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Submitted electronically to newrules@baaqmd.gov

**Comments of the American Fuel & Petrochemical Manufacturers on Proposed Rule:
Regulation 2, Rule 1 (Permits – General Requirements), Regulation 2, Rule 2 (Permits
– New Source Review) and Regulation 2, Rule 6 (Permits – Major Facility Review)
Affecting the Submission and Utilization of Crude Slate and Feedstock Information**

Dear Mr. Stone:

The American Fuel & Petrochemical Manufacturers (“AFPM”) appreciates the opportunity to submit comments on the Bay Area Air Quality Management District (“BAAQMD” or “Air District”) proposed revisions to Regulation 2, Rule 1 respecting permitting requirements that would require a refinery to obtain a permit for any “significant change” in a crude slate or feedstock historically used by the refinery and Regulation 2, Rules 2 and 6 affecting the permitting thresholds for greenhouse gases (“GHG”).

AFPM is a national trade association representing nearly 400 companies. Our members serve the American people responsibly and effectively by manufacturing virtually all U.S. fuel and petrochemicals, strengthening economic and national security, and providing jobs directly and indirectly for millions. Millions of Californians use products produced by AFPM members every day. Within the San Francisco Bay Area, AFPM’s membership includes five refiners that would be affected by the proposed rule changes.

AFPM members have made large investments to improve air quality in the United States; for example, the refining industry spent nearly \$50 billion to reduce sulfur from gasoline and diesel fuel to comply with “Tier 2” and Ultra Low Sulfur Diesel standards. These actions, in combination with new vehicle emission technologies, have resulted in substantial reductions in particulate matter (“PM”) and ozone precursors. AFPM members have also made substantial investments to comply with the new Tier 3 fuel standards that took effect this year. These standards are designed to reduce non-methane organic and nitrogen oxides emissions from automobiles by an additional 80 percent.

Nationally, total emissions of the six principal air pollutants regulated under the Clean Air Act have been reduced by 62 percent since 1980 despite vehicle miles traveled increasing by 95 percent over the same period.¹ Reduced emissions from fuels and motor vehicles have strongly

¹ EPA Air Trends report. Accessed at: <http://www.epa.gov/airtrends/aqtrends.html#comparison>.

contributed to the Bay Area’s attainment of national ambient air quality standards (“NAAQS”) for both fine PM and sulfur dioxide. While the area is still in marginal nonattainment for the 2008 ozone standard, measured air quality has improved from 80 parts per billion (“ppb”) in 2008-2010 to 73 ppb in the most recent reported period. Multiple monitors located in the Bay Area show ozone levels that are far below the level of either the federal or California ozone NAAQS.²

As detailed below, AFPM has serious concerns with BAAQMD’s proposed rule. The proposed revisions are unnecessary for the Air District to enforce its existing permitting regulations or to avoid what must be considered to be highly theoretical impacts on local air quality. Thus, we respectively request that BAAQMD withdraw the proposed revisions.

The Air District’s proposed rule fails to take affirmative steps to guard against the release of trade secret or confidential information that would be required to be submitted pursuant to Regulation 2, Rule 1 and Regulation 12, Rule 15. Release of information on crude slates and other feedstocks for an individual refinery would not only be highly damaging to the facility involved, but also could raise serious issues concerning competitive relationships within the refining industry.

Finally, the BAAQMD should not finalize a decrease in the threshold level of GHG emissions used in permitting (from 75,000 tons per year carbon dioxide equivalent (“tpy CO₂e”) to 25,000 tpy CO₂e, and should not apply this level to trigger permitting absent a 100/250 tpy increase in other regulated air pollutants. Similar to BAAQMD’s proposed revisions to permitting requirements regarding changed crude slates and feedstocks, BAAQMD has not demonstrated that these revisions are “necessary” or conducted an adequate analysis of their socioeconomic impacts as required under applicable California law.

I. The Proposal Lacks a Sufficient Legal, Policy and Technical Basis

A. BAAQMD Has Failed to Make Necessary Findings and Determinations

In justifying its proposed rule to subject crude slate changes to additional and specialized review under the California new source review (“NSR”) program, the BAAQMD states that “[c]oncerns have been raised that refineries may be making changes associated with moving to new crude slates that are subject to NSR permitting requirements, but without obtaining NSR permits or complying with the substantive requirements of the NSR program.”³ BAAQMD indicates its proposed changes are “intended to help ensure that refineries comply with all applicable permitting requirements when they change the type of crude oil they process – what is known as the refinery’s ‘crude slate.’”⁴

² In terms of localized impacts, there were *no* violations of the federal or California ozone NAAQS at Coast and Central Bay monitors for the most recent 3-year period available. Instead, ozone levels in this area ranged from 49 to 55 ppb as measured over a 3-year period; such measurements are far below the level of the federal or California standard. *Id.*

³ Workshop Report for Proposed Revisions to: Regulation 2, Rule 1 (Permits – General Requirements), Regulation 2, Rule 2 (Permits – New Source Review) and Regulation 2, Rule 6 (Permits – Major Facility Review) (“Workshop Report”), May 2017 at 10.

⁴ *Id.* at 1.

On a fundamental level, BAAQMD has failed to articulate a reasoned basis for its proposed actions and should therefore withdraw the proposed rule from consideration. First, BAAQMD lacks any detailed information, including technical support, for determinations that are required under California law to support this rulemaking. The proposed rule is based solely on unsupported assumptions regarding how up to five different characteristics of crude oil or petroleum feedstocks could affect emissions at refineries (which may, indeed, be designed for their use). No supporting data or projection of air quality benefits is contained in the Workshop Report for proposed revisions to Regulation 2, Rule 1. BAAQMD has previously received information directly challenging this underlying assumption, pointing out, “before any given batch of crude oil received at a refinery is processed, it is typically blended with other batches of crude with different properties, so that the crude blend meets all refinery specifications for properties such as vapor pressure, acidity, and other characteristics . . .”⁵

The California Health and Safety Code requires a determination of necessity as a precondition to the ability to regulate. “Prior to adopting any rule or regulation to reduce criteria pollutants, a district shall determine that there is a problem that the proposed rule or regulation will alleviate and that the rule or regulation will promote the attainment or maintenance of state or federal ambient air quality standards” (Cal Health & Saf. Code §40001(c)). But BAAQMD has abjectly failed to determine there is a problem that requires additional regulatory action. The most BAAQMD offers in the context of its Workshop Report is that a “concern has arisen” that refineries “may” be violating existing NSR regulations when making changes to their crude slate or other feedstock. But not one specific instance of such an occurrence (or even suspected occurrence) regarding avoidance of NSR is cited and BAAQMD itself makes no affirmative statement that it has determined on the basis of any evidence that such a problem exists.

The lack of an adequately defined or substantiated problem, in and of itself, is a serious legal defect in the proposed rulemaking. But this defect is compounded by the lack of any evidence that imposing an additional layer of NSR review on refineries will result in any discernable impact on ambient air quality. Indeed, as noted above, there is contrary information that refineries take steps to ensure that their crude slate inputs meet refinery specifications prior to processing. But equally, if not more important, BAAQMD either has not accounted for or has thoroughly discounted the operation of numerous air pollution controls, operating procedures and other requirements designed to limit refinery emissions. There is no demonstration in the record that the existing, federal, state and local multilayered approach to controlling air pollution from refineries is somehow singularly defeated by a “significant change” in any one of the five parameters which triggers consideration of the change as an alteration.⁶

⁵ Comments of the Western States Petroleum Association on Proposed Rules: Regulation 12, Rules 15 and 15, November 23, 2105 at 9.

⁶ An alteration occurs when “the average value of any of the [five] attributes of the crude oil or other feedstock processed occurs [and] is more than three standard deviations from the mean of the average monthly values for [the baseline historical period of 2013 to 2016].” Proposed Rule 2-1-243. But BAAQMD offers only a statistical reason why this quantitative threshold was used in the proposed rule and does not cite any evidence that changes of such a magnitude in refinery inputs affect refinery emissions, to what degree such emissions are affected or how such emissions affect ambient air quality. BAAQMD makes no determination that a change in crude slate or feedstock will overwhelm or reduce the effectiveness of installed controls or whether changes in different regulated parameters will affect emissions positively or negatively.

In part due to the lack of basic information to support its assumptions regarding refinery emissions, BAAQMD lacks any ability to project costs or benefits that could be expected to occur if the proposed rule is finalized. Indeed, it does not attempt to do so and admits that where a source complies with existing regulations there are no benefits associated with the proposed rule⁷ even though such benefits would typically be calculated based on projections of reduced air emissions.

Finally, while unstated within the Workshop Report, it is clear that the BAAQMD is seeking to regulate changes in crude slate and feedstock inputs into refineries to accomplish broader goals than NSR enforcement; the rule would serve as a means of preventing or making it much more difficult for refineries to utilize certain crude slates and feedstocks, many of which are located outside of California or outside of the United States and may require more energy to produce and ship to Bay Area refineries. This purpose, indeed, reflects the broader intent of other BAAQMD rulemakings that are designed to collectively impact refinery operations.⁸ But in this rulemaking, BAAQMD relies on its general authority with regard to ambient air quality standards (Cal Health & Saf. Code §40001), general rulemaking authority (§40702) and authority to develop plans to address ozone, carbon monoxide, sulfur dioxide, and nitrogen dioxide (§40910) as support for its proposed revisions to Regulation 2, Rule 1.⁹ While BAAQMD may have other authority it has not explicitly cited for this proposed rule, the legal and policy objective that is cited (compliance with NSR) is not supported and the relationship between the cited authority (addressing ambient air quality) and controlling changes to crude slates and feedstocks is not established. Instead, in this rulemaking BAAQMD is attempting to utilize the NSR program for purposes far beyond its intended purpose and thus, in that respect, the Air District exceeds its available authority to promulgate permitting regulations to address ambient air quality issues.

B. BAAQMD Lacks a Sufficient Technical and Legal Basis for the Proposed Rule

Nothing within the Workshop Report for the proposed rule points to any evidence or technical support for the notion that changes to crude slate inputs result in NSR violations. Therefore, BAAQMD lacks supporting information to change the definition of “alter” within Regulation 2-1-233 to specifically target crude slate changes at petroleum refineries and the Air District has not established that such an action is otherwise necessary for enforcement purposes.

As cited above, BAAQMD merely states that an unidentified “concern has been raised” regarding the potential for modifications to occur “without applying for or obtaining an NSR permit.”¹⁰ But

⁷ Workshop Report at 38.

⁸ See Workshop Report for Proposed Air District Regulations 12, Rule 15: Petroleum Refining Emissions; Tracking and Regulation 12, Rule 16: Petroleum Refining Emissions Analysis, Thresholds and Mitigation, February 2015 at 10 (“Workshop Report Rule 15, 16”). In this regard, BAAQMD’s Regulation 12, Rule 16 is specifically designed to “discourage or prevent refineries in the Bay Area from making changes that would lead to increases in emissions of greenhouse gas pollutants.” Regulation 12, Rule 16: Petroleum Refining Greenhouse Gas Emissions Limits, Revised Final Staff Report, June 2017 at 10. BAAQMD indicates that it is taking this action “because neither top-down nor market-based approaches to climate protection have proven effective in sufficiently reducing climate pollutants.” *Id.* at 30. Among other failures, BAAQMD states that little or no progress has been made since the ratification of the 1997 Kyoto Protocol and that “the current President announced that the United States will withdraw from the Paris climate agreement.” *Id.* These statements of necessity evince an intent that extends far beyond emissions from individual refineries. See also BAAQMD’s Regulation 12, 15 Rule which is intended to address “the use of heavier and/or more sour crude slates.” Workshop Report Rule 15 at 15.

⁹ Workshop Report at 43.

¹⁰ Workshop Report at 1.

further information on this concern is absent in the Workshop Report. Moreover, even if this concern had validity, of which there is no evidence proffered, BAAQMD has already taken action elsewhere to promulgate regulations requiring additional tracking and reporting on refinery emission inventory and crude slate information.¹¹ Therefore, BAAQMD has provided no information that would support the conclusion that redefining “alter” to include changes in crude slates is justified. Instead, the proposed regulations appear to be based solely on a regulatory “concept” and as an extension of other rulemaking to limit the combustion emissions of refineries.¹²

The speculative and unsupported nature of this proposed rule is further exemplified by the fact that its requirements apply not solely to changes in crude slates, but also to “another type of feedstocks received from outside the refinery.”¹³ The proposed rule encompasses “partially refined intermediate feedstocks that refineries may purchase for further processing at other process units besides their crude units.”¹⁴ This means that the cited “concern” sought to be addressed in this rule necessarily encompasses refining activity that does not take place at a refinery subject to the proposed rule, but elsewhere. In this regard, BAAQMD does not offer any explanation as to why, if this is the case, the processing of partially refined feedstocks at other facilities creates a local air emission issue properly addressed through the BAAQMD NSR program. Indeed, if the concern regarding a change in crude slates is related to additional processing that may be needed to reduce sulfur levels or other crude parameters (allegedly resulting in additional emissions) any concerns would appear to be mitigated (if not potentially resolved) by initial processing of a crude slate outside of the area of the BAAQMD’s jurisdiction.

Outside of the administrative record, sufficient technical support for the proposed regulatory changes is also lacking. In the past, BAAQMD has only asserted that a “qualitative” relationship may exist between crude slates and refinery emissions.¹⁵ Indeed, BAAQMD acknowledged that there is an “uncertain relationship between crude slate changes and refinery emissions”¹⁶ and has cited contrary evidence that existing regulatory programs apart from NSR have resulted in significant emission reductions “even as the quality of crude oil inputs has been reduced.”¹⁷ Thus, in general, BAAQMD lacks sufficient support for a rulemaking which effectively presumes not only that crude slate changes result in increased emissions, but that such changes also result in NSR violations.

The proposed regulation is also contrary to previous statements by BAAQMD with regard to the proper focus of regulation. In connection with proposals to impose facility-wide emission limits

¹¹ Proposed Regulation 12, Rules 15, 16.

¹² Indeed, the “concept” for facility-wide emission limits based on refineries’ recent operations has been attributed by BAAQMD to local organizations such as the Communities for a Better Environment (“CBE”). Regulation 12, Rule 16: Petroleum Refining Facility-Wide Emission Limits, Staff Report, March 2017 at 1, 5. BAAQMD indicates that “Air District staff [developed] Rule 12-16 working with CBE to ensure the regulatory language meets the goals of the concept.” *Id.* at 5.

¹³ Proposed Regulation 2-1-243.

¹⁴ Workshop Report at 13. *See also* proposed regulatory changes in 2-1-243 defining “significant crude slate change” as including “another type of feedstock received from outside the refinery . . .”

¹⁵ Rule 12-15: Responses to Comments, April 18, 2016 at 20.

¹⁶ *Id.*

¹⁷ Workshop Report, Preliminary Draft Air District Regulation 12, Rule 15: Petroleum Refinery Emissions Tracking, BAAQMD, March 2013 at 3.

on refineries, BAAQMD staff indicated that “there is no support for imposing a specific regulatory approach on one sector of the regulated community without factual support for such selective treatment.”¹⁸ But this is precisely what is proposed here. The proposed rule imposes an affirmative requirement for refineries to seek BAAQMD approval for any change in their crude slate at variance with historical norms (beyond a defined range). No other sector is targeted for such “pre-approval” of what amounts to changes in raw inputs into a facility.

Nor has BAAQMD explained why previous assessments of legal vulnerability are not applicable here. In the report for Regulation 12, Rule 16 regarding the imposition of facility-wide emission caps on refineries, BAAQMD staff observed that “[t]he rule would address pollutants of primarily regional concern by limiting those pollutants from one Bay Area industrial sector through a mechanism unique to that industry and unlike the mechanisms for all other industrial sectors, which relies on standards for the equipment operated by the industry and measures compliance through scientifically-tested methods rather than inventory approximations. This would likely be viewed by a court as arbitrary and capricious.”¹⁹ This concern led to the elimination of caps on criteria pollutants in Regulation 12, Rule 16, while retaining caps on greenhouse gas emissions.²⁰

The same concerns and perspectives on legal defensibility hold true here with regard to the proposed rule to amend the BAAQMD NSR program. The proposed regulatory changes apply solely to petroleum refineries and, more particularly, to the type of crude oil and feedstock that refineries purchase for processing. And they are explicitly justified on the basis of the BAAQMD’s legal authority pertaining to ambient air pollutants, not GHGs. If anything, from a legal standpoint, the focus of the regulation (a refinery’s crude slate and feedstock inputs) is even further removed from the authority being implemented (BAAQMD’s permitting authority to address criteria air pollutants). BAAQMD cannot regulate on such an unsupported and attenuated causal chain; to do so would similarly be arbitrary and capricious.

This is especially true where, as here, emissions from petroleum refineries are already heavily regulated at the federal level and state level. BAAQMD fully acknowledged the existence of these extensive federal regulations as well as other regulations adopted by the Air District and the California Air Resources Board (“CARB”).²¹ Yet, even after acknowledging the multiple layers of regulation that serve to control and reduce refinery emissions – regulations that have yielded demonstrable reductions in local emissions from refineries – BAAQMD still seeks to impose additional regulations for the same purpose without sufficient rationale. This is again arbitrary and capricious.

It is significant that current federal NSR regulations already address crude slates and feedstocks by affirmatively providing that changes in either are not considered to be “a physical change or change in the method of operation . . . “[if] the source was capable of accommodating [use of an alternative fuel or raw material] before January 6, 1975, unless such change would be prohibited under any federal enforceable permit condition which was established after January 6, 1975

¹⁸ Regulation 12, Rule 16: Petroleum Refining Facility-Wide Emissions Limits, Staff Report, March 2017 at 37.

¹⁹ *Id.*

²⁰ *Id.* at 28.

²¹ *See, e.g.*, Proposed Air District Regulations 12, Rule 15 and 16, February 2015 at 9-10; Regulation 12, Rule 16: Petroleum Refining Greenhouse Gas Emissions Limits, Revised Final Staff Report, June 2017 at 14-17.

pursuant to [federal prevention of significant deterioration permitting regulations or approved state permitting programs]” or the source was approved to use such alternative fuel or raw material under such programs.²² Thus, BAAQMD cannot claim to be driven by any federal rule or policy to implement the NSR program. Instead, the Air District is acting at variance with federal NSR regulations and policy without any explanation as to why such rules and policy are deficient and why its proposed regulations are “necessary” based on a thorough analysis of socioeconomic impacts.²³ Again, the only explanation offered for making such revisions is that undefined “concerns” have been raised; such concerns lack any empirical proof or support in the administrative record.

C. BAAQMD Cannot Project Either Costs or Benefits from the Proposed Rule

BAAQMD effectively admits the lack of support for its proposed regulatory changes by virtue of the fact that the district cannot predict either the costs or benefits for this new regulation. BAAQMD merely asserts that benefits might exist if sources subject to NSR do not comply with current regulations.²⁴ Similarly, BAAQMD projects that any costs that would be incurred would not be caused by compliance with the proposed rule, but rather through compliance with existing NSR regulations. This conclusion is erroneous as there most certainly are costs associated with obtaining the permit and the need to respond to any inquiries that arise from the public permitting process. BAAQMD projects a “significant” impact in such cases²⁵ where the district would be “forcing [refineries] to comply.”²⁶

At best, BAAQMD’s evaluation of emission reductions and compliance costs employs circular logic that is unsupported in the record. Under the theory of the proposed change, if the district amends the definition of “alter,” then: (1) additional reviews will inevitably take place; (2) these reviews could uncover previously unknown or unreported issues; (3) these issues will be of such size and character as to result in benefits; and (4) all this will occur due to the fact that the reviews were required in the first place. But this result is entirely based on the faulty premise that there are emissions associated with crude slate or feedstock changes not addressed by a refinery’s operations and pollution control equipment and that this will be revealed only through the permit process for alterations and not through current regulations which provide a comprehensive regulatory scheme to address federal and state NSR requirements. BAAQMD’s analysis is therefore fatally flawed since it does not concentrate on or define benefits that would flow directly from the imposition of the regulatory change. If it did, BAAQMD would need to admit that it has no basis to project any benefits from the rule; no information in the record suggests that refineries have changed crude slates and triggered NSR on account of this action.

Conversely, BAAQMD ignores the fact that costs will be attributable to the rulemaking based on the cost of complying with new regulatory definition contained in Regulations 2-1-233 and 2-1-243. Specifically, if a crude slate change (or another change in the type of feedstock) qualifies as

²² 40 C.F.R. §52.21(b)(2)(iii)(e).

²³ See Cal Health & Saf. Code §§40727(b), 40728.5(b).

²⁴ “The situations where the proposed revisions would have an impact would be any situation where a crude slate change would require an NSR permit, but the refinery makes the change without applying for or obtaining the required permit.” *Id.* at 38.

²⁵ *Id.*

²⁶ *Id.* at 39.

a “significant” change under proposed Regulation 2-1-243, the Air Pollution Control Officer (“APCO”) “may impose permit conditions on the authority to construct or permit to operate in order to ensure that the change . . . will not result in a modification.” In other words, costs will be imposed on refineries no matter whether or not any emissions can be projected to increase.²⁷

But BAAQMD does not assign any costs to this approval process even though the district clearly contemplates that the regulation would “require a refinery to obtain a permit for any significant change in crude slate, whether the refinery believes that it is a ‘modification’ subject to NSR or not.”²⁸ Even though refineries would be forced “to submit a permit application providing the details of any such change in crude slate,”²⁹ to participate in any process that the District might employ as it reviews the change, and, in the end, to “secure written authorization from the APCO in the form of any authority to construct”³⁰ BAAQMD does not analyze or project any costs resulting from this process. It asserts only that there might be “manageable” additional resource burdens applied to Air District staff through the need to review such permit applications.³¹

Therefore, the BAAQMD analysis of compliance costs is separately flawed on this basis. Among other requirements, when proposing the adoption or amendment of a rule, BAAQMD is required to perform an assessment of the socioeconomic impacts of adopting the regulatory changes and to “make a good faith effort to minimize adverse socioeconomic impacts” which include the impact on “industries or business . . . affected by the rule or regulation,” the impact on employment and the economy of a region, “the range of probable costs” and “the availability and cost-effectiveness of alternatives to the rule or regulation being proposed or amended.”³² Not only has BAAQMD failed to define costs associated with the compliance activities it has itself defined, it has not identified any alternatives to the rule being proposed.

II. BAAQMD Must Protect Confidential Information

Regulation 12-15-408, adopted by the BAAQMD on April 20, 2016, requires that monthly crude slate reports be made available to the APCO upon request. These reports require summarized information regarding processed volume, API gravity, sulfur content, vapor pressure, benzene, toluene, ethylbenzene and xylene (“BTEX”) and identified metals with regard to barrels, degrees, weight percent volumes, pounds per square inch, volume percent and content as applicable.³³ This information represents highly sensitive data regarding the operation of a refinery and can be used to analyze its production and project operating characteristics and economic performance. Therefore, this data and related information that may be required to be submitted and/or utilized with regard to proposed Regulation 2, Rule 1 must be protected from disclosure.

²⁷ It is also possible that this result could obtain even if a change in crude slate or other covered inputs would result in reduced emissions. The regulatory requirement is triggered if any of five different variables (API gravity, sulfur content, vapor pressure, benzene, toluene, ethylbenzene and xylene (“BTEX”), or iron, nickel and vanadium content) is more than three standard deviations from the mean of the average monthly values established in a historical 2013-2016 baseline.

²⁸ Workshop Report at 2.

²⁹ *Id.* at 11.

³⁰ Regulation 2-1-301.

³¹ Workshop Report at 39.

³² Cal Health & Saf. Code §40728.5.

³³ 12-14-408, Table 1.

BAAQMD staff state that under California law, specifically Section 6254.7 of the California Government Code, “trade secrets” are not public records but that air pollutant emission data and air monitoring data may not be considered to be “trade secrets.”³⁴ Pursuant to Regulation 12-15-407, however, a petroleum refinery or support facility may designate as “confidential any information claimed to be exempt from public disclosure under the California Public Records Act.” BAAQMD should ensure that its internal protocols for handling such information and issuing any associated reports provide adequate protection as against any unintentional release.

BAAQMD must guard against the public release of competitively sensitive information as well as to protect the legitimate financial and commercial interests of companies submitting such information. Moreover, the rationale that BAAQMD provides for the proposed rule (i.e., to determine whether there are associations between crude slates/feedstocks and emissions) does not depend on releasing specific information regarding individual refineries or broader competitive information to the public.

The Federal Trade Commission (“FTC”) has recommended that the U.S. Environmental Protection Agency (“EPA”) treat data that is an input into emissions equations as confidential.³⁵ In submitting detailed recommendations to proposed GHG reporting requirements, the FTC identified three categories of information that it considered should be treated as confidential business information: (1) inputs into emission equations; (2) unit/process “static” characteristics and unit/process operating characteristics that are not inputs into emission equations; and (3) unit/process “static” characteristics and unit/process operating characteristics that are inputs into emission equations.³⁶ With regard to the first category, the FTC recommended that such items as the “volume of fuel combusted each year; production/throughput and raw material consumption, such as petrochemical production; characteristics of raw materials, products, and by-products; and facility operating information”³⁷ not be shared since it could injure consumers by harming market competition and may be likely to lead to anticompetitive behavior.³⁸ A copy of the full FTC comments is Attachment 1 of these comments.

If BAAQMD decides to release any information gathered through Regulations 2, Rule 1 or Regulation 12, Rule 15 concerning crude slates or feedstocks, then BAAQMD must adopt generally accepted protective mechanisms for its dissemination. For example, in other contexts, the Department of Justice and the FTC) have recommended actions as aggregation, masking or lagging of data before it is released to the public.³⁹ All such methods would appear available with respect to either crude slate or feedstock information.

III. BAAQMD Should Not Lower the BACT Threshold for GHGs

BAAQMD is proposing two major changes with regard to the permitting of sources that emit GHGs. First, the Air District proposed to lower its permitting threshold from 75,000 tpy CO₂e to

³⁴ Workshop Report Proposed Air District Regulations 12, Rule 15, Staff Report, February 2015 at 16.

³⁵ 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, Comments of the Federal Trade Commission, EPA-HQ-OAR-2009-0924, September 30, 2010 at 2.

³⁶ *Id.* at 6.

³⁷ *Id.*

³⁸ *Id.* at 8.

³⁹ DOJ and FTC Statement of Enforcement Policy in Health Care (2007).

25,000 tpy CO₂e. Second, the Air District proposes to implement this permitting threshold with respect to all sources, whether or not they meet the definition of a “major” source for purposes of Clean Air Act permitting.⁴⁰

Similar to BAAQMD’s proposed changes to permitting regulations affecting crude slates and feedstocks, the necessity of this proposed change has not been adequately described, much less determined by BAAQMD in accordance with California law. In justifying the proposed revisions, BAAQMD states only that “it has become apparent that a lower threshold [than the 75,000 tpy CO₂e threshold used in federal permitting regulations] may be appropriate for GHG permitting in the Bay Area.”⁴¹ But BAAQMD does not describe in any manner why it is appropriate to lower the permitting threshold based on projected impacts on public health or the environment from making such a change. BAAQMD therefore has not complied with requirements that it establish the “necessity” or the rulemaking, i.e., that “a need exists for the regulation, or for its amendment or repeal, as demonstrated by the record of the rulemaking authority.”⁴²

Instead, BAAQMD’s conclusion in this matter is supported solely by a retrospective analysis which indicates only what number of facilities would have needed to undergo GHG permitting if a lower threshold had applied.⁴³ Pursuant to this analysis, BAAQMD considers it reasonable to lower the permitting threshold so that 90 percent versus 80 percent of historic sources would have triggered GHG permitting (35 versus 18 facilities). But BAAQMD cannot on this basis: (1) define any reduction in GHGs that would have occurred under such a lower permitting threshold; or (2) project any reduction in GHGs that will occur under this lower threshold based on the total differential of 2,908,336 tpy CO₂e represented by the different permitting thresholds. Thus, on this basis alone, BAAQMD’s analysis is insufficient to establish the need for the regulation.

BAAQMD also makes the determination that it is “necessary” to address such emissions in the face of EPA analysis that a substantially similar permitting threshold of 30,000 tpy CO₂e is too stringent for NSR permitting. Specifically, EPA has stated that “the burdens of regulation at a GHG [Significant Emissions Reduction] level between 30,000 and 75,000 tpy CO₂e would yield a gain of trivial or no value from both a programmatic and individual project-level perspective.”⁴⁴ Moreover, EPA’s statements were made after the Agency conducted an analysis of previous permitting actions and the availability of control technology for different types of sources, something which BAAQMD has not done with respect to this proposed rule. In this regard, within this rulemaking, BAAQMD concedes that any impacts of the lower threshold are “difficult to predict with certainty” and that other GHG reductions would be “modest at first.”⁴⁵ But BAAQMD offers no supporting data or analysis for its conclusions. Instead, as described above, the supporting analysis represents merely an historical review of the number of facilities potentially affected without any context as to why addressing 38 versus 18 facilities would yield any benefits or what controls may or may not have been appropriate for such sources. For this

⁴⁰ See proposed regulatory text at 2-6-212, 2-2-214, 2-2-304.2; Workshop Report at 19.

⁴¹ Workshop Report at 16.

⁴² Cal Health & Saf. Code §40727(b)(1).

⁴³ *Id.* Table 1 at 17.

⁴⁴ Revisions to the Prevention of Significant Deterioration (PSD) and Title V Greenhouse GAS (GHG) Permitting Regulations and Establishment of a Significant Emissions Rate (SER) for GHG Emissions under the PSD Program; Proposed Rule, 81 Fed. Reg. 68,110, 68,137 (Oct. 3, 2016).

⁴⁵ Workshop Report at 39.

reason, BAAQMD cannot establish that it is not duplicating existing federal requirements and that it is “proper” to execute the powers granted to the Air District in this fashion.⁴⁶

BAAQMD proposed revisions are additionally deficient based on the lack of a sufficient assessment of the socioeconomic impacts of the proposed amendments. As noted above, both costs and benefits are purely speculative and unsupported in the record of the proposed rule. By offering only qualitative assessments prefaced in generalities, BAAQMD has not satisfied its affirmative duty to perform an assessment of socioeconomic impacts and to “make a good faith effort to minimize adverse socioeconomic impacts” including “the availability and cost-effectiveness of alternatives to the rule or regulation being proposed or amended.”⁴⁷ Indeed, no alternatives are defined at all with respect to the proposed 25,000 tpy CO₂e threshold, much less alternatives to establish permitting thresholds above 75,000 tpy CO₂e.

For the above reasons, BAAQMD should withdraw its proposal to extend the lower threshold to “all” sources and not limit the threshold to “anyway” sources defined with respect to whether the source also would exceed relevant thresholds for non-GHG emissions. As the Air District is well aware, the U.S. Supreme Court determined that EPA lacks authority to implement the federal NSR program in this manner.⁴⁸ Since BAAQMD has not determined that regulating all sources for GHGs is necessary in accordance with relevant California statutes, and has not supported its determination in the record for this rule, it cannot impose such permitting requirements more broadly than required under either current California or federal regulations.

IV. Conclusion

In sum, AFPM recommends that:

- BAAQMD not finalize the proposed revisions to Regulation 2, Rule 1. Instead, current regulatory provisions regarding NSR and BAAQMD’s ability to enforce such provisions are more than adequate to address any concerns or issues regarding refinery emissions that increase as a result of a modification.
- BAAQMD take affirmative steps to protect information that it has already required refineries to submit based on its finalization of Regulation 12, Rule 15. Information submitted with regard to crude slates and feedstocks should be thoroughly protected from release as trade secret or confidential information.
- BAAQMD should similarly consider all information received or analyzed in connection with its review of alternations or modifications at refineries involving crude slates or feedstocks to be trade secret or confidential information protected from disclosure.

⁴⁶ Cal Health & Saf. Code §40727(b)(5). In this regard, EPA has further noted that “current climate modeling tools are not capable of isolating the precise correlations between singular, incremental facility-specific GHG emissions changes, ambient CO₂ concentrations, and climate impacts.” 81 Fed. Reg. at 68,123.

⁴⁷ Cal Health & Saf. Code §40728(a)-(b).

⁴⁸ *UARG v. EPA*, 134 S. Ct. 2427 (2014).

- Should BAAQMD decide in the future to release any information regarding crude slate or feedstock, it must take affirmative steps to protect trade secret or confidential information from disclosure using methods such as aggregation, masking or lagging of data.
- BAAQMD should not finalize proposed revisions to Regulation 1, Rules 2 and 6 respecting the regulation of GHG emissions, including lowering the permitting threshold for GHG emissions to 25,000 tpy CO₂e and applying this permitting threshold to any increase above this level whether or not permitting is also “triggered” on the basis of criteria air pollutants.

Once again, AFPM thanks BAAQMD for the opportunity to submit comments on this pending rulemaking. Should you or your staff have any additional questions or concerns regarding any matter presented in these comments, please contact me at (202) 602-6604 or dfriedman@afpm.org.

Sincerely,

A handwritten signature in cursive script that reads "David Friedman".

David Friedman
Vice President, Regulatory Affairs

**BEFORE THE UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY**

_____)	
Proposed Confidentiality Determinations for Data)	Docket No. EPA-HQ-
Required Under the Mandatory Greenhouse Gas)	OAR-2009-0924
Reporting Rule and Proposed Amendment to)	
Special Rules Governing Certain Information)	
Obtained Under the Clean Air Act)	
_____)	

COMMENT OF THE FEDERAL TRADE COMMISSION
September 30, 2010

Introduction

The Federal Trade Commission (FTC) appreciates the opportunity to submit this comment to the Environmental Protection Agency (EPA) on its proposed rule concerning confidentiality determinations for greenhouse gas (GHG) data.¹ On October 30, 2009, the EPA issued rules mandating that certain industries report data related to their GHG emissions.² The EPA now proposes to group that data into 22 categories and designate the confidentiality status of each category through rulemaking.

Three categories of data that the EPA proposes to make public contain potentially sensitive competitive business information: “inputs to emission equations,” “unit/process ‘static’ characteristics that are not inputs to emission equations,” and “unit/process operating characteristics that are not inputs to emission equations.” These three categories include data on production, throughput, raw material consumption, capacity, and future operations. Public disclosure of such facility- and firm-specific sensitive

¹ 75 Fed Reg. 39094 (proposed July 7, 2010), available at <http://edocket.access.gpo.gov/2010/pdf/2010-16317.pdf>.

² Mandatory Greenhouse Gas Reporting Rule, 40 C.F.R. Part 98 (2009).

business information may make it easier for reporting companies to either tacitly³ or explicitly coordinate their pricing decisions. This is especially true when certain market conditions are present, such as transparency, high concentration, impediments to entry, homogeneous products, and low elasticity of demand.⁴

Because many industries subject to the GHG reporting requirements share at least some of these market conditions, making confidential business information (CBI) public may lead to collusion that harms consumers through higher prices, decreased quality, and decreased innovation. Therefore, the FTC recommends that the EPA treat data that is an input to emission equations as confidential. The FTC also recommends that the EPA delay publication of any reported data concerning plant or unit capacity or future operating status until after reporting companies receive sufficient time to apply for confidential treatment. The competitive sensitivity of this data can vary by industry, which suggests that more information is needed to make a confidentiality determination.

Interest of the FTC

The Federal Trade Commission is an independent administrative agency charged with maintaining competition and safeguarding the interests of consumers.⁵ As part of its competition mission, the agency often provides input to federal and state policymakers on

³ Tacit coordination exists without any actual communication among competitors. *See, e.g. In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d. 651, 654 (7th Cir. 2002) (a tacit agreement to fix prices is, “an agreement made without any actual communication among the parties to the agreement.”).

⁴ *See* U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b) (2000) *available at* <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>, [hereinafter FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS].

⁵ Federal Trade Commission Act, 15 U.S.C. § 45.

the competitive implications of proposed laws and regulations.⁶ In its antitrust enforcement role, the FTC reviews mergers and challenges anticompetitive conduct across many industries that would be subject to the EPA's proposed rule on confidentiality, including petroleum refining, petrochemical production, natural gas processing, and other manufacturing industries, such as industrial gases and titanium dioxide production.⁷ In addition, FTC staff regularly studies and reports on competition in the petroleum industry.⁸

In the course of this work, the FTC applies established legal and economic principles as well as empirical analysis and recent developments in economic theory to consider how market structure, transparency, and dynamics affect the ability of rivals to explicitly or tacitly coordinate their competitive responses.⁹ In addition, the FTC has

⁶ See FTC Office of Policy Planning, Advocacy Filings, available at http://www.ftc.gov/opp/advocacy_date.shtml.

⁷ See FTC Competition Enforcement Database, available at <http://www.ftc.gov/bc/caselist/industry/index.shtml>.

⁸ Representative reviews in the petroleum industry in which FTC determined that a merger presented a competitive problem, and significant structural relief was obtained, include *In re Valero L.P.*, FTC Docket No. C-4141 (July 26, 2005) (divestiture of Kaneb terminal and pipeline assets in northern California, eastern Colorado, and greater Philadelphia area); *In re Phillips Petroleum Co.*, FTC Docket No. C-4058 (Feb. 14, 2003) (divestiture of Conoco refinery in Denver, Phillips marketing assets in eastern Colorado, Phillips refinery in Salt Lake City, Phillips marketing assets in northern Utah, Phillips terminal in Spokane, Phillips propane business at Jefferson City and East St. Louis); *In re Valero Energy Corp.*, FTC Docket No. C-4031 (Feb. 22, 2002) (divestiture of UDS refinery in Avon, California, and 70 retail outlets); *In re Chevron Corp.*, FTC Docket No. C-4023 (Jan. 4, 2002) (divestiture of Texaco's interests in the Equilon and Motiva joint ventures, including Equilon's interests in the Explorer and Delta pipelines); *In re Exxon Corp.*, FTC Docket No. C-3907 (Jan. 30, 2001) (divestiture of all Northeast and Mid-Atlantic marketing operations of the two parties and Exxon's Benicia, California, refinery). A listing of reports and other FTC activities involving the oil and gas industry is available at <http://www.ftc.gov/ftc/oilgas/index.html>.

⁹ See, e.g., U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES §7 (2010) (describing anticompetitive effects of coordination among rivals), available at <http://ftc.gov/os/2010/08/100819hmg.pdf> [hereinafter FTC/DOJ HORIZONTAL MERGER GUIDELINES].

issued guidance addressing the harm to competition that can arise from collusion when competitors share sensitive business information.¹⁰ The agency has raised these issues in antitrust enforcement actions as well.¹¹

The EPA's Proposed Rule Regarding the Confidentiality of GHG Data

The EPA's Mandatory Greenhouse Gas Reporting Rule requires certain industries to submit data related to GHG emissions on an annual basis.¹² This data must include facility and unit identifier information, emissions, unit operating characteristics, unit and facility production, unit and facility inputs and quantities, and unit capacity utilization.¹³ The EPA explains that these comprehensive, nationwide GHG data will provide a better understanding of the sources of GHGs, and will guide development of policies and programs to reduce GHG emissions.¹⁴

The Clean Air Act requires the EPA to make this data public unless they constitute confidential business information (CBI). The Clean Air Act also requires the

¹⁰ FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b) (discussing potential harms to competition when competitors exchange or disclose sensitive business information); *see also* DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, Statement 6 (Aug. 1996) (same); *available at* <http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf>; Letter from FTC Staff to Sen. James L. Seward, New York Senate (Mar. 31, 2009) (disclosure of sensitive business data in one market segment may chill competition in multiple market segments); *available at* <http://www.ftc.gov/os/2009/04/V090006newyorkpbm.pdf>.

¹¹ *See, e.g., In re* National Association of Music Merchants, FTC Docket No. C-4255 (Mar. 4, 2009) (prohibiting information exchanges among music merchant competitors), *available at* <http://www.ftc.gov/opa/2009/03/namm.shtml> .

¹² 40 C.F.R. Part 98 (2009).

¹³ For a complete list of reported categories of data, *see* 75 Fed. Reg. at 39097.

¹⁴ *See* ENVIRONMENTAL PROTECTION AGENCY, FACT SHEET, MANDATORY REPORTING OF GREENHOUSE GASES (40 CFR PART 98), *available at* <http://www.epa.gov/climatechange/emissions/downloads09/FactSheet.pdf>.

EPA to release “emission data” even if that data is CBI.¹⁵ The EPA thus explains that GHG data will fall into one of three confidentiality classes:

- “emission data” as defined by the EPA, which must be publicly released;
- non-emission data that does not amount to CBI and thus must be publicly released; and
- non-emission data that is CBI, which must not be publicly released.

Historically, the EPA evaluated whether information qualified for confidential treatment on a case-by-case basis, upon the request of the reporting company and subject to considerations of whether the disclosure would subject the reporter to business harm.¹⁶ The EPA believes, however, that the volume of GHG data to be reported makes a case-by-case determination unduly burdensome for reporting companies and the agency. Moreover, the EPA states that the amount of time required for the agency to evaluate each confidentiality request would delay making the GHG data public and diminish its usefulness.¹⁷ To address these concerns, the EPA’s proposed rule groups GHG data into 22 data categories and identifies the confidentiality status (emission data, non-CBI, or CBI) of each category.¹⁸

Public Availability of Otherwise Confidential Business Information

¹⁵ 42 U.S.C. §7414(c) (“Any records, reports or information obtained under [the Clean Air Act] 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 of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential . . .”).

¹⁶ See 75 Fed. Reg. at 39101.

¹⁷ *Id.* at 39102. Companies must annually report the previous year’s data to the EPA by March 31st. The EPA plans to release public data after verifying it. *Id.* at 39106

¹⁸ *Id.* at 39094.

The FTC commends the EPA's thorough and careful analysis identifying data that should be considered CBI or non-CBI. The FTC is concerned, however, that the proposal may allow for the public release of competitively sensitive information. Specifically, because of the potential risk to competition, we suggest that data reported under three categories – “inputs to emission equations,” “unit/process ‘static’ characteristics that are not inputs to emission equations,” and “unit/process operating characteristics that are not inputs to emission equations,” – may warrant confidential protection.

Inputs to emission equations. The Mandatory Greenhouse Gas Reporting Rule lists methods for calculating GHG emissions depending on the source of the emissions. Many of these methods involve the use of specified emission equations requiring particular data inputs.¹⁹ Inputs to emission equations include, for example, volume of fuel combusted per year; production/throughput and raw material consumption, such as petrochemical production; characteristics of raw materials, products, and by-products; and facility operating information.²⁰

The EPA proposes to designate the data category “inputs to emission equations” as “emission data” under the Clean Air Act²¹ even though the agency recognizes that much of the data falling within this category would otherwise be CBI. For instance, the

¹⁹ 40 CFR Part 98. *See also* 75 Fed. Reg. at 39108. Often, the rule provides more than one calculation method and allows reporting facilities to select their preferred method. The EPA notes that in many cases, use of a “continuous monitoring system” reduces the number of data elements that a company must report compared to use of an emission equation. *Id.* at 39109.

²⁰ *See* 75 Fed. Reg. at 39108-09 (describing types of data that would fall within the “inputs to emission equations” data category).

²¹ EPA regulations define “emission data” as “information necessary to determine the identity, amount, frequency, [and] concentration . . . of any emission which has been emitted by the source” 40 CFR 2.301(a)(2). The EPA considers inputs to emission equations to be “information necessary to determine . . . the amount” of any emission and, therefore, views such inputs as “emission data.” 75 Fed. Reg. at 39109.

EPA has designated data on production, throughput, and raw materials consumed as CBI when not used as an input to an emission equation.²² In doing so, the EPA recognized that an individual company could be harmed if rivals obtained the reported data, which could reveal strategic information on capacity, market position and costs.²³ Nevertheless, because “emission data” must be made public whether CBI or not, the EPA’s classification of inputs to emission equations necessarily precludes protecting this information.

Unit/process “static” characteristics and unit/process operating characteristics that are not inputs to emission equations. By designating “unit/process ‘static’ characteristics that are not inputs to emission equations” as non-CBI, the proposed rule would make certain capacity information public. The EPA explains that much capacity information is already publicly available through other reporting programs, reference materials and industry publications, making its release here not harmful.²⁴ Although that may be true in some industries, there are others in which accurate capacity data is not publicly available. In those cases, capacity information can be competitively sensitive.

By designating “unit/process operating characteristics that are not inputs to emission equations” as non-CBI, the proposed rule could make future operating status information public. For instance, companies must report anticipated dates and steps for

²² 75 Fed. Reg. at 39106 (“[r]ecognizing that the Inputs to Emission Equations Data Category may contain data elements that are considered sensitive by many businesses . . .”).

²³ *Id.* at 39115-16.

²⁴ *Id.* at 39112.

installing monitoring equipment.²⁵ This information could be sensitive when it alerts competitors that a production facility will be taken off-line.

The FTC is concerned that the EPA’s proposal to designate “inputs to emission equations” data as public “emission data” and the EPA’s characterization of certain capacity and operational status information as non-CBI could injure consumers by harming market competition (not merely individual competitors).²⁶ Sharing highly sensitive data under the auspices of a government-mandated reporting program may be as likely to lead to anticompetitive behavior as sharing that data by private agreement.

Competition Policy Concerns When Rivals Share Information

In some cases, sharing information among competitors may increase the likelihood of collusion or coordination on matters such as price or output.²⁷ Coordinated interaction among competitors includes collusive agreements, but it can also include conduct not necessarily condemned by the antitrust laws.²⁸ Firms that engage in coordinated interaction are better able to predict, even absent explicit agreement, how

²⁵ *Id.* at 39113.

²⁶ FTC has recognized that information exchange facilitated by a merger in otherwise concentrated petroleum markets can by itself lead to anticompetitive effects. *See In re TC Group, L.L.C.*, FTC Docket No. C-4183 (Jan. 25, 2007) (acquisition of partial interest in two of three independent terminaling companies in the southwestern United States could cause anticompetitive effects due to information exchange); *In re Chevron Corp.*, FTC Docket No. C-4144 (June 10, 2005) (Chevron’s acquisition of Unocal’s reformulated gasoline patents would allow Chevron greater opportunity than Unocal would enjoy alone to coordinate with refining competitors to raise the price for reformulated gasoline).

²⁷ FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b).

²⁸ This includes parallel accommodating conduct by rivals in which “each rival’s response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence, nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms.” FTC/DOJ HORIZONTAL MERGER GUIDELINES §7.

rivals will react to price changes.²⁹ The antitrust agencies have explained how coordinated interaction harms consumers: “[c]oordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm’s incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm’s incentive to raise prices by assuaging the fear that such a move would lose customers to rivals.”³⁰

The potential for information disclosure to harm competition will depend on the structure of the affected market and the type of information disclosed.³¹ The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals’ responses to price change or other competitive initiative. Markets are more vulnerable to coordinated conduct if each firm’s rivals can promptly and confidently observe its behavior. Market factors that support this ability and increase the likelihood of coordination include transparency, concentration, entry barriers, homogeneous

²⁹ The FTC recognizes that rivals in the petroleum and other industries collect market intelligence to anticipate and respond to rivals’ output and pricing decisions. *See, e.g., In re Chevron Corp.*, FTC Docket No. C-4023, Analysis of Proposed Consent Order to Aid Public Comment (Sept. 7, 2001) (“Integrated refiner-marketers carefully monitor the prices charged by their competitors’ retail outlets, and therefore can readily identify firms that deviate from a coordinated or collusive price.”).

³⁰ FTC/DOJ HORIZONTAL MERGER GUIDELINES §7.

³¹ *See Todd v. Exxon Corporation*, 275 F.3d 191, 199 (2d. Cir. 2001) (quoting *U.S. v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16 (1978)) (“A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of [the information disclosed.]”); *see also* FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b).

products, and low elasticity of demand.³² Many of these market factors are present in industries covered by the EPA's rule.³³

Information disclosures raise particular competitive concerns when the information contains details about output, production capacity, production rates, current price and cost data, and other business plans.³⁴ Disclosure under the proposed rule of the “inputs to emission equations,” which can reveal capacity and capabilities, other capacity information, and forward-looking operational status would increase transparency in the affected industries. In many instances, the actual output of a unit could be made public. In other cases, the amount of feedstock used, the intermediate product produced, or the

³² FTC/DOJ HORIZONTAL MERGER GUIDELINES §7.

³³ For instance, in relevant geographic markets with few players, the FTC has expressed concerns about mergers or acquisitions in the petroleum industry that would reduce the number of competitors necessary to engage in tacit or overt collusion. *See, e.g., In re Dan Duncan*, FTC Docket No. C-4173, Consent Agreement and Order (2006) (in merger matter, consent agreement ordering divestiture of certain pipeline assets related to salt dome storage for natural gas liquids in Mont Belvieu, Texas – a concentrated market with high barriers to entry – in order to protect competition in that region), *available at* <http://www.ftc.gov/os/caselist/0510108/0510108.shtm>; *In re Dow Chemical*, FTC Docket No. C-4243 (2009) (consent agreement regarding Dow Chemical's acquisition of Rohm and Haas, which implicated glacial acrylic acid, butyl acid, ethyl acrylate, acrylic latex polymers for traffic paint, and hollow sphere particles throughout North America – all concentrated markets with high barriers to entry), *available at* <http://www.ftc.gov/os/caselist/0810214/index.shtml>; *In re BASF, Inc.*, FTC Docket No. C-4253 (2009) (in a merger involving the production of pigments globally – a concentrated industry with high barriers to entry – FTC ordered BASF to maintain the viability of certain assets so as to preserve competition in the relevant market). Additional examples of FTC orders involving industries subject to the GHG reporting requirements may be obtained through the FTC Competition Enforcement Database, *available at* <http://www.ftc.gov/bc/caselist/industry/index.shtml>.

³⁴ *See* FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b) (describing potential harm to competition when firms disclose competitively sensitive data); *see also* Susan S. DeSanti and Ernest A. Nagata, *Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, 63 ANTITRUST L.J. 93 (1994) (describing activities that make it easier for parties to coordinate on price or engage in tacit collusion).

unit's capacity would be made public.³⁵ As a result, collusion or coordination could become more likely as firms are better able to predict one another's behavior.

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

Improved information can lead to better coordination even when there is a gap in time between the reported conditions and the availability of the information. Competitors having capacity information that is one or two years old may be able to discern that capacity has not changed significantly in that time. As a result, publishing capacity data that is several years old could improve competitors' estimates of current capacity. The information on operating conditions, inputs, and outputs that would be made public through disclosure of "inputs to emission equations" data could also give a firm added insight into its rivals' cost structures.

In addition to increasing the likelihood of collusion, this information can decrease the competitiveness of a bidding process. In this case, the disclosed information can allow a firm to better anticipate rivals' bids, which may lead it to bid less aggressively, resulting in increased prices. Therefore, disclosed information that would allow rivals to

³⁵ See Memorandum, Data Category Assignments for Reporting Elements, EPA No. EPA-HQ-OAR-2009-0924, available at http://www.epa.gov/climatechange/emissions/downloads/10/CBI_Data-Category.pdf.

learn more about the underlying costs of their competitors has the potential to harm competition and consumers through higher prices. This can be true even when the information is one or two years old in industries where firms do not regularly upgrade their facilities. If a unit has not been upgraded, the underlying economics of the unit are unlikely to change and therefore the public release of older data may still threaten competition.

Designating Data as CBI

Because the disclosure of competitively sensitive business information can have adverse consequences for consumers, the FTC urges the EPA to consider the implications for competition when it decides what data should be publicly released under the proposed rule. Specifically, the FTC urges the EPA to consider designating as CBI – at least initially – “inputs to emission equations,” which can reveal capacity, capacity information in the data category “unit/process ‘static’ characteristics,” and forward-looking operational information in the data category “unit/process operational characteristics.” The EPA can then determine the confidentiality status of those data elements whose competitive sensitivity varies by industry.

The EPA may wish to consider an interpretation of “emission data,” as that term is used in the Clean Air Act and defined by EPA regulation, that allows the agency to classify inputs to emission equations as CBI.³⁶ EPA regulations define “emission data” as “information necessary to determine the . . . amount . . . of any emission”³⁷

³⁶ The EPA is seeking comment on its proposed interpretation of the term “emission data” to include data that are required to perform emission calculations specified in the Mandatory Greenhouse Gas Reporting Rules. 75 Fed. Reg. at 39101, 39105.

³⁷ 40 C.F.R. 2.301(a)(2). The EPA proposes that the inputs to the equations are “necessary to determine” the amount of emissions. 75 Fed. Reg. at 39105.

Inputs to the emission equations may not be “necessary to determine” the amount of emissions because EPA will be releasing the verified amounts to the public.³⁸ Assuming this interpretation of “emission data” is consistent with the Clean Air Act, classifying inputs to emissions equations as CBI would be an effective way to balance the Act’s policy goals of promoting transparency and protecting competition. Publicly releasing the verified, total amount of emissions by unit would achieve the Act’s purpose regarding public disclosure, while keeping sensitive business information confidential would achieve the Act’s stated goal of protecting CBI. The Commission urges the EPA to interpret the Clean Air Act and related regulations in a way that gives sufficient weight to the Congressionally-authorized goal of protecting market competition for the benefit of consumers.³⁹

Capacity and operational data are also potentially competitively sensitive, but the EPA may need more specific information about how competitors might use such information in a particular industry before determining whether it is CBI. For that reason, the EPA may wish to consider delaying a decision on publication of these categories until reporters can provide better information on the impact of making them public and the need for confidentiality in particular industries. If the EPA were to treat the capacity data as confidential, the information might be made publicly available in

³⁸ See *Natural Resources Defense Council v. Leavitt*, Civ. No. 04-01295, 2006 WL 667327, at *4 (D.D.C. 2006) (“[S]trict interpretation of the ‘necessary to determine’ requirement [for emission data] is warranted in order to ensure that the exception does not swallow the rule.”).

³⁹ The Congressionally authorized goal of protecting competition can be seen in the Clean Air Act’s protection of CBI and the federal antitrust laws’ prohibition against data sharing that facilitates explicit or tacit collusion and harms consumers. See *Todd*, 275 F.3d at 198-99 (explaining that information exchange among competitors can constitute an antitrust violation even absent an explicit agreement among them).

nationally aggregated form.⁴⁰ Delaying release of the data for an extended period could also alleviate competition concerns, but only if the historical data no longer reflected current capacity or current plant capabilities.

⁴⁰ It is important to keep in mind that there may be few firms in some geographic regions or in some industries, which would raise the concern that publishing even aggregate data might decrease competition. The Energy Information Administration developed rules to make the public release of data less likely to lead to such undesirable results. *See* U.S. ENERGY INFORMATION ADMINISTRATION, DISCLOSURE POLICY FOR EIA POWER SURVEYS, (updated June 30, 2010) (explaining that certain firm-specific data will not be disclosed), *available at* <http://www.eia.doe.gov/electricity/forms/sselecpower98.html>.