EPA’s Credible Evidence Rule

▪ Overview

▪ EPA’s Credible Evidence (“CE”) rule, 62 Fed. Reg. 8314 (Feb. 24, 1997), allows any credible evidence to be used for Title V operating permit compliance certifications and to establish violations of Clean Air Act (“CAA”) emissions standards. The CE rule significantly changes the way emissions standards are enforced. Previously, the reference method tests specified in the standards were recognized as the exclusive methods for determining whether a source had violated the standards.

▪ The CE rule could result in numerous practical difficulties for sources subject to CAA emissions standards. For example, to avoid potential enforcement actions based on CE, sources may need to install new air pollution control devices or make operational changes to ensure that emissions stay below applicable emission limits at all times. Owners/operators required to certify compliance under Title V may also have difficulty determining the appropriate scope of their inquiry into a source’s compliance status.

▪ The CE rule was challenged in the United States Court of Appeals for the District of Columbia Circuit by numerous industry associations and individual companies. Clean Air Implementation Project v. EPA, No. 97-1117. These industry petitioners have challenged virtually every aspect of the CE rule. They maintain that the rule is contrary to the plain language of the CAA; unlawfully changes existing emissions standards; unlawfully requires states to revise their implementation plans (“SIPs”); transforms precise compliance obligations into unconstitutionally vague obligations; and, unlawfully attempts to narrow the scope of the operating permit shield.

▪ The Credible Evidence Rule

▪ Regulatory language:

For purposes of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any standard in this part, nothing in this part shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed.

40 C.F.R. § 60.11(g). The revisions to 40 C.F.R. §§ 52.12(c) (New Source Review/PSD, source surveillance), 52.33 (New Source Review/PSD, compliance certifications), and 61.12(e) (NESHAP, compliance with standards and maintenance requirements) are similar. The revision to 40 C.F.R. § 51.212 provides that SIPs cannot preclude the use of credible evidence.

▪ CE could include engineering calculations, indirect estimates of emissions, direct measurements of emissions, and even expert testimony as to whether a unit was able to meet its emission limit based on the operation or nonoperating of its control equipment during the alleged violation. 62 Fed. Reg. at 8315, 8319. Ultimately, it is left to administrative law judges and the courts to determine whether the evidence is credible evidence of a
violation.

• Prior to the CE rule, the reference method tests specified in the standards were the exclusive means of establishing violations of the emissions standards. EPA recognizes that the stringency of standards is related to the reference method tests. However, EPA maintains that the CE rule does not increase the stringency of the standards because, in their view, the CE rule retains all of the important elements of the reference method tests. 62 Fed. Reg. at 8323.

• Reference method tests are the "benchmark" for compliance determinations. Evidence is only credible evidence of a violation if the evidence shows that the source would have failed a reference method test if a reference method test had been performed.

• Many existing emissions standards have data averaging periods associated with them. For example, under many standards, data is collected and averaged over a 30-day period, and only the averaged data is used for compliance determinations. The concept of averaging periods is retained in the CE rule, but it has been significantly altered. Where the standard has an averaging period specifically identified, that averaging period continues to apply. However, where there is no averaging period specified in the standard, EPA considers the appropriate averaging time to be the time it would take to perform a reference method test. For example, the averaging time for data generated from a continuous opacity monitor would be six minutes; the time that reference method 9 provides for opacity measurements. 62 Fed. Reg. at 8319.

• If the underlying emission standard recognizes start-up, shutdown, or malfunction defenses, those defenses continue to apply. 62 Fed. Reg. at 8318.

• EPA recognizes that reference test method operating conditions are related to the stringency of the standards, but maintains "this does not mean that the underlying standard applies only when the plant is operating at that capacity or that the 'other information' would have to show that the plant was operating at the specified capacity during the period that the other "credible evidence" was obtained." 62 Fed. Reg. at 8319. Rather, EPA asserts that as long as two elements of the reference method test "quantification and specified time period are retained and the data from the alternate test is related to the reference test, information generated by alternate methods yields data bearing on what the results of a reference test would have been . . . ." Id.

• EPA recognizes that the CE rule will, as a practical matter, increase the frequency of compliance determinations. 62 Fed. Reg. at 8326. EPA maintains, however, that increasing the frequency of compliance determinations does not change the stringency of the underlying standards, because, in their view, EPA's regulations and the CAA place no restrictions on the frequency with which EPA could require sources to perform reference method tests. 62 Fed. Reg. at 8324. EPA asserts that the CE rule is similar to enforcement of speed limits: "allowing the use of radar guns or increasing the number of police checking for speeding may raise the chance that a speeder will be detected, but this does not alter the legal stringency of a posted speed limit." 62 Fed. Reg. at 8326. EPA fails to recognize, however, that continuous enforcement of standards using CE is not equivalent to requiring sources to perform more frequent reference method tests.

• Practical Impacts of the CE Rule
Faced with the prospect of enforcement actions, even well maintained and properly operated sources may need to take steps to reduce emissions as a result of the CE rule. For example, sources may find they need to install additional control devices to ensure that emissions stay below numerical emissions standards at all times.

Even well maintained and properly operated sources may find themselves defending against EPA or citizen group initiated enforcement actions. EPA discounts the risk of increased enforcement actions, explaining that the Agency will exercise prosecutorial discretion when deciding whether to initiate a judicial enforcement action. However, EPA does not mean to imply that it will entirely forego enforcing against even minor violations. In such cases, EPA explains that it is likely to use other enforcement mechanisms such as notices of violations and administrative compliance and penalty orders. 62 Fed. Reg. at 8318. EPA also attempts to downplay the risk of citizen suits, 62 Fed. Reg. at 8318, but cannot state with certainty what citizens groups may or may not do. If faced with allegations of violations based on non-reference test monitoring data, sources should evaluate data relative to the accuracy and bias of the monitoring devices that generated the CE. Sources should also evaluate other information that demonstrates that the source did not exceed the numerical emissions standards.

The CE rule creates uncertainty for responsible officials that must certify compliance under Title V. Several commenters during the rulemaking noted that the CE rule “creates new uncertainties and burdens for sources, because sources will not know what information they must consider before certifying compliance with Title V permit requirements.” 62 Fed. Reg. at 8319. EPA’s response to these concerns provide little guidance to the regulated community. Although EPA explains that sources need not “search out and review every possible document to determine its relevance on the issue of a source’s compliance,” 62 Fed. Reg. at 8320. EPA does not provide any meaningful guidance concerning the extent of the search that is necessary. EPA also cautions sources not to ignore material information that indicates that the source may be out of compliance. Id. In light of this vague obligation, sources should rationalize their recordkeeping to ensure that all relevant information is considered when making compliance certifications. Sources should also consider evaluating their current document retention policies in light of the CE rule.

Sources considering a self-audit should be aware that the results of the self-audit can potentially be used as credible evidence of a violation, and may need to be considered when making compliance certifications.

Any monitoring data is potentially credible evidence of a violation. Therefore, sources should weigh the benefits of any voluntary monitoring against the possible risks of the data generated being used in enforcement actions.

The CE rule creates confusion concerning the scope of the Title V permit shield. Although sources may attempt to clarify their compliance obligations through their Title V permits, EPA has cast considerable uncertainty on the scope of the permit shield. In the CE rule and the CAM rule, EPA asserts that “even if a Title V permit specifies that certain monitoring, CAM or other monitoring, be performed and that this monitoring is the sole or exclusive means of establishing compliance or non-compliance, EPA views such provisions as null and void.” 62 Fed. Reg. 54900, 54908 (October 22, 1997); 62 Fed. Reg. at 8320.

Industry petitioners maintain that the CE rule increases the stringency of standards.

One of the central issues in the CE debate is whether changing the method for determining compliance with
emissions standards changes the stringency of the standards. In order to understand industry's position, it is necessary to briefly review sections 111 and 112 of the Act, as well as the different types of standards that have been promulgated by EPA to implement these provisions.

- **The Statute**

- **New Source Performance Standards ("NSPS") Standards.**

  - Section 111 of the CAA requires EPA to establish NSPS based on “the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” These criteria are commonly referred to as "best demonstrated technology ("BDT").

  - A key component of section 111 is that new NSPS standards only apply to sources that commence construction after the publication date of the proposed standard. CAA § 111(a)(2), (b)(1). Therefore, if EPA changes an existing NSPS, EPA must ensure that the revision is consistent with the original BDT determination.

- **Section 112 NESHAP Standards.**

  - Section 112 of the 1970 CAA directed EPA to list as Hazardous Air Pollutants ("HAPs") substances that can cause serious health problems, and to establish emissions standards for those substances at a level that "provides an ample margin of safety to protect the public health." These standards are known as the NESHAPs.

  - In the 1990 CAA amendments, Congress substantially revised section 112 to, among other things, establish new, primarily technology-based, criteria for establishing standards.

  - Section 112(q) of the 1990 Act provides that standards in effect before the 1990 amendments remain in effect unless modified under the post 1990 decision criteria. Thus, any modification of an existing NESHAP triggers a rulemaking requirement to ensure that the revision complies with the new section 112 criteria.

  - EPA concedes that they did not undertake rulemakings to determine whether the existing NSPS standards are still achievable in light of the CE rule, or to revise the NESHAPs consistent with section 112(q). EPA maintains that such rulemakings are not necessary because, in their view, the CE rule does not change the existing NSPS and NESHAP standards.

- **Implementation of Sections 111 and 112.**

- **The Standards.**

  - All NSPS and NESHAP standards consist of two parts; the numerical emissions standard, and the general duty clause. The numerical standard can be expressed in a variety of ways. For example, lb/million Btu or parts per million (ppm). See e.g., 40 C.F.R. Part 60. The general duty clauses for the NSPS and NESHAP standards are essentially identical. The general duty clauses require owners/operators to ‘maintain and operate any affected
facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions.” 40 C.F.R. §§ 60.11(d), 61.12(c).

▪ Two different methods have been used by EPA to set numerical emissions standards. Ajax “The Effect of Compliance Test Frequency on the Stringency of Technology Based Standards” (Mar. 9, 1995). Early standards were set using limited data from short-term stack tests. Id. More recent standards are typically set using long-term continuous monitoring data. Id. Regardless of which method is used, standards must be established at levels that reflect the performance of, and are achievable with, the underlying emission control technology.

▪ Periodic test-based standards were developed using short-term stack testing. Id. The data underlying the standards generally consisted of between one and ten short-term emission tests that were typically done at steady-state, full load conditions with control equipment that was nearly new or in optimum condition. Id. Data variability was not taken into account when such standards were established, given that the data was not sufficient to identify short and long-term variability, and was too limited to do meaningful statistical analysis. Id. The numerical emissions standards were typically set at the 90 or 95 percent confidence levels, which means that even well maintained and properly operated sources would be expected to exceed the emissions limit once every 10 or 20 times, respectively, that the reference method test was performed. Id. EPA disagrees with industry’s assertion that variability of data was not taken into account when the standards were established, asserting that where it had concerns with variability, it raised the numerical value of the standard, excused noncompliance during certain upset conditions, lengthened averaging times, or limited the operating conditions when compliance is required. Respondent’s Opening Brief at 28, Clean Air Implementation Project v. EPA, (D.C. Cir.) (No. 97-1117) (hereafter “Respondent’s Brief”), citing, EPA’s Credible Evidence Rule Response to Comments Document at 31-32, 35-36, and 49-50.

▪ In contrast to periodic-test based standards, continuous standards are established based on long-term continuous emissions data or continuous operating parameter data. Variability is recognized and taken into account when setting the level of the standard, and the associated averaging time. Ajax, supra.

▪ Industry petitioners and EPA agree that sources must continuously comply with emissions standards. However, they fundamentally disagree about the nature of the compliance obligation. 62 Fed. Reg. at 8324.

▪ In industry petitioners’ view, the fundamental design principle underlying technology-based standards is that any source that properly installs and operates the best demonstrated technology would be in compliance with the standard. To determine whether the reference technology is in place, sources conduct technology “performance tests” under “representative” (but not all) operating conditions, consistent with the data on which the standards were originally based. Performance tests must be conducted at start-up and then periodically thereafter. To ensure that technology continues to be properly operated and maintained, all of the standards impose a general duty to “maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practices. In their view, sources must comply with the numerical emissions limits when reference method tests are performed, and must comply with the general duty obligations at all times. Petitioners’ Opening Brief at 17-18, Clean Air Implementation Project v. EPA, (D.C. Cir.) (No. 97-1117) (hereafter ‘Petitioners Brief”); 62 Fed. Reg. at 8324.

▪ In contrast, EPA maintains that sources must comply with both the numerical emissions standards and the
general duty clauses at all times. In support of this, EPA argues that “both the statute and EPA’s regulations give
the Agency broad discretion to require frequent, even continuous, testing.” Respondent’s Brief at 14, 21-37; 62
Fed. Reg. at 8324. EPA fails to recognize, however, that using CE to establish violations is not equivalent to
requiring more frequent testing.

- Industry maintains that EPA’s 40 CFR Subpart D rulemakings illustrate that changing the frequency of
  compliance determinations changes the stringency of the standards. Petitioners’ Brief at 37-41.

- The original NO\textsubscript{X} and SO\textsubscript{2} standards applicable to utility and industrial boilers, 40 CFR Subpart D, were periodic
test-based standards, and were based on 1971 technology.

- The 1979 NO\textsubscript{X} and SO\textsubscript{2} standards applicable to utility and industrial boilers, 40 CFR Subpart Da, were
continuous monitoring-based standards, based on 1979 technology. Originally, EPA considered establishing a 3-hour
averaging period, but recognized that the numerical emissions limit would not be achievable with the BDT if a
3-hour averaging period was used. Consequently, EPA increased the averaging period to 30 days. Notably, the
30-day averaging period was largely based on continuous emission monitoring data collected at emissions units
subject to the 1971 Subpart D standards, highlighting the fact that the 1971 Subpart D standards are not
achievable if the averaging period is only 3-hours.

- In 1986-87 and 1990, EPA established the Subpart Db and Dc NSPS for industrial and smaller utility boilers. Like
the 1979 Da standards, these standards have 30-day averaging periods.

- The CE rule effectively changes the original Subpart D standards to 3-hour continuous standards. Thus, sources
subject to the Subpart D NSPS would be required to install technology capable of meeting a 3-hour standard when
such technology was not even available at the time the Subpart D standard was originally set. Such a result is
contrary to the principal that NSPS standards cannot be retroactively made more stringent. See CAA § 111(a)(2),
(b)(1).

- The Subpart D standards become 3 hour continuous standards because the averaging time is equal to the time
that it would take to perform a reference method test. Emission limits in other standards would be similarly
changed. Opacity standards, for example, become 6 minute continuous standards as a result of the CE Rule.

- EPA disagrees with industry’s assertion that the history of the 40 C.F.R. Subpart D standards illustrate that EPA
recognizes that changing the method for determining compliance changes the standards. 62 Fed. Reg. at 8325. In
any event, EPA maintains that even if industry petitioners are correct, it would not undermine the CE rule. In EPA’s
view, the proper course of actions for sources to take when faced with unachievable standards is to petition the

- Prior to the CE rule, the standards expressly recognized the relationship between the test methods used to
establish the standard, and the test methods used to enforce them.

- Section 60.11(a) of the NSPS provides that “compliance with standards in this part, other than opacity
standards, shall be determined only by performance tests established by § 60.8, unless otherwise specified in the
applicable standard”.

- Section 61.12(a) of the NESHAPs provides that "compliance with numerical emissions limits shall be determined by emission tests established in § 61.13 unless otherwise specified in an individual subpart”.

- The use of methods other than the specified performance tests for compliance determinations was solely at the discretion of the owner/operator. See, e.g., 40 C.F.R. § 60.11(e)(5) which allows the use of continuous opacity monitoring data to determine compliance with opacity standards, but only with the consent of the owner/operator.

- EPA’s guidance documents confirm that EPA historically recognized the relationship between the test method and stringency of the standards. See, e.g., Memorandum, Guidance Concerning EPA’s Use of Continuous Emission Monitoring Data (Aug. 12, 1982). Indeed, upon promulgation of the CE rule, EPA issued a new guidance document to expressly rescind all previously issued inconsistent guidance. Memorandum, Interim Policy and Guidance on the Use of “Credible Evidence” in Air Enforcement Activities, 2 (Apr. 29, 1997).

- The courts have also recognized the relationship between the test method used to establish the standard and the methods used for enforcing the standards.

- In Portland Cement Association v. Ruckelshaus, 480 F.2d 375, 396 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974), after finding that the methods for sampling in the final rule were different from those used in the tests to establish the standards, the court explained that “a significant difference between techniques used by the agency in arriving at standards, and requirements presently prescribed for determining compliance with standards, raises serious questions about the validity of the standard.” See also Amoco Oil v. EPA, 501 F.2d 722, 743 (D.C. Cir. 1974); Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 427, 436 (D.C. Cir. 1973), cert. denied, 416 U.S. 969 (1974).

- Courts have relied on this fundamental principle to reject attempts by EPA to use methods other than the specified test method to determine compliance, without undertaking rulemaking on the standard. See Donner Hanna Coke Corp. v. Costle, 464 F.Supp. 1295, 1304 (W.D.N.Y. 1979).


- Not all courts have recognized these principles, however. See Sierra Club v. Public Services Co. of Colorado, 894 F. Supp. 1455 (D. Colo. 1995).

- EPA recognizes cases such as Portland Cement Association, but maintains that there is no significant difference between the method used for establishing the standards and the method used for enforcement, since the reference method test remains the “benchmark” for compliance. Respondent’s Brief at 24. In addition, EPA maintains that cases such as National Lime Ass’n v. EPA, 627 F.2d 416, 433-34 & n.54 (D.C. Cir. 1980); Sierra Club v. Costle, 657 F.2d 298, 405, 411, 422 (D.C. Cir. 1981); Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375, 399 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); and, Bunker Hill Co. v. EPA, 572 F.2d 1286, 1293 (9th Cir. 1977) support their assertion that sources must continuously comply with the numerical emissions standards. 62
Litigation

The parties.

Twenty-five petitions for review were filed in the U.S. Court of Appeals for the D.C. Circuit challenging the CE rule. An additional fifty-six petitions were filed in the D.C. Circuit challenging existing NSPS and NESHAP standards that industry petitioners allege were unlawfully changed by the CE rule. All of these petitions were filed on behalf of industry. In addition, one company intervened on behalf of an industry petitioner. All of the petitions challenging the CE rule were consolidated under lead docket Clean Air Implementation Project v. EPA, No. 97-1117. All of the petitions challenging the existing standards were consolidated under lead docket Appalachian Power Co. et al. v. EPA, No. 97-1221.

On the other side of the litigation, EPA is the respondent, and Natural Resources Defense Council is an intervenor. Also supporting EPA as amici are three associations of state and local government regulators, NESCAUM and STAPPA/ALAPCO.

Oral argument is scheduled for April 21, 1998.

Numerous procedural issues have been raised in the litigation.

Petitioners' motion for expedited consideration was granted, while their motion for establishment of a briefing format and schedule was denied. Originally, petitioners sought four main briefs. The court, however, established a standard briefing format and schedule, limiting petitioners and respondent to 12,500 word main briefs.

EPA's motion to dismiss the petitions challenging existing standards for lack of subject matter jurisdiction was held in abeyance pending resolution of the challenges to the CE rule. EPA maintains that the court does not have subject matter jurisdiction because the Agency, in their view, has done nothing to change the existing standards. See CAA § 307(b)(1) (“Any petition for review under this section shall be filed within 60 days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.”). In response to EPA's motion, the court granted EPA an additional 2500 words for their main brief. The court, however, denied EPA's alternative motion which sought to remove intervenor in support of petitioners from the litigation.

Industry maintains that the Clean Air Act plainly limits the use of CE to showing the duration of violations during the penalty phase of an enforcement action. EPA agrees that CE can be used to show the duration of violations, but also maintains that CE can be used to establish that a violation occurred in the first instance.

Two provisions of the Act are key to the debate:

Section 113(e)(1), which is entitled “penalty assessment criteria” provides that: “In determining the amount of any penalty . . . the Administrator or the court, as appropriate, shall take into consideration . . . the duration of
the violation as established by any credible evidence (including evidence other than the applicable test method).

- Section 113(a) provides that “Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement” the Administrator can, among other things, initiate an enforcement action.

- Industry petitioners maintain that the CE rule is contrary to both sections 113(a) and 113(e).

- Section 113(e)(1) plainly authorizes the use of “any credible evidence” only to show the “duration of the violation” in the penalty phase of enforcement actions, not to prove in the liability phase that a violation occurred.

- The legislative history confirms industry’s interpretation of section 113(e)(1). The Administration’s analysis accompanying the original Administration bill explained: “Subsection 113(e) also clarifies and confirms that once EPA establishes evidence of a violation using a formal test method, EPA can use other credible evidence to prove additional violations, or that a violation has continued.” Section-by-Section Analysis of the “Clean Air Act Amendments of 1989,” at 62-63 (July 20, 1989), reprinted in H.R. Doc. No. 101-87, at 348-49 (1989).

- EPA has relied extensively on a passage of the legislative history that explains that section 113(e)(1) overrules the ruling in *U.S. v. Kaiser Steel, Corp.* 62 Fed. Reg. at 8319. Industry maintains, however, that this legislative history is consistent with the plain language of section 113(e)(1). *Kaiser Steel* was a case where liability was first established using reference method test data, and the court refused to allow other evidence to be used to show the duration of the violation. In other words, the legislative history merely confirms that any credible evidence can be used to determine the duration of a violation, it says nothing about whether such evidence can be used to establish that a violation occurred during the liability phase. Intervenor Battery Council International’s Opening Brief at 13, *Clean Air Implementation Project v. EPA,* (D.C. Cir.) (No. 97-1117) (hereafter "Intervenor’s Brief").

- With regard to section 113(a), industry petitioners maintain that it does not give EPA authority to adopt a rule that establishes how liability is to be proved. Intervenor’s Brief at 14-18. Section 113(a) merely authorizes EPA to initiate an enforcement action, it says nothing about how violations may be proved. Furthermore, section 113(a) says nothing about citizen suits or criminal actions.

- In response, EPA argues that section 113(a) confers upon EPA broad authority to bring administrative, civil, or criminal actions for violations of NSPS or NESHAPs. 62 Fed. Reg. at 8320-23. EPA further maintains that “Congress cannot reasonably be thought to have authorized EPA to ‘initiate’ an enforcement action based on information that cannot be used in the action itself to prove a violation.” Respondent’s Brief at 15-16. EPA relies on section 113(e) as additional authority. Although EPA recognizes that section 113(e)(1) speaks to the duration of violations, EPA argues “there is little reason to suggest that credible evidence is sufficiently reliable that it can be used to establish violations and assess penalties on the day after a ‘reference test’ but not on the first day.” Respondent’s Brief at 15-19. EPA also relies on CAA sections 114, 301, 503 and 504 as additional authority. Respondent’s Brief at 20-21.

- Industry petitioners contend that the CE rule unlawfully changes NSPS and NESHAP standards. EPA, in contrast, moves that the CE rule in no way changes the existing NSPS and NESHAP standards since the CE rule retains all of
the important attributes of the reference method tests. 62 Fed. Reg. at 8323. EPA recognizes that the CE rule changes the frequency of compliance determinations, but asserts that does not change the stringency of the standards. 62 Fed. Reg. at 8326.

Industry maintains that the CE rule converts precise compliance obligations into unconstitutionally vague ones. Intervenor's Brief at 19-27. EPA's response is that the compliance obligations are not vague at all. Respondent's Brief at 41-45. EPA asserts that sources must comply with the numerical emissions standards and general duty clauses at all times. Furthermore, EPA asserts that the compliance obligation is not vague because the CE rule maintains all of the important attributes of the reference method tests. Industry, however, argues that is not the case since the CE rule allows evidence to be used to establish a violation without prosecutors showing that the conditions specified in the test methods have been satisfied, and imposes new averaging periods that have never been determined to be appropriate for averaging variable emissions to determine whether numeric limits are met continuously. Intervenor's Brief at 22.

Industry maintains that the CE rule unlawfully attempts to revise the 40 C.F.R. Part 70 permit shield provision. Intervenors Brief at 27-32. Industry asserts that the new interpretation of the Part 70 "permit shield" announced in the CE rule is contrary to the original part 70 rule, and completely undermines the purpose of the shield. Industry further points out that EPA has not followed the necessary procedures to revise the Part 70 regulations, or state programs that have been approved under those regulations. In response to these arguments, EPA maintains that the permit shield issue is not properly before the court, because petitioners challenge is directed at a preamble discussion rather than regulatory language. Respondent's Brief at 45-46. In any event, EPA argues, their interpretation of the permit shield is reasonable. Id.

CE SIP Call

Even before the CE rule was promulgated, EPA sent letters to states requiring them to revise their SIPs to make clear that any credible evidence can be used for compliance certifications and to establish violations. 62 Fed. Reg. at 8327. At the time that the CE rule was promulgated, fifteen states had responded to EPA's SIP call. Kansas, Iowa, Nebraska, North Dakota, Georgia and Puerto Rico had received approval; while the other SIP revisions were pending. Id.

Industry petitioners maintain that the SIP call is unlawful:

States are primarily responsible for deciding the appropriate mix of control measures to ensure that the National Ambient Air Quality Standards ("NAAQS") promulgated by EPA are attained, or maintained.

EPA has limited authority to require states to revise their SIPs, if the SIP is "substantially inadequate" to attain or maintain a NAAQS or otherwise to comply with a specific requirement of the Act. CAA § 110(k)(5). See Petitioners' Brief at 48-54.

EPA on the other hand, maintains that the SIP call is not unlawful because the CE rule "does not dictate emission control measures to the states." Respondent's Brief at 38. Rather, EPA explains, the CE rule implements the requirements in CAA sections 110(a)(2)(A), (C), and (E) that require SIPs to include enforceable control measures and assure that states have adequate enforcement authority. Id.
• If the D.C. Circuit vacates the CE rule, there may be some confusion concerning the effect of the ruling on CE provisions in the SIPs, at least until the SIPs are revised to remove the CE provisions. The effect of the court’s decision should be that states can no longer use credible evidence to establish violations. See Equidae Partners v. Oklahoma State Dept. Of Health, No. C-91-932 (Dist. Ct. Okla. Jan. 16, 1992) (state rule that depended on invalidated federal rule for its basis also invalid). Furthermore, in states with laws prohibiting state agency adoption of more stringent requirements than in federal rules, it would seem that the states must revise their programs to delete their CE rules to comply with such laws.

• Citizens Suits

• Before the CE rule was finalized, at least two courts allowed non-reference test data to be used to establish violations. See Sierra Club v. Public Services Company of Colorado, 894 F. Supp. 1455 (D. Colo. 1995); Unitek Envt’l Serv. v. Hawaiian Cement, No. 95-00723 (D. Haw. 1996).

• EPA maintains that the CE rule “creates no new rights or powers for citizen enforcers; instead, the rule clarifies existing EPA regulations. Citizens have been free to use credible evidence in Clean Air Act enforcement . . . .” 62 Fed. Reg. at 8318.

• EPA’s assertion is impossible to reconcile with case law that makes clear that citizens have no broader authority than EPA to enforce the Act. Citizens, like EPA, must prove violations in strict accordance with the requirements established in applicable standards. See Chesapeake Bay Found. v. Gwaltney of Smithfield, 791 F.2d 304, 311 (4th cir. 1986) (citizens stand in shoes of EPA in citizen suits), rev’d on other grounds, 484 U.S. 49 (1987).

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This presentation was made at the 26th Annual Conference on Environmental Law, held March 12-15, 1998, in Keystone, Colorado. For further information, please contact Peter de la Cruz at 202-434-4141 or by e-mail at delacruz@khlaw.com.