The Credible Evidence Rule

Effects on Monitoring and Compliance Certifications

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Overview

- Statutory and Historic Background
- Regulatory Changes
- Relation to Title V Monitoring
- Relation to Compliance Certification
Background

- 1970 Clean Air Act: Test methods are used to demonstrate compliance with regulations
- General provisions of parts 60 and 61:
  - Compliance determined in accordance with performance tests
  - Source owners required to operate and maintain facility consistent with good air pollution control practices at all times
  - Administrator may use monitoring results, opacity observations, procedure reviews, and inspections and other means to determine compliance
Background

Court decisions: Interpretations of CAA:

- **Portland Cement Assoc. v. Ruckelshaus (1973)**
  - Method used for compliance must be same as method used to set standard

- **Donner Hanna Coke v. Costle (1979)**
  - The use of a non-reference method was “arbitrary and capricious” in conducting enforcement actions

  - The use of the applicable test method was the exclusive method available to determine
Changes by the 1990 Clean Air Act Amendments

- **Section 103(a)** An enforcement action may be based on “any information available”

- **Section 113(e)(1)** (Penalty calculation) the duration of a violation is established by “any credible evidence”, including evidence other than that in the applicable test method

- Part 63, 63.6(f)(3) – Administrator may use results of tests, monitoring, and
Applications of CE for enforcement

- **Sierra Club filed a CAAA citizen suit - 1995**
  - Alleged that PSC’s Hayden power plant violated the 20% opacity limit 19,000+ times in 5 years.
  - PSC argued that only Method 9 observations can establish ongoing violations, not COMS data.

- **Court finding:**
  - The SIP does not limit citizens to a specific method in proving a violation and that COMS data/reports were undisputed evidence of ongoing opacity violations.
Other CE Applications

- Unitek used a broad range of data to prove that Hawaiian Cement violated the state PM standard, including:
  - EPA NOVs
  - HDOH non-compliance letters
  - Independent analysis of PM emissions data
  - Permit application indicated noncompliance and identified corrective action

- Court found that the entirety of the evidence showed Hawaiian Cement in violation
EPA Regulatory Action

- Federal Register, Feb. 24, 1997 (vol. 62, No. 36, pp 8314-8328

- Changes to Regulations:
  - 51.12 (Content of SIP)
  - 52.12 (Federal Enforcement of SIP)
  - 52.30 (Compliance Certification)
  - 60.11 (Compliance with NSPS)
  - 61.12 (Compliance with NESHAP)
Regulatory Language Additions

“...nothing in this part shall preclude the 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.”

Note that CE can be used to demonstrate either compliance or non-compliance.
Court Challenges to Regulations

- Challenges were heard by U.S. Court of Appeals (Clean Air Project v. EPA, 1997)
- The Court delayed a decision on the CE rule
  - Case is “not ripe”
  - Challenges must be based on a specific case
Summary

- CE Rule
  - Removes (perceived?) bar to admitting information other than performance test data to prove compliance or violations;
  - Does not change process for establishing credibility of evidence in enforcement actions;
  - Re-emphasizes continuous compliance - source owners cannot ignore other information relative to compliance;
  - Is not gauge for designing monitoring