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BY ELECTRONIC MAIL

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100 Cambridge Street, Suite 900
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Re: Confidentiality Protection for Information Reported under 310 CMR 7.71 by Suppliers Distributing Fuel Oil and Propane for Heating in Massachusetts

Dear Will:

This letter is sent on behalf of the Massachusetts Energy Marketers Association (“MEMA”) and the Propane Gas Association of New England (“PGANE”). MEMA is the state trade association representing the heating oil, propane, diesel fuel and renewable biodiesel industry. Its members include retail companies serving both residential and commercial customers across Massachusetts, wholesale suppliers of heating oil, diesel fuel, propane, and biodiesel, and national heating equipment manufacturers. PGANE is a trade association representing the propane industry in the six New England states. PGANE’s members include some of the region’s largest propane companies and numerous smaller companies that are often family-owned and operated. Several of PGANE’s members are also members of MEMA.

The purpose of this letter is to set forth the reasons why MEMA and PGANE believe that the Massachusetts Department of Environmental Protection (“MassDEP” or “Department”) can and should maintain the confidentiality of certain information that MEMA and PGANE members (and similarly situated companies) will be providing to the Department under the recent amendments to the regulation at 310 CMR 7.71: *Reporting of Greenhouse Gas Emissions* (the “Amendments”). This specific concern has been raised with the Department in public comments on the draft regulations in 2024, and during subsequent discussions that MEMA and PGANE have had with Department representatives. The following analysis and information are provided to present the basis for this confidentiality request.

I. The Statutory Background for the Amendments Emphasize Collection of Data from Individual Suppliers Only to Establish a Sector-Based Statewide Inventory

M.G.L. c. 21N codifies key elements of the *Global Warming Solutions Act* (“GWSA”),

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Chapter 298 of the Acts of 2008, and *An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy* (“CRA”), Chapter 8 of the Acts of 2021. Under c. 21N, the Department is required to “monitor and regulate emissions of greenhouse gasses with the goal of reducing those emissions.” The CRA amended the GWSA’s definition of “Greenhouse gas emissions source” to clarify that, in the “regulation of emissions,” “a person or entity that sells or distributes transportation fuels, heating fuels, or electricity may be considered to be the source of greenhouse gas emissions from the use, distribution, consumption, combustion, or sale of such fuels.” It is on this basis that the Amendments were drafted to add reporting requirements for companies like those MEMA and PGANE represent.

In January 2024, the Department issued a “Background Information and Technical Support Document” for the Amendments (the “TSD”). The TSD states that “the new requirements would monitor and ensure compliance with the emissions reporting provisions of M.G.L. c. 21N for GHG emissions from combustion of heating fuels and implement the reporting needed to support a Massachusetts Clean Heat Standard (CHS).” In the TSD, the Department cited the following statutes as the basis for adopting the Amendments: M.G.L. c. 21A, §§ 2, 8, and 16, M.G.L. c. 21N, and M.G.L. c. 111, § 2C and §§ 142A – 142E. However, the specific sections of these statutes that have direct relevance to the Amendments are deemed to include M.G.L. c. 21A, § 8, M.G.L. c. 21N, §§ 2 and 3A, and M.G.L. c. 111, § 142B.

M.G.L. c. 21A, § 8 simply states that the Department “shall assist in the implementation of chapter 21N.” M.G.L. c. 21N, § 2(a) states the following in relevant part (emphasis added):

The department shall establish programs to monitor and reduce emissions of greenhouse gases and **shall promulgate regulations regarding sources or categories of sources that emit greenhouse gases** in order to achieve the greenhouse gas emissions limits and sublimits and implement the roadmap plans required by this chapter.

The department shall adopt regulations to **require the reporting and verification of statewide greenhouse gas emissions** and to monitor and enforce compliance with this chapter.

Importantly, M.G.L. c. 21N, § 3A states the following (emphasis added):

(a) The secretary shall adopt **sector-based statewide greenhouse gas emissions sublimits** as components of each statewide greenhouse gas emissions limit adopted pursuant to subsection (b) of section 3 **for the sectors of electric power, transportation, commercial and industrial heating and cooling, residential heating and cooling**, industrial processes, and natural gas distribution and service.

In summary, these statutes direct the Department to obtain a statewide aggregate of GHG

emissions from the commercial, industrial and residential heating and cooling *sector* to establish “*sector-based statewide* greenhouse gas emissions sublimits.” This letter is presented in the context of, and with consideration of, these specific statutory provisions.

II. The Statutory Background for the Amendments Does Not Mandate or Require Public Disclosure of Each Separate Company’s Private Business Data.

Based on these statutes, the Amendments establish “requirements for **reporting of CO₂ emissions data** for heating fuel suppliers for natural gas, heating oil, and propane” (emphasis added). In the TSD, the Department stated that “collecting the information in the amendments will allow MassDEP to better quantify the emissions from **heating fuels being used in the Commonwealth**, and to assist with monitoring and enforcing compliance with the GWSA, in order to further the goals of emissions reductions required by that law” (emphasis added).

The quarterly reports filed by suppliers must include “metric tons of CO₂ resulted from the combustion of all fuel delivered for consumption as heating fuel in Massachusetts during the quarter,” based on the calculation inputs specified in the Amendments, *i.e.*, multiplying total fuel quantity by an established “emissions factor.” In the Amendments, the term “CO₂ emissions” is defined (for the purpose of CO₂ emissions data reports) as “metric tons of CO₂ released to the atmosphere from the combustion of heating fuel as calculated pursuant to [the amended regulation] based on the quantity of heating fuel delivered for consumption in Massachusetts.” To verify the “total fuel quantity” they delivered, suppliers must submit information for heating oil or propane sales as documented on the delivery tickets required by M.G.L c. 94 § 303F.

In November 2024, the Department issued a Response to Comments (“RTC”) to address public comments submitted on the proposed Amendments. Of particular relevance to this request for confidentiality are the responses to comments #12 and #13.

In the response to comment #12, the Department stated: “This regulation is focused on point source emissions from the combustion of heating fuels.” This is significant because the Department is not regulating the actual “point sources” of these emissions – *i.e.*, each industrial, commercial and residential location that uses heating fuels for combustion. Instead, the heating fuel suppliers are being regulated to serve as a “proxy” for the *statewide* emissions from the sector of point sources. As noted above, the objective stated in M.G.L. c. 21N, § 3A is to “adopt sector-based statewide greenhouse gas emissions sublimits . . . for the sectors of . . . commercial and industrial heating and cooling, residential heating and cooling” To accomplish this, the Department has chosen to *collect* information from each company serving as a proxy for the “sector” on the quantities of fuel delivered and formula-based GHG emissions, but there is no reason for *public disclosure* of the underlying data provided by each company.

Comment #13 stated: “Certain information collected by this program may be considered

confidential business information, potentially consisting of trade secrets, including **information about companies' customer base**. Releasing fuel sales data could compromise the integrity of the fuel market” (emphasis added). Set forth below are portions of the Department’s response to this comment, along with further information from MEMA and PGANE presented in *italics*:

- MassDEP has experience collecting, publishing, and utilizing data submitted by companies in compliance with environmental regulations.

*In a footnote to this statement, reference was made to the TSD, which cited the Department’s collection of “detailed emissions data” from “retail electricity sellers.” The TSD stated: “The information proposed for reporting under these amendments [to 7.71] is most similar to the reporting that is currently required of retail electricity sellers [under 7.75], in that retail electricity sales is a competitive energy supply business that is subject to public release of emissions information that is closely correlated with their sales.” The TSD also stated: “In particular, this data collection will allow MassDEP to include and monitor **information about sources of heating fuel emissions** in its public GHG emissions registry, which currently includes detailed emissions data for several hundred stationary facilities and retail electricity sellers”(emphasis added).*

As noted above, MEMA and PGANE recognize that heating fuel suppliers are being treated as a “source” sector, but they are not the actual sources of emissions. They are being asked for information as proxies for the hundreds of thousands of separate locations where heating fuels are combusted. Thus, the Department needs the separate amount of fuel delivered by each supplier only to assemble an aggregated amount for the “sector-based statewide inventory.”

MEMA and PGANE dispute that the public release of emissions reported by retail electricity suppliers provides an analogous situation for heating fuel suppliers. Under 310 CMR 7.75, the specific data obtained from retail electricity suppliers is used to determine fuel type, emissions, vintage and eligibility for renewable or clean energy programs for the generation units they use as sources of electricity. Also, like the primary electricity suppliers in the state, competitive retail suppliers are licensed by the Department of Public Utilities (MassDPU). These suppliers are required to submit “compliance filings” that identify “clean generation attributes” and “clean existing generation attributes.” Releasing their emissions data would not impose a new competitive hardship, nor is this information a trade secret based on the existing oversight by MassDPU and DEP. Moreover, if retail electricity suppliers have not sought confidential treatment for their data, that does not preclude MEMA and PGANE members from doing so based on the substantial differences in their markets and interests.

- On an individual basis, companies may submit a request for confidentiality under 310 CMR 3.00 for information that the company believes may be trade secret. If a request for confidentiality is granted, the information will be handled in accordance with 310 CMR 3.00.

For the reasons stated herein, MEMA and PGANE believe confidentiality protection is appropriate and that a blanket determination of confidentiality for the “sector” by DEP will be more efficient than processing hundreds of separate requests.

- Under M.G.L. c. 111 § 142B, emissions data shall not be kept confidential by MassDEP.

As stated explicitly in § 142B, that provision is related to “emission data “submitted to the Department pursuant to this section,” which is related to enforcement of air quality standards and permit limits for actual point sources of emissions. The provision is not directly related to the reporting requirements of c. 21N.

- The amendments do not propose to collect any information related to the number of end-use customers or end-use customer information.

MEMA and PGANE are aware that end-use customer numbers or information are not being collected “directly.” “Total fuel quantity” currently is private confidential business data protected by each company. The delivery tickets required by M.G.L. c. 94 § 303F are not published or public information (one copy is provided to the customer and one copy is kept by the supplier). Where the number of end-use customers, or a close approximation, can be determined from the formulaic calculation of total emissions, disclosure of that data would be harmful to each company’s private business interests.

- MassDEP considered several examples of public data releases in developing the program. Examples include routine data publications by USEPA and company-specific gasoline sales data that is available on request from the MA Department of Revenue.

The operations of retail heating oil and propane companies in Massachusetts are markedly different from those of gasoline retailers, and the availability of gasoline sales data from the Massachusetts Department of Revenue (MADOR) is not comparable to releasing data indicating sales for individual heating fuel retailers. Although heating oil and propane retailers may interact with MADOR on taxes levied on clear diesel fuel and propane (autogas) sales, and other business taxes, these retailers are not providing MADOR with total sales volumes on dyed distillate fuel and propane used for space heating. Under the Amendments, MassDEP would be the first state agency to collect data relating to heating fuels sales volume.

Gasoline retailers have a variable, inconsistent customer base, even if some customers may purchase fuel from the same gasoline retailer on more than one occasion. Conversely, the business model for heating oil and propane retailers is based predominantly on customer loyalty and long-term relationships that are often decades long. Further, these customers are not only receiving heating fuels, but they are also receiving heating and cooling equipment installation and repair. Because of these factors, the volume of heating fuel provided to these customers is inextricably tied to the private business and asset valuation of every heating oil and propane retailer in Massachusetts.

- The commenter did not provide any evidence of how the release of emissions data would compromise the integrity of the fuel market. . . . Fuel shipment data reports do not contain emissions data.

MEMA's and PGANE's concern about the release of emissions data provided to MassDEP by heating oil and propane retailers is not related to the "integrity" of the delivered fuels marketplace. Rather, it is related to safeguarding private information that, if released, will provide a supplier's competitors and others with vital competitive business information that is currently confidential.

The heating fuel business and market are highly competitive. There typically are several sellers of heating oil and propane available to consumers in any geographic area. As stated above, the amount of heating oil and/or propane delivered annually by heating oil and propane retailers is private data that provides a key element of the business valuation for each retailer. This private data will be easily determined by reversing the quarterly emissions calculations reported under the Amendments.

Retail heating oil and propane companies in Massachusetts are privately held operations, many of which are owned and operated by second and third generation families. Public disclosure of fuel volume data reveals sensitive information from which competitors can deduce market share, the scope of operations, and company finances based on the number of gallons sold. The disclosure of company-specific fuel emissions data is also a roadmap for competitors and others to determine how many fuel delivery vehicles a heating oil and/or propane retailer has, how many employees they have, and even provide guidance on the geographic locations in which the retailer operates.

Currently, this information is not available or provided to any competitor until a retailer decides to market their business assets for acquisition and the disclosure of this confidential business information during the due diligence process and subsequent negotiations is subject to a strict Non-Disclosure Agreement (NDA).

The significant consolidation that the retail heating oil and propane industry has experienced over the past twenty years is continuing, so public access to this confidential information outside of the scope of a specific transaction with an NDA in effect will dramatically harm the fair negotiating posture of our members.

The same applies to vehicle information. The Department recently sent notice to heating fuel suppliers requiring them to supply “information about storage tanks and vehicles” in a Vehicle Information Template (VIT). This information constitutes competitively sensitive information that also would not be shared without an NDA. MEMA and PGANE see the directive to supply this information as excessive and not essential for the objective of establishing a sector-based emissions inventory. MEMA and PGANE maintain that this “form prescribed by the Department” should have accompanied the release of the draft of the Amendments issued in 2024 for public comment. If the form had been released at that time, MEMA and PGANE would have provided comments to the Department in opposition to the collection of the data required in the VIT.

MEMA and PGANE members understand why their vehicles are registered with the Massachusetts Registry of Motor Vehicles and placarded under state and federal transportation regulations, and why fuel truck meters are approved and supervised by the Massachusetts Division of Inspection. However, the Department has not identified a valid reason for requiring the information on the VIT related to the goal of the Amendments. Absent a clear basis for requiring it and affording confidential treatment to that information, MEMA and PGANE may challenge the requirement.

- MassDEP intends to handle company-specific emissions data submitted under the new fuel supplier reporting requirements in a similar manner to other data that has been submitted under 310 CMR 7.71 since the first reporting deadline in 2010.

If this is a reference to the collection of data from retail electricity sellers under 310 CMR 7.71 before the transition to 310 CMR 7.75, please refer to the comments presented above regarding the differences between heating fuel suppliers and retail electricity sellers.

III. MEMA and PGANE Members Have a Legitimate Business Interest in Protecting Their Trade Secrets and Other Proprietary, Confidential, Competitively Sensitive, and Critical Business Information

As stated above, much of the information being requested by the Department constitutes proprietary, confidential, competitively sensitive, and critical business information in a highly competitive market. The members of MEMA and PGANE have a legitimate business interest in protecting their trade secrets, confidential data, and good will from competitors.

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There is a sound basis for preserving the confidentiality of this information. Some of the factors in Massachusetts case law relevant to determining whether the information sought to be protected is confidential include the extent to which the information is known outside of the business, the value of the information to competitors, and the ease or difficulty with which the information could be properly acquired or duplicated by others. *See Jet Spray Cooler, Inc. v. Gifford*, 361 Mass. 835, 840 (1972). Confidential “market share data” is clearly not “general information within the industry” and may be classified as trade secret or confidential information entitled to protection. *Ethicon Endo-Surgery, Inc. v. Pemberton*, 27 Mass.L.Rptr. 541 *6 (2010). The members of MEMA and PGANE have a legally protectable and legitimate business interest in keeping their “confidential sales data” private. *See Inner-Tite Corp. v. Brozowski*, 27 Mass.L.Rptr. 204 *17 (2010).

As noted above, it is anticipated that the Department will be presented with a large number of confidentiality requests under 310 CMR 3.00. In that regard, the following provision at 310 CMR 3.14 would be applicable:

Whenever any person requests in writing that particular records be deemed trade secrets or otherwise be deemed confidential and exempt from disclosure, such records shall be treated as confidential and shall not be deemed public records until the Department has approved or denied the request pursuant to 310 CMR 3.00.

Also, adverse decisions by the Department are subject to the ten-day delay in 310 CMR 3.15, and the period may be extended by the Department in extraordinary situations.

MEMA and PGANE believe that it would not be productive for the Department to be inundated with hundreds of separate requests for confidentiality from their members, particularly where each request would raise identical issues as discussed above. Accordingly, MEMA and PGANE are requesting that the Department engage in further discussions to identify a reasonable global resolution to the concerns raised previously and in this letter.

Respectfully submitted,
For MEMA and PGANE



Barry P. Fogel

cc: Michael Ferrante, MEMA
Leslie Anderson, PGANE