

This class determination remains applicable insofar as it does not conflict with *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019). The Agency is in the process of evaluating whether any changes need to be made to its regulations and guidance to conform with this recent U.S. Supreme Court decision and will update class determinations, as appropriate.

US EPA ARCHIVE DOCUMENT

CLASS DETERMINATION 1-77
CONFIDENTIALITY OF BUSINESS INFORMATION CONTAINED IN
BIMONTHLY SUMMARY REPORT ON FLUE GAS DESULFURIZATION SYSTEMS

Since July 1974 the Environmental Protection Agency (EPA) Division of Stationary Source Enforcement (DSSE) has been collecting data for its Summary Report on Flue Gas Desulfurization Systems in utility companies in the United States. The report was published on a monthly basis from July 1974 until July 1975 and has been published on a bimonthly basis since July 1975. The information is collected by a contractor who prepares the summary report for EPA. EPA then publishes and distributes the report to approximately 550 recipients. The information in the report is obtained by the contractor through telephone calls to approximately 53 utilities and 18 control equipment vendors. All of the utilities and control equipment vendors are on the mailing list to receive the summary report.

DSSE has asked for a class determination concerning the entitlement of the information in the report to confidential treatment under EPA's regulations on confidentiality of business information (40 CFR Part 2, Subpart B). Under 40 CFR 2.207 I have authority to issue class determinations concerning entitlement of business information to confidential treatment.

In the case of the Summary Report on Flue Gas Desulfurization Systems, I have found:

(1) EPA possesses and will continue to acquire information on flue gas desulfurization systems.


(2) The information collected and published in the report is of the same character each time. The only difference is that the information is updated bimonthly. It is proper to treat all of the information as in the same class.

(3) A class determination would serve a useful purpose in that it will remove the necessity of clearing all of the information in each bimonthly report for possible claims of confidentiality.

I have determined that the information in the Summary Report on Flue Gas Desulfurization Systems is not entitled to confidential treatment. The companies supplying the information are and have been aware for several years of the use to which the information is put. Each of the businesses that supplies the information is a recipient of the report. Several years of practice have given sufficient notice to the businesses that the information has been and will continue to be made public. None of the businesses has ever objected to publication of the information. Only one company has acted to control in any way the use of its information. Montana Power Company has refused to give any information for the past six months. This is voluntarily submitted information. If any of the other companies had objected to publication of the information they too could have refused to supply the information. All recipients are aware of Montana Power's actions. The information in the report is published to help those interested in flue gas desulfurization systems keep abreast of the latest technological changes and the state of the art. Publication of the report benefits the public. As long as a company knows it has the opportunity to refuse to supply

its data, by supplying its data the company has given its consent to publication.

Accordingly, DSSE may continue to gather information for the Summary Report on Flue Gas Desulfurization Systems and publish that information. If at some time in the future, DSSE decides to solicit information from a company not currently contributing to the report, DSSE must take steps to give that company notice in accordance with 40 CFR 2.203 that the business may request confidential treatment or refuse to supply the information. The company must be told that if it does not assert a claim or refuse to supply the information, the information will be published in the report and be available to the public.


G. William Frick
General Counsel (A-130)

7 MAR 1977
Date