**REGION 9**
SAN FRANCISCO, CA 94105

**THIS LETTER MAY CONTAIN INFORMATION CLAIMED AS PROPRIETARY BUSINESS INFORMATION ("PBI") AND SHOULD BE HANDLED IN ACCORDANCE WITH APPROPRIATE CONFIDENTIAL BUSINESS INFORMATION ("CBI") PROCEDURES**

March 27, 2024

Travis Hurst
Carbon TerraVault Holdings LLC
28590 Highway 119
Tupman, CA 93276

Re: Determination Concerning Confidentiality of Information Contained in Underground Injection Control Class VI Permit Application Nos. R9-UIC-CA6-FY22-1.1, 1.2, 1.3, and 1.4

Dear Travis Hurst:

This letter constitutes the U.S. Environmental Protection Agency's ("EPA" or "Agency") final confidentiality determination on certain information that Carbon TerraVault Holdings LLC (the "Company") submitted to EPA in applying for four Underground Injection Control (UIC) Class VI permits for the 26R reservoir in the Elk Hills Oil Field. Specifically, the Company has asserted confidentiality claims over the following information:

- A set of wellbore diagrams (i.e., "Appendix 2 AoR Wellbores Feb 2022 (CBI).pdf," a 202-page PDF file);
- Computational plume-modeling files (157 files in Rescue format); and
- Several financial instruments included as part of the Company's financial assurance demonstration (i.e., "Attachment H – Financial Responsibility 26R CBI.pdf"):
    - an irrevocable standby letter of credit from Deutsche Bank (a two-page PDF attachment);
    - a standby trust agreement with the Bank of New York Mellon (a seven-page PDF attachment); and

- an insurance endorsement from Ascot insurance (a two-page PDF attachment).[1]

On January 4, 2022, EPA requested that the Company substantiate its confidentiality claim over the wellbore diagrams and modeling files. On August 8, 2023, EPA requested that the Company substantiate its claim over some of the financial instruments, and on November 16, 2023, EPA requested that the Company substantiate its claim over other financial records, which the Company had submitted later in the application process. By substantiation letters dated February 16, 2022, August 28, 2023, and December 8, 2023, the Company responded to EPA's requests, asserting that the information should be withheld as confidential and providing comments concerning the information's confidentiality. *See* 40 C.F.R. § 2.208(a).

I have carefully considered the Company's claims of confidentiality, its substantiations, the substantive criteria for use in confidentiality determinations under 40 C.F.R. § 2.208,[2] and the comments received from the Groundwater Protection Section of EPA Region 9's Water Division. For the reasons stated below, I find that the information is entitled to confidential treatment.

**Requirements for Confidential Treatment**

FOIA's Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). Any person seeking protection for information submitted to the Agency must therefore demonstrate that the information qualifies as either (1) a trade secret or (2) commercial or financial information that is obtained from a person and is privileged or confidential. Information meeting these criteria is commonly referred to as "Proprietary Business Information" or "PBI." It is also known as "Confidential Business Information" or "CBI."

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[1] The Company has withdrawn its confidentiality claims over other information, including a financial cost summary, certificate of insurance, financial strength demonstration, and other wellbore diagrams, which this determination therefore does not address. This determination likewise does not address documents, such as wellbore tables and plugging plans, that the Company claimed were confidential only until issuance of any draft UIC permits, as EPA has now proposed those permits.

[2] 40 C.F.R. § 2.208(e) conflicts with the holding in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019). The Agency therefore does not consider 40 C.F.R. § 2.208(e) in this determination.

## I. Trade Secret

The definition of "trade secret" under FOIA is limited to "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition requires that there be a "direct relationship" between the information and the production process. *Id.*

The Company states that the wellbore diagrams and modeling files constitute trade secrets. But because those records qualify for withholding as CBI, I do not address the Company's trade-secret claims.

## II. Confidential Business Information ("CBI")

To qualify as CBI under Exemption 4, the information must be (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.

### a. *"Commercial" or "Financial"*

The terms "commercial" or "financial," for purposes of Exemption 4, are given their "ordinary meanings." *National Ass'n of Homebuilders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2003) (citing *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)). Information is generally considered commercial if the submitter has a "commercial interest" in it. *See, e.g.*, *Baker & Hostetler LLP v. U.S. Dep't of Com.*, 473 F.3d 312, 319–20 (D.C. Cir. 2006) (citing *Public Citizen*, 704 F.2d at 1290).

The Company has a commercial interest in the information at issue here because it directly relates to the Company's business efforts to engage in the commercial sequestration of carbon dioxide. The wellbore diagrams and modeling files depict and explore some of the sequestration project's more technical aspects, and the financial instruments demonstrate the monetary resources available to the Company for activities like post-injection site care and closure. Moreover, the Company developed and submitted the information to EPA in attempting to secure the permits needed to inject carbon dioxide underground for storage. Given the Company's commercial interest in this information, it meets the ordinary definition of "commercial" under Exemption 4.

### b. *"Obtained from a Person"*

Consistent with the definition of "obtain," courts focus on whether the information at issue originated from outside the government agency. *Board of Trade of City of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980); *Gulf & Western Indus.*

*v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979). And for purposes of FOIA, "person" includes business entities like the Company. *See* 40 C.F.R. § 2.201(a).

Here, EPA obtained the information from the Company, through its permit applications, and therefore from a "person."

**c. *"Privileged or Confidential"***

Finally, to qualify as CBI, the information must be "privileged or confidential," and the Company claims that the information at issue here is confidential. The U.S. Supreme Court in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019), evaluated the definition of "confidential" as used in Exemption 4. The Court held that at least where "commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Argus Leader*, 139 S. Ct. at 2366. Although the Court found that the first condition "has to be" met in order for information to be considered confidential under Exemption 4, the Court found "no need to resolve" whether the second was likewise mandatory—that is, whether privately held information can "lose its confidential character for purposes of Exemption 4 if it's communicated to the government without assurances that the government will keep it private." *Id* at 2363.

Consistent with guidance from the Department of Justice, this determination considers whether (1) the Company customarily and actually keeps the information private or closely held; (2) EPA provided an express or implied assurance of confidentiality when the information was shared with EPA; and (3) there were any express or implied indications, at the time the information was submitted, that EPA would publicly disclose the information. *See Exemption 4 After the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media* and *Accompanying Step-by-Step Guide*, United States Department of Justice, Office of Information Policy (Oct. 4, 2019), available at https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media.

This determination lastly considers the FOIA Improvement Act of 2016, which allows EPA to withhold information only if the Agency "reasonably foresees" that disclosure would harm an interest protected by a FOIA exemption, or if disclosure of the information is otherwise prohibited by law. 5 U.S.C. § 552(a)(8)(A)(i)(I-II).

1. **Does the Company customarily and actually keep the information private or closely held?**

The Company claims that it customarily and actually treats the information as private. In its substantiations, the Company explained the steps that it has taken to protect the information. For example, the Company stores and maintains the information on secure, password-

protected servers in secure file locations. The Company also limits access to the information to Company personnel on a need-to-know basis and submitted the information to EPA through a more-secure process than the Geologic Sequestration Data Tool (GSDT), which at the time was used only for non-sensitive submittals.

Based on this information, I find that the Company has satisfactorily demonstrated that it has taken reasonable measures to protect the confidentiality of the information, and that the Company intends to continue to take such measures. For similar reasons, I also find that that information is not, and has not been, reasonably obtainable without the business's consent by use of legitimate means. *See* 40 C.F.R. § 2.208(b)-(c).

Accordingly, after careful consideration of the Company's substantiations and the information at issue, I find that the Company customarily and actually treats the information as private.

2. **Did EPA provide an express or implied assurance of privacy when the information was shared with EPA?**

As the Company notes, EPA's CBI regulations at 40 C.F.R. part 2, subpart B, provide that the Agency treats information claimed as CBI as confidential pending a confidentiality determination by the appropriate EPA legal office, or a "clearly not entitled" determination by a program office. However, these regulations do not provide an express or implied assurance that any particular information would permanently remain confidential.

3. **Were there any express or implied indications, at the time the information was submitted, that EPA would publicly disclose the information, and does any statute specifically require disclosure of the claimed information?**

At the time of submission, EPA provided no express or implied indication that it would publicly disclose the information, and no statute specifically requires its disclosure. *See* 40 C.F.R. § 2.208(d).

4. **Is it reasonably foreseeable that disclosure of the information would harm an interest protected by FOIA Exemption 4?**

Under the FOIA Improvement Act, to withhold information that otherwise qualifies as confidential, EPA must identify a reasonably foreseeable harm that would result from the information's release. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I-II). Courts do not all agree on the type of harm needed, but they generally require harm to the commercial or financial interests of the entity asserting the confidentiality claim. *See, e.g.*, *Seife v. U.S. Food and Drug Admin.*, 43 F.4th 231, 241-41 (2d Cir. 2022); *but see Am. Small Bus. League v. Dep't of Def.*, 411 F. Supp. 3d 824, 836 (N.D. Cal. 2019).

Here, disclosing the wellbore diagrams and modeling files would result in reasonably foreseeable harm to the Company's commercial interests. As noted in its substantiations, the Company is a "first mover" in a competitive and relatively nascent industry. Having spent considerable effort assembling its diagrams and developing its modeling approach, the Company understandably does not want that information revealed to competitors, who could learn of the Company's methods for exploring carbon sequestration in an oil field—e.g., how the Company simulated carbon dioxide plume migration in such a field. *See Seife*, 43 F.4th at 242-43 (recognizing that the disclosure of specialized information to competitors can harm the entity that developed the information).

Disclosing the redacted portions of the financial instruments would also result in reasonably foreseeable harm to the Company's commercial and financial interests. The Company states that releasing the financial instruments could impede its ability to secure favorable terms for such documents as it develops future projects. That is because future counterparties—e.g., banks and insurers—would be able to see what the Company was willing to agree to and treat that as a starting point when negotiating with the Company on the terms of future letters of credit, trust documents, or insurance policies, rather than as the final terms agreed upon by both parties. The Company also notes that the insurance endorsement is the unique work product of the Company's broker and that revealing it publicly would give other brokers access to the product, thereby also harming the Company competitively. *See Southern Env. Law Ctr. v. Tenn. Valley Authority*, --- F. Supp. 3d ---- (E.D. Tenn. 2023) (upholding the withholding of contractual terms because of harm to the company's ability to propose terms in the future or otherwise disadvantaging the company in future negotiations).

**<u>Conclusion</u>**

Upon consideration of the Company's claims for protection, substantiation of those claims, the substantive criteria for use in confidentiality determinations under 40 C.F.R. § 2.208(a)-(d), and the comments received from the Groundwater Protection Section of EPA Region 9's Water Division, the Agency has found that the information is entitled to confidential treatment under Exemption 4 of FOIA. This constitutes the final EPA determination concerning your business confidentiality claims. *See* 40 C.F.R. § 2.205(f).

Should you have any questions concerning this matter, please contact Nathaniel Boesch, Assistant Regional Counsel, at boesch.nathaniel@epa.gov or Ivan Lieben, Deputy Regional Counsel, at lieben.ivan@epa.gov.

Sincerely,

Sylvia Quast
Regional Counsel

cc: David Albright, EPA Region 9 Water Division
Samuel Brown, Hunton Andrews Kurth LLP