



June 9, 2009

VIA ELECTRONIC FILING
E-DOCKET

U.S. Environmental Protection Agency
EPA Docket Center
Mailcode 6102T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
ATTN: Docket No. EPA-HQ-OAR-2008-0508

Re: Comments of the Renewable Fuels Association on Mandatory Reporting of Greenhouse Gases; Proposed Rule, 74 Fed. Reg. 16,448 (Apr. 10, 2009)

Dear Sir or Madam:

The Renewable Fuels Association (RFA) submits the attached comments on the Proposed Rule entitled Mandatory Reporting of Greenhouse Gases, published at 74 Fed. Reg. 16,448 (Apr. 10, 2009) ("Proposed Rule"). As the national trade association for the U.S. ethanol industry, RFA promotes policies, regulations and research and development initiatives that will lead to the increased production and use of fuel ethanol. The ethanol industry is a dynamic and growing industry that is revitalizing rural America, reducing emissions in our nation's cities, and lowering our dependence on imported petroleum. Today's ethanol industry consists of 196 ethanol plants nationwide that have the capacity to produce approximately 12.6 billion gallons of high octane, clean burning motor fuel (as of May 26, 2009). An additional 1.9 billion gallons in capacity are currently being constructed (as of May 26, 2009). America's domestic ethanol producers are providing significant economic, environmental, and energy security benefits today.

RFA members include public and private companies and farmer-owned cooperatives that represent the majority of U.S. ethanol production. Our members are on the cutting edge of technology, pursuing new processes, new energy sources, and new feedstocks to increase efficiency and reduce greenhouse gas emissions. Our members include the first company to start building a commercial-scale cellulosic ethanol biorefinery in the U.S., and dozens of RFA's member companies are working to commercialize the next generation of biofuels.

Although RFA supports a national policy with respect to greenhouse gas emissions, RFA has concerns regarding the scope of the Proposed Rule and the burdens being imposed. EPA has, in the past, used its authority under Sections 114 and 208 of the Clean Air Act in a limited manner to

avoid undue costs on regulated entities. Here, EPA is not just focusing on regulated entities, but looking at a wide range of sources so as to inform *some* future policy, imposing substantial requirements over an indefinite period of time.

In particular, despite EPA's claims that it is seeking to focus on significant sources of greenhouse gas emissions, it appears as though EPA is including numerous insignificant sources and requiring substantial amounts of information from those sources. For example, EPA provides insufficient support to require ethanol production facilities to include emissions from landfills and wastewater treatment in its reporting. Nonetheless, based on overall U.S. emissions, it is clear that these are likely to be *de minimis* sources. EPA should eliminate these sources from the requirements for ethanol facilities.

In addition, EPA's Proposed Rule would require annual reporting indefinitely, and would require facilities to continue to report even though they have reduced their greenhouse gas emissions -- a goal that should be supported by the rule. The final rule should be more limited in time, allow facilities to exempt out of the program, and should, at a minimum, give way as climate change regulation begins to be implemented. In any event, EPA should delay implementation of the rule to give facilities time to prepare for its requirements.

RFA does commend EPA for recognizing that use of biomass does not have a net impact on carbon dioxide emissions. RFA supports not including emissions from using renewable fuels as part of the reporting obligations, as well as not including emissions from fermentation of biomass in the ethanol production process. These are biogenic sources of emissions which are offset by the uptake of carbon dioxide resulting from the growth of new biomass. It is these benefits that Congress recognized in seeking to promote use of renewable fuel over fossil fuels. Moreover, ethanol facilities that capture emissions from the fermentation process should be able to count those emissions against their threshold, rather than reporting them separately as under the Proposed Rule.

As further outlined in the attached comments, RFA believes that the Proposed Rule may be overly broad and burdensome, and that EPA should look to revise the proposal to reduce and eliminate some of these undue burdens. Finally, EPA should make clear that any final action it takes with respect to this proposal is simply to help it inform whether and how to regulate greenhouse gas emissions under the Clean Air Act, and does not trigger any other requirements under the Act.

RFA appreciates the opportunity to submit the attached comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Dinneen", with a long horizontal stroke extending to the right.

Bob Dinneen
President and CEO

**COMMENTS OF THE RENEWABLE FUELS ASSOCIATION
MANDATORY REPORTING OF GREENHOUSE GASES,
PROPOSED RULE, 74 FED. REG. 16,448 (APR. 10, 2009)**

EPA-HQ-OAR-2008-0508

I. Introduction

The Renewable Fuels Association (“RFA”) appreciates the opportunity to comment on EPA’s Proposed Rule for Mandatory Reporting of Greenhouse Gas Emissions (“Proposed Rule”). RFA represents the U.S. ethanol industry. It has long been recognized that ethanol, and renewable fuels generally, provide significant benefits in reducing greenhouse gas (“GHG”) emissions. Congress expressly recognized these benefits, as well as the numerous other environmental, economic and national security benefits of renewable fuels, with the enactment of the Renewable Fuel Standard (“RFS”) under the Energy Policy Act of 2005, and again in 2007 with the expansion of the RFS under the Energy Independence & Security Act of 2007. A number of peer-reviewed studies over the past five years have shown that current ethanol reduces GHG emissions by at least 30-50% compared to gasoline.¹ RFA’s member companies are working to commercialize the next generation of biofuels, including ethanol from cellulosic and other biomass feedstocks, which are likely to reduce GHGs by at least 80-100%.

The innovations from the ethanol industry, however, are not limited to cleaner burning fuels. In addition to making advancements in second-generation biofuels, producers of first generation ethanol have made and continue to make dramatic improvements in the energy efficiency and overall sustainability of the production process. According to a recent report of ethanol production in the U.S. by the U.S. Department of Energy’s Argonne National Laboratory, since 2001, ethanol yield per bushel of corn increased 6.4% for dry mills and 2.4% for wet mills, total energy use (fossil and electricity) decreased 21.8% in dry mills and 7.2% in wet mills, and grid electricity use decreased 15.7% decrease in dry mills.² These improvements have led to a significant reduction in the GHG intensity of producing ethanol from grain, and will continue as new technologies are introduced and the industry continues to evolve. “For the future it is estimated that solely due to technological learning, production costs of ethanol may decline 28-44 percent”; “Future improvements in energy efficiency may lead to lower costs, but also to lower GHG emissions.”³

While RFA generally supports a national policy to address climate change and efforts to obtain more accurate information on the significant sources of those emissions in the U.S., RFA questions the need for the broad scope of and substantial requirements in the Proposed Rule, and is concerned with EPA’s use of the Clean Air Act (“CAA”). Any final rule should consider the extent of its authority under the CAA and the significant costs EPA’s proposal will have on industry.

¹ See, e.g., Adam J. Liska, *et al.*, *Improvements in Life Cycle Energy Efficiency & Greenhouse Gas Emissions of Corn-Ethanol*, Journal of Industrial Ecology (Jan. 2009), http://www.ethanolrfa.org/objects/documents/2110/2009_jie_improvements_in_corn_ethanol-liska_et_al.pdf (“Direct effect GHG emissions were estimated to be equivalent to a 48 percent to 59 percent reduction compared to gasoline, a twofold to threefold greater reduction than reported in previous studies.”).

² See May Wu, Argonne National Laboratory, *Analysis of the Efficiency of the U.S. Ethanol Industry 2007*, http://www.ethanolrfa.org/objects/documents//2007_analysis_of_the_efficiency_of_the_us_ethanol_industry.pdf.

³ W.G. Hettinga, *et al.*, *Understanding the reductions in U.S. corn ethanol production costs: An experience curve approach*, Energy Policy, Vol. 37, Issue 1, Jan. 2009 at 190, 202.

II. EPA's Authority to Gather Information Under the CAA Does Not Contemplate Such a Broad Reaching Reporting Program as in the Proposed Rule.

The FY 2008 Consolidated Appropriations Act granted EPA one-time funding “for activities to develop and publish a draft rule . . . and a final rule . . . to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States.”⁴ Any such rule, however, must be based on EPA’s “existing authority under the Clean Air Act.”⁵ In the Proposed Rule, EPA purports to rely on Sections 114 and 208 of the Act. 74 Fed. Reg. 16,448, 16,454-16,455 (Apr. 10, 2009). While these provisions give EPA authority to seek information from regulated entities, they were intended to obtain information necessary to ensure compliance with requirements under the Act, not to create such a substantial new program as in the Proposed Rule.⁶

While Section 114 does give EPA authority to seek information to assist in the development of regulations under the Act, in the Proposed Rule, EPA states that “[a]ccurate and timely information on GHG emissions is essential for informing *some* future climate change policy decisions.” 74 Fed. Reg. at 16,455 (emphasis added). The information collected “would provide useful information for a variety of policies.” *Id.* While EPA claims that “it is appropriate for EPA to gather the information required by this rule because such information is relevant to EPA’s carrying out a wide variety of CAA provisions,” *id.* at 16,454, it also admits that it “does not yet know the specific policies that will be adopted.” EPA, *Supporting Statement Part A: Information Collection Request For The Mandatory Reporting Of Greenhouse Gases – Proposed Rule*, at 3 (Mar. 16, 2009) (OAR-2008-0507-0179). Moreover, EPA has previously indicated that the CAA is not the appropriate vehicle for regulating GHG emissions, 73 Fed. Reg. 44,354, 44,355 (July 30, 2008), and any regulation under the Act, with respect to particular sources, requires specific findings by EPA for the need of such regulations. EPA has already taken substantial steps to develop its regulatory policy, including the issuance of the Advanced Notice of Proposed Rulemaking on Regulating Greenhouse Gases under the CAA (“ANPR”). EPA recognizes this effort, noting “the mandatory GHG reporting rule does not indicate that EPA has made any final decisions related to the questions identified in the ANPR.” 74 Fed. Reg. at 16,456. There is no indication that Congress contemplated the use of Section 114 and 208 to establish such a broad-reaching program based on the *potential* of subsequent regulation under the CAA, and the FY 2008 Consolidated Appropriations Act is insufficient to expand EPA’s authority in this case.⁷

Indeed, the FY 2008 Consolidated Appropriations Act merely provides funding to develop a reporting rule. As noted, the explanatory statement makes clear that EPA is subject to its authority under the CAA, and merely provides guidance as to what EPA should consider. While giving EPA discretion to determining the thresholds, timing, and coverage of the rule, EPA’s discretion is still constrained by the CAA. While RFA does not oppose to obtaining further information from industry regarding GHG emissions and taking steps to assist in development of a baseline, we

⁴ Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2128 (enacted Dec. 26, 2007).

⁵ 153 Cong. Rec. H16,131 (daily ed. Dec. 17, 2007).

⁶ See Clarifying Statement, 123 Cong. Rec. H8662 (Aug. 4, 1977), as reprinted in 1977 U.S.C.C.A.N. 1502, 1573. See also *United States v. Louisiana Pac. Corp.*, 908 F. Supp. 835, 841 (D. Colo. 1995) (“Section 7414 grants broad authority to the Administrator to ensure compliance with the CAA through recordkeeping, monitoring, and inspections.”).

⁷ See *Calloway v. Dist. Of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000) (“While appropriation acts are ‘Acts of Congress’ which can substantively change existing law, there is a very strong presumption that they do not.”) (citation omitted).

question EPA's authority to imposes such a broad-reaching and onerous program, particularly where a substantial portion of the entities covered are not likely to be regulated under the CAA, as insignificant sources with respect to GHG emissions.

III. Any Reporting Rule Should Not Place Undue Burdens on Industry.

Assuming EPA has authority under Sections 114 and 208 to establish the broad reporting regime as proposed, the requirements are unduly burdensome for the purposes EPA has identified -- *i.e.*, development of public policy. Even where EPA may have needed the information for regulations it was in the process of developing (rather than trying to formulate whether and how to regulate), EPA historically has used these sections to obtain information in a limited manner. EPA has done so because it recognized that such requests can be time-consuming and costly.⁸ As such, EPA has often used voluntarily submitted information rather than issue Information Requests, and Information Requests have typically been limited to collecting data from specific sources over a discrete period of time. Here, however, EPA has proposed a broad and burdensome program with no end in sight.

Moreover, EPA already has substantial information available to inform public policy, particularly with respect to ethanol production. In identifying the source categories to be covered by the Proposed Rule and the thresholds for mandatory reporting that will apply to those source categories, EPA looked to its Inventory of U.S. Greenhouse Gas Emissions and Sinks. The only justification EPA gives for requiring that more information be reported is that current inventories do not provide facility-specific information. EPA does not explain, however, why such facility-specific information is necessary to develop a policy to address national GHG emissions. Nonetheless, EPA's Proposed Rule imposes substantial burdens on industry.

Further, with respect to ethanol production, EPA has been engaged in a rulemaking process in which it has examined and been provided with substantial information regarding the facility's processes that may result in GHG emissions.² Yet, EPA provides little information in the Technical Support Documents with respect to ethanol production, as compared to the other listed source categories.

The following provides comments on various aspects of the Proposed Rule that RFA believes imposes undue burdens on industry, including numerous small businesses in the renewable fuels sector.

⁸ *Natural Res. Def. Council v. EPA*, 529 F.3d 1077, 1085 (D.C. Cir. 2008).

² Neither EPA's Proposed Rule or the Technical Support Document for Ethanol Facilities mentions the current analysis being conducted in the RFS in which EPA is undergoing extensive study of the GHG emissions attributable to ethanol production facilities. For the RFS, EPA has direct statutory authority to analyze GHG emissions from ethanol facilities. Contrary to its stated goal in the Proposed Rule, however, EPA has declined to propose to allow facilities to provide facility-specific information for calculating their GHG emissions in the RFS proposal. 74 Fed. Reg. 24,904, 24,913 (May 26, 2009). To the extent facilities are required to report under the Proposed Rule, EPA should allow those facilities to utilize that information to establish their GHG lifecycle emissions under the RFS.

A. EPA does not provide sufficient information on its analysis of ethanol production facilities for RFA to adequately comment on the Proposed Rule and its potential impacts on the industry.

1. RFA cannot adequately respond to EPA's estimates on the potential impacts of the Proposed Rule on ethanol facilities.

EPA provides little information on its analysis of ethanol production facilities in support of the requirements for this source category in the Proposed Rule. Although EPA provides estimates as to the number of facilities that may be covered (based only on 140 total facilities), EPA provides no total emissions estimates for ethanol facilities. Ethanol is one of only two source categories for which EPA provides no such emission estimates to support their inclusion in the listed source categories (food processing being the other). See Technical Support Document for Reporting Thresholds: Proposed Rule for Mandatory Reporting of Greenhouse Gases, Table 5-8 (Mar. 8, 2009) ("TSD for Reporting Thresholds") (OAR-2008-0508-0046). RFA questions EPA's claim that "[e]stimates of total national emissions from landfills and stationary combustion at ethanol facilities are unavailable." Technical Support Document for Ethanol Facilities: Proposed Rule for Mandatory Reporting of Greenhouse Gases, at 3 (Feb. 4, 2009) ("TSD For Ethanol Facilities") (OAR-2008-0508-0010). In the Proposed Rule, EPA notes that "[d]ata on stationary fuel combustion were used to estimate the minimum number of facilities that would meet each of the facility-level thresholds examined." 74 Fed. Reg. at 16,500. We did not find these estimates in the record. The only information provided in the TSD and the Regulatory Impact Analysis was on wastewater treatment. As such, RFA cannot adequately respond to EPA's decision to include ethanol facilities as a source category and to the potential impacts of the rule on ethanol facilities. EPA must provide this information to provide notice and an adequate opportunity for comment. Therefore, EPA should include this information in the record and reopen the comment period, providing sufficient time for interested members of the public to review the data and submit comments.

2. EPA provides insufficient support for its inclusion of landfills and wastewater treatment in the reporting requirements for ethanol production facilities.

In addition to stationary fuel combustion, EPA includes landfills and wastewater treatment as sources for which ethanol production facilities must report GHG emissions in accordance with the methodologies in the Proposed Rule. In 2007, EPA estimated that emissions from waste activities, including landfilling, wastewater treatment, and composting, were just over 2% of total U.S. GHG emissions. EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2007*, at 8-1 (Apr. 15, 2009) (hereinafter referred to as "EPA GHG Inventory"), <http://www.epa.gov/climatechange/emissions/downloads09/Waste.pdf>. Any emissions that may be attributable to landfills and wastewater treatment at ethanol facilities are likely to be only a tiny fraction of this small percent.

First, EPA provides no support for its inclusion of landfill emissions for ethanol facilities. EPA indicates it has no data on landfilling at ethanol facilities "but it is believed that some of these facilities may have landfills with significant GHG emissions." TSD for Ethanol Facilities, at 3. Such a statement is not adequate justification to impose reporting requirements on ethanol facilities with

respect to such landfills, where they are likely to be *de minimis*. A typical ethanol plant is not expected to have a landfill.

In 2007, based on EPA's GHG Inventory and assuming no recovery, industrial landfills made up less than 12% of total CH₄ emissions from landfills in the U.S., with municipal waste landfills making up the rest. EPA GHG Inventory, at 8-2. CH₄ emissions from industrial landfills were estimated at 15.3 teragrams CO₂ equivalent (Tg CO₂ Eq.)¹⁰ in 2006 and 15.4 Tg CO₂ Eq. in 2007. *Id.* In its Technical Support Document for the Landfill Sector ("TSD for Landfill Sector") (Feb. 4, 2009), EPA estimated that, in 2006, 14.6 million metric tons CO₂ equivalent (mtCO₂e) of CH₄ emissions came from industrial landfills at pulp and paper facilities and food-processing facilities (at 4). That leaves only 0.7 million mtCO₂e of CH₄ emissions that can be attributed to *all other* industrial landfills. This is 4.6% of CH₄ emissions from industrial landfills (15.3 Tg CO₂ Eq.), 0.5% of CH₄ emissions from landfills in total (130.4 Tg CO₂ Eq.), 0.4% of CH₄ emissions from the waste sector generally (156.5 Tg CO₂ Eq.), 0.1% of CH₄ emissions in the U.S. (582.0 Tg CO₂ Eq.), and 0.0099% of total GHG emissions in the U.S. (7,051.1 Tg CO₂ Eq.) (for 2006).¹¹ Based on the information available, industrial landfills at ethanol facilities can only be an insignificant part of U.S. GHG emissions, insufficient to require reporting under the rule.

Second, the only discussion on emissions from ethanol facilities that EPA provides in its support documents for the Proposed Rule is on EPA's estimates of emissions from wastewater treatment at ethanol facilities, but this information also is not sufficient to support the inclusion of these emissions in the rule. Even here, EPA is making assumptions as to the number of facilities that contain wastewater treatment and the potential emissions. More important, as with landfill emissions, even based on EPA's assumptions, emissions from wastewater treatment at ethanol production facilities are insignificant. EPA estimated that wastewater treatment systems account for only 4% of total anthropogenic CH₄ emissions. Technical Support Document for Wastewater Treatment: Proposed Rule for Mandatory Reporting of Greenhouse Gases, at 4, (Feb. 4, 2009) ("TSD for Wastewater Treatment"). EPA estimated that CH₄ emissions from wastewater treatment at ethanol production facilities were less than 1% of total CH₄ emissions from industrial wastewater treatment. TSD for Ethanol Facilities, at 3.¹² EPA estimated only 1 ethanol facility to have emissions from wastewater treatment to exceed 25,000 mtCO₂e. TSD for Wastewater Treatment, at 7.

Based on EPA's GHG Inventory, the estimated emissions from wastewater treatment at ethanol facilities is *de minimis*. EPA estimated that CH₄ emissions totaled 68,200 mtCO₂e in 2006. TSD for Ethanol Facilities, at 3. This is 0.27% of total CH₄ emissions from wastewater treatment (24.5 Tg CO₂ Eq.), 0.044% of total CH₄ emissions from the waste sector generally (156.5 Tg CO₂ Eq.), 0.012% of total CH₄ emissions in the U.S. (582.0 Tg CO₂ Eq.), and 0.00096% of total GHG emissions in the U.S. (7,051.1 Tg CO₂ Eq.) (for 2006).¹³ Based on the information available,

¹⁰ One teragram (Tg) is equal to 1 million metric tons. 74 Fed. Reg. 18,886, 18,905 n.30 (Apr. 24, 2009).

¹¹ Total emissions are from EPA GHG Inventory, at 2-3, 2-4, 8-1, and 8-2.

¹² Although the TSD for Ethanol Facilities does not explain what total emissions are being referred to, the TSD for Wastewater Treatment noted CH₄ emissions from industrial wastewater treatment were estimated at 7.9 million mtCO₂e (at 3-4), of which the estimated emissions from ethanol facilities (68,200 mtCO₂e) is 0.86%. TSD for Ethanol Facilities, at 3.

¹³ Total emissions are from EPA GHG Inventory, at 2-3, 2-4, 8-1, and 8-6.

emissions associated with wastewater treatment at ethanol facilities makes up an insignificant part of GHG emissions, insufficient to require reporting under the rule.

EPA simply provides insufficient justification for including emissions from landfills and wastewater treatment at ethanol facilities as part of their reporting requirements.¹⁴ As such, these sources should be removed from the reporting requirements for ethanol production facilities under Subpart J of the Proposed Rule (Proposed Section 98.102(b) and (c)).

B. EPA should raise the reporting threshold to 100,000 mtCO₂e.

For the Proposed Rule, EPA evaluated thresholds of 1,000, 10,000, 25,000 and 100,000 mtCO₂e per year. While EPA appropriately declined to propose a threshold below 25,000 due to the substantially increased burdens compared to the little benefits, EPA glosses over the fact that the 100,000 threshold would retain virtually the same coverage. The majority of source categories identified by EPA would still have well over 90% of emissions from that source category covered under the 100,000 threshold. TSD for Reporting Thresholds, Table 5-8. (As previously noted, EPA provides no emissions estimates for ethanol production facilities.) In fact, EPA estimated that at the 100,000 threshold, the median share of entities covered falls to 66%, but the median share of emissions covered remains high at 98%. See EPA, *Regulatory Impact Analysis for the Mandatory Reporting of Greenhouse Gas Emissions Proposed Rule (GHG Reporting), Final Report*, at 4-119 (Mar. 2009). Thus, EPA appears to be targeting a substantial number of facilities that have insignificant contributions to the national total of GHG emissions. This is counter to EPA's stated goal of the reporting rule -- to focus on significant sources of GHG emissions. As such, EPA should raise the threshold to 100,000. (It is unknown if this threshold could even be higher and retain similar coverage, because EPA only provides estimates 25,000 and then 100,000.) One alternative for EPA to continue to obtain information on these smaller sources is to provide for voluntary reporting for facilities below this threshold, or to provide a phase-in of reporting requirements as noted in Section IV of these comments.

C. EPA should allow facilities to rely on reports that may already be submitted to government entities (including EPA).

Several States already require reporting from ethanol facilities. For example, Iowa requires GHG reporting from Title V sources and ethanol facilities.¹⁵ EPA should give facilities the option of utilizing reports already being submitted to States.

It should be noted that in an inventory done by the Iowa Department of Natural Resources ("IDNR") -- 2007 Greenhouse Gas Emissions from Selected Iowa Source Categories (Aug. 28, 2007) -- non-biogenic GHG emissions from ethanol plants paled in comparison to the largest emitters in the State.¹⁶ IDNR found that emissions ranged for 24 dry mill ethanol plants (22 natural gas-fired and 2 coal-fired) ranged from 0.0114 to 0.1822 million mtCO₂e (at 14-15). This can be

¹⁴ Although CH₄ does have higher global warming potential, these emissions are based on CO₂ equivalent emissions, and EPA has identified CO₂ as the largest contributor of GHGs directly emitted by human activities and as "a significant driver" of climate change. 74 Fed. Reg. at 16,464.

¹⁵ Mem. from Ruth Mead and Darcy Wilson, Eastern Research Group, Inc., to Suzanne Kocchi, EPA, regarding Review of Existing State Greenhouse Gas Reporting Rules, Summary of Existing State GHG Rules, at 1 (Jan. 27, 2009).

¹⁶ Available at http://www.iowadnr.gov/air/prof/ghg/files/2007_Greenhouse_Gas_Inventory.pdf.

compared to the emissions from the ten highest emitters in the State (all coal-fired utilities) which ranged from 1.31 to 9.14 million mtCO₂e (at 19). The emissions from these ten facilities accounted for 69% of the total GHG emissions from fossil fuel combustion in the State.

D. EPA should not require actual emissions to determine whether the threshold has been exceeded in the first place.

In order to determine whether the threshold has been exceeded, the applicability determination under the Proposed Rule requires a large number of facilities to calculate their emissions under the rule in order to determine if they must report. 74 Fed. Reg. at 16,469. Under the proposal, then facilities will have to make the calculations during the year just to determine that they may not exceed the threshold. This imposes a large burden on facilities, who will likely not be able to determine if the rule is applicable to them prior to commencement of the rule's compliance period. While RFA supports EPA's presumption regarding stationary source combustion units that have a maximum rated heat input capacity of less than 30 mmBtu/hr,¹⁷ EPA should provide a simplified means by which all facilities can determine applicability of the Proposed Rule prior to commencement of the compliance period, such as allowing facilities to provide their own estimates to EPA based on the prior year's operations.

E. EPA should not require annual reporting and should provide for a sunset of the requirements.

The explanatory statement for the FY2008 Consolidated Appropriations Act notes that EPA has the discretion to determine the appropriate frequency of reporting. 153 Cong. Rec. at H16,131. Section 114 of the CAA provides that the information required may be on a "one-time, periodic or continuous basis." 42 U.S.C. § 7414(a)(1). The Proposed Rule would have covered entities file reports annually for an indefinite period of time. Such reports must be filed by March 31. There is no authority or justification to have such an open-ended reporting requirement. If the purpose is to obtain baseline information, it is unclear why such information is needed indefinitely. EPA provides no indication that processes or emissions are likely to change substantially year to year.

Moreover, three months is insufficient time for facilities to compile and prepare the reports that would be required under the Proposed Rule. Other reporting programs allow longer time intervals for reporting, including up to six months.

For any final rule, EPA should at least move to biennial reporting, give facilities at least six months to prepare the reports for the prior year, and include a sunset provision, particularly as climate change policies begin to be implemented. In the alternative, EPA should require annual reports for a limited period of time, such as three years, which is sufficient to establish a baseline to be used against future climate change policy.

F. A "Once In, Always In" policy is not appropriate.

The Proposed Rule would require that once a facility becomes subject to reporting under the rule, it must continue to comply with all of the reporting rule requirements, including the

¹⁷ EPA's assumption is based on a facility operating full time, and thus a presumption may be supportable for a higher rated capacity based on fewer operating hours.

requirement to submit reports. (Proposed Section 98.2(g)). Even though a facility's emissions fall below the reporting thresholds established in the Proposed Rule, the facility must continue to make reports to EPA. This "once in, always in" policy is not appropriate given the stated purpose of the Proposed Rule to be to focus on significant sources of GHG emissions. EPA indicated that it has sought to exclude small facilities and "small emitters" from the proposal. 74 Fed. Reg. at 16,456, 16,467.

The purpose of a threshold is to ensure that the larger sources are covered, but also to give incentives to entities to reduce their emissions below that threshold. As EPA recognizes, a once in, always in policy provides disincentive for sources to implement measures to reduce their emissions to below the thresholds. *Id.* at 16,470. This policy also penalizes facilities that may have made errors in their initial calculations or that have an abnormal year in GHG emissions. In addition, EPA should recognize that reduction in emissions may also come from reduced operations due to a loss of resources. These facilities should not continue to be subject to the burden of complying with the Proposed Rule.

EPA states that the purpose of the once in, always in policy is to track trends in emissions and understand factors that influence emission levels. *Id.* Providing for exemptions for facilities that can show their emissions have fallen below the threshold and are likely to stay below that level, such as through improved efficiencies or removal of emission sources, would still provide EPA information on these trends and would provide concrete examples of effective methods to achieve such reductions. As such, exemptions are not inconsistent with EPA's stated need. Moreover, such facilities could still be reinstated into the program if the emissions rise again due to significant changes in operations.

RFA, therefore, supports a procedure by which a facility can seek to be removed from the program if it can show that it has reduced its emissions below the threshold similar to that in California's mandatory reporting rule but also where it has permanently removed a significant source of emissions from its facility that would reduce its overall emission below the threshold for reporting.

G. RFA supports Option 4 for monitoring - reporter's choice of methods.

EPA considered four general approaches for monitoring requirements under the Proposed Rule. These options included: (1) direct emission measurements (e.g., continuous emission monitoring systems ("CEMS")); (2) combination of direct emission measurement and facility-specific calculations; (3) simplified calculation methods; and (4) reporter's choice of methods. 74 Fed. Reg. at 16,474-16,475. Option 4 would give reporters flexibility to select any measurement or calculation method and any emission factors for determining emissions. *Id.* at 16,475. The Proposed Rule proposes Option 2 as the general monitoring approach. Option 2 would require direct measurement of emissions from units at facilities already required to collect and report data using CEMS under other programs. For facilities that have units that do not have CEMS installed, they would have the choice to directly measure emissions or to use facility-specific calculations, which would be identified in each subpart.¹⁸ RFA agrees that generally requiring CEMS is not warranted, unless facilities already utilize such systems. While EPA should provide guidance as to

¹⁸ For stationary fuel combustion, EPA has proposed a four-tier system, requiring use of CEMS for certain facilities.

how to make these calculations, facilities should be given the option to use CEMS or utilize other reasonable methods to determine GHG emissions.¹⁹ Such reports should provide EPA with sufficient facility-specific information to inform future policy.

RFA also agrees that generally requiring direct measurement of landfills and wastewater treatment is not warranted, and that facilities should be able to rely on simplified measurements to calculate emissions. RFA supports EPA developing a tool to assist reporters in calculating emissions from wastewater treatment as noted on page 16,561 of the Proposed Rule, and EPA should, at a minimum, delay inclusion of this source category until such a tool is developed.

H. RFA supports self-certification, but opposes the stringent requirements being imposed on “designated representatives.”

Proposed Section 98.4 requires that a designated representative of each facility certify the accuracy of GHG emissions reports. 74 Fed. Reg. at 16,615. It also includes a verification requirement. Options for data verification considered include: (1) no verification, (2) verification by an independent third party, and (3) verification by EPA. *Id.* at 16,476-16,477. The Proposed Rule would provide for verification by EPA. RFA supports self-certification with verification by EPA, rather than a third-party.

RFA notes, however, that the proposal is intended to collect information for *future* policy making, not to establish compliance with any regulation under the Act. The methods imposed are largely based on estimates. Under the Toxic Release Inventory regulations, EPA requires “[s]ignature of a senior management official certifying the following: ‘I hereby certify that I have reviewed the attached documents and, to the best of my knowledge and belief, the submitted information is true and complete and that amounts and values in this report are accurate based upon reasonable estimates using data available to the preparer of the report.’” 40 C.F.R. § 372.85(b). EPA recognized that, because the calculations are based on estimates, a reasonable standard should be required. 53 Fed. Reg. 4500, 4512 (Feb. 16, 1988). EPA should use similar certification requirements here.

The designated representative requirements in the Proposed Rule place undue risks on the person making the certification and add unnecessary burdens on the facility. For example, the proposal requires that the designated representative be identified through an “agreement binding on the owners and operators” to specifically identify a particular individual, requiring updates any time there is a personnel change. Proposed Section 98.4. The Proposed Rule also provides for an alternate designated representative, but states that “... any representation, action, inaction, or submission by the alternate designate representative shall be deemed to be a representation, action, inaction or submission by the designated representative.” Proposed Section 98.4(f)(1). The designated representative may have legitimate reasons not to be available to certify the report, and should not be required to be accountable for reporting he or she is not able to review ahead of time. Finally, it is unclear why separate requirements for a “certificate of representation” or personal examination of every document is needed in this case.

¹⁹ While default factors may be a useful means of reducing the reporting burdens, facilities should be given the opportunity to utilize or develop default factors that may be more representative of the industry.

IV. EPA Should Defer the Effective Date of the Reporting Rule or Provide a Phase-in Approach to Focus on Significant Sources of Emissions in the First Place.

The Proposed Rule would require covered entities to begin monitoring and recordkeeping on January 1, 2010 and to submit reports of 2010 GHG emissions no later than March 31, 2011. Proposed Section 98.3(a)(1). EPA indicates that it intends to issue the final rule in sufficient time to begin monitoring on January 1, 2010, but that it may be unable to meet that goal. 74 Fed. Reg. at 16,471. Sufficient time is needed to develop the monitoring, recordkeeping and quality assurance programs required to comply with the rule, particularly for smaller sources. In particular, facilities may need to perform an operation review and measuring devices may need to be installed to ensure compliance with the requirements. Of the options noted in the Proposed Rule, RFA supports EPA's proposed alternative date of reporting 2011 data in 2012, delaying implementation by one (1) year to allow sufficient time for facilities to prepare.

A better approach, however, would be to have EPA phase in reporting requirements over time, with larger sources beginning to report 2011 emissions in 2012, and the rest of the sources subject to the rule beginning to report over the next several years. EPA should begin with the major sources of GHG emissions (e.g., those listed under Proposed Section 98.2(a)(1)) and suppliers of industrial greenhouse gases and fossil fuels (e.g., those listed under Proposed 98.2(a)(4)), not some arbitrary threshold. EPA has provided insufficient information to identify these major sources, but these sources generally have no threshold indicating EPA believes them to be significant sources. EPA could then phase in industrial sources under Proposed Section 98.2(a)(2) and (a)(3) generally, based on decreasing thresholds, starting at no less than 100,000 down.

Moreover, as EPA recognized, the Proposed Rule would have double reporting of GHG emissions. 74 Fed. Reg. at 16,466. Although the FY2008 Consolidated Appropriations Act refers to both upstream and downstream users, EPA's stated goal is to focus on significant sources of emissions.²⁰ As EPA recognized with respect to the Toxic Release Inventory reporting program, "the first few years' data should be evaluated to determine whether modifications of the threshold would meet the statutory test of obtaining reporting on a substantial majority of the releases (i.e., pounds released per year) of each chemical from subject facilities." 53 Fed. Reg. at 4508. In this way, EPA can focus its efforts on the most significant sources -- the asserted goal of the proposed rule -- and allow smaller facilities with less resources time to prepare for the rule.

V. EPA Properly Excludes Emissions Associated with Fermentation in Determining Emissions from Ethanol Production Facilities.

Under the Proposed Rule, reporting is only required for those sources for which EPA has provided calculation methodologies. For ethanol production facilities, EPA proposes to require reporting of emissions only from three sources -- stationary fuel combustion, landfills and wastewater treatment.²¹ As such, emissions from ethanol fermentation should neither be calculated against the threshold nor be included in the reporting requirements. RFA agrees that this is the

²⁰ EPA recognizes that exclusion of "downstream" users may result in facilities being below the proposed threshold. 74 Fed. Reg. at 16,466.

²¹ For the reasons noted above, RFA believes that landfills and wastewater treatment are *de minimis* sources and should be eliminated.

appropriate approach, which is consistent with EPA's treatment of renewable fuels in general, and requests that EPA make this determination clear in the final rule.

EPA has properly focused on non-biogenic anthropogenic sources of GHG emissions in the Proposed Rule. Ethanol is produced from biomass, and the carbon in biomass is of a biogenic origin --meaning that it was recently contained in living organic matter. For example, emissions associated with ethanol fermentation are not counted against GHG emissions in Iowa's reporting program because they are considered biogenic emissions. Also, EPA has found that "the CO₂ emitted from biomass-based fuels combustion does not increase atmospheric CO₂ concentrations, assuming the biogenic carbon emitted is offset by the uptake of CO₂ resulting from the growth of new biomass." 74 Fed. Reg. 24,904, 25,039 (May 26, 2009). This also applies to biogenic emissions from fermentation.

In addition, there are several ethanol plants that are capturing CO₂ from the fermentation process and removing these emissions from the atmosphere. The capture and removal of CO₂ produced by fermentation is a net reduction in atmospheric CO₂, not just a reduction in CO₂ emissions. These facilities should be allowed to count these emissions against their total for determining whether the threshold is met, and they should be included in any reports to EPA.

VI. EPA Should Consolidate Reporting for Facilities that Reduce Their GHG Emissions Through Carbon Capture and Sale.

EPA proposes separate requirements for suppliers of CO₂. Suppliers of CO₂ include production process units that capture a CO₂ stream for purposes of supplying CO₂ for commercial applications. Proposed Section 98.420(a)(1). These suppliers must report the mass of CO₂ captured from the production process unit.

Because of the relative purity of the CO₂, some ethanol plants capture CO₂ from the fermentation process for sale in other industries. A 2007 survey showed over 23% of facilities reporting captured CO₂ emissions.²² These CO₂ emissions are generally sold for use in dry ice production and carbonated beverage bottling. For example, a facility in Milton, Wisconsin was reported to plan on capturing CO₂ from the fermentation process for sale to more than 50 customers in southern Wisconsin and northern Illinois who use CO₂ for "a hundred different applications" in the chemical, food-processing and beverage industries.²³ Because biogenic sources of emissions are generally excluded from reporting, EPA should also exclude these captured emissions from reporting under Proposed Section 98.420(b). Moreover, these sales avoid additional new production of CO₂. At a minimum, EPA should clarify how these captured emissions, which are biogenic, should be reported.

²² May Wu, Argonne National Laboratory, *Analysis of the Efficiency of the U.S. Ethanol Industry 2007*, http://www.ethanolrfa.org/objects/documents//2007_analysis_of_the_efficiency_of_the_us_ethanol_industry.pdf.

²³ Stacey Vogel, *Milton gas could end up in your soda: Ethanol plant will capture, sell CO₂*, *The Janesville Gazette*, Feb. 8, 2008, available at <http://gazettextra.com/news/2008/feb/08/milton-gas-could-end-your-soda-ethanol-plant-will/>.

VII. EPA Properly Determined That Suppliers of Ethanol and Other Renewable Fuels Should Not Be Required to Report GHG Emissions From Their Products.

In the Proposed Rule, EPA notes that it is not proposing to require suppliers of biomass-based fuels to report on their products anywhere under this rule. 74 Fed. Reg. at 16,570. EPA notes that this is consistent with the “longstanding accounting convention adopted by the IPCC, the UNFCCC, the U.S. GHG Inventory, and many other State and regional GHG reporting programs where emissions of CO₂ from the combustion of renewable fuels are distinguished from emissions of CO₂ from combustion of petroleum or other fossil-based products.” *Id.* “Under such convention, potential emissions from the combustion of biomass-based fuels are accounted for at the time of feedstock harvest, collection, or disposal, not at the point of fuel combustion.” *Id.* This approach is also consistent with EPA’s approach in the proposed rule for changes to the RFS, as noted above. 74 Fed. Reg. at 25,039. RFA strongly supports this approach.

As noted above, Congress recognized the importance of renewable fuels in reducing GHG emissions from the mobile source sector in passing the RFS.²⁴ Under that program, EPA is required to estimate the emissions from combustion of renewable fuel compared to gasoline. Although we are still reviewing the proposal (and have substantial concerns with much of EPA’s analysis), EPA’s proposed rule on changes to the RFS program includes a comparison of lifecycle emissions for gasoline and ethanol, finding that 2005 baseline gasoline had 3,417,311 CO₂-eq/mmBtu tailpipe GHG emission compared to 37,927 for ethanol.²⁵ 74 Fed. Reg. at 25,041. Thus, use of ethanol over fossil fuels results in substantial reductions in GHG emissions. Given that Congress has already spoken on the issue, there is no need nor justification for EPA to impose reporting requirements on renewable fuel producers under the Reporting Rule.

VIII. EPA Should Not Require Reporting of Confidential Business Information or Should Include Provisions Protecting Such Information from Disclosure.

The Proposed Rule requires extensive and substantial amounts of information, some of which industry considers to be confidential business information (“CBI”). Such information is not limited to emission data, because, EPA notes, the information is necessary “to support a range of future climate change policies and regulations.” 74 Fed. Reg. at 16,456. Some of these policies may include nonregulatory approaches. *Id.* at 16,454-16,455. RFA recognizes that EPA has indicated that it would protect any information claimed as CBI in accordance with its regulations, but EPA also states that “in general, emission data collected under CAA sections 114 and 208 cannot be considered CBI.” *Id.* at 16,463. Also, EPA proposes to disseminate the emissions data to the public each year. *Id.* at 16,595.

EPA is only requesting the information for future reference. EPA’s guidance on what constitutes “emission data” includes “information necessary to determine” emissions. 56 Fed. Reg. 7042, 7042 (Feb. 21, 1991). *See also* 40 C.F.R. § 2.301(a)(2)(i). Since EPA will have emission data reported, none of the additional information being requested is *necessary* to determine emissions. Courts have found that a “strict interpretation of the ‘necessary to determine’ requirement is

²⁴ Congress made clear, however, that the RFS did not affect the regulatory status of GHGs. 42 U.S.C. § 7545(o)(12).

²⁵ Tailpipe GHG emissions for ethanol include CH₄ and N₂O but not CO₂ emissions as these are assumed to be offset by feedstock carbon uptake.

warranted in order to ensure that the exception does not swallow the rule.” *Natural Res. Def. Council v. Leavitt*, Civ. No. 04-01295, 2006 WL 667327, at *4 (D.D.C. Mar. 14, 2006). Moreover, some of this information may be required under the RFS, which would not be subject to the “emissions data” exception under Section 114.

Thus, EPA should review the need for the information being requested and provide clear guidance as to what will be considered “emission data.” Emission data should only be the actual emissions calculations. Moreover, EPA should only provide information to the public in a manner to protect the submitters confidentiality.

IX. RFA Supports Inclusion of Electricity Purchases in the Reporting Rule.

EPA indicated that it is not currently proposing that facilities report information regarding electricity purchases. 74 Fed. Reg. at 16,479. RFA generally supports including the reporting of electricity purchases by facilities subject to reporting. Reporting of electricity usage may have two avenues of benefit. First it provides a user total of electricity with which a cross reference to electricity generation can then be made. This type of cross reference is not available today. The second benefit is the ability to compare electricity usage across industries and operations. This will allow EPA to consider the benefits of facilities with combined heat and power operations.

X. EPA Should Clarify that the Reporting Provisions, if Finalized, Do Not Trigger Any Other Requirements Related to GHG Emissions under the Clean Air Act.

In a footnote, 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 PSD [(Prevention of Significant Deterioration)] program.”²⁶ 74 Fed. Reg. at 16,456 n.8 (citing Memorandum entitled “EPA’s Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program” (Dec. 18, 2008)). Although EPA notes that it is reconsidering the cited memorandum and that such proceeding would be the appropriate venue for submitting comments on the issue of whether monitoring regulations under the CAA should trigger the PSD program, EPA should make this determination prior to finalizing any greenhouse gas emissions reporting rule. This is necessary, given the potential impacts of imposing the PSD requirements due to greenhouse gas emissions as EPA identified in the ANPR, 73 Fed. Reg. at 44,497-44,503. In particular, EPA should reaffirm the findings in the December 2008 Memorandum. RFA incorporates the analysis in EPA’s memorandum by reference in these comments.

As noted above, the Proposed Rule makes clear that EPA has made no decisions regarding regulation of GHG emissions under the CAA. 74 Fed. Reg. at 16,456. As the ANPR made clear and EPA also affirmed here, GHGs “are not currently controlled by other mandatory Federal programs.” 74 Fed. Reg. at 16,464. EPA also stated that the Proposed Rule “does not require

²⁶ The PSD program refers to the pre-construction permit program under the CAA. A PSD permit must include the best available control technology (“BACT”) to control emissions of “each pollutant subject to regulation under this chapter emitted from, or which results from, such facility.” 42 U.S.C. § 7475(a)(4). PSD regulations provide that BACT is required only for “regulated [New Source Review] pollutant[s],” which includes “[a]ny pollutant that otherwise is subject to regulation under the Act.” 40 C.F.R. § 52.21(b)(50).

control of greenhouse gases.” *Id.* at 16,448. Thus, consistent with EPA’s past interpretations and practices, as outlined in the December 2008 Memorandum, the reporting rule, if finalized, would not constitute regulation of GHG emissions under the CAA to trigger the PSD requirements. Alternatively, EPA need not make a final determination as to the continued effect of the December 2008 Memorandum, but must recognize that the request for information under Sections 114 and 208 of the CAA for the purpose of determining whether and how to regulate GHG emissions, as EPA has proposed, does not trigger any other requirements under the CAA, particularly the potentially onerous PSD requirements, putting the cart before the horse.

Similarly, EPA should clarify that any greenhouse gas reporting rule under Section 114 is not an “applicable requirement” under Title V. The Title V program requires operating permits for major sources that include all federally applicable air requirements. EPA should make clear that the reporting rule is being proposed pursuant to Section 114(a)(1), which is not included among the applicable requirements to be included in Title V operating permits in 40 C.F.R. § 70.2. Further, as with the PSD program, the reporting rule is expected to provide information for future action and should not be considered to trigger any current requirements under the CAA. EPA should make this clear in the final rule.