstream cap and trade system	Emission point sources	Same as above and/or direct emissions monitoring	Same as above
Carbon tax	All sectors	Accounting records and existing tax systems	Self-reported subject to audit and penalties
Technology standards		Emissions reporting may not be required	Permitting process; periodic audits

Given the range of policies that could be adopted, it is doubtful that EPA could select just one reporting requirement that provides exactly the information required – neither more nor less – by a future policy not yet designed in detail. Instead, the proposed rule takes a least-common-denominator approach, proposing data collection broad enough to serve come-what-may future regulatory approaches. Because the rule is far-reaching and requires information collection that may not be needed depending on the ultimate policy selected, it is quite possible that the rule would have to be significantly modified once regulatory regimes are established. We urge EPA to defer monitoring and reporting requirements for specific sectors until a policy is developed, as the level of detailed data required to support policy assessment and compliance will depend on the type of policy adopted and the purposes of the data collection.

The Act does not dictate monitoring and reporting requirements for all sectors by a date certain, but merely that EPA finalize a rule. EPA has the flexibility in such a rule to phase in reporting requirements in coordination with regulatory regimes. In the meantime, as described below, the monitoring rule could focus on how to make use of significant existing GHG data in furthering EPA’s policy decisions on GHG regulations.

C. In the final rule, EPA should take better advantage of existing GHG data prior to imposing new obligations on industry.

EPA has requested comment on the relationship of the proposed rulemaking to other government efforts or existing GHG reporting programs. We believe that the two most well-known and extensive U.S. GHG assessments – EPA's *Inventory of U.S. Greenhouse Gas Emissions and Sinks* and Energy Information Administration's (EIA) *Emissions of Greenhouse Gases in the United States* – should be taken into consideration in determining what additional level of reporting may be required by EPA to inform climate policy.

Both EPA's and EIA's assessments are detailed analyses that can be relied upon for the development of a national GHG policy. The EPA's and EIA's assessments provide an extensive breakdown of its annual CO₂e emissions estimate for the six major sources of GHG emissions (CO₂, CH₄, N₂O, HFCs, PFCs, and SF₆) from more than 40 aggregated source categories (e.g., Iron and Steel production) and more than 75 source sub-categories (e.g., sinter, iron, steel, and others within Iron and Steel production). Given the detail provided by these assessments, EPA already has sufficient data to help in evaluating and developing a climate change policy without forcing entities to increase their reporting through additional burdensome monitoring.

The EPA's assessment, in particular, is considered robust in that it meets the standards for national GHG reporting set forth by the United Nations Framework Convention on Climate Change and follows the IPCC Good Practice Guidance (IPCC 2000). See EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 – 2007* (April 15, 2009) at p. ES-18. These standards determine the level of uncertainty analysis and quality assurance/quality control (QA/QC) for a national inventory of GHG emissions. EPA's assessment shows that its CO₂e emissions estimate is within a fairly tight band. At a 95% confidence interval, EPA determined that its emissions estimate could be between 3% below and 7% above its CO₂e point estimate. The highest certainty in EPA's emissions estimates are from CO₂ emissions while the highest uncertainty is from its CH₄ and N₂O estimates. EPA should focus on improving its existing assessment rather than implementing new, burdensome requirements.

From a QA/QC standpoint, EPA has implemented a systematic plan that has "been formalized in accordance with the QA/QC plan and the UNFCCC reporting guidelines." *Id.* This plan includes specific detailed procedures and forms that standardize the process of documenting and archiving information, expert review, provisions to track which procedures have been followed, feedback mechanisms for corrective action, coordination and interaction within EPA, across state and Federal agencies and departments, research institutions and consulting firms involved in supplying such data. In addition to national QA/QC plans, source-specific QA/QC plans have been developed for a number of sources. *Id.* at pp. 1-14.

If more emissions detail is reasonably required to assist in setting a policy, we recommend that EPA use the extensive EIA databases on fuel consumption and use by industry that allows one to calculate GHG emissions by region and by sector within a reasonable level of confidence. Also, engineering “best estimates” can be used for more detailed emissions estimates.

If a GHG policy is formed either through regulatory or legislative means, we recommend that EPA adjust or even reconsider the proposed reporting requirements so that the ultimate rule relies on protocols similar to existing programs and does not add significant burdens beyond companies’ existing efforts. Where existing data collection efforts are sufficient to meet any legitimate needs enunciated in the proposed rule, the additional requirements are unnecessary.

II. EPA must better ensure the protection of confidential business information.

Compliance with the proposed reporting rule will require submission of large amounts of information that is entitled to confidential treatment. Safeguards for the handling and protection of confidential business information (“CBI”) data should be built into the protocols for the reporting program. Careful consideration of how CBI will be handled is especially critical given that EPA plans to publish data collected under the rule (with the exception of CBI data) on its website, and through reports and other formats. See 74 Fed. Reg. at 16595. The Associations share the agency’s view that transparency can help ensure the quality of the emissions data and build public confidence in those data. However, it is critically important that in its efforts to provide the public with access to emissions data, EPA not overlook that much of the information that would be collected under the proposed rule is *not emissions data*, but rather highly-sensitive CBI.

EPA asserts that it would protect any information claimed as CBI in accordance with its regulations in 40 C.F.R. Part 2, Subpart B. See 74 Fed. Reg. at 16463. Under these regulations, business information is entitled to confidential treatment if:

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

voluntarily submitted, "its disclosure would be likely to impair the Government's ability to obtain necessary information in the future."

40 C.F.R. § 2.208. These criteria apply to information collected pursuant to Sections 114 and 208 of the CAA, except that information that is "emission data, a standard or limitation, or is collected pursuant to section 211(b)(2)(A) of the Act is not eligible for confidential treatment." 40 C.F.R. § 2.301(e). Here, the proposed rule requests substantial amounts of information that are not emissions data and, therefore, should not be excluded from confidential treatment. For example, fuel use and distribution data are requested so that EPA can estimate potential future emissions from the unidentified sources that may use the fuel. As explained below, such information is definitively not emissions data as it does not relate to any actual discharge of material into the air. Nor is it necessary to determine the characteristics of any actual emissions or sources. See 40 C.F.R. § 2.301(a)(2).

Given the sheer magnitude of highly sensitive information that would be collected under the proposed rule, the Associations recommend that EPA identify in the final rule classes of information that EPA will treat as confidential in accordance with the agency's regulations.

For example, the information requested of upstream suppliers of fossil fuel should be accorded CBI protection. The substantive criteria for providing confidential treatment are met. The Associations' business confidentiality claim for such information has not expired by its terms, nor been waived or withdrawn. See 40 C.F.R. § 2.208(a). In addition, not only have the Associations' members historically protected these data as confidential, other state and federal agencies have also treated the data as CBI when they have been collected under other programs. See 40 C.F.R. § 2.208(b). This information could not be easily obtained by EPA without a company's consent. See 40 C.F.R. § 2.208(c). Further, no statute specifically requires disclosure of the information. See 40 C.F.R. § 2.208(d). Most importantly, disclosure of the non-aggregated fuel production and distribution data would substantially harm the competitive position of the Associations' members. See 40 C.F.R. § 2.208(e). This information divulges methods and processes. Competitors could reverse-engineer the fuels data to provide process-specific information that could provide them with a competitive advantage in the marketplace. This is only one example of scores of types of information that EPA should clarify is entitled to confidential treatment.

The plain meaning of "emissions data" is data related to material that has actually been emitted by a source. Where a term is unambiguous and the intent of Congress is clear, the agency must give effect to that interpretation. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Here, EPA's regulations should be read in a manner that is consistent with the unambiguous meaning of "emissions data." Under those regulations, "emissions data" is:

- (A) Information **necessary to determine** the identity, amount, frequency, concentration, or other characteristics . . . of any emission **which has been emitted by the source** . . . ;
- (B) Information **necessary to determine** the identity, amount, frequency, concentration, or other characteristics . . . of the emissions which . . . the source **was authorized to emit** . . . ; and
- (C) A general description of the location and/or nature of the source **to the extent necessary** to identify the source and distinguish it from other sources . . .

40 C.F.R. § 2.301(a)(2)(i) (emphasis added). As the emphasized language shows, to be “emissions data,” it must be “necessary to determine” characteristics of a substance that has actually been emitted or authorized. *Id.* Indeed, EPA has successfully argued that “emissions data” focuses on emissions that have been “emitted by the source” or that “the source was authorized to emit” rather than potential future emissions by other sources outside the control of the party producing the information. See *NRDC v. Leavitt*, Civ. No. 04-01295, 2006 WL 667327, at *3 (D.D.C. March 14, 2006) (citing 40 C.F.R. § 2.301(a)(2)(i)(A) & (B)). In that case, the court correctly held that a “plain reading of 40 C.F.R. § 2.301(a)(2)(i) indicates that ‘emissions data’ is defined narrowly to focus on information obtained from a source of emissions, not a producer of materials that will later contribute to emissions.” *Id.* at *4. EPA should adhere to that legal holding and make clear that non-emissions information such as fuel use and distribution data is presumptively CBI. The requested information provides no information necessary to determine the characteristics of any actual emissions of GHGs. Rather, EPA plans to use the information to estimate the potential future emissions that would be associated with the complete oxidation of the fuels.

The Associations are also concerned that EPA will attempt to collect CBI and aggregate it or otherwise re-shape it into a supposed non-CBI form for public availability. That is a very difficult task given the volume and sensitivity of the information involved. If EPA plans to present information in that form, the Agency should fully engage regulated parties in those efforts *before* the information is presented to the public, particularly given the liability to which EPA employees and contractors could be exposed if CBI information is disclosed. The Associations recommend that EPA engage regulated parties in this discussion through a follow-on proposal explaining any mechanism EPA plans to employ to aggregate or otherwise present CBI information in a public form.

III. The proposed rule's "once in, always in" approach is fundamentally flawed.

Under EPA's proposal, once a facility is subject to the rule, the facility must continue to report each year thereafter, even if the facility no longer meets the threshold criteria. EPA's proposal suggests that even if a facility has completely shut down, it would still be required to indefinitely report "no emissions" if it had once met the rule's requirements for reporting. Such an approach is unique in environmental regulations and imposes clear ongoing burdens without any rational benefit.

EPA has requested comments on whether it should develop a process whereby a facility that has emissions under the threshold for consecutive years can be given the opportunity to become exempt from the reporting requirements. The Associations strongly recommend that for each annual reporting period, owners and operators only be required to report if their facilities and/or supply operations meet the rule's reporting requirements for that reporting period. Requiring reporting from facilities or supply operations that do not meet the rule's thresholds would be an unnecessary significant burden for a relatively small emitter of GHGs, and unnecessary to further any legitimate regulatory purpose. EPA's rationale in setting the proposed thresholds was that they capture the majority of GHG emissions while keeping the reporting burden to a minimum and excluding smaller facilities and sources. *E.g.* 74 Fed. Reg. at 16467. To require a facility to report indefinitely, even if that facility's emissions drop well below the threshold or even to zero, is flatly inconsistent with the goal of minimizing the reporting burden and exempting smaller facilities.

The "once in, always in" approach is also contrary to EPA's past practice. In the Toxics Release Inventory ("TRI") program, for example, facilities are only required to report for listed chemicals that have exceeded the relevant thresholds in that given year.³ See 40 C.F.R. § 372.22 ("A facility that meets all of the following criteria *for a calendar year* is a covered facility *for that calendar year* and must report . . .") (emphasis added). As such, companies have an effective incentive to decrease toxic chemical use and releases. In contrast, the proposed rule's "once in, always in" approach would eliminate the possibility that a similar incentive to reduce GHG emissions might be established as a result of this reporting rule.

The Associations believe that EPA should look to other regulatory approaches such as TRI and require reporting only in years when a facility's emissions exceed the threshold. In response to EPA's specific request for comment on this issue, EPA's final rule should be structured so that if a facility falls below the threshold for a specified period of time (e.g., three years), it will be exempt from the reporting obligations in the future. A

³ EPA also uses the same approach in its other regulatory programs. For example, the Resource Conservation and Recovery Act regulations for large quantity generators are only applicable to generators of greater than 1,000 kg of waste in a calendar month. See *generally* 40 C.F.R. Part 262 and § 261.5(e).

similar process is included in the California Air Resources Board's mandatory reporting rule, whereby a facility that triggers the reporting requirement only has to report until its emissions drop below the prescribed level for three consecutive years.

In sum, while EPA claims that a "once in, always in" approach would ensure the consistency of the data reported, the approach is overly burdensome and is not needed to serve any of the particular, stated purposes of the rule. Moreover, the inability to exit the rule's requirements has an unintended consequence, namely eliminating an incentive for facilities to lower their emissions below the reporting thresholds.

IV. EPA should eliminate the inappropriate double-reporting of emissions and reduce the cost of compliance.

A. EPA does not state a rational basis for requiring double-reporting.

EPA acknowledges the double-reporting of emissions that would result from the proposed rule – "There is inherent double-reporting of emissions in a program that includes both upstream and downstream sources." 74 Fed. Reg. at 16466. EPA also admits that "it is possible to construct a reporting system with no double-reporting" and that the costs of such a system would be "approximately 32% lower than the proposed option." *Id.* EPA contends that it pursued a rule that includes double-reporting due to 1) the language in the FY2008 Consolidated Appropriations Act and 2) assistance in the formulation of policies.

EPA's reasoning is flawed, and the rule should be modified to eliminate double-reporting. First, as stated in the Joint Explanatory Statement accompanying the FY2008 Consolidated Appropriations Act, EPA has the *discretion* to "include in its rule reporting of emissions resulting from upstream production and downstream sources, to the extent that the Administrator deems it appropriate."⁴ Thus, EPA is not under any obligation to require double reporting, and has not articulated an appropriate rationale for doing so. Second, there are sufficient GHG inventories and fuel consumption data available to evaluate the impacts of policies without subjecting entities to additional burdensome reporting lacking a specific rationale. For any data that might be unavailable through the EIA or other public record, EPA can apply engineering best estimates to discern, with a high degree of confidence, the emissions resulting from upstream sources.

⁴ Page 33 of the Joint Explanatory Statement to Accompany Consolidated Appropriations Amendment for Division F-Interior (emphasis added).

B. The Final Rule must comply with the Paperwork Reduction Act.

Double-reporting also violates the Paperwork Reduction Act of 1995 (PWA) by imposing undue cost and administrative burdens on entities for reporting, even though sufficient data on monthly and annual fossil fuel consumption already are provided by the EIA. The final rule must comply with the PWA.

PWA's singular purpose is to balance the paperwork burden against the public benefit of the information being sought. The justifiable burden for GHG reporting will depend on the type of policy adopted for mitigating GHG emissions. For example, a reporting rule requiring real-time monitoring of emissions of GHGs at the point source might be overly burdensome if the policy adopted is anything other than a cap and trade and no financial instruments are tied to the emissions.

From the standpoint of a GHG Reporting Rule, EPA must consider the following questions in light of the PWA:

- What information purposes is the data collection intended to serve, and what data elements are necessary to achieve those purposes?
- Are there other existing sources for the necessary information?
- Is there a less burdensome way to collect the information?

In terms of the first item, there are four main purposes that data proposed to be collected by EPA arguably could serve – scientific analysis, policy assessment, regulatory compliance, and litigation – and each of these purposes requires differing levels of detail. Because no regulatory policy has been set, imposing a mandatory GHG reporting rule that imposes additional burdensome costs violates the purpose of the PWA when existing data sources, such as data series from the EIA and GHG emissions publications from the EIA and EPA, would suffice. Until a policy requiring a new set of monitoring and reporting is adopted, we recommend that EPA select monitoring and reporting requirements that allow reporters to have flexibility and that minimize the costs of reporting.

C. EPA facility and aggregate-level compliance cost estimates require more analytical discipline.

The cost of compliance with the proposed rule is likely much higher at a facility-level and in the aggregate than EPA's estimates. At a facility-level, there are costs for the following activities:

1. Procuring, installing, and maintaining measurement equipment;
2. Installing and maintaining information systems that monitor and record emissions;

3. Preparing and submitting emissions data to the EPA; and
4. Production losses associated with making unscheduled shutdowns to install necessary measurement equipment.

In its Regulatory Impact Analysis, EPA provides expected costs to covered entities of monitoring GHG emissions for two broad cost categories – labor costs, and capital, operating, and maintenance costs – and only addresses the first three activities listed above. After surveying reports and articles and receiving direct quotes from vendors, the Associations believe that EPA's cost estimates for these activities are significantly less than what actual costs would be based on market data. For example, we believe EPA is significantly understating the cost associated with non-hardware related capital expenditures, including critical information technology functions necessary for data collection and reporting efforts. We urge EPA to gather cost estimates from a range of continuous emissions monitoring systems ("CEMS") vendors to more rigorously evaluate potential equipment and labor costs.

EPA is non-transparent in its cost analysis because it fails to offer a clear view of the data and sources underlying the analysis of the data. For example, the methodology given for non-EGU (industrial) sources states, "the primary sources of data on individual units were EPA analyses on certain industrial sectors, and a characterization of the U.S. boiler population" (Regulatory Impact Analysis p.4-21). EPA provides no documentation to clarify how this review was conducted, thereby preventing replication of the analysis and calling into question its accuracy. EPA has an obligation to reveal the bases for its cost analysis.

In addition, the Associations recommend that EPA acknowledge and account for the costs associated with suspending operations in order to upgrade equipment and implement processes for monitoring GHG emissions. These costs could potentially be much larger than the labor and capital costs estimated by EPA in the rule and, as such, must be taken into account in EPA's rulemaking. For those entities that will be forced to upgrade existing CEMS, delays could be significant depending on the nature of the production processes to be monitored.

The Associations further recommend that EPA consider permitting covered entities a flexible installation period to allow upgrading activities to take place during normally scheduled production outages. The length of this "upgrade window" would vary by sector and reduce overall compliance costs. Prior to the end of this transitional period, entities in each sector would be allowed to report emissions using methods they deem appropriate. The cost of a marginal drop in emissions data quality from self-reporting would be minor relative to the costs of abrupt process suspensions to meet a pre-determined program implementation schedule.

At an aggregate level, the Associations believe the cost estimate for complying with the policy is overly-simplistic. In the Regulatory Impact Analysis, EPA contends that its

recommended option for monitoring – referred to as the “hybrid” approach – requires that entities that previously installed CEMS to comply with existing regulations, such as ARP or NBP, upgrade those systems to include GHG monitoring capabilities. Those entities that did not previously have CEMS installed can calculate GHG emissions using “default parameters,” or indirect calculations based upon high heat values, CO₂ emission factors, fuel consumption, etc. The estimated cost for complying with the “hybrid” approach is \$168.4 million in the first year and \$134.0 million in subsequent years in 2006 dollars. In order to estimate these costs, EPA applies a simple ratio of Tier 4, Tier 2, and Tier 1 costs to the estimated cost of the recommended “hybrid” method. Applying simple ratios to estimate cost changes across a multitude of sectors and production process is highly questionable. Rather, EPA should conduct a more robust cost analysis of these alternative reporting methods.

Accurate estimates of compliance costs for different reporting requirements will also be an important input into choice of a regulatory approach in any mandatory GHG regulatory system that EPA may subsequently adopt. For example, if an upstream system based on accounting records for fuel purchases has significantly lower compliance costs than a downstream system based on CEMS, that fact needs to be taken into account in the regulatory rulemaking process.

V. EPA’s analysis of its proposed reporting threshold lacks the proper statistical rigor.

At the outset, the Associations want to be clear that they support EPA’s decision to establish a threshold no less than 25,000 metric tons of CO₂-equivalent (MtCO₂e). At the same time, they believe that EPA’s analysis of other threshold options lacks the proper statistical rigor required for such a far-reaching rule. Similarly, while the proposed rule would allow a facility with an aggregate maximum rated heat input capacity of less than 30 million British thermal units (mmBtu) per hour to presume it has emissions below the 25,000 MtCO₂e threshold, the 30 mmBtu figure is not supported by a statistically sound analysis. When proposing a policy that would induce significant costs on industry, proper statistical analysis is necessary to establish the coverage of varying threshold levels through empirical analysis and to estimate the marginal costs and benefits of moving to more demanding thresholds. EPA’s analysis only examines four threshold levels, which is insufficient to generate a robust statistical analysis examining the number of facilities and the percentage of emissions covered.

A. EPA failed to give sufficient consideration to thresholds above 25,000 MtCO₂e.

In terms of the statistical impacts, EPA attempts to justify the selected threshold by comparing the number of facilities covered under its proposed 25,000 MtCO₂e threshold to 1,000, 10,000, and 100,000 MtCO₂e thresholds, yet EPA does not explain

adequately why these comparison thresholds were chosen. From our examination, it appears that they may have been selected for aesthetic roundness and potential consistency with some other existing state and regional programs instead of any statistical reasoning.

The Associations believe that EPA must consider thresholds between 25,000 and 100,000 MtCO₂e, as well as thresholds above 100,000 MtCO₂e. The statistical symmetry of EPA's current threshold comparison is inconsistent in two ways. First, EPA compares its proposed 25,000 MtCO₂e threshold to two lower thresholds but only one higher threshold. Second, the 100,000 MtCO₂e threshold is four times greater than the 25,000 MtCO₂e threshold and is 10 times greater than the next lowest threshold (10,000 MtCO₂e) examined. EPA does not provide satisfactory statistical reasoning for the jumps in the thresholds it examined.

EPA acknowledges that the accuracy of its estimates of the number of facilities covered under different emission thresholds varies widely by source category, particularly in those sectors where limited data availability precludes a rigorous analysis. For example, in its analysis of the effect of various thresholds on Unspecified Stationary Combustion Sources, EPA states "Due to the methodology employed, EPA considers the results . . . to be a coarse estimate of the relative effect of threshold options" (Threshold TSD at p.25). The uncertainty in this analysis is important because although these sources accounted for just six percent of U.S. GHG emissions in 2006, the number of covered entities is among the most sensitive to threshold choice.

Given EPA's lack of statistical rigor, the Associations believe it would be prudent for EPA to consider a greater number of thresholds in its analysis along with a cost-benefit analysis for each additional threshold. We recommend that EPA evaluate multiple thresholds between 25,000 MtCO₂e and 100,000 MtCO₂e and perhaps one above 100,000 MtCO₂e as well. Our recommendation is supported by EPA's own data. As shown in Table B, moving from a 25,000 MtCO₂e threshold to 100,000 MtCO₂e threshold for Unspecified Industrial Stationary Combustion reduces the number of covered facilities by 66 percent (2,000 entities), while covered emissions fall by just 23 percent. Evaluating additional thresholds is reaffirmed by EPA's own statement that "as you move from lower to higher emissions thresholds the number of reporters falls far faster than the emissions coverage." (Threshold TSD at p. 26.) Including additional thresholds would offer a better view of the range of potential outcomes from choice of threshold and clarify the point that EPA does not know precisely how many entities would be covered under each option.

Table B: Emissions from Unspecified Industrial Stationary Combustion at Varying Threshold Levels

Threshold Level mtCO ₂ e/yr	Total National Emissions Million mtCO ₂ e	Total Number of Facilities	Emissions Covered		Facilities Covered	
			Million mtCO ₂ e/ yr	Percent	Number	Percent
1,000	410	350,000	250	61%	32,000	9.1%
10,000	410	350,000	230	56%	8,000	2.3%
25,000	410	350,000	220	54%	3,000	0.9%
100,000	410	350,000	170	41%	1,000	0.3%

B. The Proposed Rule lacks clearly stated summary level data on emissions coverage by threshold.

In addition to the facility coverage, EPA provides estimates in Section IV.C of the preamble of the percent of total emissions covered under the 1,000, 10,000, and 25,000 MtCO₂e thresholds. For the 100,000 MtCO₂e threshold, EPA does not provide an estimate of the percent of total emissions covered. While one may be able to calculate the coverage using sector-specific data supplied in the Threshold TSD, EPA should provide emissions coverage estimates for the 100,000 MtCO₂e threshold as it does for the other thresholds.

C. EPA's fragmentation argument is inconsistent.

EPA contends that the 100,000 MtCO₂e threshold "fragments" several large industry sectors and that the 25,000 MtCO₂e threshold avoids this fragmentation. EPA lists ammonia manufacturing, nitric acid production, lime manufacturing, and pulp and paper as examples of these key industries. However, for nitric acid and lime manufacturing, 100% facility coverage is not achievable even at the 25,000 MtCO₂e threshold as shown in Table C, which contradicts EPA's contention. Also, EPA's own data show that other industries with significant GHG emissions are fragmented even at thresholds at or below its recommend 25,000 MtCO₂e threshold (see Table C). This rebuts EPA's argument that the 25,000 MtCO₂e threshold is preferred due to avoiding "fragmentation" of industries emitting significant amounts of GHGs.

Table C: Example Industry Fragmentation at Thresholds Other than 25,000 MtCO₂e

Industry	Total Emissions (MtCO ₂ e)	Total Facilities	Number of Facilities Required to Comply at Examined Thresholds (MtCO ₂ e)			
			1,000	10,000	25,000	100,000
Aluminum Production	6,402,000	14	14	13	13	13
Iron and Steel	85,150,877	130	130	128	121	111
Lime Manufacturing	25,421,043	89	89	86	85	52
Mg Production	3,200,000	13	13	11	11	9
Nitric Acid Production	17,731,650	45	45	44	43	40
Petrochemical Production	54,830,000	88	88	87	87	84
Petroleum Refining	204,750,000	150	150	149	146	128

For EPA to improve upon its threshold analysis, we recommend the following:

- Consider additional threshold levels between 25,000 and 100,000 MtCO₂e, and possibly higher than 100,000 MtCO₂e as part of a more thorough statistical analysis.
- Select thresholds based on statistical reasoning as opposed to simply aesthetic roundness and/or consistency with other existing state and regional programs, especially as EPA's reporting rule may preempt state and regional reporting requirements.
- Discuss the incremental change in burden and coverage when moving from one level to the next.
- Explain why engineering best estimates cannot be used if a threshold "fragments" a particular industry.
- Explain why EPA shows total emissions by industry and by facility/facilities in its proposed rule, yet wants to burden entities to collect the same data.⁵

⁵ For blocks of facilities within an industry, one can use the data in the Threshold Analysis tables by industry to back-calculate facility-level emissions by taking the difference in emissions coverage between thresholds and dividing it by the difference in facilities covered between thresholds.

VI. EPA should clearly state that finalizing a reporting rule would not make GHGs “subject to regulation” under the Clean Air Act.

In its preamble, EPA states that “[a]t this time, a regulation requiring the reporting of GHG emissions and emissions-related data under CAA sections 114 and 208 does not trigger the need for EPA to develop or revise regulations under any other section of the CAA, including the [Prevention of Significant Deterioration (“PSD”)] program.” See 74 Fed. Reg. at 16456. In the final rule, we urge EPA to explicitly state in the rule itself that the rule’s requirements do not make GHGs “subject to regulation” under the CAA and thus do not trigger any permitting requirements for GHGs under the PSD program.

A final rule that requires the monitoring and reporting of GHG emissions would not make GHGs “subject to regulation” under the CAA because the rule’s requirements do not involve actual emission controls. As set forth in EPA’s recent “definitive interpretation” of its PSD regulations, CO₂ is not currently regulated under the CAA despite the existence of CO₂ monitoring and reporting provisions under Section 821 since 1993. See Stephen L. Johnson, Administrator, U.S. EPA, EPA’s Interpretation of Regulations That Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program (Dec. 18, 2008), at 1, published at 73 Fed. Reg. 80,300 (Dec. 31, 2008) (hereinafter “Johnson Memorandum”). In the Johnson Memorandum, EPA correctly interpreted the term “regulated NSR pollutant” in 40 C.F.R. § 52.21(b)(5) to cover “only those pollutants subject to a statutory or regulatory provision that requires actual control of emissions of that pollutant.” Johnson Memorandum at 6.⁶

The plain meaning of the term “subject to regulation” also supports this conclusion. See *id.* at 7-8. “Regulation” is commonly defined as “the act or process of controlling by rule or restriction.” See Black’s Law Dictionary (8th ed.). Moreover, even if the dictionary definition alone did not require a single interpretation of the phrase “subject to regulation,” the context of the phrase supports a conclusion that pollutants “subject to regulation” are only pollutants that are subject to “the act or process of controlling by rule or restriction” and do not include all pollutants subject to any rule or order issued by an administrative agency. See Johnson Memorandum at 8 (explaining that different language, such as “subject to a regulation” or “subject to regulations” might be more consistent with the secondary meaning of regulation as a “rule”). Principles of statutory construction also make this a reasonable conclusion. See *id.* at 8-9.

The conclusion that monitoring and reporting requirements do not make a pollutant “subject to regulation” is also consistent with EPA’s past practice and statements,

⁶ EPA has agreed to reconsider the Johnson Memorandum through a notice-and-comment process, but has expressly declined to stay its effectiveness. See Letter from Lisa P. Jackson, Administrator, EPA (Feb. 17, 2009).

including the agency's most recent announcements. See *id.* at 10-13 (explaining that as a matter of practice, EPA has not issued PSD permits containing emissions limitations for pollutants that are only subject to monitoring and reporting requirements); see also EPA, ANPR for Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,497 (July 30, 2008) ("Since there is no NAAQS for GHGs and GHGs are not otherwise subject to regulation under the CAA, the PSD program is not currently applicable to GHGs."); Proposed Rule, Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the CAA, 74 Fed. Reg. 18,886, 18,905 n.29 (proposed Apr. 24, 2009) ("At this time, a final positive endangerment finding would not make the air pollutant found to cause or contribute to air pollution that endangers a regulated pollutant under the CAA's Prevention of Significant Deterioration (PSD) program.").

In 1998, years after EPA had promulgated regulations requiring the monitoring and reporting of CO₂ emissions, EPA's General Counsel stated that "[w]hile CO₂ emissions are within the scope of EPA's authority to regulate, the Administrator has made no determination to date to exercise that authority under the specific criteria provided under any provision of the Act." Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (April 10, 1998). This interpretation is also consistent with the Agency's initial statements regarding the meaning of the phrase "subject to regulation" in 1978. See Johnson Memorandum at 12; 43 Fed. Reg. 26,388, 26397 (June 19, 1978) (interpreting "subject to regulation under the Act" to mean "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations . . . includ[ing] all criteria pollutants subject to NAAQS review, pollutants regulated under [NSPS], pollutants regulated under the [NESHAP] and all pollutants regulated under Title II of the Act regarding emission standards for mobile sources.").

EPA has emphasized that the primary purpose behind the proposed rule is informational – to collect data that will help inform future regulatory action. Nothing in the preamble even remotely suggests that any provision in the rule is intended to impose actual control on any pollutant. In fact, the preamble states that "[t]he proposed rule **does not require control of greenhouse gases**, rather it requires only that sources above certain threshold levels monitor and report emissions." 74 Fed. Reg. at 16448 (emphasis added). To suggest that any pollutant might somehow be "subject to regulation" as a result of the proposed rule's requirements would put the horse before the cart by triggering PSD emission controls as a result of an information-gathering rulemaking that is proposed to inform the agency's potential future development of such controls. *E.g.* 74 Fed. Reg. at 16454 (identifying EPA's proposed potential uses for the requested data). As EPA has previously stated, adopting a definition of "subject to regulation" that includes any pollutant covered by any regulatory provision "would lead to the perverse result of requiring emissions limitations under the PSD program while the Agency is still gathering the information necessary to conduct research or evaluate

whether to establish controls on the pollutant under other parts of the Act.” Johnson Memorandum at 9.

For these reasons, the agency should include an unequivocal statement that the final rule does not make GHGs “subject to regulation” under the CAA.

VII. Given the possibility of near-term Federal climate change legislation, EPA’s final rule should include a sunset provision.

Congress is actively considering proposed legislation on climate change, including the recently released H.R. 2454, American Clean Energy and Security Act, introduced by Representatives Waxman and Markey (“Waxman/Markey bill”). The Waxman/Markey bill would establish an economy-wide cap-and-trade mechanism for reducing GHG emissions in the United States and would require, in part, the establishment of a Federal GHG registry based on certain statutory criteria. To avoid superfluous and conflicting requirements with any reporting program required by future legislation (such as the Waxman/Markey bill, should it be enacted), the Associations recommend that EPA include a sunset provision in the final rule that would end obligations under the program at the time that provisions in the legislation take effect which supplant the EPA monitoring and reporting program.

Respectfully submitted,

American Chemistry Council
American Coke and Coal Chemicals Institute
American Iron and Steel Institute
American Petroleum Institute
Corn Refiners Association
CropLife America
National Association of Manufacturers
National Oilseed Processors Association
National Petrochemical and Refiners Association
Rubber Manufacturers Association

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Addendum – Description of Associations Joining In Comments

American Chemistry Council is a nonprofit trade association whose member companies represent the majority of the productive capacity of basic industrial chemicals within the United States. The business of chemistry is a \$664 billion enterprise and a key element of the nation's economy.

American Coke and Coal Chemicals Institute is a trade association representing approximately 80% of the U.S. production of metallurgical coke, by both merchant coke producers and integrated steel companies with coke production capacity, and 100% of the U.S. manufacture of coal chemicals produced from coke byproducts.

American Iron and Steel Institute represents approximately 28 member iron and steel companies, and 138 associate and affiliate members who are suppliers to or customers of the steel industry. These members operate and hold ownership interests in various steel manufacturing and related operations across the United States and its producer, associate and/or affiliate members supply various customers and projects in the United States.

American Petroleum Institute is a national trade association that represents all aspects of America's oil and natural gas industry. API has approximately 400 members, from the largest major oil company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry.

Corn Refiners Association is the national trade association representing the corn refining (wet milling) industry of the United States. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil, and feed products from corn components such as starch, oil, protein, and fiber.

CropLife America represents the major manufacturers, formulators and distributors of crop protection and pest control products in the United States.

National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

National Oilseed Processors Association is a national trade association comprised of 16 companies engaged in the production of vegetable meals and oils from oilseeds including soybeans. NOPA's 16 member companies process more than 1.4 billion bushels of oilseeds annually at 66 plants located throughout the country, including 61 plants which process soybeans.

National Petrochemical and Refiners Association is a national trade association whose members comprise more than 450 companies, including virtually all United States refiners and petrochemical manufacturers. NPRA's members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

Rubber Manufacturers Association is the national trade association for the rubber products industry. RMA has more than 80 members, including all of the country's major tire manufacturers, as well as manufacturers of such rubber products as belts, hoses, gaskets, seals, anti-vibration components, and other automotive and industrial rubber goods.