



## Advice & Counsel

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### The "Any Credible Evidence" Rule is Incredible!

#### Dear Advice and Counsel,

**At the SUR/FIN Conference in Cleveland, we heard Bill Sonntag, Director of Government Relations for the surface finishing industry, mention that EPA officials from the Office of Enforcement and Compliance Assurance are considering a proposal to finalize the "Any Credible Evidence (ACE)" rule under the Clean Air Act. This rule would allow EPA or citizens to use "any credible evidence" to establish a violation of air emission standards. Apparently, EPA plans to finalize ACE sometime soon. We find this INCREDIBLE! What's going on?**

**Signed, Smokey**

Dear Smokey,

The Government Advisory Committee (GAC) for the surface finishing industry is working on this one. The whole issue is whether EPA/citizens can use information other than stack tests for determining compliance with the Clean Air Act. Here are the details:

In an October 22, 1993, (page 54648) *Federal Register* Notice, EPA solicited public comment on a proposal to amend 40 CFR parts 51, 52, 60, and 61 to eliminate language that had been interpreted to require exclusive reliance on reference test methods as the means of establishing compliance with air emission limitations under the Clean Air Act, and to clarify that credible evidence can be used instead. In the same notice, EPA proposed an Enhanced Monitoring Rule, which was subsequently suspended. In September 1995, EPA proposed to hold a public meeting on the credible evidence provision. That public meeting was held in April of this year.

Section 113(a) of the Clean Air Act, gives EPA the authority to bring enforcement action "on the basis of any information available." In *United States vs. Kaiser Steel Corp.*, however, the District Court ruled that only reference method stack testing could be used to establish violations of permit limits. In the 1990 amendments to the Clean Air Act, Congress legislated that the duration of the violation could be established by "any credible evidence (including evidence other than the applicable test method)."

EPA is now considering proceeding to finalize 40 CFR parts 51, 52, 60, and 61 to replace exclusive reliance on stack test data, with "any credible evidence." EPA believes that the revised criterion would provide for more economical compliance certification on the part of the discharger, and at the same time provide state inspectors, EPA, and citizens with an easier, less expensive method of assessing compliance or noncompliance with emission standards.

EPA believes this to be a balanced approach that meets the "common sense" approach to regulation of industry, by removing cost barriers from the regulated community and the regulators at the same time.

#### Some Advantages And Disadvantages

Allowing the use of emission data other than stack tests is critical to other EPA proposals to streamline the Clean Air Act, including the Compliance Assurance Monitoring (CAM) rule and the Open Market Trading Rule (OMTR). Under the CAM rule, sources would be allowed to certify compliance with applicable permit limits based on monitoring key operating parameters. Similarly, to provide sufficient flexibility for a

broad pollutant trading scheme, at least some sources would have to be allowed under the OMTR to use means other than reference test methods to quantify the emission reductions being traded.

Your concern is that the citizenry will use questionable perceptions as "credible evidence" and will essentially harass you with unfounded, groundless lawsuits, in anticipation of an out-of-court settlement.

EPA intends that the use of credible evidence will require some emission

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sources to take steps to improve the degree to which they comply with the Act. EPA also promises to publish enforcement policy to assist regional offices and the states in distinguishing between minor and insignificant violations that need not be pursued and significant violations for which prompt and aggressive enforcement is necessary. Unfortunately, this leaves the citizenry without such guidance.

EPA would still use the reference test methods as the standard for determining the credibility and precision of other emission data and measurements.

By providing industry with flexible, inexpensive, accurate means of determining compliance, this proposal significantly reduces the regulatory burden. The proposal also can assist industry in more general compliance and enforcement contexts. For example, the 1990 Clean Air Act Amendments can cause an emission source to be presumed in violation continuously from the time a violation notice was received until the source demonstrates compliance. The

credible evidence rule would allow the emission source to demonstrate a return to compliance prior to the actual stack test.

EPA does not intend that the credible evidence rule would result in multiple minor violations that would prompt citizen suits or local enforcement actions. EPA focuses on violations that:

1. May threaten or result in harm to public health or the environment.
2. Are of significant duration or magnitude.
3. Represent a pattern of noncompliance.
4. Involve a refusal to provide specifically requested compliance information.
5. Involve criminal conduct.
6. Allow a source to reap an unfair and illegal economic advantage.

#### A Legitimate Concern

EPA studied citizen suits in the past (under the Clean Water Act), and concluded that, in general, such suits did not cover sporadic inconsequen-

tial violations. Not covered or studied, however, were the number of "suits" that were threatened and settled "out of court" by vulturous and questionable environmental entities. I believe this is the kind of harassment with which you are specifically concerned.

Through a meeting with Sylvia Lowrance, Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA, we were informed that the Agency still firmly holds that the burden of proof of a violation rests with the regulatory agency and/or the citizen bringing an enforcement action. In subsequent correspondence, the GAC has informed the EPA that we believe that many important issues remain unsolved, including the relationship between the credible evidence rule and Compliance Assurance Monitoring. EPA should define the parameters of credible evidence in addition to compliance test methods prescribed in rules and permits. Further, EPA should propose this rule again to allow all stakeholders to participate in the rulemaking process. *P&SF*