Appendix D

- **Credible Evidence Rule**
- **Memo on Startup, Shutdown, and Malfunction**
- **Memo on Limiting Potential to Emit**

federal register

Monday
February 24, 1997

Part II

Environmental Protection Agency

40 CFR Part 51, et al.
Credible Evidence Revisions; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, 60 and 61

[FRL–5691–2]

RIN 2020–AA27

Credible Evidence Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In an October 22, 1993 Federal Register, EPA solicited public comment on a proposal to amend 40 CFR Parts 51, 52, 60 and 61 to eliminate language that has been read to provide for exclusive reliance on reference test methods as the means of demonstrating compliance with various emission limits under the Clean Air Act (''CAA'' or ''Act''). These revisions—generally referred to as the ''credible evidence'' revisions—were designed to clarify that non-reference test data can be used in enforcement actions, and to remove any potential ambiguity regarding this data's use for compliance certifications under Section 114 and Title V of the Act. In the same document, EPA proposed an ''enhanced monitoring'' rule under Section 114 and Title V. EPA subsequently decided to suspend development of the original enhanced monitoring rule and develop a compliance assurance monitoring (''CAM'') approach to serve the same statutory goals as the original enhanced monitoring proposal. Today's rulemaking finalizes the previously proposed credible evidence revisions to Parts 51, 52, 60 and 61. EPA will take final action regarding enhanced monitoring and CAM in a separate rulemaking.

DATES: *Effective Date:* April 25, 1997. *Judicial Review:* Under CAA section 307(b)(1), judicial review of this nationally applicable final action is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this rule. Under CAA section 307(b)(2), the regulations that are the subject of today's rule may not be challenged later in civil or criminal proceedings brought by EPA in reliance on them.

ADDRESSES: *Docket.* Supporting information used in developing this rulemaking is contained in Public Docket No. A–91–52. This docket is available for public inspection and copying between 8:00 a.m. and 5:30 p.m. on weekdays, excluding federal holidays, at the EPA Air and Radiation Docket and Information Center, Room M–1500, Waterside Mall, 401 M Street SW., Washington, DC 20460; telephone (202) 260–7548. A reasonable fee may be charged for photocopying docket materials.

FOR FURTHER INFORMATION CONTACT: Gregory Jaffe, Air Enforcement Division (Mailcode 2242–A), Office of Regulatory Enforcement, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20460; telephone (202) 564–2260.

SUPPLEMENTARY INFORMATION: The contents of the preamble are listed in the following outline:

I. Background

A. Statutory and Regulatory Authority

The credible evidence revisions are based on EPA's long-standing authority under the Act, and on amplified authority provided by the 1990 CAA Amendments. Section 113(a) of the Act authorizes EPA to bring an administrative, civil or criminal enforcement action ''on the basis of any information available to the Administrator.'' In this provision, which predates the 1990 CAA Amendments, Congress gave EPA clear statutory authority to use any available information—not just data from reference tests or other federally promulgated or approved compliance methods—to prove CAA violations. (The preamble will generally use the phrase ''reference tests'' to include all these compliance methods. Where appropriate, the phrase ''reference tests'' will also include test conditions specified in individual regulations.)

In the 1990 CAA Amendments, Congress included an enforcement title (Title VII) to enhance EPA's compliance and enforcement authorities. Among other things, Congress revised Section 113(e)(1) of the Act to overrule a federal court decision (*Kaiser Steel*, discussed below) that had held that only specified reference test data could prove violations. Thus, although the pre-existing authority of Section 113(a) forms the principal basis for today's action, the credible evidence revisions are also supported by the language, history and intent of the 1990 CAA Amendments. *See also* Section III.C. below.

In addition to clarifying EPA's, states' and citizens' enforcement authorities under the Act, the credible evidence revisions eliminate any potential ambiguity regarding the use of non-reference test data as a basis for Title V compliance certifications. Such potential ambiguity could arise from comparing the draft compliance assurance monitoring (CAM) approach and associated Part 70 changes, which would allow sources to include CAM data as a basis for certifying compliance, with various EPA regulations that could be read on their face to specify reference test methods as the sole means of determining compliance.

B. Benefits of the Credible Evidence Revisions

As a preliminary matter, EPA wishes to clearly state 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 underlying emission standards by amending the nature of the compliance obligation. This rulemaking does not amend existing emission standards nor does it modify generic regulations affecting the compliance obligation such as exceptions for startup, shutdown, and malfunctions. See, e.g., 40 CFR 60.8(c). This regulation also does not designate any particular data as probative of a violation of an emission standard. Rather, this regulation merely removes what some have construed to be a regulatory bar to the admission of non-reference test data to prove a violation of an emission standard, no matter how credible and probative those data are that a violation has occurred. The credible evidence revisions do not affect the compliance obligation and thus do not affect the stringency of existing emission standards. What compliance obligation is imposed by any given emission standard remains an issue ultimately to be determined based on that emission standard and not this rulemaking.

For these reasons, we do not believe that this rulemaking affects whether emission standards require intermittent or continuous compliance. However, as made clear below, and in the detailed response to comments document, EPA's position continues to be that an emission standard requires continuous compliance unless the emission standard specifically provides otherwise.

Today's credible evidence revisions will benefit sources, state environmental agencies, EPA and the public. EPA, states and citizens will be able to use credible evidence to assess a source's compliance status and respond to noncompliance. This will help ensure that the government and citizens alike can respond to sources that are not complying with air pollutant emission standards on an ongoing basis, thus furthering the protection of public health and the environment. At the same time, sources will be able to use credible evidence for contesting allegations of noncompliance in enforcement actions. Accordingly, today's rulemaking exemplifies EPA's ''common sense'' approach to environmental protection, which encourages smarter, cheaper and more flexible means of achieving environmental goals without compromising the fundamental health and environmental protections provided by federal environmental laws.

In the past, state regulatory authorities and EPA have relied primarily on infrequent on-site inspections and even more infrequent reference tests in order to check compliance with emission limits at major stationary sources. According to a September, 1990, General Accounting Office (GAO) report, these on-site inspections were performed approximately once a year; the reference tests, typically once every five years. ''Air Pollution: Improvements Needed in Detecting and Preventing Violations,'' GAO, No. GAO/RCED–90–155, September 1990, at 12, 19. These methods are inadequate to ensure that sources continuously stay within their emission limits: for example, Pennsylvania officials have estimated that, in comparison with continuous emissions monitoring, on-site inspections may be 50 times less likely to detect non-compliance. *Id.* at 18. Reference tests may not yield a representative emissions picture because the sources typically schedule, set up and run the tests themselves. This allows sources to ''fine tune'' their operations and emissions control processes prior to the tests, and generate results that may not be typical of day-to-day source operations. *Id.* at 19–20. Reference tests can also be expensive and burdensome: They can cost up to $100,000, and take a week or more to complete. *See, e.g.*, 43 FR 7568, 7571 (1978).

In contrast to the above approach, today's rule will make it clear that various kinds of information other than reference test data, much of which is already available and utilized for other purposes, may be used to demonstrate compliance or noncompliance with emission standards. (The preamble generally refers to this other information as ''non-reference test data''). EPA, state agencies and industry routinely rely on many types of information, including engineering calculations, indirect estimates of emissions, and direct measurement of emissions by a variety of means, in order to assess compliance with CAA requirements. Where available, continuous emission monitoring (CEM) data and well-chosen parametric monitoring data, such as the operating temperature and air flow rate of a regenerative thermal oxidizer, generally provide accurate data regarding a source's compliance with emission limits and standards. These data also generally cover a greater percentage of a source's time in operation and are more representative of a source's ongoing compliance status than sporadic performance testing.

Under today's rule both sources and potential enforcers will be put on the same evidentiary footing in an enforcement action. Further, since 1992, EPA's Part 70 operating permit regulations have allowed the use of this data in compliance certifications. Today's action reaffirms this approach, and removes any potential ambiguity regarding the use of such data for this purpose.

Today's action reflects EPA's efforts to make existing regulatory programs work better rather than creating additional requirements. By ensuring greater compliance with existing emissions limits, the credible evidence revisions will help minimize the need for further requirements to achieve air quality goals. *See* the October, 1993, proposal, 58 FR 54654.

C. Public Participation

The final credible evidence revisions were developed with the benefit of insight from many parties that will be affected by the regulations, including State and local air pollution control agencies, large and small industries, trade associations and environmental organizations. Many comments regarding credible evidence issues were received during the development and after the proposal of the original enhanced monitoring rule, in 1991 through 1995. Many additional comments were received after the Agency announced that it was continuing to go forward with the credible evidence revisions in 1996.

To obtain the views of all interested parties at the early stages of developing the enhanced monitoring rulemaking, EPA published a notice in the Federal Register on August 8, 1991, to make available a Public Information Document on enhanced monitoring and to provide notice of a public meeting to be held on August 22, 1991, on the subject (56 FR 37700–37701, August 8, 1991). In response to the public meeting, EPA received many comments which were included in the docket for the proposed regulations.

Over the next four years, EPA held over one hundred informal informational and discussion sessions with representatives of interested organizations to receive their views on enhanced monitoring, as well as a second informational meeting with approximately fifty attendees held on August 12, 1993. Following publication of the proposed enhanced monitoring regulations on October 22, 1993 at 58 FR 54648, EPA conducted a public hearing in Washington, D.C., on November 19, 1993. Testimony was given by twelve individuals, representing industry and environmental organizations.

In addition, during the public comment period, which was first scheduled to close on December 30, 1993, and was extended until January 31, 1994, in response to requests for

extension, EPA received comments from a wide variety of interested parties concerning the enhanced monitoring proposal, including numerous comments on credible evidence issues. In the fall of 1994, EPA held a series of informational meetings with interested parties affected by the rule. The Agency then reopened the public comment period on specific issues to solicit additional comments, and held an additional stakeholder meeting. In response to the reopened public comment period, EPA received over 200 additional comment letters.

In April, 1995, EPA announced that it was suspending development of the enhanced monitoring rule while it developed the CAM approach to serve the same statutory goals. In a September, 1995, public draft of the CAM approach, EPA stated that it would hold further discussions with stakeholders before it proceeded to finalize the credible evidence revisions. On March 8, 1996, EPA announced that a public meeting on credible evidence issues would be held on April 2, 1996. To focus the meeting's discussion, EPA released a paper on March 21, 1996, entitled ''The Use of Information Other Than Reference Test Results for Determining Compliance With the Clean Air Act'' (sometimes referred to as the ''Credible Evidence White Paper''). EPA distributed this paper by electronic bulletin board to the same stakeholders who were involved in the enhanced monitoring and CAM rulemakings, further distributed it to various other interested parties, and made it generally available to the public.

The public meeting was held on April 2, 1996, where twenty-three organizations and individuals presented oral statements and written comments. At the meeting, EPA announced that, although the rulemaking docket would not formally be re-opened, additional written comments would be accepted for at least another 30 days. Moreover, EPA stated that it would meet with any interested parties to discuss the credible evidence rules. As a result, many additional written comments have been received, and numerous additional EPA/stakeholder meetings have been held.

Section III of this preamble contains a description of the most significant public comments and EPA's responses to them. Summaries of other public comments on the credible evidence revisions received over the past five years, together with the Agency's responses, are available in the docket in a document entitled ''Credible Evidence Revisions: Detailed Response to Comments Document'' (referred to in this preamble as the ''Detailed Response Document'').

II. Summary of Final Rule

The credible evidence revisions consist of various changes to 40 CFR 51.212, 52.12, 52.30, 60.11 and 61.12. These revisions provide minor modifications to existing regulatory provisions to clearly allow for the use of any credible evidence—that is, both reference test and comparable non-reference test data—to prove or disprove violations of the Act in enforcement actions. These revisions make clear that enforcement authorities can prosecute actions based exclusively on any credible evidence, without the need to rely on any data from a particular reference test. The revisions also have the effect of eliminating any potential ambiguity regarding the use of non-reference test data as a basis for Title V compliance certifications. The credible evidence revisions do not call for the creation or submission of any new emissions or parametric data, but rather address the role of existing data in enforcement actions and compliance certifications. As such, today's final action is distinct and separable from the bulk of the proposed enhanced monitoring rule, which addressed new monitoring requirements.

By clearly providing that federally approved SIP test methods or Agency reference test methods are not the exclusive means of establishing noncompliance or compliance, EPA in no way intends to alter the underlying emission standards. The Agency will still use the reference methods for exactly what they are: test methods of reference against which to compare information generated by means other than the reference tests. The National Bureau of Standards maintains a number of standards against which other measuring devices, used in scientific or commercial applications, are calibrated. Similarly, where a SIP, New Source Performance Standard or permit specifies EPA Method 25A, for example, for determining the amount of volatile organic compounds (''VOCs'') that are emitted, the ''other evidence'' that could establish compliance would have to relate to the likely measurement of VOCs that would be obtained by a Method 25A measurement. This could include, for example, consideration of key operating parameters for the facility as correlated with emissions during a Method 25A test.

A. 40 CFR Part 51, § 51.212

Section 51.212(c) is revised to clarify that the inclusion in a state implementation plan (SIP) of enforceable test methods for SIP emissions limits does not preclude enforcement based on other 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. This revision does not affect the existing requirements in §§ 51.212(a) and (b) for periodic testing and inspections, and establishment of a system of violation detection and investigation.

The proposed revisions to § 51.212 contained detailed lists of ''presumptively credible evidence'' and ''presumptively credible monitoring methods.'' After consideration of public comments, EPA has decided to delete these lists because they are potentially confusing and unnecessary. While EPA continues to believe that the listed evidence and monitoring methods are indeed credible, the Agency recognizes that both judicial and administrative tribunals routinely make determinations concerning the admissibility and weight of evidence on a case-by-case basis.

B. 40 CFR Part 52, § 52.12

Section 52.12(c) is revised to clarify that, for purposes of federal enforcement, any credible evidence 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 may be used to establish whether or not SIP violations have occurred. As with § 51.212 above, EPA has deleted the proposed lists of presumptively credible evidence and monitoring methods for the same reasons stated above. Under today's final action, where an emission limitation specifies a particular monitoring or testing method approved by EPA for use in the SIP to determine compliance, data from such method will continue to be the benchmark against which other emissions or parametric data, or engineering analyses, will be measured. Similarly, where there are no approved SIP methods, the test methods specified in part 60 of this chapter will remain the standard against which other such information will be evaluated.

C. 40 CFR Part 52, § 52.30

Proposed § 52.30(a), which concerned compliance certifications, has been revised in accordance with § 51.212 above, and the same comments apply. The enforcement-related § 52.30(b) is rendered unnecessary by today's final § 52.12(c), which effectively

encompasses it. Finally, the entire section has been renumbered as § 52.33.

D. 40 CFR Part 60, § 60.11

Similar to the existing regulation, § 60.11(a) states that compliance with Part 60 standards shall be determined in accordance with the applicable performance tests and performance testing provisions in this part. A new § 60.11(g) clarifies that nothing in § 60.11 precludes the use, including 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, for purposes of submitting compliance certifications or establishing whether or not a source has violated or is in violation of any Part 60 standard, including opacity standards.

The first sentence in today's final § 60.11(a) has been modified from the proposal. EPA has decided to use mandatory phrasing in the first sentence (''Compliance with standards * * * shall be determined in accordance with the applicable performance tests * * *'') as is included in the existing regulation, rather than adopt the permissive language proposed in 1993 (''Compliance with standards * * * may be determined by performance tests * * *). The rationale for retaining this mandatory language is to make clear that, although the regulation is being modified to clarify that it does not establish an exclusive method of determining compliance, the reference tests remain the benchmark against which other emissions or parametric data, engineering analyses, or other information will be evaluated. For similar reasons, EPA included in § 60.11(g) the requirement that evidence or information gathered by other means than the reference tests be ''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''. This phrase means that the evidence or information must bear on whether a facility would have been found to be in compliance, during the time period in question, if the appropriate performance test had been conducted. It does not mean that, to prove a violation occurred, ideal testing conditions, for example the sun light at a certain angle to the tester for an opacity reading, must exist if other credible evidence, such as continuous opacity monitor data, can establish that a violation occurred. These changes have been made in response to comments that EPA's proposal did not give full recognition to the role of reference tests in determining compliance with emission standards. Section 60.11(g) combines the requirements of the proposed subsections (g) and (h) with the exception of presumptions included in those sections which have been deleted. The clarifying language in § 60.11(g) renders unnecessary the previously proposed language in § 60.11(b). Accordingly, the proposed language for that subsection is deleted from today's rule. The proposed changes to subsection (e) have been deleted as unnecessary due to changes to subsections (a) and (g). Finally, § 60.11(f) is revised so as to clarify that it does not countermand subsection (g).

Under today's revisions, information generated from an appropriate and properly conducted test method established under the general provisions of Part 60 or in the applicable subpart will still generally be the best method for determining a source's compliance during the test period. Other emissions or parametric data, or engineering analyses, may be considered if relevant to the results that would have been obtained by the appropriate, properly conducted reference test methods.

E. 40 CFR Part 61, § 61.12

Today's revisions to § 61.12 generally mirror the revisions to § 60.11, largely for the same reasons. Section 61.12(b) remains unchanged from its current promulgated version because credible evidence has always been used to establish violations of these standards.

III. Major Issues

Throughout the development of this rulemaking, various commenters have expressed concerns regarding the proposed rule's potential effects on CAA enforcement, compliance certifications and emissions standards. The most significant of these comments, together with EPA's responses, are discussed below.

A. Use of Credible Evidence in Enforcement Actions

Commenters raised various concerns regarding the potential use of credible evidence in enforcement actions. Some commenters argued that the use of such evidence would be unconstitutional, unprecedented and unfair. Others expressed concern that EPA, states or citizen groups would use credible evidence to bring enforcement actions for insignificant violations. These comments are addressed below.

Industry commenters have argued that the use of credible evidence in enforcement actions would violate sources' constitutional right to due process. Specifically, the commenters argue that EPA must comprehensively identify the precise types of information that can be used as credible evidence, or else sources will not have sufficient ''fair warning'' regarding potential enforcement. EPA rejects this view. ''Fair warning'' jurisprudence holds that regulated sources must have adequate notice identifying ''the standards with which the agency expects parties to conform.'' *General Electric Co.* v. *U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). Today's rule does not establish or alter standards with which sources regulated under the CAA must comply. Rather, today's rule only concerns the evidence that can be used to prove violations of a standard, giving full recognition to the role of reference test methods under the standards. The Federal Rules of Evidence govern the admission of evidence in all federal district court litigation, including CAA enforcement actions, without any discernible constitutional infirmity. Similar evidentiary rules govern federal administrative and state environmental actions. Our legal system provides that a federal or administrative law judge will be the ultimate, independent arbitrator of the evidence's admissibility and credibility.

Credible evidence is far from a new concept in judicial and administrative actions. In private lawsuits such as contract disputes, and in governmental and citizen enforcement actions brought under environmental laws other than the CAA, litigants can and do use a wide variety of information to prove their claims, or to refute the claims of opposing parties. In all these lawsuits, the judge acts as the final, independent arbitrator of what constitutes credible and admissible evidence. Today's final rule addresses problems arising from certain CAA regulations, which predate the 1990 Amendments to the CAA, containing language that has been read to allow only a very limited amount of information, i.e., data from reference test methods, to be used as evidence of violations. As such, the rule merely corrects an anomaly that has been read into these regulations, and brings their potential enforcement into line with that of other CAA requirements such as the ''general duty obligations'' in 40 CFR 60.11(d) (for NSPS standards) and 40 CFR 61.22(c) (for National Emission Standards for Hazardous Air Pollutants (NESHAPs)), and with other environmental statutes. It should be emphasized that the determination that evidence or information is credible is merely a threshold determination that

the evidence or information in question is technically relevant, and therefore, legally admissible in an enforcement action. In light of section 113(a) providing that the Administrator may bring an enforcement action based on ''any information'', EPA believes that Congress intended this threshold to be a low one.

Industry commenters have also argued that using credible evidence in enforcement actions is unfair because sources will not know what credible evidence may be used against them. EPA believes that this claim lacks merit. This issue is no different in CAA enforcement than in any civil or criminal matter resolved by our nation's courts. Further, EPA disagrees with the notion that sources will likely be faced with an unknown and unlimited array of evidence. To the contrary, with regard to sources subject to Title V permits, EPA generally expects that most if not all of the data that EPA would consider as potentially credible evidence of an emission violation at a unit subject to monitoring under the agency's proposed CAM rule would be generated through means of appropriate, well-designed parametric or emission monitoring submitted by the source itself and approved by the permitting authority, or through other requirements in the source's permit. Sources not subject to CAM should still be readily able to discern the information, for example information about the operation of pollution control devices, that is relevant to their compliance with applicable regulation.

Some industry representatives have expressed concern that the use of credible evidence in compliance determinations will reveal multiple minor violations for which EPA, the states or citizens will bring lawsuits. It is not EPA's intent to foster frivolous lawsuits, and EPA does not expect that such lawsuits will occur as the result of today's action. As EPA explained in the Credible Evidence March 1996 memorandum, EPA generally focuses its judicial enforcement resources 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, or (6) allow a source to reap an economic windfall. *See* March 1996 Memorandum, p. 5.

An examination of EPA's judicial enforcement cases over the past few years reveals that EPA has focused its judicial enforcement resources on large, significant cases rather than a large number of relatively minor matters. The Credible Evidence March 1996 memorandum contains several examples that illustrate this point. In contrast, EPA's approach to minor unexcused violations generally has been to exercise prosecutorial discretion and use tools such as notices of violation and administrative compliance and penalty orders. In every case, EPA considers the nature and extent of the violation and all other circumstances surrounding the violation in determining whether and what kind of enforcement response is appropriate. Further, for any type of noncompliance, EPA generally will not bring a federal enforcement action where a state or local permitting authority has taken timely and appropriate action under existing policies to resolve the violations. Finally, for all violations, EPA will apply all other existing specific enforcement policies, such as the May, 1996, *Policy on Compliance Incentives for Small Businesses*, in accordance with their terms. EPA does not intend to use credible evidence to change any of these policies.

EPA has a balanced enforcement program that seeks to assure compliance using the mix of the compliance and enforcement tools available to it. Deterrence is also an overall goal of the program. Judicial enforcement against minor CAA violations generally is a lower enforcement priority, because EPA believes its other enforcement and compliance assistance tools allow it to respond to such violations without the need to file an action in federal court. Accordingly, in considering whether to bring a judicial action, or whether to use some other enforcement or compliance tool, EPA generally takes into consideration such factors as number and duration of the exceedances, harm or risk posed by the exceedance, potential for recurrence, the source's compliance history, and other circumstances surrounding the violation. For example, if a source were installing a new unit subject to an NSPS standard and had some difficulty getting the control equipment to operate properly after the ''shakedown'' period permitted before the initial performance test (*see* 40 CFR 60.8(a)) but solved the problem promptly after the test, this generally would be a low enforcement priority, absent other circumstances indicating a need for judicial action.

These same general policies regarding EPA's use of judicial and administrative enforcement actions were discussed in Section I.D. of the August 2, 1996, CAM draft approach. Therein, EPA provided various specific examples of circumstances where the Agency was or was not likely to take compliance or enforcement action based on the examination of CAM data.

Finally, the NSPS general provisions and many SIPs generally excuse sources from compliance with emissions limits during periods of startup, shutdown or malfunction. *See* 40 CFR 60.11(c). Some specific NSPS standards additionally excuse sources from compliance during certain operating periods. Exceedances monitored during any of these specifically excused periods are not violations of the emission limit. Moreover, some NSPS standards specify averaging periods for determining compliance and noncompliance. As a result, many short term emissions values when averaged with other values in the relevant averaging period, will not constitute violations. The credible evidence proposal does not change any of these general or specific periods of excused noncompliance, or any averaging periods, or any of their effects on compliance.

Regarding citizen suits, in February, 1996, EPA performed a review of citizen enforcement actions under the Clean Water Act (CWA), and found that citizen enforcers generally do not focus on sporadic, inconsequential violations. This analysis was summarized in the Credible Evidence White Paper, and is included in the Air Docket. Although to date there have been far fewer CAA citizen suits than CWA citizen suits, there have been at least two notable CAA citizen cases involving serious violations: *National Wildlife Federation* v. *Copper Range Co.*, Civil Action No. 2:92–CV–186 (W.D. Michigan), involving one of the largest sources of particulate matter in Michigan's Upper Peninsula, which was emitting particulates at 230 lbs/hour (over five times its permitted limit) and toxic air pollutants including mercury, arsenic, cadmium and lead; and *Sierra Club* v. *Public Service Company*, 894 F. Supp. 1455 (D.C. Col. 1995), involving a power plant that had committed over 19,000 opacity emission violations, which had allegedly affected a nearby wilderness area. Both of these suits were ultimately settled (with the United States an intervenor) for multi-million dollar penalties and significant injunctive relief, including the installation of appropriate pollution controls.

EPA notes that today's rule creates no new rights or powers for citizen enforcers; instead, the rule clarifies existing EPA regulations. Citizens have been free to use credible evidence in Clean Air Act enforcement, and have won at least two court cases using it. *See Sierra Club* v. *PSC*, cited above, and *Unitek Environmental Services* v.

Hawaiian Cement, Civ. No. 95–00723 (D. Hawaii 1996). Also, EPA is aware of no increase in citizen suits in any of the five states—Kansas, Iowa, Nebraska, North Dakota and Georgia—whose SIPs, based on EPA's SIP Call, have specifically clarified that credible evidence can be used for enforcement, or in those states that have credible evidence provisions in other parts of their state law.

Finally, EPA takes this opportunity to further elaborate on certain credible evidence and enforcement issues that were discussed in the August, 1996, draft CAM approach preamble. Therein, EPA explained that ''the CAM rule cannot and does not replace a source's obligation to comply with otherwise applicable emission limits.'' Nonetheless, as a practical matter, ''EPA expects that a unit that is operating within appropriately established indicator ranges as part of an approved CAM plan will, in fact, be in compliance with its applicable limits.'' (*See* draft CAM rule § 64.6(c), which requires that ''the ranges shall be established so as to provide a reasonable assurance of compliance with emission limitations or standards for the anticipated range of operations at a pollutant-specific emissions unit.'') Such a unit generally will not be an enforcement target. However, if the Agency obtains information that the unit is in fact exceeding its applicable emission limit even though it is operating within its approved indicator ranges, the Agency will consider whether or not to take compliance or enforcement action in accordance with its general enforcement policies. Further, under the CAM approach, the source has such information, it would have to promptly remedy the exceedance and notify the permitting authority and submit a proposed permit modification to correct its CAM monitoring as required under draft CAM rule § 64.3(b)(5).

Under today's rule, the legal burdens regarding the establishment of violations or compliance in an enforcement action are not changed. The means of meeting these burdens will vary in different circumstances. Today's rule provides that where information (such as non-reference emissions data, parametric data or engineering analyses) is equivalent to information generated by reference test methods, the former may be used to establish compliance or noncompliance in an enforcement action. There is no need to establish that every test condition specified in a reference test method has been matched by a surrogate condition in the method used to generate the comparable information. Typically, reference test methods (and any additional test conditions specified in individual regulations) quantify the presence of particular physical attributes—for example, mass or concentration of a chemical or group of chemicals—over a specified period of time. As long as these two elements—quantification and specified time period—are retained and the data from the alternate method is related to the reference test, information generated by alternate methods yield data bearing on what the results of a reference test would have been, and the use of such information to establish compliance or noncompliance in an enforcement action will not affect the stringency of the underlying standard. Of course, non-reference data that is already quantified in the same units as the underlying standard, e.g., emissions data generated by properly operating and calibrated non-reference CEMs, should generally be comparable to reference test data, with all specified averaging periods still applying.

For example, Method 9, the NSPS reference method for opacity, requires that a trained visible emissions observer (VEO) view a smoke plume with the sun at a certain angle to the plume in order to properly illuminate it. In contrast, a continuous opacity monitor (COM) contains a calibrated light source that provides for accurate and precise measurement of opacity at all times. Notably, EPA uses COM data to certify and re-certify the credentials of VEOs under Method 9. Accordingly, since a comparable light source is provided by a COM, if COM data were offered in an enforcement action to prove or disprove opacity violations, there would be no need to establish that the sun was shining during the period the COM data was collected. Where a reference test method or test requirements in an individual regulation include plant operating conditions, e.g., a requirement that testing be conducted at a specified percentage of maximum plant capacity, this does not mean that the underlying standard applies only when the plant is operating at that capacity or that the ''other information'' would have to show that the plant was operating at the specified capacity during the period that the other ''credible evidence'' was obtained.

Where a party seeks to introduce other sorts of information in an enforcement action, for example, expert testimony as to whether a unit was able to meet its emission limit based on the operation or nonoperation of its control equipment during the period of alleged violation, the information would still need to be relevant to reference test data in the sense that it must be related to reference test data in some fashion. In the expert testimony example, this might be accomplished by a qualified expert opinion that a reference test would have demonstrated noncompliance in these same circumstances. Finally, where general burdens of proof for the proponent of this information are reduced through statutory provisions or other means, the same reduced burdens will apply in circumstances where EPA uses non-reference test data to assert noncompliance. *See, e.g.,* CAA section 113(e)(2).

B. Use of Credible Evidence in Compliance Certifications

Some commenters argued that today's final action will create new uncertainties and burdens for sources, because sources will not know what information they must consider before certifying compliance with Title V permit requirements. Previously, these commenters argue, sources would have needed to consider only the results of any specified reference tests, whereas under the credible evidence revisions almost any information could be potentially relevant to determining compliance. Thus, as a practical matter sources would need to ''go through every file drawer'' and examine a great deal of additional information before certifying compliance. Even then, sources would not know whether they had reviewed all compliance information that was potentially credible. According to some commenters, even if the source determined its compliance using a reference method, the source would still be uncertain as to whether it could certify compliance during that period, because other contemporaneous information might still indicate noncompliance. Still other commenters argue that allowing a broad array of information to be considered in compliance certifications would render the certification requirement void for vagueness.

At the outset, EPA notes that today's action merely eliminates any potential ambiguity or conflict between Parts 51, 52, 60, and 61 and Part 70 regarding the ability of sources to use non-reference test data in compliance certifications. Consistent with the congressional intent reflected in Title V and section 114(a)(3), Part 70 already contemplates use of non-reference test data in compliance certifications. There are other pending rulemakings—specifically, pending actions involving the CAM approach and Part 70—that are

proposing to modify existing Part 70 requirements to provide additional detail as to what information sources must consider when certifying compliance. Nothing in these rule revisions is meant to specify what degree of correlation there must be between CAM monitoring data and emissions violations or compliance certifications; rather this issue will be discussed in the CAM rulemaking.

In addition, EPA believes that the commenters have greatly exaggerated the purported uncertainties and burdens in certifying compliance under Part 70 and notes that facilities routinely determine their compliance with numerous statutory or regulatory obligations without government imposed ''checklists.'' Under Title V, the source's substantive CAA obligations (i.e., the source's applicable requirements) are clearly set forth in the source's CAA operating permit.

Contrary to the commenters' claims, sources that are certifying compliance using properly conducted continuous reference methods may generally certify compliance based solely on the continuous reference method data, although naturally such sole reliance would be inappropriate in the face of obvious contrary information or fraud as discussed below.

Of course, if a source becomes aware of other material information that indicates that an emission unit has experienced deviations (as that term is defined in the draft CAM approach) or may otherwise be out of compliance with an applicable requirement even though the unit's permit-identified data indicates compliance, the source must consider this information, identify and address it in the compliance certification, and certify accordingly. This ensures, among other things, that sources will not certify compliance in circumstances where doing so would constitute a violation of CAA section 113(c) and 18 U.S.C. Section 1001, which prohibits sources from knowingly making a false certification or omitting material information, or a violation of other prohibitions on fraud. EPA emphasizes, however, that its purpose here is to make clear that sources may not ignore obvious relevant information. EPA does not view compliance certification requirements as imposing a duty on the source to search out and review every possible document to determine its relevance on the issue of the source's compliance.

Following on the above discussion, the Agency takes this opportunity to restate that while a Title V permit can include a ''permit shield'' protecting it from allegations that it has failed to satisfy CAA *monitoring* requirements, such shield does not relieve the source of its obligation to comply with the underlying emission limits or other applicable requirements being monitored. In other words, even where a source receives a ''shield'' providing that the monitoring provisions set forth in its Title V permit constitute compliance with all monitoring requirements of the CAA, the source would not be shielded from allegations of noncompliance with the underlying substantive requirements (e.g., emission limits) being monitored even if the source's required monitoring failed to detect the violation. *See also* the October, 1993, proposal, 58 FR 54678.

Industry commenters argued that allowing credible evidence in Title V compliance certifications would render the certification requirement constitutionally void for vagueness. According to these commenters, reference test methods are necessary to define, in a consistent and reproducible manner, the level of performance that constitutes compliance; without a reference method, an emission limit would be incomplete. As discussed above, EPA in no way intends to eliminate reference tests or to alter their methodology. Instead, these tests, performed as specified under EPA and state regulations, will remain the benchmark against which to compare other emissions or parametric data, or engineering analyses, regarding source compliance.

Finally, numerous commenters argued that allowing credible evidence in compliance certifications and enforcement actions would disrupt the Title V permit process and cause substantial delays in the issuance of these permits because local permitting authorities would have to adjust many of the sources' emission limits, which the commenters contend were not intended to be complied with continuously. Such Title V gridlock could occur only if today's action in fact changed the stringency of emission standards.

C. EPA's Authority To Promulgate the Credible Evidence Revisions

1. Statutory Authority

Today's rulemaking and related SIP call are based primarily on EPA's existing authority prior to the 1990 CAA Amendments. Section 113(a) of the Act authorizes EPA to bring an administrative, civil or criminal enforcement action ''on the basis of any information available to the Administrator.'' This provision provides the Agency with clear statutory authority to use any available information to prove violations of requirements under the Act, and demonstrates that Congress did not intend to limit EPA to using reference test method results in bringing enforcement actions. The language of Section 113(a), together with the fact that the Act nowhere prohibits the use of information other than reference test results to prove violations, indicates that the Act does not limit the use of any information to prove a violation. Therefore, by law the Agency is limited only by general evidentiary rules in what it can use to prove a violation alleged in an enforcement action.

2. The Kaiser Steel Decision Does Not Constrain EPA's Authority To Amend Its Regulations

Although the Act sets no inherent limits on EPA's authority to use any type of information to prove a violation, some EPA regulations provide for specific test methods for determining compliance and have been read by some to constrain EPA's enforcement authority. In *United States* v. *Kaiser Steel Corp.*, No. CV–82–2623 IH (C.D. Cal. Jan. 17, 1984), the district court construed the language of EPA's regulations at 40 CFR 60.11 as limiting the admissible evidence of violations of opacity standards to observations utilizing Method 9, the opacity reference test method. Thus, when the Agency attempted to use expert testimony pertaining to opacity to prove the existence of violations without Method 9 test data, the court rejected the evidence and held that EPA could prove violations only on those days where the Method 9 test was conducted. This decision—which interpreted only EPA's existing regulations, not the Act—was specifically overruled by Congress in the 1990 CAA Amendments. Today's rulemaking is intended to clarify that EPA's regulations do not constrain EPA to using reference tests to prove a violation of an emission standard. Rather, EPA retains its full authority under Section 113(a) to use ''any information'' as the basis for an enforcement action.

3. Despite Commenters' Claims, Clean Air Act Case Law Does Not Mandate Exclusive Reference Tests

At least one commenter has asserted that the decision in *Portland Cement Ass'n* v. *Ruckelshaus,* 486 F.2d 375, 399 (D.C. Cir. 1973), *cert. denied,* 417 U.S. 921 (1974), stands for the proposition that CAA emission standards may be enforced only through an exclusive reference test method. First, the commenter relies on the court's ruling

that a reference test method must make measurements with ''reasonable accuracy'' and be ''objective.'' 486 F.2d at 401 & n. 103. Second, the commenter cited the court's concern with deviations between sampling methods used in gathering data to set an emission standard and sampling methods used in reference methods. The court stated that ''a significant difference between techniques used by the agency in arriving at standards, and requirements presently prescribed for determining compliance with standards [i.e., the reference method], raises serious questions about the validity of the standards.'' 486 F.2d at 396. EPA disagrees with this reading of *Portland Cement.*

These holdings, individually or together, do not support the conclusion that violations of an emission standard may only be demonstrated by an exclusive reference method. The court's statements regarding the reliability of reference methods were made in context of a challenge to an opacity standard. The industry petitioner argued that testing compliance with that standard, inspector observations, is inaccurate and therefore arbitrary. The court agreed that the evidence called the reliability of inspector observations into question and remanded to EPA for it to determine if there was a way to measure compliance with the standard with ''reasonable accuracy.'' In no way did the court imply that the opacity standard had to have an exclusive reference test but simply rejected the test EPA proposed to use as insufficiently supported.

The *Portland Cement* court's discussion of a compliance method that differed from the test method used to develop the standard also lends no support to the conclusion that an exclusive test method is required. It is true that the court mentioned reference methods ''outlined by regulation.'' However, the mere description of an agency practice (here, the inclusion of a reference test in a regulation setting an emission standard) does not transform that practice into a statutory requirement. Moreover, the thrust of the court's remarks was to caution EPA that, where EPA has established by regulation a reference method for sources to demonstrate compliance, the best data EPA can put forth to show that a standard is in fact achievable is data generated by the reference method. The D.C. Circuit, however, has specifically rejected the assertion that standards can only be supported by reference test data. *See National Lime Ass'n* v. *EPA,* 627 F.2d 416, 446, fn.103 (D.C. Cir. 1980). None of this, thus, supports the commenter's claim that a standard's supporting data must be generated using the reference method, and its supposed corollary that only reference method data can be used to enforce the standard, especially where, as here, that other information must be related back to a reference test method. At best, the commenter's arguments would apply only in the context of an original standard-setting, where an emission limitation or other standard newly promulgated by EPA was being challenged on the basis that the standard's supporting data was inadequate. Today's rule sets no new emission or work-practice standards, and amends no existing ones.

Thus, the commenter is mistaken. Neither of the two passages in *Portland Cement* cited by the commenter address whether exclusive reference tests are necessary, much less mandate establishment of such tests. Further, EPA regulations are inconsistent with the exclusivity argument of the commenter. For example, section 60.8(a) of Title 40 of the CFR provides a whole string of circumstances under which a source can alter or completely replace the reference test required by the regulation. Finally, today's final action regarding the use of non-reference test data in enforcement is fully consistent with the court's requirement that reference testing be conducted in a nonarbitrary manner.

4. The 1990 CAA Amendments Further Support EPA's Authority

Various provisions of the 1990 CAA Amendments provide additional support for EPA's position that reference tests are not the exclusive means of proving violations. As noted above, Congress specifically reversed the *Kaiser Steel* decision in Section 113(e) of the Amendments by providing that the duration of a violation may be established ''by any credible evidence (including evidence other than the applicable test method).'' The legislative history for this provision shows that Congress meant to clarify that in an enforcement action courts are not restricted to reference test method data, but may consider any evidence of violation or compliance admissible under relevant evidentiary rules. *See* S. Rep. No. 228, 101st Cong., 1st Sess. 1, 358 (1989) (''Senate Report''), *reprinted in* 1990 U.S. Code Cong. & Admin. News 3385, 3741 (''Reprint'').

Other provisions of the 1990 CAA Amendments also evidence Congressional intent that reference test methods should not be used as the exclusive means for assessing compliance with CAA emission limits. Most pointedly, the requirements in Section 114(a)(3) for enhanced monitoring and for compliance certifications based on a determination of whether compliance was continuous or intermittent presumes that data other than reference tests would be used for these purposes. As explained in the October, 1993, proposal, the use of non-reference test data is also consistent with the monitoring, compliance assurance, and compliance certification requirements in Sections 504(a), 504(c), and 503(b)(2) of the Act. *See* 58 FR 54649–50. In addition, Section 504(b) of the Act grants discretionary authority to the Administrator to prescribe procedures and methods for monitoring, and provides that continuous emission monitoring systems need not be required ''if alternative methods are available that provide sufficiently reliable and timely information for determining compliance.'' In sum, Congress' repeated emphasis on providing reliable and timely compliance information is inconsistent with the notion that only data from infrequently performed reference tests is relevant to compliance certifications and enforcement actions.

5. Commenters' Attempts To Narrow the Scope of Sections 113(e) and 113(a) Are Unpersuasive

Several industry commenters have claimed that the legislative history of the 1990 CAA Amendments shows that section 113(e)(1) does not provide authority for today's final action. Additionally, these commenters have asserted that the section's legislative history upon which EPA has relied is ambiguous.

In the October, 1993, proposal, EPA cited to the Senate Report's discussion of Section 113(e)(1). The Senate Report stated:

> This title of the bill enhances the ability of the Environmental Protection Agency * * * by making clear that the Agency may rely upon any credible evidence of violations in pursuing alleged violations.

Senate Report at 358, Reprint at 3741. The Report further explained:

> [T]he amendment clarifies that courts may consider any evidence of violation or compliance admissible under the Federal Rules of Evidence, and that they are not limited to consideration of evidence that is based solely on the applicable test method in the State implementation [plan] or regulation. For example, courts may consider evidence from continuous emission monitoring systems, expert testimony, and bypassing and control equipment malfunctions, even if these are not the applicable test methods. Thus, this amendment overrules the ruling in *United States v. Kaiser Steel Corp.*, No. 82–2623 (C.D. Cal. January 17, 1984) to the extent that

the court in that case excluded the consideration of such evidence.

Senate Report at 366, Reprint at 3749. Finally, the Report notes that data from enhanced monitoring and compliance certifications ''will facilitate enforcement, due in part to the fact that such data and certifications can be used as evidence.'' Senate Report at 368, Reprint at 3751.

The commenters, in turn, rely on the views of Senator Chafee regarding S. 1630, inserted into the Congressional Record at the time the legislation was introduced. Senator Chafee stated with regard to Section 113(e)(1):

> Subsection 113(e) also clarifies and confirms that once EPA establishes evidence of a violation using a formal test method, EPA can use other credible evidence to prove additional violations, or that violation has continued.

135 Cong. Rec. S 9650, 9655 (August 3, 1989).

EPA believes that the best reading of the legislative history still supports its interpretation of Section 113(e)(1). First, there is no ambiguity in the Senate Report, the language of which unreservedly supports enforcement actions brought on the basis of non-reference test data. Second, EPA does not believe that Senator Chafee's floor statement outweighs the clear statement in the Senate Report. The Senate Report is a more authoritative reflection of congressional intent than a floor statement produced at the beginning of the legislative process.

Various commenters also objected to EPA's reliance on Section 113(a) as a basis for today's action. One commenter argued that Section 113(a) does not preempt regulatorily specified reference test methods. Several commenters asserted that EPA's construction of Section 113(a) would render superfluous the new language in Section 113(e)(1) concerning credible evidence. These commenters claim that, under EPA's interpretation of Section 113(a), Congress could have ''fixed'' the *Kaiser Steel* decision simply by clarifying the scope of EPA's authority under Section 113(a).

These various commenters have misunderstood EPA's interpretation of Section 113(a). EPA has not asserted that Section 113(a) preempts reference test methods. Rather, EPA believes that Section 113(a) provides authority to amend current regulations to make clear that data from reference test methods are not the exclusive means of establishing noncompliance or compliance in enforcement actions. Given this interpretation of Section 113(a), Congress's passage of Section 113(e)(1) cannot be described as superfluous—particularly in light of the decision in *Kaiser Steel.*

6. EPA Can Promulgate the Credible Evidence Revisions Without Reproposal

Several commenters have argued that finalization of the proposed changes in Parts 51, 52, 60 and 61 without first reproposing those changes violates the Administrative Procedure Act (APA), the CAA, and due process. The commenters' main argument is based on EPA's presumed change in course on implementing the requirement in Section 114(a)(3) concerning enhanced monitoring and compliance certification. As noted above, the changes to Parts 51, 52, 60 and 61 were proposed in the same rulemaking that proposed an enhanced monitoring and compliance certification program. Since that proposal, EPA has re-evaluated its approach to enhanced monitoring and has made publicly available and has sought comment on a revised approach—the CAM approach—for satisfying the same statutory goals as the original enhanced monitoring proposal. Some commenters contend that switching to CAM will fundamentally change their view of the proposed changes to Parts 51, 52, 60 and 61 because those proposed changes were evaluated only in terms of how they would be implemented under the October, 1993, proposal on enhanced monitoring. Until CAM is formally proposed, these commenters assert, they cannot give meaningful comments on the credible evidence revisions. Further, the commenters argue that the proposed revisions provided insufficient notice and opportunity to comment because EPA has not adequately defined the term ''credible evidence.''

EPA believes today's rule has no procedural infirmities. EPA is today finalizing the enforcement-related portions of the proposal it made in 1993 with only minor changes.

The commenters' claim that they cannot meaningfully comment on credible evidence revisions prior to proposal of the CAM approach is not well-taken for two reasons. First, EPA does not believe that any knowledge of the draft CAM approach is necessary to comment on today's rulemaking. In today's final rule, EPA has removed any presumptions regarding the credibility of any specific data. If and when the draft CAM approach is finally adopted, CAM data will be treated under today's rule like any other potential source of compliance information. Thus, knowledge of the draft CAM approach is not critical to commenting on this rulemaking. In any event, the nature of the draft CAM approach has been generally available in some detail since September, 1995—well before EPA renewed its request for comment on today's rulemaking. Further, EPA has sought and received additional comment on the enforcement consequences of the draft CAM approach by distribution of a revision of the CAM approach in August, 1996. The revised approach specifically discussed the relationship of the draft CAM approach and today's action.

Second, the October, 1993, proposed rulemaking gave interested parties sufficient notice of the issues raised by the proposed changes to Parts 51, 52, 60 and 61. The Agency made clear that these revisions were designed to remove any potential ambiguity regarding the use of enhanced monitoring data in compliance certifications, and to clarify that any credible evidence of a violation of an emission standard was admissible to prove (or disprove) such a violation. *See* 58 FR 54677. To clarify that these credible evidence revisions extended beyond the data gathered under an enhanced monitoring program, EPA gave two specific examples of evidence collected outside the enhanced monitoring program that under the revised regulations could be used to prove a violation. *See* 58 FR 54676–54677. Thus, the October, 1993, proposal clearly put interested parties on notice that the credible evidence revisions were not merely an adjunct to the enhanced monitoring program. In fact, industry commenters on the October, 1993, proposal clearly understood the central issue posed by the proposed credible evidence changes, and they commented on it extensively. Today's final action promulgates revisions to *existing* regulations, and are not contingent upon *future* promulgation of the CAM approach or any other form of enhanced monitoring requirement.

Neither is this rulemaking procedurally deficient for not providing an express regulatory definition of the term ''credible evidence''—a term which Congress itself inserted, without definition, into the Act. The issues of credibility, admissibility and weight of evidence have been exhaustively addressed by federal and state court evidentiary rules regarding evidence, and the thousands of cases decided under them. Today's final action defers to those regulations and makes clear that there are no bars in regulations under the CAA which prevent the use of evidence or information other than reference test methods in compliance certifications and enforcement actions. Of course, in judicial enforcement

proceedings, what evidence is credible and admissible will be determined by the court taking into account how the evidence was gathered and the specifics of the emission standard and any associated reference method.

Finally, EPA believes that it has taken extensive steps, detailed in Section I.C. above, to ensure that the concerns of affected parties were fully aired. None of the additional public outreach actions that EPA undertook in 1996 were required by the APA or the CAA; instead, EPA undertook them voluntarily to ensure full input by interested parties regarding the credible evidence rules.

D. Stringency

Industry commenters have presented several arguments in support of their position that this rulemaking requires sources to be in continuous compliance and thus would effectively increase the stringency of underlying requirements, including SIP limits and standards established by EPA under the NSPS and NESHAP programs.

EPA believes that industry's arguments on this point are fundamentally wrong. It is not EPA's intent that these rules should increase the stringency of any applicable requirement. These rules do not do so because they maintain the focus of the compliance determination on whether or not the appropriate reference test would have shown a violation.

The commenters' arguments regarding increased stringency are as follows: applicable requirements are accompanied by specified reference tests. Any departure from past practice regarding the use of these tests, including the use of other credible information to directly assess compliance, particularly on a more frequent basis, will inevitably change the results of an inquiry into the compliance status of any source compared to exclusive reliance on the infrequent performance of the reference tests. Therefore, industry argues, using credible evidence would change the underlying applicable requirements—usually in a manner that makes them more stringent—without going through the necessary rulemaking procedures.

Industry's argument hinges on the premise that adoption of an emission standard that includes a particular form of reference test—one that is not required to be performed continuously as a matter of course—limits the compliance obligation. The scope of the compliance obligation is not at issue in this rulemaking. The scope of the compliance obligation prescribed by any particular standard shall be based on the emission standard and not this rulemaking. However, to fully respond to industry comments, and to give notice of the position EPA will take in future enforcement proceedings, EPA believes it is necessary to address in some detail the nature of the compliance obligation under emission standards with particular emphasis on the compliance obligation as it pertains to emission standards which have a reference test method that is not required to be performed continuously.

While the bulk of the commenters' concerns were expressed with respect to NSPS, the same concerns also apply in most cases to NESHAPs and SIPs. Likewise, EPA's responses focus on NSPS, but are generally applicable to other emissions limits as well.

1. Emissions Limits Require Continuous Compliance (Consistent With Any Averaging Times) Except During Periods Where Compliance Is Specifically Excused

To resolve commenters' claims of increased stringency, the nature of the compliance obligation facing owners and operators of sources of air pollution under the Act must be addressed. Under the CAA, its regulations, and the case law, a source's compliance with emission limitations must be continuous (consistent with any averaging times) except where a particular emission standard specifically provides for periods of noncompliance.

The Statute. The Clean Air Act defines the terms ''emission limitation'' and ''emission standard'' as meaning ''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 * * *.'' CAA section 302(k) (emphasis added). In accordance with this clear statutory statement, the Act authorizes penalties for multiple days of violation should a source fail to meet its continuing obligation. *See also* CAA sections 113(e)(2) (providing that ''a penalty may be assessed for each day of violation,'' and establishing a presumption of continuing violation if certain conditions are met) and 113(e)(1).

CAA Regulations. The Act's general requirement of continuous compliance is mirrored in the NSPS regulations, which generally require that sources comply with established emission limits except during certain defined time periods. NSPS provisions typically specify that compliance with stated limits is required ''on and after the date'' of an initial performance test conducted in accordance with 40 CFR 60.8. *See, e.g.,* 40 CFR 60.502. The need for continuous compliance is also discussed in the preambles to numerous NSPS, including many older ones. For example, in proposing standards for glass manufacturing plants (Subpart CC), EPA stressed the need for effective monitoring to assure that affected facilities are ''continuing to maintain the emission reduction observed during the performance test.'' 48 FR 50670, 50675 (1983). EPA has also made this point clear in publicly-available guidance memoranda. *See* Detailed Response Document at Section 4.

In addition to requirements for continuous compliance, NSPS regulations also typically contain specifically excused periods of noncompliance. These periods confirm that compliance is required at other times. They also confirm the basic reasonableness of this compliance scheme—that is, sources must generally comply continuously with their numerical emission limits, but not during periods of specifically excused noncompliance, and only in accordance with any specified averaging periods. For example, for many standards, compliance is not required during periods of startup, shutdown or malfunction. This exception is contained in the NSPS general provisions and in individual standards. *See* 40 CFR 60.8(c); *see also, e.g.,* 40 CFR 60.46a.

Case Law. In various judicial decisions, courts have approved of the basic NSPS regulatory scheme of continuous compliance accompanied by limited, specified exceptions for noncompliance. The courts have stated that the specified exceptions are needed because sources must comply at all other times. *See, e.g., Portland Cement,* 486 F.2d at 399 (court noted EPA's then-proposed ''startup, shutdown and malfunction'' compliance exclusion regulation with approval, 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 NSPS standards, the court again noted with approval 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 support the ''never to be

exceeded'' standard currently in force'') (emphasis added); and *Bunker Hill Co.* v. *EPA,* 572 F.2d 1286, 1301–02 (9th Cir. 1977) (in challenge to SIP sulfur dioxide standard, court observed that EPA regulations required that the standard be met ''all of the time,'' and thus EPA must typically promulgate upset provisions to excuse noncompliance beyond the source's control). Similarly, the proposition that compliance must be continuous is reflected in numerous judicial decisions involving challenges to various NSPS rulemakings. In these cases, both the D.C. Circuit Court and industry petitioners have emphasized that for an emission standard to be achievable it must be able to be continuously complied with over wide operating ranges at varied facilities. *See, e.g., Portland Cement, Essex Chemical, National Lime,* and *Sierra Club* v. *Costle,* 657 F.2d 298 (D.C. Cir. 1981). In *National Lime,* for example, the lime industry's trade association itself complained that the data underlying the promulgated numerical emission standards were insufficient to show that the standards were ''in fact achievable on a continuous basis.'' 627 F.2d at 430. In holding that EPA had not adequately demonstrated the achievability of the standards for the industry as a whole, the court explained that ''to be achievable, we think a uniform standard must be capable of being met under most adverse conditions that can reasonably be expected to recur . . . .'' *Id.* at 431. In *Sierra Club* v. *Costle,* various electric utility companies challenged a particulate standard on the basis that ''the data reflect only short term performance while the standard requires long term continuous compliance.'' 657 F.2d at 377 (emphasis added). This challenge was rejected by the court based on data showing that certain sources had ''consistently complied with the standard.'' *Id.* at 382.

2. Commenters' Advocacy of Noncontinuous Compliance Would Lead to Numerous Anomalies

Some industry commenters have argued that numerous emissions limitations do not require continuous compliance or, alternatively, that ''continuous'' does not have the straightforward meaning suggested above. The commenters' argument centers on NSPS standards issued under CAA section 111. In the commenters' view, many such standards do not contemplate that facilities will operate in compliance on a continuous basis with stated emissions limits, but rather require only an initial demonstration of compliance with stated limits upon start-up or shortly thereafter. After an initial performance test, continuous compliance is required only with respect to operation and maintenance ''in a manner consistent with good air pollution control practice'' as specified in 40 CFR 60.11(d). As to numerical emissions limits, commenters suggest that these must be met only on those infrequent occasions that a subsequent performance test is conducted. So long as any such performance test is passed, the source is in ''continuous'' compliance with numerical emissions limits without regard to whether its emissions in fact exceeded the numerical limit during the time between the tests, no matter how long that may be.

EPA rejects this view of the nature of the obligation to comply with NSPS and other emission limits under the CAA. *See* Detailed Response Document. EPA and the courts have long held that emission limits must be complied with continuously, consistent with any associated averaging periods, except where a particular limit provides otherwise. Adopting the commenters' view of compliance would lead to numerous anomalies.

In the April 2, 1996, public meeting and in follow-up written comments, several commenters argued that many reference test methods were selected specifically because they would only be performed infrequently—for example, on a yearly basis. These once a year tests would be proper for their associated emission standards, which in the commenters' view were intended to be complied with only 95% of the time. Specifically, performing a reference test once a year would yield ''acceptable'' compliance results, because on average a source would be found out of compliance only 5% of the time—that is, in one in twenty tests, or once every twenty years. According to these commenters, testing for compliance more frequently would be unfair, because it would increase the likelihood that the source would be found out of compliance during periods where the standard itself contemplated noncompliance. In order to avoid being found in noncompliance, sources would have to continuously stay below their emission limits—which in these commenters' view would effectively increase the stringency of the emission standard.

EPA disagrees with the commenters' notion that sources must meet their legal numerical air emission limits only seldomly. Further, EPA rejects as inconsistent with the Act and its underlying purposes the notion that sources can somehow be in routine ''compliance'' without staying within these limits on an ongoing basis. The fundamental goal of the CAA and the emission standards established under it, is to achieve clean air. Moreover, many emission standards, such as hazardous air pollutant standards under Section 112 and emission standards in State Implementation Plans designed to implement national ambient air quality standards, have a direct relationship to the protection of human health. Routine compliance with numerical emission standards is critical to achieving this goal. The commenters' view that such compliance is somehow not required would completely undercut these public health and safety goals.

If the commenters' view was correct, any EPA or state targeting of a specific source by requiring the source to perform more frequent reference tests would be unfair and presumably illegal, because any such increased frequency in reference testing would destroy the delicate balance of frequent noncompliance and infrequent testing that the commenters claim is contemplated by the rules. Under this view, EPA and states might not be able to require an apparently violating source to conduct a previously unscheduled reference test, because it would improperly raise the source's chances of being found in noncompliance and thereby ''increase the stringency of the underlying standards.''

The commenters'' argument is also inconsistent with the language, structure, and purpose of the CAA. For example, if the frequency of testing must be limited to meet the intent of the emission limits, to be fair to all sources EPA's regulations should have required that the tests be performed only at infrequent intervals. EPA's rules contain no such restrictions; rather, CAA section 114(a)(1)(D) grants EPA broad discretion to order reference tests whenever the Administrator deems it appropriate. Moreover, commenters'' argument is inconsistent with CAA section 113(e)(1), which even on its narrowest reading (note that EPA's reading is considerably broader) specifically provides for use of non-reference test data to prove continuing additional days of violation after an initial violation is established by reference test data, and by CAA section 113(e)(2), which establishes a presumption of continuing violation after notice of the violation has been given to the source, provided that EPA can make a prima facie showing that ''the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice.'' This presumption continues until the violator ''establishes that continuous compliance has been achieved.''

Likewise, sections 114(a)(3) and 504(a)-(c) regarding enhanced monitoring and certification as to whether compliance is continuous or intermittent, and prompt reporting of deviations, are simply inconsistent with a regulatory regime that would require only occasional demonstrations of compliance with emission limits. Taken together, these provisions, represent a fundamental statutory rejection of the commenters' argument. *See* Detailed Response Document, Section 4, which discusses other reasons why these comments are without merit.

3. Comments Regarding Continuous Compliance Are Not Directed at Today's Action, but Rather at Underlying Emission Standards

Industry commenters have argued that the quality and quantity of the data used in establishing emissions limitations, such as those under the NSPS and NESHAP programs, reflect a conscious decision by EPA that compliance with such standards would need to be demonstrated only periodically. It follows that requiring continuous compliance with stated limits at this juncture would effectively increase the stringency of the standards. As discussed above, EPA believes that the commenters' general arguments strain common sense. Commenters have pointed to various NSPS standards to support their views, but EPA finds these examples unpersuasive.

In particular, commenters have pointed to the NSPS for kraft pulp mills, 40 CFR Part 60, Subpart BB, and for steam electric generators constructed between 1971 and 1978, Subpart D, as reflecting a general acknowledgment by EPA that national standards need not be complied with at all times. EPA believes that, to the contrary, Subparts BB and D and other cases demonstrate that where EPA intended to allow affected sources to exceed stated emissions limits, the standards in question expressly so provide. It is true that in the development of some NSPS and NESHAP standards, EPA was concerned with the limited number and distribution of test runs and the inherent variability in levels of emissions from even well-controlled facilities. Where appropriate, EPA addressed those concerns by adjusting the numerical value of the standard, providing excess emissions allowances and provisions for noncompliance during certain upset conditions, or through changes in averaging times. With other standards, EPA did not provide for any departure from the general requirement that compliance must be continuous. Examples of all these approaches, and specific responses to comments regarding Subparts D and BB, are provided in the Detailed Response Document.

The commenters' assertions that sources cannot comply on a continuous basis are really directed not to the propriety of today's rules, but rather to the adequacy of the underlying NSPS and other emission standards that are not at issue in this rulemaking. To the extent there is any documentation that a well-run facility cannot comply consistently with underlying national emission standards, or applicable SIP requirements, such documentation would be relevant only to those existing standards, not to today's rule. EPA notes that despite several requests to commenters to identify any standards that cannot be complied with on a regular basis, no specific information has been provided to this rulemaking docket that demonstrates that well operated and maintained facilities employing pollution control technologies of the types upon which the underlying emission standards were based cannot comply with those standards on a continuing basis. The most that was submitted was a statistical re-analysis of the data relied upon by EPA in promulgating several emission standards and a one page graph purporting to show that an industrial boiler could not comply with the NO_X emission limit at low levels.

The agency has considered this comment concerning the Subpart D NO_X standard carefully, as it does not intend to impose requirements that are impossible for well-designed sources to meet, but believes that this concern is largely theoretical. The information provided by the commenter to EPA was vague and did not prove that the undisclosed source could not comply with the emission standard. Further, if a standard was impossible to achieve under some circumstance, EPA and citizens are not likely to bring enforcement cases in such instances. In reviewing CAA enforcement actions the agency has been unable to identify any case where either the agency or a citizen sought to enforce a standard that was impossible to achieve. The agency was also unable to identify any case in which a defendant established that compliance was not possible at the time of the alleged violation. This appears to be the case even in those states and localities that have had ''credible evidence'' rules for years.

Additionally, should it be determined that a standard could not be met during some relatively infrequent or inconsequential period of source activity, the potential for significant adverse impact on that source is remote. The agency has previously expressed its policy that, generally, judicial enforcement is not the appropriate vehicle to redress sporadic, infrequent violations with no environmental consequence. Further, it is unlikely that a citizen could prevail in enforcing a theoretically impossible standard since Courts will not issue an injunction where there is nothing to be done. Similarly, where one cannot establish that a source failed to act in a manner required by law a significant penalty will not be imposed by the courts. The agency is not aware of any situation in which it has filed, and one should not anticipate large numbers of citizen suits being filed, where there is nothing the source could have done or could do to achieve a greater degree of compliance. Moreover, the courts today have additional tools, including fee awards and sanctions available under the Federal Rules of Civil Procedure and other statutes to address meritless suits.

In further response to these industry comments, EPA has included in the record a 1993 study conducted by EPA Region V that shows that almost all (95%) of sources with sulfur dioxide CEMs were meeting their federal and state sulfur dioxide emission limits approximately 97% of the time, with excess emission periods totaling only 3%. *See* Region V Study, Figure 2. Because this 3% figure included excess emissions recorded during periods in which compliance is specifically not required, such as startup and shutdown, the percentage of operating time in noncompliance with the standard is even smaller and may mean that most sources are in compliance all the time. EPA Region V sources with continuous opacity monitors showed similar results: the average source's percentage of opacity exceedances was less than 2%, with 95% of sources at or below approximately 4%. *See* Study, Figure 1. As with the sulfur dioxide data, opacity exceedances during periods of startup, shutdown and other excused periods were not excluded. Accordingly, the percentage of actual noncompliance with opacity limits was even smaller. Note that these figures are for the average (50th percentile) and worst (95th percentile) facilities. The best run facilities have fewer excess emissions reports.

Additional CEM data from EPA Region V that focused specifically on exceedances from NSPS Subpart D SO_2 emission standards shows similar results. This data shows that Subpart D sources report few or no excess SO_2 emissions. Approximately two-thirds of the sources report no excess emissions

at all, during any three month reporting period. Further, since 1990, the vast majority of sources (95%) have reported total excess emissions averaging less than 2.5% of operating time; since 1993, less than 1.7%. Since these figures include all excess emission periods, including periods that are probably excused, the actual SO_2 exceedance rates were even lower.

These data show that there are not ''fundamental flaws'' in the subject standards such that the standard cannot be met. *Indeed,* the data demonstrate that most sources do comply all or nearly all of the time.

If the regulated community believes that a standard cannot be met across some meaningful range of normal operating conditions, or if specific exemptions beyond those currently provided are proper, we believe the appropriate action is for the affected industry to file a petition for amendment of the standard at issue or propose more specific permit conditions so that the matter can be fully assessed and addressed through the regulatory process. However, the information submitted by the commenters does not show that there currently exists a significant ''impossibility'' issue that is so widespread as to outweigh the benefits of the proposed rule.

4. Enforcement Using Continuous Monitoring Data Does Not Increase the Stringency of Applicable Requirements

Industry commenters have argued that the stringency of emission standards will be increased if enforceable data is obtained more frequently than has been ordinarily obtained in the past through reference testing. Further, the commenters argue that direct enforceability of this data would contradict EPA's stated positions in adopting standards under the NSPS and NESHAP programs because EPA intended that continuous monitoring would only show compliance with good operation and maintenance procedures, i.e., general duty requirements, and would not be otherwise used in enforcement. (*See, e.g.,* 38 FR 10820 (1973) (preamble to proposed startup, shutdown and malfunction regulation); 43 FR 7571 (1978) (preamble to final kraft pulp mill standards).

Because the NSPS and NESHAP emission standards must be met continuously, consistent with any averaging times and except during periods where compliance is specifically excused, any more frequent or continuous monitoring of the standards and any enforcement based on violations uncovered thereby have no effect on the stringency of the standards. To take a simple analogy, allowing the use of radar guns or increasing the number of police checking for speeding may raise the chance that a speeder will be detected, but this does not alter the legal stringency of a posted speed limit.

In some early NSPS, the agency required the installation of what were styled ''indicator monitors'' and provided policy guidance that such monitoring data would not be used as the sole basis of enforcement actions absent further rulemaking. 38 FR 10820. To the extent that the CAA Amendments of 1990 did not supersede this policy statement, today's action is that future rulemaking. These policy statements, like today's rulemaking, pertain only to the kinds of evidence EPA uses to prove violations. The policy change that was contemplated in our 1993 proposal and 1996 memorandum are supported by technological advances in the accuracy and reliability of continuous emission monitors, deficiencies in EPA's previous practices identified by GAO and others, and the language and intent of the Act and the 1990 CAA Amendments.

EPA's past statements regarding limitations on the use of data derived from continuous monitoring methods for purposes of enforcing standards were motivated in part by concerns over the cost and availability of such methods and their ability to accurately determine compliance. *See, e.g., National Lime,* 627 F.2d at 450 (responding to petitioners' argument that there was no adequately demonstrated technology for monitoring opacity, EPA stated that the continuous monitoring data would not be used to determine compliance with the opacity standard but ''to keep a check on the operation and maintenance of the control equipment,'' and that the monitors were reliable enough to perform this limited function). For example, in the 1973 startup, shutdown and malfunction regulation proposal, EPA noted that while continuous monitoring data would not, at that time, be used to determine compliance as a general matter, such data could be used if ''approved as [an] equivalent or alternative method for performance testing.'' 38 FR 10820. Indeed, the NSPS general provisions have long provided that in lieu of performance tests using reference methods, a source could demonstrate compliance using an approved equivalent or alternative method, and that EPA can waive reference tests where the source has otherwise satisfactorily demonstrated compliance. *See* 40 CFR 60.8(b).

Since the 1970s, the availability, cost and accuracy of methods that enable determinations of compliance on a continuous basis has improved markedly. *See, e.g.,* 1990 GAO report at 19, 22–23 (1986 and 1988 EPA studies showed CEM data highly reliable); *Continuous Emission Monitoring,* 1993, Jahake, Thomas Publishing Co. For these reasons, EPA believes it is appropriate as a technical matter to allow information derived from these methods to be used in compliance certifications and enforcement actions. In fact, more recent national standards issued by EPA provide for determining and enforcing compliance directly by use of continuous monitoring data.

5. Sources Must Comply Both With Good Operation and Maintenance Requirements and With Emission Limits

Industry commenters have claimed that as to the NSPS program, the only goal of the program was to insure that best demonstrated technology was employed, such that once an initial reference test demonstrated that compliance with the standards could be achieved, it need not be demonstrated thereafter, and that an affected source's only ongoing obligation was its ''general duty'' to employ good operation and maintenance practices to minimize emissions in accordance with 40 CFR 60.11(d).

EPA agrees that proper operation and maintenance of an emissions unit and any associated pollution controls in accordance with 40 CFR 60.11(d) is vital to complying with emission standards. However, while it is true that sources have a continuing duty to employ good operations and maintenance practices, this duty does not substitute for the sources' obligation to comply with its emission limits. The two obligations, while related, are separate requirements in the NSPS regulations and in legal effect.

EPA has made these points plain as far back as 1973 in the proposed NSPS startup, shutdown and malfunction rulemaking:

> It is anticipated that the initial performance test and subsequent performance tests will ensure that equipment is installed which will permit the standards to be attained and that such equipment is not allowed to deteriorate to the point where the standards are no longer maintained. In addition, the proposed regulation requires that the plant operator use maintenance and operating procedures designed to minimize emissions in excess of the standard.

38 FR 10820 (1973) (emphasis added). This preamble text clearly states both that proper equipment maintenance is vital to remaining within an emission

standard (otherwise equipment would deteriorate to the point where standards were not met) and that the general operation and maintenance obligation is a separate regulatory requirement. Additional discussion of the distinction between the emission limits and good operating practice requirements can be in the Detailed Response Document. These statements make it clear that good operating practices requirements are separate and distinct from the need to continuously comply with emissions limits.

E. SIP Call

In the October, 1993, proposal, EPA announced that it planned to call for States to amend their applicable implementation plans to ensure that owners or operators may use enhanced monitoring (or other monitoring approved for the source pursuant to part 70) for compliance certification purposes, and that data from this monitoring, along with any other credible evidence, may be used as evidence of a violation of an applicable plan. 58 FR 54660. In December, 1993, and February, 1994, the Office of Air and Radiation's Stationary Source Compliance Division, the division then responsible for writing and implementing the enhanced monitoring rules, issued memoranda to EPA's Regional offices instructing them to conduct the SIP call. As of September, 1996, fifteen states and local air pollution control districts, together with the Commonwealth of Puerto Rico, had responded to the call and submitted SIP amendments for EPA approval. Kansas, Iowa, Nebraska, North Dakota, Georgia and Puerto Rico had received approval; the other states and districts' revisions were pending.

For substantially the same reasons that allow EPA to go forward with today's final rule, EPA has the authority to initiate and continue this SIP call. EPA's decision to forego the enhanced monitoring approach in favor of the CAM proposal has no effect on the basic goals of the SIP call, which are to clarify that non-reference test data can be used in enforcement actions, and to remove any potential ambiguity regarding this data's use for Title V compliance certifications.

Today's action ensures that the evidentiary rules for CAA violations are consistent in all fifty states. EPA has surveyed those states that have responded to the SIP call and has determined that the credible evidence changes have not created the difficulties forecast by the commenters.

IV. Administrative Requirements

A. Docket

Today's final rulemaking action is subject to Section 307(d) of the Act. Accordingly, EPA has established a docket (No. A–91–52), which consists of an organized and complete file of all information submitted to, or otherwise considered by, EPA in the development of today's action and the CAM approach. The docket includes all memoranda and studies cited by EPA in this preamble. The principal purposes of the docket are: (1) to allow interested parties a means to identify and locate documents so that they can effectively participate in the rulemaking process, and (2) to serve as the record in case of judicial review. The docket is available for public inspection at EPA's Air Docket, which is listed under the **ADDRESSES** section of this document.

B. Office of Management and Budget (OMB) Review

Today's rulemaking is not a ''significant regulatory action'' because the revisions make only evidentiary changes and do not impose any additional implementation costs on regulated sources. Nevertheless, EPA submitted this final rule to OMB for review. Changes made in response to OMB suggestions and recommendations will be documented in the public record.

C. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, EPA generally must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of $100 million or more. Before promulgating a rule for which such a statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Section 203 requires the Agency to establish a plan for obtaining input from and informing, educating, and advising any small governments that may be significantly or uniquely affected by the rule.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's rulemaking makes only evidentiary changes and does not impose any additional costs on regulated sources or State, local, or tribal governments. For the same reason, these evidentiary changes will not significantly or uniquely affect small governments. Accordingly, this rulemaking is not subject to the requirements of sections 202, 203, and 205 of the UMRA.

D. Regulatory Flexibility Act

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this rule will not have a significant economic impact on a substantial number of small entities. As explained above, this rulemaking does not impose any additional implementation costs on small or large entities.

E. Paperwork Reduction Act

The information collection requirements for the proposed enhanced monitoring rule were previously submitted for approval to OMB under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* In contrast, today's rule does not contain any information collection requirements subject to OMB review under the PRA.

F. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 847), EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Controller General of the General Accounting Office prior to publication of this rule in today's Federal Register. For the same reasons that this rulemaking is not a ''significant regulatory action'' under Executive Order 12866, this rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 51

Environmental protection, Air pollution control.

40 CFR Part 52

Air pollution control.

40 CFR Part 60

Air pollution control.

40 CFR Part 61

Air pollution control.

Dated: February 13, 1997.

Carol M. Browner,

Administrator, U.S. Environmental Protection Agency.

For the reasons set out in the preamble, 40 CFR Chapter I is amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for part 51 is revised to read as follows:

Authority: 42 U.S.C. 7401, 7411, 7412, 7413, 7414, 7470–7479, 7501–7508, 7601, and 7602.

2. Section 51.212 is amended by revising paragraph (c) to read as follows:

§ 51.212 Testing, inspection, enforcement, and complaints.

* * * * *

(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. As an enforceable method, States may use:

(1) Any of the appropriate methods in appendix M to this part, Recommended Test Methods for State Implementation Plans; or

(2) An alternative method following review and approval of that method by the Administrator; or

(3) Any appropriate method in appendix A to 40 CFR part 60.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 is revised to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

2. Section 52.12 is amended by revising paragraph (c) to read as follows:

§ 52.12 Source surveillance.

* * * * *

(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:

(1) Sources subject to plan provisions which do not specify a test procedure and sources subject to provisions promulgated by the Administrator will be tested by means of the appropriate procedures and methods prescribed in part 60 of this chapter unless otherwise specified in this part.

(2) Sources subject to approved provisions of a plan wherein a test procedure is specified will be tested by the specified procedure.

3. Subpart A is amended by adding a new § 52.33 to read as follows:

§ 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.

(b) For all federal implementation plans, paragraph (a) of this section is incorporated into the plan.

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

1. The authority citation for part 60 is revised to read as follows:

Authority: 42 U.S.C. 7401, 7411, 7413, 7414, 7416, 7601 and 7602.

2. Section 60.11 is amended by revising paragraphs (a) and (f) and by adding paragraph (g) to read as follows:

§ 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.

* * * * *

(f) Special provisions set forth under an applicable subpart shall supersede any conflicting provisions in paragraphs (a) through (e) of this section.

(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.

PART 61—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

1. The authority citation for part 61 is revised to read as follows:

Authority: 42 U.S.C. 7401, 7412, 7413, 7414, 7416, 7601 and 7602.

2. Section 61.12 is amended by revising paragraph (a) and adding paragraph (e) to read as follows:

§ 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 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.

[FR Doc. 97–4196 Filed 2–21– 97; 8:45 am]

BILLING CODE 6560–50–P

EC-P-1998-25

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 15 1983

OFFICE OF
AIR, NOISE AND RADIATION

MEMORANDUM

SUBJECT: Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions

FROM: Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation

TO: Regional Administrators, Regions I-X

I have been asked to clarify my memorandum of September 28, 1982, concerning policy on excess emissions during startup and shutdown.

Specifically, I stated that "startup and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the design and implementation of the operating procedure for the process and control equipment. Accordingly, it is reasonable to expect that careful planning will eliminate violations of emission limitations during such periods." I further stated that "[i]f excess emissions occur during routine startup and shutdown of such equipment, they will be considered as having resulted from a malfunction only if the source can demonstrate that such emissions were actually caused by a sudden and unforeseeable breakdown in the equipment."

A question has been posed as to whether there can be situations in which it is unreasonable to expect that careful planning can eliminate violations of emission limitations during startup and shutdown. I believe that there can be such situations. One such situation, which was already mentioned in the policy, is a malfunction occurring during these periods. A malfunction during startup or shutdown is to be handled as any other malfunction in accordance with the policy as presently written.

Another situation is one in which careful and prudent planning and design will not totally eliminate infrequent short periods of excesses during startup and shutdown. An example of this situation would be a source that starts up or shuts down once or twice a year and during that period there are a few hours when the temperature of the effluent gas is too low to prevent harmful

ormation of chemicals which would cause severe damage to control equipment if the effluent were allowed to pass through the control equipment.

Therefore, during this latter situation, if effluent gases are bypassed which cause an emission limitation to be exceeded, this excess need not be treated as a violation(A) if the source can show that the excesses could not have been prevented through careful and prudent planning and design and(B) that bypassing was unavoidable to prevent loss of life, personal injury, or severe property damage.

I have clarified the policy concerning this issue. A copy is attached.

Attachment

Attachment

POLICY ON EXCESS EMISSIONS DURING STARTUP, SHUTDOWN, MAINTENANCE, AND MALFUNCTIONS

Introduction

Several of the existing State implementation plans (SIPs) provide for an automatic emission limitation exemption during periods of excess emission due to startup, shutdown, maintenance, or malfunction.* Generally, EPA agrees that the imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner and/or operator is not appropriate. However, any activity which can be foreseen and avoided, or planned, is not within the definition of a sudden and unavoidable breakdown. Since the SIPs must provide for attainment and maintenance of the national ambient air quality standards, SIP provisions on malfunctions must be narrowly drawn. SIPs may, of course, omit any provisions on malfunctions. [For more specific guidance on malfunction provisions for RACT SIPs, see the April 1978 workshop manual for preparing nonattainment plans].

I. EXCESS EMISSION FROM MALFUNCTIONS

A. AUTOMATIC EXEMPTION APPROACH

If a SIP contains a malfunction provision, it cannot be the type that provides for automatic exemption where a malfunction is alleged by a source. Automatic exemptions might aggravate air quality so as not to provide for attainment of the ambient air quality standards. Additional grounds for disapproving a SIP that includes the automatic exemption approach are discussed in more detail at 42 FR 58171 (November 8, 1977) and 42 FR 21372 (April 27, 1977). As a result, EPA cannot approve any SIP revisions that provides automatic exemptions for malfunctions.

* The term "excess emission" means an air emission rate which exceeds any applicable emission limitation, and "malfunction" means a sudden and unavoidable breakdown of process or control equipment.

B. ENFORCEMENT DISCRETION APPROACH--SIP EMISSION LIMITATION ADEQUATE TO ATTAIN AMBIENT STANDARDS

EPA can approve SIP revisions which incorporate the "enforcement discretion approach". Such an approach can require the source to demonstrate to the appropriate State agency that the excess emissions, though constituting a violation, were due to an unavoidable malfunction. Any malfunction provision must provide for the commencement of a proceeding to notify the source of its violation and to determine whether enforcement action should be undertaken for any period of excess emissions. In determining whether an enforcement action is appropriate, satisfaction of the following criteria should be considered.

1. To the maximum extent practicable the air pollution control equipment, process equipment, or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;

2. Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

3. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

4. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality; and

5. The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance.

II. EXCESS EMISSIONS DURING STARTUP, SHUTDOWN, AND MAINTENANCE

Any activity or event which can be foreseen and avoided, or planned, falls outside of the definition of sudden and unavoidable breakdown of equipment. For example, a sudden breakdown which could have been avoided by better operation and maintenance practice is not a malfunction. In such cases, the control agency must enforce for violations of the emission limitation. Other such common events are startup and shutdown of equipment, and scheduled maintenance.

Startup and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the planning, design and implementation of operating procedures for the process and control equipment. Accordingly, it is reasonable to expect that careful and prudent planning and design will eliminate violations of emission limitations during such periods. However, for a few sources there may exist infrequent short periods of excess emissions during startup and shutdown which cannot be avoided. Excess emissions during these infrequent short periods need not be treated as violations providing that the source adequately shows that the excess could not have been prevented through careful planning and design and that bypassing of control equipment was unavoidable to prevent loss of life, personal injury, or severe property damage.

If excess emissions occur during routine startup and shutdown due to a malfunction, then those instances will be treated as other malfunctions which are subject to the malfunction provisions of this policy. (Reference Part I above).

Similarly, scheduled maintenance is a predictable event which can be scheduled at the discretion of the operator, and which can, therefore, be made to coincide with maintenance on production equipment, or other source shutdowns. Consequently, excess emissions during periods of scheduled maintenance should be treated as a violation unless a source can demonstrate that such emissions could have been avoided through better scheduling for maintenance or through better operation and maintenance practices.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 28 1982

OFFICE OF
AIR, NOISE AND RADIATION

MEMORANDUM

SUBJECT: Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions

FROM: Kathleen M. Bennett
Assistant Administrator for Air, Noise and Radiation

TO: Regional Administrators, Regions I-X

This memorandum is in response to a request for a clarification of EPA's policy relating to excess emissions during startup, shutdown, maintenance, and malfunctions.

Excess emission provisions for startup, shutdown, maintenance, and malfunctions were often included as part of the original SIPs approved in 1971 and 1972. Because the Agency was inundated with proposed SIPs and had limited experience in processing them, not enough attention was given to the adequacy, enforceability, and consistency of these provisions. Consequently, many SIPs were approved with broad and loosely-defined provisions to control excess emissions.

In 1978, EPA adopted an excess emissions policy after many, less effective attempts to rectify problems that existed with these provisions. This policy disallowed automatic exemptions by defining all periods of excess emissions as violations of the applicable standard. States can, of course, consider any demonstration by the source that the excess emissions were due to an unavoidable occurrence in determining whether any enforcement action is required.

The rationale for establishing these emissions as violations, as opposed to granting automatic exemptions, is that SIPs are ambient-based standards and any emissions above the allowable may cause or contribute to violations of the national ambient air quality standards. Without clear definition and limitations, these automatic exemption provisions could effectively shield excess emissions arising from poor operation and maintenance or design, thus precluding attainment. Additionally, by establishing an enforcement discretion approach and by requiring the source to demonstrate the existence of an unavoidable malfunction on the source, good maintenance procedures are indirectly encouraged.

Attached is a document stating EPA's present policy on excess emissions. This document basically reiterates the earlier policy, with some refinement of the policy regarding excess emissions during periods of scheduled maintenance.

A question has also been raised as to what extent operating permits can be used to address excess emissions in cases where the SIP is silent on this issue or where the SIP is deficient. Where the SIP is silent on excess emissions, the operating permit may contain excess emission provisions which should be consistent with the attached policy. Where the SIP is deficient, the SIP should be made to conform to the present policy. Approval of the operating permit as part of the SIP would accomplish that result.

If you have any questions concerning this policy, please contact Ed Reich at (382-2807).

Attachment

Attachment

POLICY ON EXCESS EMISSIONS DURING START-UP, SHUTDOWN, MAINTENANCE, AND MALFUNCTIONS.

Several of the existing State implementation plans (SIPs) provide for an automatic emission limitation exemption during periods of excess emission due to start-up, shutdown, maintenance, or malfunction.* Generally, EPA agrees that the imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner and/or operator is not appropriate. However, any activity which can be foreseen and avoided, or planned is not within the definition of a sudden and unavoidable breakdown. Since the SIPs must provide for attainment and maintenance of the national ambient air quality standards, SIP provisions on malfunctions must be narrowly drawn. SIPs may, of course, omit any provision on malfunctions. [For more specific guidance on malfunction provisions for RACT SIPs, see the April 1978 workshop manual for preparing nonattainment plans.]

I. AUTOMATIC EXEMPTION APPROACH

If a SIP contains a malfunction provision, it cannot be the type that provides for automatic exemption where a malfunction is alleged by a source. Automatic exemptions might aggravate air quality so as not to provide for attainment of the ambient air quality standards. Additional grounds for disapproving a SIP that includes the automatic exemption approach are discussed in more detail at 42 FR 58171 (November 8, 1977) and 42 FR 21372 (April 27, 1977). As a result, EPA cannot approve any SIP revision that provides automatic exemptions for malfunctions.

II. ENFORCEMENT DISCRETION APPROACH--SIP EMISSION LIMITATION ADEQUATE TO ATTAIN AMBIENT STANDARDS

EPA can approve SIP revisions which incorporate the "enforcement discretion approach". Such an approach can require the source to demonstrate to the appropriate State agency that the excess emissions, though constituting a violation, were due to an unavoidable malfunction. Any malfunction provision must provide for the commencement of a proceeding to notify the source of its violation and to determine whether enforcement action should be undertaken for any period of excess emissions. In determining whether an enforcement action is appropriate, satisfaction of the following criteria should be considered:

* The term "excess emission" means an air emission rate which exceeds any applicable emission limitation, and "malfunction" means a sudden and unavoidable breakdown of process or control equipment.

1. To the maximum extent practicable the air pollution control equipment, process equipment, or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;

2. Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

3. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

4. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality; and

5. The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance.

III. EXCESS EMISSIONS DURING START-UP, SHUTDOWN, AND MAINTENANCE

Any activity or event which can be foreseen and avoided, or planned, falls outside of the definition of sudden and unavoidable breakdown of equipment. For example, a sudden breakdown which could have been avoided by better operation and maintenance practices is not a malfunction. In such cases, the control agency must enforce for violations of the emission limitation. Other such common events are start-up and shutdown of equipment, and scheduled maintenance.

Start-up and shutdown of process equipment are part of the normal operation of a source and should be accounted for in the design and implementation of the operating procedure for the process and control equipment. Accordingly, it is reasonable to expect that careful planning will eliminate violations of emission limitations during such periods.

If excess emissions occur during routine start-up and shutdown of such equipment, they will be considered as having resulted from a malfunction only if the source can demonstrate that such emissions were actually caused by a sudden and unforeseeable breakdown in the equipment.

Similarly, scheduled maintenance is a predictable event which can be scheduled at the discretion of the operator, and which can therefore be made to coincide with maintenance on

production equipment, or other source shutdowns. Consequently, excess emissions during periods of scheduled maintenance should be treated as a violation unless a source can demonstrate that such emissions could not have been avoided through better scheduling for maintenance or through better operation and maintenance practices..

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

JUN 13 1989

MEMORANDUM

SUBJECT: Guidance on Limiting Potential to Emit in New Source Permitting

FROM: Terrell E. Hunt
Associate Enforcement Counsel
Air Enforcement Division
Office of Enforcement and Compliance Monitoring

John S. Seitz, Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: Addressees

This memorandum transmits the final guidance on conditions in construction permits which can legally limit a source's potential to emit to minor or de minimis levels. We received many helpful comments on the January 24, 1989 draft of this guidance, and have incorporated the comments into the final document wherever possible. A summary of the major changes which have been made to the guidance in response to these comments is provided below.

Several commenters noted that the draft guidance used the term "federally enforceable" to mean both federally enforceable as defined in the new source regulations (40 C.F.R. Sections 52.21(b) (17), 51.165(a) (1) (xiv), 51.166(b) (17)), and enforceable as a practical matter. We have tried to distinguish the places where each term should be used, explained the relationship between the two terms, and indicated that in order to properly restrict potential to emit, limitations must be both federally enforceable as defined in the regulations and practically enforceable.

Some commenters requested that the section on averaging times for production limits be more specific as to when it is appropriate to use limitations which exceed a one month time basis. We have tried to explain why it is not possible to develop generic criteria for making this distinction, and to indicate situations where exceptions to the policy that production and operation limitations not exceed one month may be warranted.

There were some requests for a section on enforcement. We have included a new Section VI which addresses this topic. We also received many good suggestions on the example permit limitations. The section on examples has been substantially reworked to reflect your comments.

Finally, we learned through the comments that in two specific circumstances, short term emission limits are the most useful and reasonable way to restrict and verify limits on potential to emit. These circumstances are: 1) when control equipment is installed but control equipment operating parameters are difficult to measure during enforcement inspections; and 2) in surface coating operations with numerous and unpredictable use of coatings containing varying VOC content, where add-on control equipment is not employed. Therefore, we have made a narrow exception to the flat prohibition on use of emission limits to restrict potential to emit for these specific circumstances, and only when certain additional conditions have been met.

Again, we appreciate the thoughtful comments we have received on this guidance. Please insert this document into your Clean Air Act Compliance/Enforcement Policy Compendium as Item Number H.3. If you have any questions, please contact Judith Katz in the Air Enforcement Division at FTS 382-2843, or Sally Farrell in the Stationary Source Compliance Division at FTS 382-2875.

Addressees:

Regional Counsels
Regions I-X

Regional Counsel Air Branch Chiefs
Regions I-X

Air Management Division Directors
Regions I, III, and IX

Air and Waste Management Division Director
Region II

Air, Pesticides, and Toxics Management Division Directors
Regions IV and VI

Air and Radiation Division Director
Region V

Air and Toxics Division Directors
Regions VII, VIII and X

Air Compliance Branch Chiefs
Regions I-X

New Source Review Contacts
Regions I-X

Alan Eckert
Associate General Counsel

Greg Foote, OGC
Gary McCutchen, NSRS, AQMD
David Solomon, NSRS, AQMD
Sally Farrell, SSCD
Judy Katz, AED

David Buente, Chief

Environmental Enforcement Section

DOJ

LIMITING POTENTIAL TO EMIT IN NEW SOURCE PERMITTING

JUNE 13, 1989

AIR ENFORCEMENT DIVISION
OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

STATIONARY SOURCE COMPLIANCE DIVISION
OFFICE OF AIR QUALITY PLANNING AND STANDARDS

Limiting Potential to Emit in New Source Permitting

I. Introduction

II. The Louisiana-Pacific Case

III. Types of Limitations that will Limit Potential to Emit

IV. Time Periods for Limiting Production and Operation

V. Sham Operational Limits

A. Permits with conditions that do not reflect a source's planned mode of operation are void ab initio and cannot act to shield the source from the requirement to undergo preconstruction review.

1. Sham permits are not allowed by 40 CFR 52.21(r) (4)

2. Sham permits are not allowed by the definition of potential to emit: 40 CFR 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4)

3. Sham permits are not allowed by the Clean Air Act

B. Guidelines for determining when minor source construction permits are shams.

1. Filing a PSD or nonattainment NSR application

2. Applications for funding

3. Reports on consumer demand and projected productions levels

4. Statements of authorized representatives of the source regarding plans for operation

VI. Enforcement Procedures

VII. Examples

VIII. Conclusion

Limiting Potential to Emit in New Source Permitting

I. Introduction

Whether a new source or modification is major and subject to new source review under Parts C and D of the Clean Air Act is dependent on whether that source or modification has or will have the potential to emit major or significant amounts of a regulated pollutant. Therefore, the definition of "potential to emit" under the new source regulations is extremely important in determining the applicability of new source review to a particular source. The federal regulations define "potential to emit" as:

> the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of fuel combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.

40 C.F.R Sections 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4).

Permit limitations are very significant in determining whether a source is subject to major new source review. This is because they are the easiest and most common way for a source to obtain restrictions on its potential to emit. A permit does not

have to be a major source permit to legally restrict potential emissions. A minor source construction permit issued pursuant to a state program approved by EPA as meeting the requirements of 40 C.F.R. Section 51.160 is federally enforceable. In fact, any permit limitation can legally restrict potential to emit if it meets two criteria: 1) it is federally enforceable as defined by 40 C.F.R. Sections 52.21(b) (17), 51.165(a) (1) (xiv), 51.166(b) (17), i.e., contained in a permit issued pursuant to an EPA-approved permitting program or a permit directly issued by EPA, or has been submitted to EPA as a revision to a State Implementation Plan and approved as such by EPA; and 2) it is enforceable as a practical matter. The second criterion is an implied requirement of the first criterion. A permit requirement may purport to be federally enforceable, but, in reality cannot be federally enforceable if it cannot be enforced as a practical matter.

Non-permit limitations can also legally restrict potential to emit. These limitations include New Source Performance Standards codified at 40 C.F.R. Part 60 and National Emission Standards for Hazardous Air Pollutants codified at 40 C.F.R. Part 61.

The appropriate means of restricting potential to emit through permit conditions has been an issue in recent enforcement cases. Through these cases and through guidance issued by EPA, the Agency has addressed three questions: what types of permit

limitations can legally limit potential to emit; whether long averaging times for production limitations are enforceable as a practical matter; and whether sources may limit potential to emit to minor source levels as a means of circumventing the preconstruction review requirements of major source review.

II. The Louisiana-Pacific Case

In United States v. Louisiana-Pacific Corporation, 682 F. Supp. 1122 (D. Colo. Oct. 30, 1987) and 682 F. Supp. 1141 (D. Colo. March 22, 1988), Judge Alfred Arraj discussed the type of permit restrictions which can be used to limit a source's potential to emit. The Judge concluded that:

> ... not all federally enforceable restrictions are properly considered in the calculation of a source's potential to emit. While restrictions on hours of operation and on the amount of materials combusted or produced are properly included, blanket restrictions on actual emissions are not.

682 F. Supp. at 1133.

The Court held that Louisiana-Pacific's permit conditions which limited carbon monoxide emissions to 78 tons per year and volatile organic compounds to 101.5 tons per year should not be considered in determining "potential to emit" because these blanket emission limits did not reflect the type of permit conditions which restricted operations or production such as limits on hours of operation, fuel consumption, or final product.

The Louisiana-Pacific court was guided in its reasoning by the D.C. Circuit's holding in Alabama Power v. Costle, 636 F. 2d 323 (D.C. Circuit 1979). Before Alabama Power, EPA regulations required potential to emit to be calculated according to a source's maximum uncontrolled emissions. In Alabama Power, the D. C. Circuit remanded those regulations to EPA with instructions that the Agency include the effect of in-place control equipment in defining potential to emit. EPA went beyond the minimum dictates of the D.C. Circuit in promulgating revised regulations in 1980 to include, in addition to control equipment, any federally enforceable physical or operational limitation. The Louisiana-Pacific court found that blanket limits on emissions did not fit within the concept of proper restrictions on potential to emit as set forth by Alabama Power.

Moreover, Judge Arraj found that:

> ...a fundamental distinction can be drawn between the federally enforceable limitations which are expressly included in the definition of potential to emit and (emission) limitations.... Restrictions on hours of operation or on the amount of material which may be combusted or produced ... are, relatively speaking, much easier to "federally enforce." Compliance with such conditions could be easily verified through the testimony of officers, all manner of internal correspondence and accounting, purchasing and production records. In contrast, compliance with blanket restrictions on actual emissions would be virtually impossible to verify or enforce.

Id. Thus, Judge Arraj found that blanket emission limits were not enforceable as a practical matter.

Finally, the Court reasoned that allowing blanket emission limitation to restrict potential to emit would violate the intent of Congress in establishing the Prevention of Significant Deterioration (PSD) program.

III. Types of Limitations that will Restrict Potential to Emit

As an initial matter in this discussion, a few important terms should be defined. Emission limits are restrictions over a given period of time on the amount of a pollutant which may be emitted from a source into the outside air. Production limits are restrictions on the amount of final product which can be manufactured or otherwise produced at a source. Operational limits are all other restrictions on the manner in which a source is run, including hours of operation, amount of raw material consumed, fuel combusted, or conditions which specify that the source must install and maintain add-on controls that operate at a specified emission rate or efficiency. All production and operational limits except for hours of operation are limits on a source's capacity utilization. Potential emissions are defined as the product of a source's emission rate at maximum operating capacity, capacity utilization, and hours of operation.

To appropriately limit potential to emit consistent with the opinion in Louisiana-Pacific, all permits issued pursuant to 40 C.F.R. Sections 51.160, 51.166, 52.21 and 51.165 must contain a

production or operational limitation in addition to the emission limitation in cases where the emission limitation does not reflect the maximum emissions of the source operating at full design capacity without pollution control equipment. Restrictions on production or operation that will limit potential to emit include limitations on quantities of raw materials consumed, fuel combusted, hours of operation, or conditions which specify that the source must install and maintain controls that reduce emissions to a specified emission rate or to a specified efficiency level. Production and operational limits must be stated as conditions that can be enforced independently of one another. For example, restrictions on fuel which relates to both type and amount of fuel combusted should state each as an independent condition in the permit. This is necessary for purposes of practical enforcement so that, if one of the conditions is found to be difficult to monitor for any reason, the other may still be enforced.

When permits contain production or operational limits, they should also have recordkeeping requirements that allow a permitting agency to verify a source's compliance with its limits. For example, permits with limits on hours of operation or amount of final product should require an operating log to be kept in which the hours of operation and the amount of final product produced are recorded. These logs should be available

for inspection should staff of a permitting agency wish to check a source's compliance with the terms of its permit.

When permits require add-on controls operated at a specified efficiency level, permit writers should include, so that the operating efficiency condition is enforceable as a practical matter, those operating parameters and assumptions which the permitting agency depended upon to determine that the control equipment would have a given efficiency.

An emission limitation alone would limit potential to emit only when it reflects the absolute maximum that the source could emit without controls or other operational restrictions. When a permit contains no limits on capacity utilization or hours of operation, the potential to emit calculation should assume operation at maximum design or achievable capacity (whichever is higher) and continuous operation (8760 hours per year).

The particular circumstances of some individual sources make it difficult to state operating parameters for control equipment limits in a manner that is easily enforceable as a practical matter. Therefore, there are two exceptions to the absolute prohibition on using blanket emission limits to restrict potential to emit. If the permitting agency determines that setting operating parameters for control equipment is infeasible in a particular situation, a federally enforceable permit

containing short term emission limits (e.g. lbs per hour) would be sufficient to limit potential to emit, provided that such limits reflect the operation of the control equipment, and the permit includes requirements to install, maintain, and operate a continuous emission monitoring (CEM) system and to retain CEM data, and specifies that CEM data may be used to determine compliance with the emission limit.

Likewise, for volatile organic compound (VOC) surface coating operations where no add-on control is employed but emissions are restricted through limiting VOC contents and quantities of coatings used, emission limits may be used to restrict potential to emit under the following limited circumstances. If the permitting agency determines for a particular surface coating operation that operating and production parameters (e.g. gallons of coating, quantities produced) are not readily limited due to the wide variety of coatings and products and due to the unpredictable nature of the operation, emission limits coupled with a requirement to calculate daily emissions may be used to restrict potential to emit. The source must be required to keep the records necessary for this calculation, including daily quantities and the VOC content of each coating used. Emission limits may be used in this limited circumstance to restrict potential to emit since, in this case, emission limits are more easily enforceable than operating or production limits.

IV. Time Periods For Limiting Production and Operation

As discussed above, a limitation specifically recognized by the regulations as reducing potential to emit is a limitation on production or operation. However, for these limitations to be enforceable as a practical matter, the time over which they extend should be as short term as possible and should generally not exceed one month. This policy was explained in a March 13, 1987 memorandum from John Seitz to Bruce Miller, Region IV. The requirement for a monthly limit prevents the enforcing agency from having to wait for long periods of time to establish a continuing violation before initiating an enforcement action.

EPA recognizes that in some rare situations, it is not reasonable to hold a source to a one month limit. In these cases, a limit spanning a longer time is appropriate if it is a rolling limit. However, the limit should not exceed an annual limit rolled on a monthly basis. EPA cannot now set out all inclusive categories of sources where a production limit longer than a month will be acceptable because every situation that may arise in the future cannot now be anticipated. However, permits where longer rolling limits are used to restrict production should be issued only to sources with substantial and unpredictable annual variation in production, such as emergency

boilers. Rolling limits could be used as well for sources which shut down or curtail operation during part of a year on a regular seasonal cycle, but the permitting authority should first explore the possibility of imposing a month-by-month limit. For example, if a pulp drier is periodically shut down from December to April, the permit could contain a zero hours of operation limit for each of those months, and then the appropriate hourly operation limit for each of the remaining months. Under no circumstances would a production or operation limit expressed on a calendar year annual basis be considered capable of legally restricting potential to emit.

V. Sham Operational Limits

In the past year, several sources have obtained purportedly federally enforceable permits with operating restrictions limiting their potential to emit to minor or de minimis levels for the purpose of allowing them to commence construction prior to receipt of a major source permit. In such cases where EPA can demonstrate an intent to operate the source at major source levels, EPA considers the minor source construction permit void ab initio and will take appropriate enforcement action to prevent the source from constructing or operating without a major source permit.

The following example illustrates the kind of situation addressed in this section: An existing major stationary source proposes to add a 12.5 megawatt electric utility steam generating unit, and applies for a federally enforceable minor source permit which restricts operation at the unit to 240 hours per year. Because the project is designed as a baseload facility, EPA does not believe that the source intends to operate the facility for only 240 hours a year. Further investigation would probably uncover documentation of the source's intent to operate at higher levels than those for which it is permitted.

This situation raises the question of whether a source can lawfully bypass the preconstruction or premodification review requirements of Prevention of Significant Deterioration (PSD) and nonattainment New Source Review by committing to permit conditions which restrict production to a level at which the source does not intend to operate for any extensive time. If, after constructing and commencing operation, the source obtains a relaxation of its original permit conditions prior to exceeding them, does this constitute a violation of the preconstruction review requirements? This section discusses why it is improper to construct a source with a minor source permit when there is intent to operate as a major source, and provides guidelines for identifying these "sham" permits.

A. Permits with conditions that do not reflect a source's planned mode of operation are void ab initio and cannot act to shield the source from the requirement to undergo preconstruction review.

1. Sham permits are not allowed by 40 CFR Section 52.21(r) (4) Section

52.21(r) (4) states:

> At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980 on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then (PSD) shall apply to the source or modification as though construction had not yet commenced on the source or modification.

When a source that is minor because of operating restrictions in a construction permit later applies for a relaxation of that construction permit which would make the source major, Section 52.21(r) (4) prescribes the methodology for determining best available control technology (BACT). However, it does not foreclose EPA's ability, in addition to the retroactive application of BACT and other requirements of the PSD program, to pursue enforcement where the Agency believes that the initial minor source permit was a sham. EPA will limit its activity to requiring application of 40 CFR 52.21(r) (4) only for the cases where a source legitimately changes a project after finding that the operating restrictions which were taken in good faith cannot be complied with. Whether a source has acted in good faith is a factual question which is answered by available evidence in the particular case.

2. Sham permits are not allowed by the definition of potential to emit:

40 C.F.R. Sections 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4).

The definition of potential to emit enables sources to obtain federally enforceable permits with operational restrictions as a means of limiting emissions to minor source levels. However, implicit in the application of these limitations is the understanding that they comport with the true design and intended operation of the project.

3. Sham permits are not allowed by the Clean Air Act

Parts C and D of the Clean Air Act exhibit Congress's clear intent that new major sources of air pollution be subject to preconstruction review. The purposes for these programs cannot be served without this essential element. Therefore, attempts to expedite construction by securing minor source status through the receipt of operational restrictions from which the source intends to free itself shortly after operation are to be treated as circumvention of the preconstruction review requirements.

B. Guidelines for determining when minor source construction permits are shams.

EPA's determination that a purportedly federally enforceable construction permit is a sham is made based on an evaluation of specific facts and evidence in each individual case. The following are criteria which should be scrutinized when making such a determination:

1. Filing a PSD or nonattainment NSR permit application

If a major source or major modification permit application is filed simultaneously with or at approximately the same time as the minor source construction permit, this is strong evidence of an intent to circumvent the requirements of preconstruction review. Even a major source application filed after the minor source application, but either before operation has commenced or after less than a year of operation should be looked at closely.

2. Applications for funding

Applications for commercial loans or, for public utilities, bond issues, should be scrutinized to see if the source has guaranteed a c ertain level of operation which is higher than that in its construction permit. If the project would not be funded or if it would not be economically viable if operated on an extended basis

(at least a year) at the permitted level of production, this should be considered as evidence of circumvention.

3. Reports on consumer demand and projected production levels.

Stockholder reports, reports to the Securities and Exchange Commission, utility board reports, or business permit applications should be reviewed for projected operation or production levels. Ifreported levels are necessary to meet projected consumer demand but are higher than permitted levels, this is additional evidence of circumvention.

4. Statements of authorized representatives of the source regarding plans for operation.

Statements by representatives of the source to EPA or to state or local permitting agencies about the source's plans for operation can be evidence to show intent to circumvent preconstruction review requirements.

Note that if a determination is made that a permit is a "sham" for one pollutant and, therefore, the source is a major source or major modification, the permit may possibly still contain valid limits on potential to emit for other pollutants.

In such cases, the entire source must still go through new source review, during which, for PSD review, all pollutants for which there is a net significant increase must be analyzed for BACT. In nonattainment new source review, new sources must have LAER determinations only for pollutants for which they are major. Major modifications, however, must have LAER determinations for all nonattainment pollutants emitted in significant amounts. If the valid limits in a partially void minor source construction permit keep certain pollutants below significance levels, then those pollutants would not have to be analyzed for BACT or LAER. However, if a source or modification is determined to be major for PSD or NSR because part of its minor permit is deemed void, it would have to undergo BACT or LAER analysis for all significant pollutants.

VI. Enforcement Procedures

This guidance has discussed permit conditions which will legally restrict potential to emit, shielding a source from the requirement to comply with major new source permitting regulation. Failure by a permitting agency to adhere to these guidelines may result in a permit that does not legally restrict potential to emit, thereby subjecting a source to major new source review. If that source has not gone through preconstruction review, it is a significant violator of the Clean Air Act and is subject to enforcement for constructing or

modifying without a major new source permit.

The enforcement options available to EPA in these situations include administrative action under Sections 167 or 113 (a) (5) of the Act or federal judicial action under Sections 113 (b) (2), 113 (b) (5), 113(c), or 167. Which enforcement option is selected depends on the facts of the particular situation. (See July 15, 1988 guidance on EPA Procedures for Addressing Deficient New Source Permits.)

VII. Examples

The following examples are provided to illustrate the type of permit restrictions which would and would not legally limit potential to emit to less than major source thresholds. These examples are provided for purposes of clarifying the potential to emit and averaging time guidance only. They are not intended to reflect all the permit conditions necessary for a valid permit. Specific test methods, compliance monitoring and recordkeeping and reporting requirements are necessary to make permit limitations enforceable as a practical matter. The use of examples where averaging times are the longest times allowed under EPA policies is not intended to necessarily condone the selection of the longest averaging times; averaging times should in practice be as short as possible.

1. The minor source construction permit for a boiler contains the following restrictions: 250,000 gal fuel/month; 0.8% S fuel; 8000 hours/year.

These conditions are federally enforceable production and operation limits, but do not limit potential to emit because one of them does not meet EPA policies on enforceability as a practical matter. The averaging time for hours of operation, one of the operational limits necessary to restrict emissions to less than 250 tpy, exceeds a monthly or rolling yearly limit. If, instead of 8000 hours/year, the hourly restriction were stated as 666 hours/month, the permit would serve to keep the source a minor source, assuming the permit contains appropriate recordkeeping provisions.

2. A waferboard plant which has the physical capacity to emit over 300 tpy of carbon monoxide in the absence of using specific combustion techniques has the following permit restriction as the sole emission limitation: 249 tpy.

This does not limit potential to emit since an operational or production restriction is necessary for the source to be restricted to 249 tpy. The permit must contain a restriction on hours of operation or capacity utilization which, when multiplied by the maximum emission rate for the CO sources at the plant, results in emissions of 249 tpy. Additionally, while the

emission limit alone cannot restrict potential to emit, the emission limit is unenforceable as a practical matter since it is limited on an annual basis. The permit should contain a short term emission limit (in addition to the annual emission limit), consistent with the compliance period or parameter in the applicable test method for determining compliance.

3. A small scale rock crushing plant that cannot emit more than 240 tpy under maximum operation without controls (including plant-wide particulate emissions from transfer and storage operations) has the following permit restriction as the sole emission limitation: 240 tpy particulate matter.

Since no operational limitations are necessary for the source to emit below 250 tpy, no operational restrictions need be in the permit to limit potential to emit. However, although this is not a major source, the state agency should express the emission limit in this permit as a lb/hour measure or gr/dscf so that it will be enforceable as a practical matter.

4. A plant consisting solely of a small rock crusher has the following permit restrictions: 0.05 lb gr PM/dscf; fabric filter must be employed and maintained at 99% efficiency.

Assuming that maintaining the fabric filter at 99% efficiency will result in emissions of less than 250 tpy, this permit would limit

potential to emit if it also contained either 1) parameters that allowed the permitting agency to verify the fabric filter's operating efficiency or 2) a requirement to install and operate continuous opacity monitors (COMs) and a specification that COM data may be used to verify compliance with emission limits. Note that if this second alternative were adopted, it would not be necessary to require that the fabric filter be maintained at 99% efficiency.

To determine potential to emit, the efficiency rate of the fabric filter would be multiplied by the maximum uncontrolled emission rate, the maximum number of operating hours and maximum throughput capacity since there are no other operating or production limits. However, the efficiency rate of the fabric filter would not be enforceable as a practical matter unless there were an enforceable means to monitor ESP performance on a short term basis. The two alternatives mentioned above would satisfy this requirement.

5. A surface coating operation has the capability of utilizing 15,000 gal coating/month, with the following permit restrictions: 3.0 lb VOC/gal coating minus water; 20.5 tons VOC/month; monthly VOC emissions to be determined from records of the daily volumes of coatings used times the manufacturers specified VOC content.

This does not limit potential to emit since the source has the physical capacity to exceed 250 tpy of VOC, and the permit does not contain a production or an operational limitation. A monthly limit on gallons of coating used which when multiplied by 3.0 lb/gal equates to less than the 250 tpy threshold 13,500 gallons/month), with appropriate recordkeeping, would generally be necessary to limit potential to emit. If, however, the permitting agency determines, due to the wide variety of coatings employed and products produced, that restrictions on operation or production are not practically enforceable, then the above emission limits could restrict potential to emit if there are requirements that the source calculate emissions daily, and keep the appropriate records.

If the source was alternatively to meet the 20.5 ton/month limit by employing add-on controls, the permit would need to contain an operational limit, such as the requirement to install and operate an incinerator at 99% efficiency. A requirement to monitor incinerator efficiency (either directly or indirectly via temperature monitoring for example), and appropriate recordkeeping retirements to verify compliance with each of the permit conditions would also be necessary to make the permit conditions enforceable as a practical matter. Note, however, that in the case where add-on controls are employed, the source may be able to meet a shorter term emission limit than the ton per month figure.

VIII. Conclusion

We hope this guidance will help EPA Regions identify sources which have the potential to emit major amounts of an air pollutant which will subject those sources to the requirements of preconstruction new source review. Every source which is subject to these requirements but has not obtained a major new source permit should be seriously considered for enforcement action.