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The Incredible Effects of the EPA's Any Credible Evidence Rule

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The Incredible Effects of the EPA's "Any Credible Evidence" Rule

I. Introduction

On February 13, 1997, United States Environmental Protection Agency ("EPA") Administrator Carol M. Browner signed into law a final rule amending various sections of the Code of Federal Regulations pertaining to the Clean Air Act (CAA)[1] to include the much debated "any credible evidence" rule.[2] The basic result of this rulemaking is that the use of any available evidence (as opposed to only data from reference testing) which is deemed "credible"[3] is admissible in an action brought to determine if a facility is in compliance with the CAA.[4] In short, with what the EPA insists is merely a housekeeping provision,[5] the Agency has eviscerated traditional CAA enforcement and monitoring.

Throughout the rule's proposal period[6] and since the date of the promulgation of the final rule, numerous issues have been raised by industry and industrial sources concerning the use of credible evidence in enforcement actions and compliance certifica-

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1. Clean Air Act, 42 U.S.C. §§ 7401-7671q (1995).

2. The final rule became effective on April 25, 1997, 30 days after its publication in the Federal Register. Credible Evidence Revisions, Part II, 62 Fed. Reg. 8,314-8,328 (1997) (to be codified at 40 C.F.R. pts. 51, 52, 60 and 61).

3. The "credibility" of evidence is defined by the appropriate state or federal rules of evidence.

4. This is not the first time that the rule has been in the forefront of the environmental enforcement landscape. Beside being discussed in the rule's proposal stage, this issue was also hotly debated by the EPA and industry prior to the 1990 Amendments of the CAA. Prior to passing the 1990 Amendments, Congress was confronted with the issue of whether or not to change the language of Section 113(a) which allows any credible evidence to be used in determining not the violation itself, but the duration of the violation. Ultimately, Congress did not change the language, and the "any credible evidence" rule avoided its first attack. Now, with the signing of the current rule, new challenges are being made which raise doubts as to the propriety of the any credible evidence rule in regard to its use in the establishment of a violation of the CAA, not just in the determination of the length of a violation.

5. Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8,314.

6. The EPA first proposed its credible evidence rule as part of its enhanced-monitoring rule proposal in October 1993. Enhanced Monitoring Program, Part II, 58 Fed. Reg. 54,648 (1993).

tions.[7] These concerns continue to mount despite the EPA's contention that the rule will actually be beneficial to industry.[8] Issues raised by critics and industrial sources include the contentions that the EPA does not have statutory authority to promulgate the rule, and that the decisions in *United States v. Kaiser Steel Corp.*[9] and other cases have construed the language of the EPA's regulations as limiting the admissibility of evidence to violations established by reference tests alone.[10] Another argument which has been lodged against the EPA and the implementation of the rule is that the use of credible evidence will increase the stringency of the CAA beyond the scope of its structure. In addition, opponents to the rule contend that the utilization of any credible evidence in enforcement of the CAA is unconstitutional for want of due process, that the new rule is not only bad enforcement policy, but it also undermines compliance and clean air federalism, and that it defeats the advantages provided by many state laws which allow voluntary self-audits through which facilities may make compliance determinations on their own initiative.

This comment will review the propriety of these arguments as well as the EPA's response to them in light of the more than 70 cases that have been filed in the Court of Appeals for the District

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7. It is important to note that "credible evidence" is not a new concept in the law or in judicial and administrative actions. In private lawsuits in other areas of the law (such as criminal law, torts and contracts), litigants can use a wide variety of information to prove their claims, or to refute them. Only state or federal rules of evidence limit the use of evidence in these areas. *See*, FED. RULES EVID. RULE 402, 28 U.S.C.A. (providing that all relevant evidence is admissible).

While the EPA contends that enforcement actions are no different from other claims and that it is simply trying to mirror every other area of law by using credible evidence to establish a violation of the CAA (Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8,317), there are many notable differences between clean air enforcement actions and other lawsuits which prevent the use of such evidence, as discussed below. The most notable difference is the difficult, technical nature of the CAA. The EPA is notorious for its lengthy and complex mass of regulations and rulemakings. This alone sets CAA enforcement actions apart from other suits and should prevent the use of any credible evidence.

8. The EPA contends that the credible evidence revisions actually help industry as the revisions will provide sources with cheaper and more flexible means for certifying compliance in permit compliance certifications and for asserting compliance in enforcement actions. Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8315. However, as will be discussed later, these benefits fail to outweigh the new burdens that are placed upon sources under the new credible evidence regime.

9. No. CV-82-2623-IH, 1984 U.S. Dist. LEXIS 19642 (C.D. Cal. Feb. 8, 1984). The published materials from this case include only the court's order.

10. *Id.*

of Columbia pursuant to Section 307(b)(1) of the CAA[11] in order to challenge the EPA's credible evidence revisions.[12] This Comment argues that, overall, the EPA has created an indefensible rule whose incredible effects include a dramatic, and possibly illegal alteration of the landscape of environmental enforcement.

II. Background

In order to fully understand the litany of legal problems created by the credible evidence rule, it is necessary to understand the concept of reference testing methods as well as how the EPA, states, citizen groups and courts have used these testing methods to enforce the CAA prior to the promulgation of the credible evidence revisions.

A. The Reference Test Method vs. Any Credible Evidence

For more than twenty-five years, in order to assure uniformity in the application of emission standards, the EPA has published a number of "reference test methods."[13] Further, the Agency has required sources to establish their compliance with emission standards by use of those reference test methods.[14] Essentially, a reference test method is a specific testing method which is used to determine whether a source is in compliance with a particular emission standard or limit.[15] Under this approach, in theory, a source could conduct testing on a periodic basis utilizing these methods and then rely on the comprehensive nature of the testing in order to assume compliance on a day to day basis.

The reference tests have been issued through public rulemaking in order to assure that a source's compliance measurements are directly linked to the test data justifying the particular emission

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11. 42 U.S.C. § 7607(b)(1).

12. *See* discussion *infra*.

13. *See, e.g.*, 40 C.F.R. § 60, App. A, Method 9 (used to measure the opacity of emissions).

14. Sources were permitted, however, to petition the Administrator to use other methods. 40 C.F.R. § 52.12 (1997).

15. *See id.* In many cases, the EPA has specifically noted its preference for the use of a particular reference test method in connection with the promulgation of a particular emission standard or limitation. In fact, many states and industries were led to believe that the reference test methods specified by the EPA were to be the exclusive methods to be used for compliance or non-compliance determinations. Despite the fact that the EPA regulations provide that states were free to request permission of the Administrator to use an alternate testing method (*See* 40 C.F.R. § 52.12 (1997)), the Agency formerly pressured the states to incorporate the reference testing methods into their state implementation plans.

limit. In publishing a reference test method, the EPA usually details the following: (1) the proper training of test personnel; (2) how the test is to be conducted; (3) how the test results are to be analyzed; (4) how often the tests are to be conducted; and (5) how compliance with the standard is to be determined through the use of the test results.[16] Furthermore, the reference test method represents good science in that the test methods are peer reviewed to ensure their validity and utility for their stated purposes. Such review takes place through the *Federal Register* publication process. Over the years, the EPA has issued hundred of pages of reference test methods, and states have adopted even more.[17] Ultimately, this mass of rulemaking involved in the reference test method aimed to verify that compliance determinations use the same procedures and testing that was used to develop the emissions standards in the first place.

As technology is ever-progressing alternate testing methods have been developed which, at least theoretically, might be used in compliance determinations.[18] The new credible evidence rule undermines the stability of the reference test approach by allowing the use of "any credible evidence" to prove or disprove violations of the numeric emissions limit, regardless of whether or not that information was collected under the same standardized testing conditions used to develop the emission standard.[19]

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16. *See, e.g.*, 40 C.F.R. § 60, App. A, Method 9 (1997) which sets forth opacity regulations. Here, the EPA specifies how observers are to be trained for the opacity testing, how the opacity tests are to be conducted, when the tests are to be conducted, and how the opacity test results are to be used to make a compliance determination with the opacity standards. Opacity refers to the "density" of emissions from a source.

17. *See, e.g.*, 40 CFR § 60, App. A.

18. For example, using the opacity standard once again, continuous emission monitors (CEM's) have come into existence. These devices use lasers to measure the opacity of plumes coming out of a plant stack. However, such devices are costly and difficult to maintain since they must be calibrated daily in order to maintain their accuracy. Because of this, some industrial sources have also argued that such monitoring is unreliable.

19. According to Greg Jaffe, EPA senior enforcement counsel, the types of evidence that the EPA might use under the credible evidence rule include not only CEM data, as mentioned above, but also continuous opacity monitoring data, eyewitness testimony, parametric data, and engineering design information. *Rejection of Rule Might Not Prevent Use of Credible Evidence for Enforcement*, 28 Env't. Rep. (BNA) 982 (September 26, 1997).

Also, the EPA is becoming increasingly hi-tech. The Agency has recently purchased for its enforcement arsenal a portable remote sensing device that has the ability to determine ambient air quality levels from as far as several hundred yards away. The EPA's Air Enforcement Office reportedly plans to initially use the

The EPA contends, though, that the use of credible evidence is beneficial and more efficient to use for industry as well as for the EPA, states and citizens who bring enforcement actions.[20] The reasoning underlying this contention is that sources can now use any credible evidence in addition to reference test results to refute non-compliance claims or to demonstrate that they have returned to compliance once a violation is discovered. While this may be true, sources will also face a higher burden in that virtually any information can now be used to establish a violation by the Agency or a state. Therefore, by using such a vast array of information to establish violations of standards that were developed through the use of reference test methods, the EPA now will compare apples with oranges in making compliance determinations. Because of this, industrial sources are now left guessing as to whether they are, or ever will be, in compliance with the CAA.

B. Judicial Preference of the Reference Test Method

Since early in the development of the reference testing method, courts have recognized the importance of this method in assuring the integrity of compliance determinations. In 1973, the Circuit Court for the District of Columbia held in *Portland Cement Ass'n v. Ruckelshaus*[21] that, in the interest of fairness, the EPA could not make any significant divergence in the compliance test methods from those test methods which were used to set the emission limit.[22] Otherwise, the emission limit itself would be invalidated.[23] Only one year later, in *Detroit Edison Co. v. EPA*,[24] the Sixth Circuit found that the EPA's regulations, including new source performance standards and reference methods, could not be changed without following rulemaking procedures.[25] The court thus again highlighted for the EPA the importance of using the same tests to determine compliance with an emission standard as were used to develop and establish that particular emission

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device primarily as a screening and targeting device that will identify those facilities that warrant more detailed inspection. However, such a tool can become a powerful enforcement weapon under a credible evidence regime. Ronald Weich, *Has the EPA of Optical Sensing for Air Quality Begun?*, 13 ENVTL. COMPLIANCE & LITIG. STRATEGY, 1 (Aug. 1997).

20. *See* Credible Evidence Revisions, Part II, *supra* note 8, at 8315.
21. 486 F.2d 375 (D.C. Cir. 1973), *cert. denied* 417 U.S. 921 (1974).
22. *Id.* at 400-401.
23. *See id.* at 396.
24. 496 F.2d 244 (6th Cir. 1974).
25. *See id.* at 249.

standard.

Later, the issue of whether the EPA could use data resulting from tests other than the reference test methods in enforcement actions was raised in *Donner Hanna Coke Corp. v. Costle*.[26] The EPA notified Donner Hanna that it intended to inspect its facility using a "stopwatch" variation of Method 9 testing procedure.[27] Donner Hanna filed action in federal district court seeking a declaratory judgment as to the constitutionality of the proposed inspection procedure under the Fourth Amendment[28] and judicial review under the Administrative Procedure Act[29] because the proposed inspection procedure varied from the reference test method. The court found that the EPA's attempt to use the stopwatch technique was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law because it might have the effect of making the underlying emission standard more stringent.[30] The court noted that "[i]t is undisputed that the method of determining compliance with an emission standard can affect the level of performance required by the standard even though the standard itself has not changed."[31]

A few years later, courts continued to warn the EPA that any changes to the compliance monitoring and enforcement would meet with judicial resistance. In *United States v. Kaiser Steel Corp.*,[32] the United States District Court for the Central District of California ruled that because of what it perceived to be limitations in the EPA's regulations, only the reference testing method could be used to establish violations of permit limits, notwithstanding other irrefutable scientific evidence that could be used to demonstrate violations.[33] Until the final rulemaking of the credible evidence revisions, the EPA appeared to heed these numerous judicial

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26. 464 F. Supp. 1295 (W.D. N.Y. 1979). In *Donner,* the plaintiff was the operator of a coke plant seeking judicial review of an order issued by the EPA requiring the plaintiff to open its doors to EPA inspectors. *See id.* at 1296.

27. *See id.* at 1298. The Method 9 testing is set forth in "EPA Visible Emission Inspection Procedures" (August 1975) (1975 EPA Guidelines).

28. U.S. CONST. amend. IV.

29. 5 U.S.C.A. § 101 et. seq. (1997).

30. *See Donner* at 1299-1300, 1304-5.

31. *Id.* at 1304.

32. No CC-82-2623 IH (D.C. Cal. Jan 17, 1984). The published materials from this case (available on LEXIS at GENFED library, DIST File) include only the court's order.

33. *See id.* Although the court's opinion denying the EPA's position is unpublished, the case is often cited for the proposition that the EPA is limited to the use of reference test methods in enforcement.

warnings by formally interpreting the CAA to mean that it must rely entirely upon the reference test methods in order to establish violations of emission standards.[34]

C. *The 1990 CAA Amendments and Judicial Review of Citizen Enforcement Suits*

In the 1990 Amendments to the CAA, allegedly in an effort to overturn the *Kaiser Steel* decision,[35] Congress added language to the CAA which sets forth the specific criteria to be applied in assessing the penalties for proven violations.[36] The critical language appears in a list of case specific factors that the Administrator may consider in assessing penalties. These factors include "the duration of a violation as established by any credible evidence (including evidence other than the applicable test method)."[37] This is the first time that the "any credible evidence" language appeared in the CAA since its original enactment.[38]

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34. *See, e.g.*, 40 C.F.R. §§ 60.11(a), 52.12(c) (1997). Prior to the final promulgation of the credible evidence revisions, these regulations stated that "for purposes of Federal enforcement," compliance with applicable emission limits "shall be determined only by" reference tests prescribed or approved by the EPA. *Id.* Based upon this interpretation of the CAA, the EPA has limited citizen suits alleging noncompliance to only those based upon determinations made by the reference test methods. Also, the EPA refused to approve numerous SIP's which did not include reference test methods, and even promulgated an entirely separate rule to allow easier use of reference alternatives. *See* U.S.C. 42 § 110(a)(2)(A); National Emission Standards for Hazardous Air Pollutants for Source Categories and for Coke Oven Batteries, 59 Fed. Reg. 1,992 (1994).

35. The EPA and some commentators have argued that the 1990 Amendments overruled the *Kaiser Steel* decision. *See, e.g.*, Enhanced Monitoring Program, Part II, 58 Fed. Reg. 54,648, 54,649 (1993); EPA, *The Use of Information Other Than Reference Test Results for Determining Compliance With the Clean Air Act*, undated position paper (prepared for Apr. 2, 1996 public hearing; available through the ELR Document Service, ELR Order No. AD-3099); *see also*, David T. Buente, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop* 21 ENVTL. L. 2233, 2238 (1991) (§ 113(e) amendment allows citizens to present evidence through general "expert opinion" that sources have violated emissions limits, even in the absence of any actual test data).

36. 42 U.S.C. § 7413(e)(1).

37. *Id.*

38. It is reasonable to allow courts to utilize any credible evidence to establish the duration of a violation. For example, consider a facility that conducts a reference test on January 1 and discovers that it is not in compliance with the CAA. If the facility adds new pollution control equipment but does not perform another test until March 1, at which time they find that they are now in compliance, the length of the violation is technically only one day. Under the 1990 Amendments to § 113(e), the EPA can use other evidence to demonstrate that the facility remained in violation until new equipment was installed. This is a reasonable and logical process, but one that is quite different from using any

After the 1990 Amendments, courts continued to question what evidence might be used to establish violations of the CAA. In 1995, the court in *Sierra Club v. Public Service Co. of Colorado*[39] allowed the use of evidence other than that from reference testing in order to determine that a source was in non-compliance.[40] What distinguished this case and those previous cases dealing with the use of such evidence is that here, the plaintiff was a citizen group whose primary evidence of the violation was data and reports from the plant's CEM's rather than the reference test method.[41] Thus, the court based its reasoning on the fact that nothing in the CAA or EPA regulations restricted citizens to proving violations exclusively through the reference test method, stating that to hold otherwise "guts the interstitial remedial functions of the [CAA's] citizen suit provisions."[42] However, the court's holding relates only to citizen groups, and both states and the EPA were still bound to rely solely upon reference test data in order to establish a violation of the CAA. Further, the court did not closely examine either the language or the legislative history of the 1990 Amendments.

Later, in *Unitek Environmental Services, Inc. v. Hawaiian Cement*[43] another court considered the question of whether citizen groups may use evidence other than reference testing to establish a violation. Here, a citizen group brought an action using as evidence a notice of violation ("NOV") which the EPA had issued to the defendant.[44] The NOV was based upon the results of reference testing which the defendant had sent to the EPA pursuant to the CAA.[45] However, the court accepted into evidence other data, such as modeling data that was not obtained through

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credible evidence to establish a violation.

39. 894 F. Supp. 1455 (D.Colo. 1995). In this case, the Sierra Club alleged violations of CAA and in seeking summary judgment, relied upon defendant's own monitors to establish the claimed violation. *See id.* at 1456.

40. *See id.* at 1458.

41. "Sierra Club proffers no evidence of unredressed violations determined by Method 9." *Id.* at 1458. The Sierra Club alleged that the defendants (who operate the Hayden power plant in Colorado) had violated the CAA more than 19,000 times over a period of five years by emitting pollutants that were in excess of the twenty percent opacity limitation set forth in the plant's permit. *Id.* at 1456.

42. *Id.* at 1460.

43. 27 ELR 20483 (D. Haw. Aug. 27, 1996).

44. Unitek brought a citizen's enforcement action alleging that the defendant had repeatedly violated the particulate matter limits and other related control requirements of the Hawaii state implementation plan. 27 ELR at 20484.

45. *See* 42 U.S.C. § 7414.

reference test methods.[46] Thus, the court founded its conclusion that there was violation on both reference test data and other various "credible evidence." It is important to note, though, that the court did not base its findings upon the credible evidence language found in the 1990 CAA Amendments.[47]

D. Where the Credible Evidence Revisions Occur in the CAA

With these two cases as a precursor, the EPA has passed the credible evidence rule in its final form. The credible evidence revisions consist of modifications of existing enforcement regulations promulgated pursuant to the CAA, specifically, 40 CFR §§ 51.212, 52.12, 52.30, 60.11 and 61.12, in order to allow for the use of any credible evidence to prove or disprove violations of the CAA. The specific changes to the regulations are as follows:

> (1) 40 CFR § 51.212(c) was revised to clarify that the inclusion of reference test methods for emissions limits in state implementation plans ("SIP's") does not preclude the use of other credible evidence or information;[48]
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> (2) 40 CFR § 52.12 was revised to provide that any credible evidence may be used for purposes of federal enforcement;[49]

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46. 27 ELR at 20489.

47. Even though the *Unitek* and *Sierra Club* courts allowed the use of credible evidence by citizen groups, neither case squarely addressed whether a citizen group may bring an enforcement action solely based on credible evidence.

48. *40 C.F.R. 51.212 Testing, inspection, enforcement and complaints.*

> The [state implementation] plan must provide for:
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> . . .
>
> (c) Enforceable test methods for each emission limit specified in the plan. For the purpose of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any standard in this part, the plan must not 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.

See also Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8,314. Originally, the Section 51.212 revision was to also include a detailed list of presumably credible evidence and presumptively credible monitoring methods, but the EPA decided to delete the lists because they were potentially confusing and unnecessary, thus allowing judicial and administrative tribunals to determine the admissibility of such evidence on a case-by-case basis.

49. *40 C.F.R. § 52.12 Source surveillance.*

> . . .

(3) 40 CFR § 52.30(a) was renumbered as Section 52.33 and has been revised in accordance with revised Section 51.212 to provide that any credible evidence may be used in the submission of compliance certifications;[50]

(4) 40 CFR § 60.11(g) was added and states that nothing in Section 60.11(a), which provides that compliance with Part 60 standards are to be determined in accordance with the applicable performance tests, is to be construed to prevent the additional or exclusive use of any credible evidence or information to determine compliance with the standards;[51] and

(5) the revision of 40 CFR § 61.12 generally mirrors that of Section 60.11 by providing for the use of any credible evidence to determine compliance with numerical emissions limits.[52]

(c) For purposes of Federal enforcement, the following test procedures and methods shall be used, provided that for the purpose of establishing whether or not a person has violated or is in violation of any provision of the plan, 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 procedures or methods had been performed.

See also Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8,314. As with Section 51.212, the EPA originally included a list of presumptively credible evidence in this section, but it was eliminated for similar reasons. *See supra* n.48.

50. 40 C.F.R. § 52.33 Compliance certifications.

(a) For the purpose of submitting compliance certifications, nothing in this part or in a plan promulgated by the Administrator 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 had been performed.

See also Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8,314.

51. *40 C.F.R. §60.11 Compliance with standards and maintenance requirements.*

(a) Compliance with standards in this part, other than opacity standards, shall be determined in accordance with performance tests established by § 60.8, unless otherwise specified in the applicable standard.

. . .

(g) For the purpose 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.

See also Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8,314.

52. *40 C.F.R. § 61.12 Compliance with standards and maintenance requirements.*

(a) Compliance with numerical emission limits shall be determined in accordance with emission tests established in § 61.13 or as otherwise

Though these are seemingly minor and innocuous changes, their effect has been to completely turn the compliance monitoring system on its head. The EPA has moved from the exclusive use of reference test methods for proving violations to the Agency, states, and citizen groups for the purpose of establishing a violation of the CAA.

E. Judicial Review of the Credible Evidence Rule

Since the final implementation of these changes, numerous challenges have been raised pursuant to Section 307(b)(1) of the CAA.[53] In fact, although the credible evidence rule has gone largely unnoticed outside of the realm of environmental law, over sixty petitions for review have been filed in the Circuit Court for the District of Columbia. In one case more than eighty industry groups joined to bring *Clean Air Implementation Project v. EPA*.[54]

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specified in an individual subpart.

(b) Compliance with design, equipment, work practice or operational standards shall be determined as specified in an individual subpart.

. . .

(e) For the purpose 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 had been performed.

See also Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8,314. Generally, Section 61.12 remains unchanged from its original promulgated version because credible evidence has always been used to establish violations of these standards.

53. 42 U.S.C. § 7607(b)(1). Under this section, the sole avenue for judicial review of any part of the CAA is available only when a petition is filed for review in the U.S. Court of Appeals for the District of Columbia Circuit within sixty days of final publication of the Rule in the *Federal Register*. Further, Section 307(b)(2) of the CAA provides that the subject of the amendments may not be challenged at any time in a later civil or criminal proceedings. 42 U.S.C. § 7607(b)(2).

54. No. 97-1117 (C.A. D.C. filed Nov. 12, 1997). In this case, briefs were filed on November 12, 1997 in which the petitioners set forth a series of detailed attacks on the rule, contending that it illegally alters the enforcement scheme for CAA regulations by expanding the types of evidence available to prove violations. The court has since consolidated this and twenty-three other petitions which represent 101 parties. More than seventy of the parties involved in the challenge to the rule are power companies or associations that represent them. *Attorneys Contend Evidence Rule Carries Huge Liability Impact, Seek Judicial Review,* 28 Env't Rep. (BNA) 1405 (Nov. 21, 1997).

Other groups that have brought suit include the Fertilizer Institute, the Society of the Plastics Industry, the National Association of Manufacturers and the Ohio

This onslaught of cases indicates that the credible evidence revision is possibly the most massive piece of legislation that has been generated under the CAA. Obviously, this casts the changes in a light quite different than that intended by EPA.[55] Ultimately, though, the arguments presented by these petitions hopes to bring to the court's attention the incredible impact of the any credible evidence rule.[56]

III. Critical Analysis

Although there are numerous arguments against the use of any credible evidence in establishing a source's violation under the CAA, the most persuasive are that: (1) the EPA lacks statutory authority to promulgate the credible evidence revisions; (2) the credible evidence rule increases the overall stringency of the emission limitations and standards which underlie the CAA; (3) the rule is unconstitutional for want of due process; (4) the credible evidence revisions undermine federalism and the states' autonomy to manage their own environmental programs; and (5) the use of credible evidence in establishing violations of the CAA defeats the benefits provided by state voluntary self-audit programs.

Chemical Council.

55. The EPA appears to have consistently presented the changes as if they were merely minor alterations of the existing regulations. For example, the rule's *Federal Register* casts it as a single-page housekeeping revision, and in the rule's preamble, the EPA's Office of Enforcement and Compliance Assurance (OECA) insists that the rule changes nothing. *See* Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8317. Also, the OECA says that the revision is a "minor rule" with no impact since it merely deals with "evidentiary matters" by assuring that facilities comply between reference tests. *Id. See also,* Peter Fairley, *"Credible Evidence" Heads for Courts*, CHEMICAL WEEK, Feb. 26, 1997, at 14.

56. Even if the Court of Appeals for the District of Columbia finds in favor of the many plaintiffs in the case challenging the validity of the credible evidence revisions, the EPA contends that an unfavorable court decision will not have much of an effect upon the rule. According to Greg Jaffe, the EPA's Senior Enforcement Counsel, a court decision against the rule would not destroy the ability of states or citizens to bring enforcement actions based on credible evidence, because the ruling would not be an evidentiary decision. In other words, the court will only be assessing procedural matters with regard to the EPA's rule that are not binding on evidentiary decisions made by other courts. *Rejection of Rule May Not Prevent Use of Credible Evidence for Enforcement*, 28 Env't Rep. (BNA) 982 (Sept. 26, 1997).

Regardless, while these cases are pending, the EPA, states, and citizen plaintiffs will still be able to apply the credible evidence rule in individual cases. For example, less than a month after the rule was finalized, the EPA's Region VIII took action against Phillips Petroleum Co. based upon air monitoring data that previously would not have been permitted as a basis for enforcement. *Id.*

A. *The EPA Lacks Statutory Authority to Promulgate the Credible Evidence Revisions*

One of the most fundamental attacks on the credible evidence revisions is that the EPA does not have the authority to promulgate the revisions, thus making the new rule a nullity. According to the EPA, the rulemaking is "based on [its] existing authority prior to the 1990 CAA amendments."[57] The Agency contends that Section 113(a), which authorizes the Agency to bring enforcement action on the basis of any information available to the Administrator, gives the EPA what it says is "clear statutory authority to use any available information to prove violations of the requirements under the Act."[58] The Agency also proposes that Section 113(e), which allows the use of any credible evidence to determine the duration of a violation, also demonstrates that Congress did not intend to limit the EPA to using only reference test methods in bringing enforcement actions. Thus, by combining the language of Section 113(a) and Section 113(e) with the fact that the Act does not explicitly prohibit the use of information other than that resulting from reference testing, the EPA contends that it has authority to promulgate the credible evidence revisions. Therefore, the Agency believes that it is "limited only by general evidentiary rules in what it can use to prove a violation."[59]

The Agency provides no other basis for its authority to promulgate the rules, and by doing so, the Agency has left itself open to attack by industry groups who contend that the new rule lacks statutory authority. As clearly followed in *American Petroleum Institute v. EPA*,[60] the EPA cannot adopt a regulation without first having proper statutory authority from Congress.[61] Just as the EPA now finds itself in court defending its creation of the credible evidence rule based upon its interpretation of statutory authority, the EPA was previously forced to defend another of its regulations in *American Petroleum*.[62] In that case, the United States Court of Appeals for the District of Columbia Circuit ruled

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57. Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8320.
58. *Id.*
59. *Id.*
60. 52 F.3d 1113 (D.C. Cir. 1995). *See* Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8119.
61. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) ("It is axiomatic that an administrative Agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). *Id.* at 208.
62. 52 F.3d at 1117.

that the EPA could not issue a renewable oxygenate rule.[63] In reaching its decision, the court applied principles set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[64]

Under what has become known as the "*Chevron* doctrine," a court reviewing an Agency's interpretation of a statute which that Agency administers must first determine whether Congress "has directly spoken on the precise question at issue."[65] If the statute is clear, the review is terminated and the court "must give effect to the unambiguously expressed intent of Congress."[66] If the court determines that Congress' intent is not clear, or that Congress has not directly addressed the issue, the court must then consider whether the Agency's interpretation "is based on a permissible construction of the statute."[67] In this second step, the court must give considerable weight to the Agency's construction of the statute, and the court is forbidden to substitute its own construction of the statute for the Agency's reasonable interpretation.[68]

Applying the *Chevron* doctrine to the EPA's interpretation of the CAA and the 1990 CAA Amendments, it appears that the Agency's interpretation does withstand the first step of the analysis. Congress intended to allow the use of credible evidence only when necessary to establish the repeated or continuing nature of violations—after the fact of the violation itself has been demonstrated by the traditional reference test.[69]

For example, the "any credible evidence" clause of the 1990 Amendments appears in a subsection entitled "Penalty assessment criteria" which is devoted entirely to factors that the EPA and courts must consider in "determining the amount of penalty to be assessed . . . ."[70] Such factors include the violator's good faith, size, past compliance with the CAA, and the "*duration* of the violation as established by any credible evidence (including evidence other than the applicable test method)."[71] None of the factors, however, involve a determination of whether a violation has occurred in the first place.

Furthermore, the legislative history of the 1990 Amendments

63. *See id.* at 1119, 1121.
64. 467 U.S. 837 (1984).
65. *Id.* at 842.
66. *Id.* at 843.
67. *Id.*
68. *Id.* at 843-44.
69. *See* 42 U.S.C. § 7413(e)(1).
70. 42 U.S.C. § 7413(e)(1).
71. *Id.* at § 7413(e)(1) (emphasis added).

indicate that this provision was merely intended to overturn the theory that a separate reference test was required to prove each and every day of a repeated or continuing violation. It is doubtful that Congress ever imagined that this clause would be used to revolutionize the CAA's established compliance plan which utilizes the reference test method. The Bush Administration's explanation of the bill, which eventually became the 1990 Amendments,[72] states that subsection 113(e) merely "clarifies and confirms that once [the EPA] establishes evidence of a violation using a formal test method, [the EPA] can use other credible evidence to prove additional violations, or that a violation has continued."[73] Subsequently, the House passed the enforcement provisions as recommended by the Bush Administration, but noted that the Amendments also provided adequate safeguards against arbitrary enforcement actions by the EPA, states or citizen groups.[74] Therefore, Congress neither authorized nor imagined the EPA's complete elimination of the reference test method, and EPA's interpretation of the "any credible evidence clause" does not survive the first step of the *Chevron* analysis.

In its preamble to the credible evidence revisions, the EPA notes that it does not rely solely upon Section 113(e)(1), of the CAA.[75] Rather, it also attempts to rely upon Section 113(a)(1) which states that the EPA is authorized to bring an enforcement action "on the basis of any information available to the Administrator. . . ."[76] However, as with Section 113(e)(1), the EPA has manipulated its authority in an attempt to use credible evidence in bringing an enforcement action. Section 113(a)(1) merely confirms that the EPA has unreviewable discretion in deciding whether or not to *start* an enforcement action, without having to meet any particular threshold.[77] This section says absolutely nothing about what is required to prove a violation.

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72. The bill was entitled "The Clean Air Act Amendments of 1989." However, the bill was ultimately renamed "The Clean Air Act Amendments of 1990" since that was the year in which the law was finally passed by Congress.

73. Section-by-Section Analysis of "The Clean Air Act Amendments of 1989," p. 64 (July 20, 1989).

74. H.R. REP. NO. 101-490, at 390-394 (1990). *See also, e.g.*, 135 CONG. REC. S9665 (daily ed. Aug. 3, 1989) (statement of Sen. Chafee); S. REP. No. 101-228, 228, at 366 (1989).

75. Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8320.

76. 42 U.S.C. § 7413(a)(1).

77. *Heckler v. Chaney*, 470 U.S. 821 (1985) (emphasis added); *see also Encyclopedia Britannica v. FTC*, 605 F.2d 964, 975 (7th Cir. 1979), *cert. denied.*, 445 U.S. 934 (1980).

Furthermore, Section 113(a)(1) has been a part of the CAA since 1970. If Congress already authorized the use of credible evidence to prove violations in 1970, as the EPA contends, then there was no need for Congress to add the "any credible evidence" to the penalty assessment criteria in Section 113(e)(1) through the 1990 Amendments. Because there appears to be after the fact revisionism in the EPA's claim of statutory authorization to implement the credible evidence rule, the Agency's interpretation of Section 113(a)(1) fails under the first step of the *Chevron* test, as did its interpretation of Section 113(e)(1).

Moreover, the EPA's interpretation of both section 113(a)(1) and section 113(e)(1) also fails under the second step of the *Chevron* doctrine, which determines whether the Agency's interpretation is based upon a permissible construction of the statute.[78] With this step, the court must accord considerable weight to the Agency's construction of the statute.[79] However, the fact that the CAA does not explicitly state that the use of credible evidence is allowed in enforcement actions does not defeat the analysis. To suggest "that *Chevron* step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent."[80] Thus, the EPA's reliance on the fact that the CAA does not prohibit the use of any credible evidence to establish a violation[81] causes its interpretation of the CAA to be an impermissible construction of the CAA, and the second step of the *Chevron* analysis is not satisfied. Consequently, a court may reject the credible evidence rule as being without statutory authority.[82]

In sum, industry's argument that the EPA does not have statutory authority to promulgate the credible evidence revisions appears to be well-founded and the Court of Appeals might reject the rule in its review of the regulatory revisions.

B. The Credible Evidence Rule Increases the Stringency of the CAA

Perhaps the most incredible impact of the credible evidence

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78. *See supra* notes 67, 68.
79. *See Chevron* at 843-44.
80. *Railway Labor Executives Ass'n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc), *cert. denied* 115 S. Ct. 1392 (1995).
81. *See* Credible Evidence Revisions, 62 Fed. Reg. at 8,320.
82. *See American Petroleum*, 52 F.3d at 1120.

rule is that it might increase the overall stringency of the CAA, especially its emission limitations and standards. The EPA states in the preamble to the credible evidence rule that "this rulemaking merely addresses an evidentiary issue. The credible evidence revisions are not intended to and will not serve to affect the stringency of the underlying emission standards by amending the nature of the compliance obligation."[83] Nevertheless, this is exactly what the Agency has done. Through the credible evidence revisions, the EPA has changed the whole concept of compliance and has made the underlying CAA significantly more stringent.

The entire dispute over the increased stringency of the CAA under the credible evidence revisions boils down to what "compliance" means. In the rule's preamble, the EPA takes the position that "compliance must be continuous . . . except when a particular emission standard specifically provides for periods of noncompliance."[84] In support of its position, the Agency relies on a number of authorities including the CAA's definition of the terms "emission limitation" and "emission standard" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis."[85] Also, the EPA cites several cases which it believes hold that emission limitations must be adhered to at all times.[86]

Industry, on the other hand, contends that the EPA's past practices under the reference test method regime establish that the term "compliance" is not quite so cut and dry. Industry asserts that

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83. Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8,315.

84. *Id.* at 8,323

85. 42 U.S.C. § 7602(k).

86. In the Credible Evidence Revisions, Part II, 62 Fed. Reg. 8,314 (1997), the EPA lists the following cases as supporting their position of continuous compliance: *Portland Cement*, 486 F.2d at 399 (the court approved EPA's then-proposed "start-up, shutdown and malfunction" compliance exclusion regulation, suggested that it was a "limited safety valve" and stated that it imparts a construction of "reasonableness" to the standards as a whole and adopts a more flexible system of regulation that can be had by a system devoid of "give"); *Essex Chemical Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 969 (1974) (in a challenge to sulfuric acid plant and coal-fired steam generator standards, the court again approved of the proposed start-up, shutdown and malfunction exception and remanded the rule stating that "such variant provisions appear necessary to preserve the reasonableness of the standards as a whole and that the record does not reflect the "never to be exceeded" standard currently in force"); and *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1301-02 (9th Cir. 1977) (in challenge to a SIP sulfur dioxide standard, the court observed that EPA regulations required that the standard be met "all of the time," and thus the EPA must typically promulgate upset provisions to excuse noncompliance beyond the source's control).

emission limits and standards assumed that the installation and operation of "reference control technology"[87] would put a facility in "compliance." In other words, under the reference test method, emission limits and standards were generally set low enough to compel installation of the reference controls on which those limits were based. Facilities were then required to operate and maintain these emission control measures "consistent with good air pollution control practices for minimizing emissions."[88] Until the passing of the credible evidence rule, the EPA never required that facilities be within the emissions limits every minute of every day. Rather, both the EPA and industry have relied upon the comprehensive nature of the reference tests to ensure that facilities are in compliance on a day-to-day basis.

Therefore, the use of the reference testing methods is central to the overall stringency of the CAA. As mentioned above, the emissions limits and standards set forth in the CAA and the regulations promulgated thereunder were established in reference to specific tests and measures of compliance. These reference tests were designed to assess and compare pollution control processes under specified testing conditions which do not account for, and essentially disregard, the full range of operating variability.[89] Under the credible evidence rule, however, rather than ignoring this long-term variability, the EPA can now spotlight it by characterizing as violations of the CAA even the two or three percent of total operation time that facilities might go over an emission standard. This is true even if the facility is far below the emission standard for the vast majority of the year.

Thus, under the credible evidence revisions, compliance must now be measured by a system of essentially continuous and varied forms of inspection and testing evidence. The underlying standard is made more stringent because, had the credible evidence revisions been in place when the emissions standards were established, the limits would have been higher to ensure a realistically achievable

87. "Reference control technology" refers to devices that have been demonstrated to meet emission standards and limits through an initial reference test. Also, facility obligations mandate that the sources properly operate and maintain these controls.

88. *See, e.g.*, 40 C.F.R. § 60.11(d).

89. For example, it is very common for many sources to discharge in excess of emissions limits or standards during "start-ups," "close-downs," infrequent valve venting or various regular fluctuations (or "burps") occurring in the daily activity of the facility.

standard.[90] Many facilities which believe that they are in compliance based upon their reference tests may not be in compliance based on other forms of evidence. The result is that sources will have to achieve more stringent emission reductions in order to comply with a limit that is enforced by the use of any credible evidence than if the limits were enforced only through the reference test methods. This point was noted in the *Donner Hanna Coke* case discussed above. The court there rejected the use of testing methods other than the reference tests by groups of plaintiffs seeking to prove a violation of the CAA.[91] The court reasoned that allowing such plaintiffs to utilize other types of evidence would effectively make the underlying emission standard more stringent.[92]

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90. An example of how the proposed credible evidence rule can lead to more stringent standards can be found in the opacity rules of Illinois. That state has adopted limitations that prohibit opacity above thirty percent for certain lengths of time. 35 Ill. Admin. Code § 212.123 The limitations also prohibit opacity above sixty percent at any time. *Id.* The state's regulations further mandate that compliance determinations will be made through measurements resulting from the EPA's Method 9 located at 40 C.F.R. § 60, Appendix A (1997). *Id.*

Under this testing method, reported opacity based on human observations shall be based upon six minute averages of visually observed opacity. Therefore, there can be no valid opacity measurement for less than six minutes.

Under the credible evidence rule, a continuous opacity meter (or "COM") can measure and record instantaneous opacity slugs (short-term peaks) which last less than 5-10 seconds. Therefore, every 5-10 seconds, there can be a COM reading, thus increasing the possibility of recording an exceedance of the sixty percent opacity limitations. However, if the COM were used to establish the opacity limitations for Illinois, then the standard would be set much higher so as to account for the increased probability of a violation, as well as the increased accuracy of the equipment. By doing so, the standard would be attainable by industry.

This problem can exist with any continuous emissions monitoring equipment because such equipment allows minor, insignificant exceedances to be recorded. According to Robert L. Ajax, an environmental consultant and the former head of the Standards Development Branch of the EPA's Office of Air Quality Planning and Standards, "[t]he standards weren't set high enough to take into account the full range of variability." *"Any Credible Evidence" Rule: Changing the Enforcement Landscape*?, 27 Env't Rep. (BNA) 2053 (Feb. 7, 1997).

91. *See supra* text accompanying notes 26, 27.

92. "It is undisputed that the method of determining compliance with an emission standard can affect the level of performance required by the standard, even though the standard itself has not changed" *Donner Hanna Coke*, 464 F.Supp. at 1304-05; *see also Portland Cement Ass'n*, 486 F.2d at 400-01.

Also, industry has made the argument that the use of credible evidence revisions in this regard is analogous to a change from one method of determining average fuel economy to another. Under existing law, fuel economy (like air emissions standard compliance) is measured by filling up the tank, driving the car until the tank needs to be refilled , and averaging the mileage over the amount of gasoline that was consumed. Under the any credible evidence rule, the EPA is

However, the EPA insists that the overall stringency of the standards will not be increased under the credible evidence revisions. In support of its position, the Agency makes an analogy to support its point: "[A]llowing 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."[93]Rather than supporting the EPA's position, though, this analogy actually highlights the increased stringency problems that are inherent in the credible evidence revisions. Speed limits were not established by using radar guns to determine the most practical and efficient speed motorists could drive while still enhancing highway safety. The emission limits and standards of the CAA, on the other hand, were indeed established by using the reference test methods to determine the most beneficial, yet readily achievable emission standard without sacrificing the goal of improving overall ambient air quality. Industry's quarrel with the credible evidence revisions is that standards are now more stringent, not that there are more "police" and sources of evidence available to plaintiffs in bringing enforcement actions.

What is most alarming about the increased stringency created by the credible evidence rule is the fact that the EPA has never assessed whether the use of any credible evidence will have a beneficial impact on ambient air quality. If the use of such evidence truly reduces air pollution, then industry might concede that the increased burdens it faces under the credible evidence revisions are worthwhile. Because of the increased stringency of the CAA under the credible evidence revisions, however, the impact on industry could total billions of dollars. The EPA has not yet demonstrated that these expenditures are being made to attain public health goals that are valued even by industry, rather than to pay for control simply for control's sake.

Further, because the rule in effect changes the test for compliance with emissions limits, it tightens those limits without giving the emission sources the opportunity to comment on those tighter limits. In fact, this is the primary basis on which the Utility

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insisting on measuring fuel economy instantaneously during the entire road trip. Obviously, this will produce substantially different results for any given period of driving since there are different automobile operating conditions.

93. Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8,326.

Air Regulatory Group[94] has based its complaint. Essentially, they believe that the EPA is trying to change the rules in the middle of the game without giving the players an opportunity to comment on the impact of the changes. Plainly, this "'is unfair on its face and patently illegal.'"[95]

Overall, it appears that industry will be able to present a strong argument that the credible evidence rule does, in fact, increase the overall stringency of the CAA and its emission limitations and standards. This proposition, combined with the argument that the EPA might not have authority to promulgate the rule at all, might cause the Circuit Court for the District of Columbia to reject the rulemaking.

C. The Credible Evidence Rule Denies Due Process

Another incredible impact of the credible evidence rule that is related to the argument that stringency of the CAA might be increased is that the new revisions deny due process by subjecting sources to enforcement actions they cannot reasonably contemplate.[96] It has been established that regulated sources must be given adequate notice of the standards the EPA intends to enforce against them. For example, in *General Electric Company v. United States Environmental Protection Agency*,[97] the United States Court of Appeals for the District of Columbia held that regulated sources must have adequate notice which clearly identifies "the standards with which the Agency expects parties to conform."[98] The EPA contends, though, that the credible evidence rule does not establish or alter the standards with which facilities that are regulated by the CAA must comply, and therefore, does not violate due process.[99] Rather, the EPA states that the credible evidence revisions concern only the evidence that can be used to establish a violation, and the reference test methods are given full recognition under the standards.[100]

While this may seem tenable in theory, the EPA's position is indefensible when considered in light of how the credible evidence

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94. The Utility Air Regulatory Group represents 76 utilities and three industrial trade associations.

95. *Utility Industry Asks Court to Review Controversial Credible Evidence Rule*, UTIL. ENV'T REP., Mar. 14, 1997, at 5.

96. *See* U.S. Const. Amend V.

97. 53 F.3d 1324 (D.C. Cir. 1995).

98. *Id.* at 1329.

99. Credible Evidence Revisions, Part II, 62 Fed. Reg. at 8,314, 8,317.

100. *See id.*

revisions work in practice. As demonstrated above, the credible evidence rule affects the stringency of the CAA's emission standards. Also, industries have come to rely upon the reference test methods as the only data that can be used to establish a violation. Since the rule allows data from any testing method whatsoever, a facility that believes itself to be in compliance under one test method may actually be noncompliant under a different method of testing. As a result, a facility may be hit with an enforcement action, despite the fact that it is in compliance under the reference test method.

Without a defined list of the kinds of evidence that can be used (as under the reference test method regime), sources do not have fair warning of the applicable measures of compliance they will be required to meet. While the reference test method provided an adequate benchmark from which sources could work to ensure compliance under the CAA, the credible evidence revisions eliminate not only any consistency which was provided under the reference testing regime, but also the only easily determinable measure for when a source is or is not in compliance. Therefore, it is possible that a court could find the credible evidence rule violative of due process.

D. The Credible Evidence Revisions Undermine Clean Air Federalism

In addition to the EPA's possible lack of authority in enacting the credible evidence rule, the increased stringency of the CAA under the rule, and its invalidity under due process principles, sources also argue that the basic principle of federalism inherent in the CAA is undermined by the EPA's rulemaking. One of the most fundamental aspects of the CAA is the balance that is struck between the EPA and the states. The Agency recognizes that the control of air pollution "is the primary responsibility of states and local governments."[101] Thus, the CAA requires states to submit SIPs which meet detailed criteria as opposed to having the EPA dictate the exact contents of the state plan.[102] Under this structure of the CAA, states remain free to go beyond the federal minimum. The EPA generally cannot reject a SIP submitted by a state on the grounds that it will have an "excessive economic

101. *See, e.g.*,. 42 U.S.C. §§ 7401(a)(3) and 7410(a)(2); Train v. NRDC, 421 U.S. 60 (1975).
102. *Id.*

impact," nor can the EPA "cherry pick" a submitted SIP by approving or favoring only those parts of the SIP that are "more stringent."[103] Even those regulations passed after the 1990 Amendments to the CAA have respected these principles of state autonomy by recognizing that states do most of the CAA's work and bring over ninety percent of its enforcement actions.[104]

The credible evidence rule will now require states to amend their SIPs by making credible evidence an exclusive means of establishing non-compliance, regardless of whether the state prefers to retain the former reference test regime and regardless of the resources a state may have expended to develop those tests. A state's failure to include the credible evidence revisions may cause the EPA to reject its SIP and local facilities will be sanctioned. Most alarming is the fact that the EPA may reject a SIP for failure to include the credible evidence provisions despite the fact that "credible evidence" appears nowhere in the statute's long list of minimum criteria for SIP approval.

The new credible evidence revisions also appear to allow immediate federal enforcement (utilizing the new credible evidence rule) of nearly all SIP provisions and individual new-source permits already issued by states, notwithstanding other permit conditions or past state efforts to build consensus around existing permit terms.

States will not only suffer from a loss of autonomy, but also from a loss of valuable resources as they may be required to re-examine existing emission limits in order to assure those numeric limitations are capable of being met (without new or different controls) on a long-term basis under the credible evidence regime. In fact, the credible evidence rulemaking explicitly invites such wasteful re-examination by stating that "[t]o the extent there is any documentation that a well-run facility cannot comply consistently with . . . applicable SIP requirements [under the any credible evidence rule], such documentation would be relevant only to those existing [limits], not to today's rule."[105] Finally, the credible evidence rule will also confound state adoption of new emission limits which also must be shown to be achievable under the credible evidence rule despite long-term variability. Moreover, the credible

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103. *See* 42 U.S.C. § 7416; *Union Electric Co. v. EPA*, 427 U.S. 246 (1976); *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028 (7th Cir. 1984); *Riverside Cement Co. v. Thomas*, 843 F.2d 1246 (9th Cir. 1988).

104. *See, e.g,*. Operating Permit Program, 57 Fed. Reg. 32250, 32293 (1992) (final operating permit rules).

105. Credible Evidence Revisions, Part II, 62 Fed.Reg. at 8,325.

evidence will confound such standard-setting efforts by requiring state environmental agencies to demonstrate that each and every proposed emission standard is achievable regardless of the compliance monitoring method that is used.

Thus, the credible evidence revisions will cause states to lose almost complete control of their ability to define the compliance obligations they impose on regulated facilities. This is alarming because the ability to control and define compliance obligations is a central aspect of most air pollution programs.[106] Rather than setting their own definitions of compliance, states must now acquiesce to those definitions set by the EPA and citizen groups, as well as the judges and juries who hear and decide enforcement suits. Consequently, these definitions could vary wildly from case to case within a single state. Therefore, by undermining the autonomy of the states in implementing their own air pollution programs through the credible evidence revisions, the EPA has upset the delicate state/federal balance in air pollution management. By doing so, the EPA undermines clean air federalism, and the very structure of the CAA. This is yet another argument that industry will likely make before the Circuit Court in its challenge to the rule.

E. The Credible Evidence Rule and State Audit Laws

As evidenced by the loss of state autonomy in clean air enforcement, the effects of the credible evidence revisions will continue to be far-reaching. The effects of the new rule will also reach state self-audit laws. Many states have such laws, which allow for voluntary audits by companies that wish to determine if they are in compliance with applicable emission standards and limits.[107] These laws usually provide that any information which is disclosed as part of a self-audit is privileged.[108] Thus, under a self-audit, a company will be able to determine if they are in compliance with the CAA, but will not face an enforcement suit if it discovers that it is not in compliance.[109] This feature makes such audits an attractive option for many companies, and most importantly, the goals of the CAA and compliance determinations remain satisfied.

However, under the credible evidence rule, the extent to which these laws afford complete protection against enforcement actions

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106. *See, e.g., supra* n.95.

107. *See Credible Evidence Rule May Dampen Utility of State Audit Laws, Attorney Says*, 28 Env't Rep. (BNA) 1446 (Nov. 28, 1997).

108. *Id.*

109. *Id.*

is unclear. While the EPA was previously limited in its use of information that is disclosed under voluntary self-audits in enforcement cases, the Agency now has greater leeway regarding the evidence it can present to a court under the credible evidence rule. Therefore, it seems likely that the EPA will argue that a state self-audit privilege is not applicable in federal cases and that EPA will seek the information collected through an audit during the discovery process. It will then be up to the court to decide upon the scope of the privilege that is afforded under state audit law. For sources, making a prediction as to which way a court will decide is difficult, if not impossible.[110]

Therefore, the credible evidence rule might diminish the usefulness of state environmental audit laws for companies which are merely attempting to comply with air pollution regulations. Also, the willingness of sources to monitor their own evidence and voluntarily provide information to state agencies will undoubtedly decrease under the credible evidence regime. Sources will become increasingly aware that, under the credible evidence rule, they might end up defending themselves in federal court against what was thought to be privileged information. This is especially alarming when one considers that the entire purpose of such audit laws was to avoid litigation in the first place. Many now believe that the use of the credible evidence rule in this regard will have a "chilling effect" on the use of environmental audits.[111] If this is true, the credible evidence rule will actually undermine the purpose

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110. *See Credible Evidence Rule May Dampen Utility of State Audit Laws, Attorney Says*, 28 Env't Rep. (BNA) 1446 (Nov. 28, 1997).

111. According to Environmental Law Attorney Kenneth R. Meade, such a chilling effect is very likely. Despite the chance that industries will win on the issue of whether the information from voluntary audits is privileged, companies will likely stop using the process since avoiding litigation is the very purpose of the audit laws. *Id.* Other industry attorneys agree. *See Rejection of Rule May Not Prevent Use of Any Credible Evidence for Enforcement*, 28 Env't Rep. (BNA) 982 (Sept. 26, 1997).

Further, R. Lewis Shaw, deputy commissioner of the South Carolina Department of Heath and Environmental Control, has said that his state is already experiencing a chilling effect due to the uncertainty arising from the clash of the credible evidence rule and the state audit laws. In 1996, South Carolina adopted a law which provides for both an immunity against enforcement actions and a privilege for audit information. However, only about six of the 1,500 industries in that state have actually completed a self-audit program. Since there was a high level of industry support when the law was being considered by the state legislature, the credible evidence rule is blamed. Shaw states that the rule "really has dampened the enthusiasm on the part of industry. I'm sure this will add more uncertainty." *Credible Evidence Rule May Dampen Utility of State Audit Laws, Attorney Says*, 28 Env't Rep. (BNA) 1446 (Nov. 28, 1997).

of the CAA, which is to assure that all industries comply with effective environmental pollution monitoring.

IV. Conclusion

As these arguments demonstrate, there is ample justification for industry's uproar against the EPA's use of credible evidence in determining whether a source has violated the CAA. First, the rule may be found to be void, as the EPA might lack statutory authority to promulgate the rule in the first place. Second, the credible evidence revisions might be invalidated on the grounds that they illegally increase the stringency of the emission limitations and standards of the CAA. Third, the rule might be unconstitutional as it does not provide due process to industries by failing to properly notify sources of the type of evidence that might be used against them in compliance actions. Fourth, the rulemaking undermines the structure of the CAA by removing a state's autonomy to establish its own compliance plans through SIP's, thus upsetting the delicate federal/state balance that is inherent in clean air enforcement. Finally, the credible evidence revisions also undermine the advantages provided to both industries and CAA enforcement agencies by the use of state voluntary self-audit laws.

In sum, many on both sides of these arguments believe that this rulemaking is the most significant and controversial piece of legislation to come out of the CAA. The EPA has created an indefensible rule that is likely to have broad, negative impacts on industry and even the pursuit of better ambient air quality. As noted by William Lewis, an industry attorney, "There is not much question, in terms of the breadth of the impact, that there is not another rule that will have as significant a negative impact on industry" as the credible evidence rule.[112] Thus, the effects of the any credible evidence rule are, indeed, incredible.

Brad E. Harker

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112. *Rule on Credible Evidence Due in February, Expected to Prompt Industry Group Litigation*, 27 Env't Rep. (BNA) 1859 (Jan. 10, 1997).