

## Interim Policy and Guidance on the Use of "Credible Evidence" in Air Enforcement Activities (Memorandum)

MEMORANDUM 4/29/97

**SUBJECT:**

INTERIM POLICY AND GUIDANCE ON THE USE OF "CREDIBLE EVIDENCE" IN AIR ENFORCEMENT ACTIVITIES

**FROM:**

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ASSISTANT ADMINISTRATOR

**TO:**

Regional Administrator (EPA Regions I-X)  
Regional Counsel (EPA Regions I-X)  
Regional Enforcement Division Directors (EPA Regions I, VI and III)  
Air Division Directors (EPA Regions I-X)

The Agency recently revised its regulations and reaffirmed its authority to use any credible evidence to enforce continuing compliance with applicable requirements under the Clean Air Act, as amended. 62 Fed. Reg. 8314 (February 24, 1997) (commonly and hereinafter referred to as the "credible evidence rule"). For clarity of policy, consistency in application and guidance on the use of "credible evidence" in the Agency's clean air enforcement program(1), the following will serve as interim implementing measures:

**Withdrawal of Prior Agency Policy and Guidance** - Previous policy guidance concerning the use of continuous emission monitoring (CEM) data indicated that this data would be used for direct enforcement of applicable emissions limitations only when specified as the compliance test method in Agency rules, state implementation plans (SIPs), source permits, orders or consent decrees. These policies, along with any other Agency-imposed restrictions on its longstanding statutory authority to use "credible evidence", were superseded by the 1990 amendments to the Clean Air Act. Since enactment of those amendments, there has been no limit on EPA's pre-existing statutory authority to use credible evidence to establish violations. With the credible evidence rule, however, the Agency has formally confirmed and acknowledged its authority, ability and intention to continue to rely upon any credible evidence, including CEM data (as appropriate), to establish a violation and seek

appropriate relief. Accordingly, credible evidence can be used to establish any violation, regardless of whether the violation occurred before or after promulgation of that rule.

Certain Agency policy and other memoranda have in the past suggested a distinction between information sufficient to support issuing a notice of violation and information necessary to prove a violation or determine compliance. The 1990 amendments to the Clean Air Act and the credible evidence rule eliminated any perceived need or basis for recognizing such an artificial distinction. To avoid possible confusion in the future by those required to comply with emissions limitations and misapplication by those involved in enforcing such limitations, all such prior Agency policy and guidance are hereby expressly withdrawn to the extent they imply any limitation on the use of CEM data (or any other data generated/developed by methods not specified by regulation) in the Agency's enforcement activities(2). Moreover and to the extent that prior statements of policy or position may be affected by or inconsistent with the credible evidence rule, the credible evidence rule and this policy/guidance control.

Interim Enforcement Response Policy - The credible evidence rule does not affect prior Agency guidance on the "Timely and Appropriate Enforcement Response to Significant Air Pollution Violators", issued by John S. Seitz, Director, Office of Air Quality Planning & Standards, and Robert Van Heuvelen, Director of Civil Enforcement, under memorandum dated February 7, 1992, as subsequently clarified and amended, or other guidance of general applicability. Agency enforcement resources and activities should continue to focus on addressing significant violations and in causing sources to return to continuous compliance with applicable requirements. Enforcement activities (particularly judicial enforcement proceedings) should generally be directed at 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, or (6) allow a source to reap an economic benefit. See Credible Evidence White Paper, "The Use of Information other Than Reference Test Results for Determining Compliance with the Clean Air Act", March 21, 1996.

Minor violations generally should continue to be a lower judicial enforcement priority because other tools can typically be used to address these violations without resort to federal court (e.g., occasional exceedences of short duration that are quickly and adequately resolved can typically be handled administratively without the use of more formal, judicial enforcement proceedings). However, Agency enforcement personnel should look at all the facts and circumstances of a case (e.g., extent and duration of noncompliance, environmental consequences and economic benefits of noncompliance), including consideration of the full range of types of violations and all available enforcement tools, in deciding whether and, if so, what enforcement response is warranted to address sporadic, infrequent violations identified or determined through the use of credible evidence.

The Agency has and should maintain a balanced enforcement program that seeks to assure compliance through using a mix of the compliance and enforcement tools available to it. Common sense and reasoned enforcement discretion must continue to guide the Agency in assessing and determining whether available information should be proffered or otherwise used as credible evidence

of a violation(3).

**SIP Revisions Concerning Credible Evidence** - Numerous states have submitted or will soon submit revisions to their SIPs to expressly permit the use of "credible evidence" to enforce applicable requirements. See 40 CFR 51.212(c), as recently promulgated. Some revisions have been approved, but many others are still pending (due in part to the pendency of the now concluded credible evidence rule) or are yet to be submitted. As reflected in the credible evidence rule, EPA (and the states) have had the authority and ability to use credible evidence to enforce Clean Air Act requirements. Nonetheless and to ensure clarity at the earliest practicable date, action on these SIP revisions should be expedited, consistent with necessary legal requirements and in consideration of other pending policy matters (e.g., state audit immunity policies).

**Proceedings Involving the Use of Credible Evidence in FY 97 are "Nationally Significant"** - In re delegating concurrence authority for the settlement of enforcement actions to Regional Counsel, an exception was made for cases raising issues of national significance. Memorandum, Redlegation of the Assistant Administrator for OECA's Concurrence Authority in Settlement of Certain Civil Judicial and Administrative Enforcement Actions, Steven A. Herman, Assistant Administrator, July 8, 1994. Guidelines for identifying nationally significant cases/issues were contemporaneously issued, with subsequent guidance further clarifying the matter. Memorandum, OECA/Regional Procedures for Civil Judicial and Administrative Enforcement Case Redlegation, Robert Van Heuvelen, Director, Office of Regulatory Enforcement, November 8, 1994. Consistent with such re delegation, guidelines and guidance, the initiation, litigation and resolution of civil proceedings involving the use or anticipated use of non-reference test data to establish/refute the existence or duration of a violation under SIPs, NSPS, or NESHAPs are to be identified and treated as cases involving "nationally significant issues" for at least the next year.

Regional Counsel should review their current cases (regardless of redelegated authority) to determine whether credible evidence issues have been or are likely to be raised. In all future referrals and enforcement actions, Regional Counsel, Enforcement Division Directors and Air Division Directors should consider whether non-reference test method data and/or other information are available and can be used to enforce compliance with applicable Clean Air Act requirements.

**Future Guidance/Work Group Formation** - Since the evaluation and use of credible evidence plays an important part in ensuring continuous compliance with emission limitations and requirements, the Regions are encouraged to use non-reference test data where appropriate. Such use could be aided, and consistency enhanced, by the issuance of additional guidance and direction on the evaluation and use of all forms of non-reference test data as credible evidence.

With this memorandum I am also announcing the creation of a Credible Evidence Work Group, to be chaired by ORE's Air Enforcement Division. This work group is charged with developing additional guidance on the use of credible evidence and other, related materials. This activity will undoubtedly benefit greatly from the perspectives and expertise resident in the Agency's regions, offices and program activities. Please submit nominations of persons with both legal and technical experience in

clean air enforcement matters to Bruce Buckheit, Director, Air Enforcement Division, Office of Regulatory Enforcement, not later than June 1, 1997.

The measures identified and described in this document are intended solely for the guidance of government personnel (e.g., the Interim Enforcement Response Policy). They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States or the Environmental Protection Agency. EPA reserves the right to act at variance with these measures and to change them at any time without public notice.

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1. In every enforcement action taken by the Agency we rely on credible evidence of the violation. As used in this Policy and Guidance, however, the term "credible evidence" refers specifically to the kinds of evidence discussed in the credible evidence rule (e.g., non-reference test method data and other information that are 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 62 Fed. Reg. 8314 (Feb. 24, 1997).

2. The following guidance is expressly included in this withdrawal:

Memorandum, Guidance Concerning EPA's Use of Continuous Emission Monitoring Data, from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, August 12, 1982.

Memorandum, Guidance: Enforcement Applications of Continuous Emission Monitoring System Data, Edward E. Reich, Director, Station Source Compliance Division, and Michael S. Alushin, Associate Enforcement Counsel, Air Enforcement Division, April 22, 1986.

Policy Statement, CEMS Policy, Gerald A. Emison, Director, Office of Air Quality Planning and Standards (OAQPS), March 31, 1988 (reissued). See also Policy Statement, CEMS Policy and FY 1988 Guidance, Gerald A. Emison, Director, OAQPS, July 28, 1987.

Memorandum, Transmittal of SO<sub>2</sub> Continuous Compliance Strategy, John S. Seitz, Director, Stationary Source Compliance Division (OAQPS), July 5, 1988.

3. For example, the Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991) recommends that recoupment of economic benefit due to delayed and avoided compliance costs be calculated from the "first provable date of violation." Agency enforcement personnel should utilize

their common sense and experience to assess and evaluate all available information in determining what constitutes a "provable" date of violation under that policy.

For further information, please contact: Mark Siegler, EPA/OECA/AED.

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