

COALITION FOR SUSTAINABLE CEMENT MANUFACTURING & ENVIRONMENT
1029 J Street, Suite 300, Sacramento, CA 95814

July 9, 2010

Ms. Mary Nichols, Chairman
California Air Resources Board
1001 "I" Street
Post Office Box 2815
Sacramento, California 95812

Subject: Comments on CARB's Proposed Regulation for Energy Efficiency and Co-Benefits Assessment of Large Industrial Facilities

Dear Ms. Nichols,

The Coalition for Sustainable Cement Manufacturing and Environment ("CSCME"), a coalition of all six cement manufacturers operating the 10 cement plants in California,¹ hereby submits the following comments on the California Air Resources Board ("CARB") Proposed Regulation for Energy Efficiency and Co-Benefits Assessment of Large Industrial Facilities ("Proposed Regulation").

1. Audit Information Will Contribute To Ensuring Compliance With AB 32

AB 32 requires that any emission reduction measures adopted by CARB consider cost-effectiveness and minimize leakage. Compliance with these requirements, among others, is critical to ensuring that implementation of AB 32 achieves its climate change objectives without significant and irreversible adverse economic impacts on California industries.

In its Statement of Reasons for the Proposed Regulation, CARB confirms that the Proposed Regulation "does not require any actions to reduce emissions, nor claim any emission reductions associated with implementation of the regulation," and thus, according to CARB, the requirements of cost-effectiveness and minimization of leakage do not apply. However, CARB also confirms that the information collected under the Proposed Regulation will be used to (a) assess the situation if projects are implemented,² (b) identify a range of possible approaches, including State and local regulations, to maximize GHG emission reductions,³ (c) "acquire the necessary data needed to further pursue achieving GHG emission reductions from the largest GHG emitting facilities in the State,"⁴ and (d) prepare a report with preliminary findings and recommendations for use as "a starting point for discussion with all

¹ The Coalition includes CalPortland Company, Cemex, Inc., Lehigh Southwest Cement Company, Mitsubishi Cement Corporation, National Cement Company of California Inc., and Texas Industries, Inc.

² Statement of Reasons, at ES-2.

³ *Id.* at ES-6.

⁴ *Id.* at ES-8.

preliminary findings and recommendations for use as “a starting point for discussion with all stakeholders on what actions and approaches could be taken to maximize GHG, criteria pollutant, and toxic air contaminant emission reductions.”⁵ Importantly, if CARB proceeds to adopt any future greenhouse gas reduction measures based on the information provided in the energy audits, the development and implementation of such measures must be in full compliance with AB 32, including the requirements to consider cost effectiveness and minimize leakage.

In CSCME’s view, the proposed assessments can provide valuable information that can inform CARB’s current and future development of GHG reduction measures and contribute to CARB’s assessment of cost-effectiveness and leakage. In particular, the information will reinforce the prior comments of CSCME that the California cement industry is highly GHG-, energy-, and capital-intensive, that it has already implemented state-of-the-art energy efficiency measures in order to maximize its competitive position and comply with stringent California laws and regulations, and that it has few, if any, cost effective abatement options available. Finally, CSCME believes that the information provided under the Proposed Regulation will assist in managing the expectations of CARB and other stakeholders regarding the appropriate design of emissions reduction measures for the California cement industry.

2. Additional Energy Efficiency Improvements Are Extremely limited

In its Statement of Reasons for the Proposed Regulation, CARB states that “information gathered from the implementation of the proposed regulation will be a valuable resource in determining what GHG emission reduction opportunities are available” and that the information “is needed to identify promising areas for emission reductions.”⁶ This language indicates that CARB foresees additional energy efficiency improvements resulting from the audit process. CSCME is concerned about CARB’s expectation in this regard. Although cement manufacturers are always searching for additional methods to improve energy efficiency, the cement plants in California are already the most efficient plants in the United States and possibly in the world, and therefore, there are few additional efficiency improvements that have yet to be implemented by California cement producers.

CSCME urges CARB to examine each industry based on its unique circumstances and avoid any presumption that the audit process will necessarily identify a particular level or configuration of energy efficiency improvements for every industry. The California cement industry is proud of the efficiency improvements made to date and feels confident that it has already implemented the most cost-effective improvements that are feasible at this point. CSCME looks forward to demonstrating this fact in the context of the audit process.

⁵ *Id.* at ES-10.

⁶ Statement of Reasons, at ES-1, 45.

3. The Proposed Regulation Requests Highly Confidential Information That Is Not Subject To Public Disclosure Under California Law

Section 95155 of the Proposed Regulation requires covered facilities, including cement plants, to submit an Assessment Report containing the information specified in section 95154 of the Proposed Regulation. Under section 95158(b), the Executive Officer will establish an Internet site “in which all Assessment Reports will be made available to the public.” Importantly, section 95160(b) of the Proposed Regulation confirms that any entity submitting information may:

designate information that is not emissions data as confidential because they believe it to be a trade secret or otherwise exempt from public disclosure under the California Public Records Act (Government Code section 6250 et seq.). All such requests for confidentiality will be handled in accordance with the procedures specified in title 17, California Code of Regulations, section 91000 to 91022.

As indicated in previous comments, CSCME has serious concerns about the confidentiality of information required for the Assessment Reports and about CARB’s intent to fully comply with the legal and procedural requirements for protecting confidential information. According to the Statement of Reasons:

ARB staff believes it is critical that the information collected be publicly available, particularly to those communities that are located near the facilities. In developing the proposed regulation, ARB staff’s goal was to require information that would provide sufficient detail about energy efficiency improvement projects to facilitate transparency, yet not reveal any confidential business information about the facility. As such, it is expected that a majority of the information received will not be confidential business data. In addition, ARB staff will work with the facility operators throughout the analysis and reporting process to address issues regarding confidentiality such that most if not all of the information provided to ARB can be directly released to the public.⁷

These statements about all or almost all data being disclosed to the public are in striking contrast to the core information required to be submitted in an Assessment Report under section 95154 of the Proposed Regulation, which is largely proprietary, confidential, and highly competitive business information that would not be made public by any entity that is in competition for sales and market share. Moreover, it is unclear if it would be legal for competitors to share the type of information being requested by CARB because of potential anti-trust violations. Cement companies and other covered entities in California devote significant effort and resources to develop business and investment strategies to optimize market share, and they necessarily maintain this information as confidential. If

⁷ Initial Statement of Reasons for Proposed Rulemaking for the Proposed Regulation, at 32 (emphasis added).

they were forced to divulge this information, it would lead to significant domestic as well as international competitive disadvantages.

The concern about confidentiality is particularly relevant to the cement industry, which is forced to treat virtually all data associated with energy efficiency as confidential, because this data can be used to understand the cost structure of their product (given the large contribution of energy cost to total cost for an energy-intensive process). Understanding the effects of particular energy efficiency improvement projects on a specific plant is a way to know how competitive that plant is compared to other plants.

As CARB is aware, cement production is highly capital- and energy-intensive, and thus, cement producers are always taking steps to improve overall operations/design/costs in order to improve their bottom line. Accordingly, decisions about whether to make significant investments in energy efficiency measures and the nature and scope of such investments directly impact a cement facility's competitive position in relation to other California cement producers and in relation to imports from non-California sources.

Section 95154 of the Proposed Regulation lists the various types of information that must be included in an Assessment Report. Although some of this information, such as emissions data, is clearly public, most of the information requested precisely fits within the definition of "trade secrets" as defined by the California Public Records Act:

any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.⁸

Although the disclosure of any individual trade secret in isolation would create competitive concerns, the Proposed Regulation requires the submission and potential disclosure of the entire range of confidential information that is critical to preserving the competitive position of each cement facility. In other words, the disclosure of one type of information may not raise significant concerns, but when this information is combined with the other information required under the Proposed Regulation, domestic and foreign competitors will gain a significant competitive advantage.

Section 95154(a) the Proposed Regulation requires that covered entities conduct a facility energy consumption and emissions analysis. As demonstrated below, the overlapping categories of requested information in section 95154 require the submission of a substantial amount of highly sensitive, business proprietary information that cannot be disclosed publicly without significant harm to the facility's competitive position. This information qualifies as "trade secrets" because these types of

⁸ Cal. Gov't Code § 6254.7(e).

information are “known only to certain individuals” within manufacturing facilities, and the information gives these manufacturers “an opportunity to obtain a business advantage over competitors who do not know or use it”.

A cement manufacturer’s ability to design and operate a production facility is at its core an effort to produce a product with certain chemical specifications that, when combined with other materials to produce concrete, will outperform a competitor’s product. Closely tied to this proprietary effort to produce a superior product is the ability to produce such a product at a lower cost. This involves design, process equipment, and controls (in some fashion common throughout the industry) that are adapted to the specific operation of an individual quarry and facility. This not only relates to the fuel types, but the raw materials and various additives that are part of the production process to manufacture cement. Each of these would be directly compromised by the public dissemination of the requested information:

- § 95154(a)(5) “Process flow diagram of the facility, identifying each process or system and its geographic location.”

Process flow diagrams provide detailed information regarding the manufacturing process, which varies among manufacturers and by which manufacturers are able to maintain competitive advantages both through the operational alterations themselves (some may be patented) as well as the timing of improvements. Process flow diagrams would inherently identify the differences between plants and equipment technologies, including differences in types of energy used, process technology, and relative energy consumption, which allow competitors to readily calculate costs.

- § 95154(a)(6) “Name and description of each process or system and the equipment types used in each.”

Similar to process flow diagrams above, the specific descriptions of processes and equipment types are also essential elements of a facility’s manufacturing process. Public disclosure of this information would reveal unique facility-specific information that is part of a facility’s overall business plan. Disclosing the types of equipment in use would allow competitors to use the energy cost or energy types with standard costs to estimate manufacturing costs based on known energy consumption factors for the equipment.

- § 95154(a)(7) “Types of energy used in each process or system (i.e., natural gas, purchased electricity, etc.), and whether the energy is purchased or produced by the facility.

The types of energy used in the manufacturing process are sensitive, proprietary information that represent a key component in energy-intensive cement manufacturing. This information is a specific component of a manufacturer’s dynamic to lower costs and, as such, is extremely sensitive information that is not publicly disclosed at the level of detail requested. In addition, whether the energy is purchased or produced by the facility can be a significant element in the overall cost structure of the product. The type of fuel in conjunction with the equipment technology can be used to determine costs. Disclosing the types of fuel used would also potentially be detrimental to the use of alternate fuels. The markets for alternative fuels are highly competitive both within the cement industry and among other industries, and

manufacturers often have to innovate with respect to handling, processing, and firing technologies. These investments in technology and equipment could be compromised by competitors if the technologies were known or costs could be determined.

- § 95154(a)(8)a-c “Facility energy use and emissions” including amount of fuel and electricity consumed in 2009.

Similar to § 95154(a)(7), the amount of fuel and electricity consumed in the manufacturing process is sensitive, proprietary information that is a key component of the cost structure of cement manufacturing. A breakdown of energy use by type would potentially identify the facility among competitors, effectively revealing manufacturing costs. Making the data anonymous would not be sufficient to protect the data because there are few facilities in California.

Section 95154(b) requires that covered entities conduct an analysis of the energy efficiency improvement opportunities that exist at the facility. According to the Statement of Reasons, the analysis must cover “the full range of potential energy efficiency improvement opportunities that exist at a facility, from those with relatively low costs that can be implemented quickly, to improvements requiring large expenditures that will take more time and have more extensive facility impacts.”⁹ This section essentially requires facilities to provide their capital investment plans, detailing future potential projects specific to improving energy efficiency. Public disclosure of this information would reveal long-term, facility-specific investment decisions that are the result of significant research and strategic planning. Competitors (in particular, foreign entities) would benefit greatly from knowledge of these investment plans and would likely revise their own planning to reflect this knowledge.

As demonstrated below, the information requested in section 95154(b) of the Proposed Regulation is, by its nature, highly confidential and qualifies as “trade secrets”:

- § 95154(b)(1) “Identify potential improvement projects for equipment, processes, or systems that cumulatively account for at least 95 percent of the facility’s total greenhouse gas emissions reported in section 95154(a).”

Similar to 95154(a)(5) and (6), identifying potential improvement projects for equipment, processes, and systems used in the production process will require identifying all of these items. The majority of energy used in cement plants is in two main processes, the kiln fuel and grinding electricity. Identifying the potential improvements in these systems will reveal facility-specific manufacturing plans and techniques such as capacities, costs, demand information, and essentially any potential modification that may be performed to obtain a competitive advantage. Such information is highly confidential and proprietary in nature and would not be publicly disclosed.

- § 95154(b)(2) “Include a comprehensive assessment of potential energy efficiency improvement opportunities.”

Providing a complete assessment of improvement opportunities is akin to providing a facility’s long-term investment plans for energy efficiency. Such planning is intrinsic to the performance and strategy among competitors, and reveals decision-making logic that would allow a

⁹ *Id.* at 29.

competitor to discern the key strengths, weaknesses, and investment timing of potential upgrades. This information has a significant effect on competitive positions and is therefore highly confidential.

- § 95154(b)(4) detailed information regarding each potential improvements evaluated, including:

This entire section would reveal details about equipment selection, capital requirements, and timing that could potentially be used by competitors and equipment suppliers. The decision-making process would reveal not only those projects that are worth considering further but also, perhaps more importantly, those that are not necessary or do not provide economic benefit. This information is sensitive to acquiring capital, equipment, and engineering resources and could be used to the advantage of suppliers of these resources.

- (a) "Existing facility equipment, process, or system involved;"

As under § 95154(b)(1), this information is highly proprietary and will reveal facility-specific manufacturing plans and techniques, therefore it should remain confidential.

- (b) "Type of potential improvement, including, but not limited to, equipment upgrades or modifications, process changes, changes to operating procedures or maintenance practices, or investment in new technologies; potential improvement projects should encompass low-cost projects that could be implemented quickly to mid- and long-term projects requiring higher capital expenditures and that may have more extensive facility impacts; emerging technologies that are not yet commercially available may also be considered;

This section requests extremely detailed information regarding potential efficiency improvements that reveal an array of facility-specific technologies and procedures. This information, when provided in such detail, constitutes confidential information that affects a company's competitive position.

- (c) "Summary description of each potential improvement, including but not limited to, a description of the system(s) involved and the energy efficiency issues that have been identified, and a description of how the improvement would benefit energy efficiency;

Describing potential improvement projects and their efficiency benefits will reveal not only sensitive facility-specific investment plans, but also the potential financial gains that will result from these projects.

- (d) "Status of the improvement (i.e., under investigation, scheduled, on-going, completed, or not implementing);"

Again, revealing the status of potential improvements will provide information regarding facility-specific investment plans, which affect a company's competitive position.

- (e) "For any improvement projects not being implemented, provide a description of the rationale for not implementing the project;"

The rationale for not implementing a particular improvement project may be a complex evaluation of investment planning and other considerations that are highly confidential in nature.

- (f) “Estimated time frame for the project implementation and the estimated completion date for those that are under investigation, scheduled, or ongoing, and the actual completion date for those that have been implemented;”
Similar to 95154(b)(4)(d), information regarding project time frames reveals facility-specific investment plans that affect competitive position.
- (g) “Estimated total one-time budgetary costs (in 2010 dollars), including, but not limited to, capital costs of equipment, installation, design, construction, and permits;”
This information reveals the results of investment and business plans that affect a company’s competitive position.
- (h) “Estimated total average recurring annual budgetary costs (in 2010 dollars), including, but not limited to, operation and maintenance;”
This information also reveals the results of long-term business plans and future budgetary issues that play a large role in a facility’s financial health and therefore affect its competitive position.
- (i) “Estimated project life;”
Providing information about estimated project life of efficiency improvement projects reveals the timing of long-term investment decisions, indicating when certain future investments will need to be made.
- (j) “Estimated average annual energy savings;”
Similar to 95154(b)(4)(c), providing details about the savings associated with efficiency improvement projects reveals information related to a facility’s financial planning, which should remain confidential.
- (k) “Estimated associated average annual GHG emission reductions and criteria pollutant and toxic air contaminant emission impacts;”
Although emissions data is public information, projections of future emissions data associated with future projects necessarily discloses critical data about the nature of the projects and the energy efficiency and cost advantages linked to such projects.
- (l) “Estimated annual cost savings (in 2010 dollars), if applicable;”
Again, this information provides details about a facility’s specific financial planning and investment decisions, which should remain confidential.
- (m) “Specification in detail of the estimation method, source test method, or other measurement method that was used to quantify the estimated GHG, criteria pollutant, and toxic air contaminant emission impacts in (10) above. The estimation method must include, but is not limited to, emission factors, control efficiency assumptions, and any other key assumptions used. The Executive Officer may work with the facility operator to determine appropriate values and may provide guidance for specific methodologies to be used;”

As indicated above, disclosure of estimated future emissions and the methodologies for calculating them will necessarily disclose competitive details about the nature and commercial benefit associated with such projects.

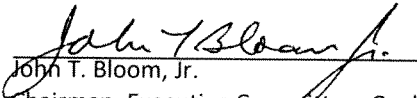
- (n) "Identification of any District air quality permit requirements, California Environmental Quality Act requirements, and other implementation considerations (including, but not limited to building, zoning, operational, safety, noise, water, and other environmental impacts)."

The reference to "other implementation considerations" (including a wide range of potential "impacts") is open-ended and suggests that CARB may require an unspecified amount of additional confidential information and may find that an assessment is incomplete without such information.

Despite CARB's intention to "facilitate transparency, yet not reveal any confidential business information about the facility," the Proposed Regulation does indeed require a significant amount of information that is by its very nature highly confidential. Public disclosure of the information identified above by design would reveal a significant amount of information about the manufacturing process and investment decisions of covered facilities, both of which are highly sensitive and have a considerable impact on the competitive position of any given facility. This information, therefore, should be classified as "trade secrets" under the Public Records Act and not subject to public disclosure.

In sum, in order to optimize cooperation by covered entities and ensure that CARB's objectives underlying the Proposed Regulation can be achieved, CSCME requests assurances in the Final Regulation and any further statement of reasons that CARB will not attempt to force public disclosure of confidential information to the detriment of the competitive position of California cement producers.

Sincerely yours,



John T. Bloom, Jr.

Chairman, Executive Committee, Coalition for Sustainable Cement Manufacturing & Environment
Vice President & Chief Economist, U.S. Operations, Cemex

CC:

Linda Adams, California Environmental Protection Agency
Andrew Altevoigt, California Environmental Protection Agency
Cindy Tuck, California Environmental Protection Agency
John Moffatt, California Governor's Office
Dan Pellissier, California Governor's Office

Michael Prozio, California Governor's Office
James Goldstene, California Air Resources Board
Kevin Kennedy, California Air Resources Board
Lisa Williams, California Air Resources Board