

ORAL ARGUMENT SCHEDULED FOR APRIL 21, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1117
(and consolidated cases)

CLEAN AIR IMPLEMENTATION PROJECT, *et al.*,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Action
of the U.S. Environmental Protection Agency

BRIEF OF AMICI STAPPA,
ALAPCO AND NESCAUM
IN SUPPORT OF RESPONDENT

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLEAN AIR IMPLEMENTATION PROJECT,)	
<i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	No. 97-1117
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent,)	

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of this Court, counsel for Amici STAPPA, ALAPCO and NESCAUM hereby certify that STAPPA, ALAPCO and NESCAUM are nonpartisan and nonprofit associations. The associations represent state and local governmental air pollution control officials in the 50 states, 4 territories and over 165 major metropolitan areas throughout the country. The members of STAPPA, ALAPCO and NESCAUM have primary responsibility for implementing and enforcing our nation's air pollution control laws and regulations, through delegation from the United States Environmental Protection Agency (EPA) under the federal Clean Air Act. STAPPA and ALAPCO share joint headquarters at 444 N. Capitol St., N.W., Suite 307, Washington, D.C.; NESCAUM is located at 129 Portland St., Boston, Massachusetts. STAPPA and ALAPCO are incorporated under the laws of Delaware, and NESCAUM is incorporated under the laws of Massachusetts. STAPPA, ALAPCO and NESCAUM have not issued any shares or

debt securities to the public and do not have a publicly owned parent, subsidiary or affiliate.

**CERTIFICATE AS TO PARTIES,
RULINGS AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel for Amici STAPPA, ALAPCO and NESCAUM hereby certify the following information.

A. Parties and Amici

All parties, intervenors and amici appearing in this Court are listed in the Brief for Petitioner Clean Air Implementation Project, et al.

B. Rulings Under Review

The rule at issue in this case is “Credible Evidence Revisions,” published in the Federal Register at 62 Fed. Reg. 8314 (Feb. 24, 1997).

C. Related Cases

Petitioners’ certificate of counsel accurately identifies the related cases.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief.

Act	Clean Air Act
Agency	United States Environmental Protection Agency
ALAPCO	Association of Local Air Pollution Control Officials
CAA	Clean Air Act
CAM	Compliance Assurance Monitoring
CE	Credible Evidence
CE Revisions	EPA's "Credible Evidence Revisions," promulgated at 62 Fed. Reg. 8314 (Feb. 24, 1997)
CEM	Continuous Emission Monitor
CO	Carbon Monoxide
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standard
NESCAUM	Northeast States for Coordinated Air Use Management
NESHAPs	National Emission Standards for Hazardous Air Pollutants
NO _x	Nitrogen Oxides
NSPS	New Source Performance Standard
PSD	Prevention of Significant Deterioration
SIP	State Implementation Plan
SO ₂	Sulfur Dioxide
STAPPA	State and Territorial Air Pollution Program Administrators

BRIEF OF AMICI

STATEMENT OF JURISDICTION

The petitions for review involve revisions to 40 C.F.R. Parts 51, 52, 60 and 61 involving requirements for State Implementation Plans (SIPs), SIP enforcement, New Source Performance Standards (NSPS) and pre-1990 National Emission Standards for Hazardous Air Pollutants (NESHAPS), respectively, promulgated by EPA under the Clean Air Act (CAA or the Act), 42 U.S.C. §§ 7401 *et seq.*^{1/} This Court has jurisdiction, under § 307(b) of the CAA, over the petitions which seek to challenge the credible evidence revisions (CE revisions).

STATUTES AND REGULATIONS

These cases arise under regulations promulgated at 40 C.F.R. Parts 51, 52, 60 and 61, pursuant to EPA's authority under CAA § 113. The statute and regulations are reproduced in the Addendum to Petitioners' Brief.

STATEMENT OF ISSUES

- I. Whether the CE revisions lawfully reaffirm state and local air agencies' historical and reasonable use of CE to assess a source's compliance status and respond to noncompliance.
- II. Whether the public health, welfare and cost-effective benefits of CE in enforcement actions outweigh the interest in relying exclusively on reference test methods, which can be expensive, infrequent and constitute a "snapshot" measurement of emissions.

^{1/} Hereinafter, citations for the CAA will be to the Act itself.

III. Whether there is predictability in what, when and how CE will be applied because state and local air agencies will use it consistent with past practice, and information that would be CE is already within the physical possession of regulated sources.

IV. Whether the CE revisions to Parts 51 and 52 are lawful because EPA has granted greater deference to state and local agencies in choosing enforcement approaches that are tailored to the needs of different areas and sources.

STATEMENT OF THE CASE

This Brief relies on the Statement of the Case in Respondent's Brief.

INTRODUCTION

Across the country, state and local air pollution control agencies have used CE in enforcement actions and compliance assessments to ensure continuous compliance with air pollution control requirements. State and local air agencies' experience illustrates the significance of CE in developing enforcement programs that protect public health and the environment from harmful air emissions. This Brief will provide real world examples where state and local air agencies used CE to identify and respond to air pollution violations in a reasonable manner.^{2/} Used in tandem with test methods that are specified in emission standards and limitations to determine compliance ("reference test methods"), CE, or non-reference test data, is highly probative and accurate evidence of compliance. With CE, enforcement authorities can measure actual compliance with emission standards, not just whether sources are capable of achieving compliance. The United States Environmental Protection Agency's (EPA) CE revisions, promulgated on

^{2/} See Infra § I.B. (examples provided from Maryland, Arkansas, Dayton, OH, New Hampshire, South Carolina and Oregon).

February 24, 1997, reaffirm the state and local air agencies' long-standing practice of using CE to evaluate a source's compliance status and to respond to noncompliance.^{3/}

Of quintessential importance in this case is the question of whether compliance with emission limits found in stationary source permits must be continuous or periodic. It is imperative to emphasize that continuous compliance is critical to state and local efforts to attain and maintain the health-based National Ambient Air Quality Standards (NAAQS) and, thus, protect public health and the environment. For the reasons stated in EPA's brief, STAPPA, ALAPCO and NESCAUM agree that the CAA unequivocally mandates continuous compliance with emission standards and limitations, unless it specifically provides otherwise on its face.

Sporadic reference tests can demonstrate little more than that a source is capable of achieving compliance with emission limits. To ensure continuous compliance with air quality regulations, enforcement authorities and regulated sources should have access to the best and widest array of information relevant to actual compliance. Many forms of CE, which are collected more frequently and usually are more reliable than the reference test method, empower state and local agencies to ensure that facilities are achieving emission limits continuously. CE, to be admissible, must show whether a facility would have been found to be in compliance during the time period in question had the applicable reference test method been conducted.^{4/} Both CE and reference test methods are critical in developing reasonable enforcement strategies based on the types of regulated facilities in the area and the unique mix of statutory and common law

^{3/} Credible Evidence Revisions, 62 Fed. Reg. 8314 (1997) (to be codified at 40 C.F.R. § 52.12).

^{4/} Id. at 8317.

enforcement authority available to each state and local agency. Using CE, along with reference tests, promotes flexibility and innovation, which is needed to meet the heavy enforcement responsibilities of state and local air agencies.

One of Congress' key objectives in enacting the 1990 Amendments to the CAA was to strengthen the Act's enforcement provisions. EPA's CE revisions respond to Congress' call by enhancing enforcement of the Act's public health and welfare standards. It would be unacceptable to require enhanced enforcement and then to force state and local agencies, as well as EPA and citizens, to turn a "blind eye" to highly probative and reliable information relevant to a source's compliance.

SUMMARY OF ARGUMENT

The CAA's paramount interest in protecting public health and the environment is served by allowing CE in enforcement actions. In support of this principle, this Brief will demonstrate that (1) state and local air agencies have historically used CE in a reasonable and constructive manner to establish violations of air pollution control requirements; (2) the important benefits of CE far outweigh Petitioners' interest in relying exclusively on reference test methods, which are expensive, infrequent and constitute a "snapshot" measurement of emissions; (3) there is predictability in what, when and how CE will be used in enforcement actions; and (4) EPA's CE revisions to Parts 51 and 52 grant greater deference to state and local agencies in developing enforcement programs that are tailored to the needs of different areas and sources. This Brief will not address why the CE revisions are lawful under § 113 of the CAA or why the CAA mandates continuous compliance with emission standards, as these issues have been adequately developed by the Respondent in its Brief.

Since the vast majority of enforcement and implementation activities under the CAA are performed at the state and local levels, STAPPA, ALAPCO and NESCAUM members are uniquely positioned to demonstrate that CE has been utilized in a reasonable and justified manner. Specific examples, provided below,^{5/} show that state and local air agencies have historically used CE as the exclusive basis of enforcement actions, as well as an indicator of noncompliance that would induce either corrective action by the source or a reference test method to confirm or disprove noncompliance. CE is an effective enforcement because it assists state and local regulators in identifying instances of noncompliance that would have otherwise gone unobserved if state and local agencies were required to rely exclusively on reference test methods.

The multiple benefits of using CE to assess a source's compliance status and to respond to noncompliance transcend the interest in relying exclusively on reference test methods. The timely and reliable information generated from CE enables enforcement authorities to measure actual compliance with emission standards that are designed to protect public health and the environment. Moreover, CE is cost-effective for state and local agencies -- as well as regulated sources -- and provides much needed flexibility to ensure that sources are in continuous compliance with emission limits. Regulated sources may also use CE to disprove allegations of noncompliance.

There is a high degree of predictability regarding what, when and how CE will be used. Information or data that is technically relevant to a source's compliance must be comparable to the reference test, which will serve its original purpose -- a test of reference against which other emissions or parametric data, engineering analysis,

^{5/} See Infra § I.B.

continuous monitoring data or other information will be evaluated.^{6/} Moreover, CE is within the regulated source's control; industry is in a singular position in that it has access to all the data and test results regarding its facilities, as well as other information not generally available to public or the state and local regulators.

Finally, EPA's revisions to Parts 51 and 52 and its 1993 SIP call lawfully reaffirm state and local air agencies' authority to choose enforcement strategies and policies. STAPPA, ALAPCO and NESCAUM support EPA's efforts to promote expedited SIP revisions because this action is wholly consistent with the division of authority envisioned by Congress in § 110 and amplified by the courts. The revisions do not mandate any particular strategy for assuring compliance and certainly allow states and localities to rely exclusively on reference test methods, as appropriate. Indeed, the CE revisions have removed an obstacle and granted greater deference to state and local air agencies' ability to choose enforcement measures that meet their unique enforcement responsibilities.

^{6/} A reference test method is specified in the final rule of an emission standard or limitation to determine compliance on a uniform basis. See e.g., 40 C.F.R. Part 60, App. A, Method 9 for opacity regulations (1996).

ARGUMENT

I. THE CE REVISIONS REAFFIRM STATE AND LOCAL AIR AGENCIES' AUTHORITY TO USE CE TO ASSESS COMPLIANCE AND RESPOND TO NONCOMPLIANCE WITH THE REQUIREMENTS OF THE CAA.

The members of STAPPA, ALAPCO and NESCAUM, who have primary responsibility for implementing our nation's air pollution control laws and regulations,^{7/} have historically used CE in enforcement actions.^{8/} The CE revisions reaffirm this long-standing practice and authority, which, at the state and local levels, has taken on many uses. In some cases, for example, CE has been used as the exclusive means for instituting an enforcement action against regulated sources of air pollution, while in others, it has served as an indicator of noncompliance, triggering either corrective action by the source or a reference test method. Through their extensive experience in implementing and enforcing regulatory air programs, state and local agencies believe that the CE revisions were lawfully promulgated and will provide an effective and necessary tool for assessing a source's compliance status and responding to noncompliance.

^{7/} Through delegation from EPA under the federal Clean Air Act, §§ 110, 112(l), 209(b) and 502(d); and retention of authority under §§ 116 and 506(a).

^{8/} Enforcement options available under the CAA include informal measures (e.g., telephone call, warning letter or on-site visit); notices of violation under § 113(a)(1); administrative measures (i.e., compliance orders under § 113(a), and penalties under § 113(d)(1)); court imposed civil penalties under § 113(b); judicial equitable remedies (i.e., injunctive relief under § 113(b) -- and emergency powers under § 303); noncompliance penalties under §120; and criminal actions under § 113(c).

A. State And Local Air Agencies' Historical Use Of CE Illustrates That It Is An Effective And Authorized Means To Prove Or Disprove Air Pollution Violations.

Since the vast majority of enforcement and implementation activities under the CAA are performed at the state and local levels, STAPPA, ALAPCO and NESCAUM members are in a unique position to evaluate the use of CE.^{9/} Indeed, prior to the enactment of the 1970 Clean Air Amendments, all enforcement activities of a judicial nature had been on the state and local levels. Beyond enforcement activities, state and local involvement in the control of air pollution predates the federal CAA. One of the first regulatory measures to address air pollution was a smoke ordinance adopted in 1881 by the city of Chicago.^{10/} Since that time, all of the 50 states, the District of Columbia,

^{9/} See e.g., EPA's Office of Air and Radiation, FY 1993 Draft Report on the Timely and Appropriate Enforcement Response to Significant Air Pollution Violators (May 1994) (The report found that between 1990 and 1993, state and local authorities were the lead agencies in addressing significant violators in over 84 percent of the cases compared to EPA); See also generally, 57 Fed. Reg. 32250, 32293 (July 21, 1992) (EPA's final rule on the Title V Operating Permit Program ensures that the basic framework for effective enforcement will be in place in each state with an approved part 70 program and encourages additional enforcement authority for state and local permitting authorities).

^{10/} Chicago, Ill., Laws and Ordinances, part V, art. XXVII, § 1451 (2016), and art. XXIX, §§ 1650-2 (2253-5) (1881).

the Commonwealth of Puerto Rico and the Virgin Islands have enacted air pollution control legislation.^{11/}

In the late 1960s, when concern over environmental problems intensified, the control of air pollution shifted from common law nuisance actions to state and local administrative agencies created in response to federal and state environmental legislation. Early cases reveal that non-reference test data was used extensively to support abatement

^{11/} Ala. Code tit. 22 §§ 22-28-1 to 22-28-23 (Supp. 1982); Alaska Stat. §§ 46.03.010-46.03.040, 46.03.140-46.03.240, 46.03.710 to 46.03.900 (1982); Ariz. Rev. Stat. Ann. § 36.770 et seq., § 28.327 (Supp. 1983); Ark. Stat. Ann. § 82.1931 et seq. (Supp. 1983); Cal. Health & Safety Code §§ 24198-24370.2, 39000-39570 (Supp. 1974); Colo. Rev. State. Ann. §§ 25-7-101 to 25-7-129 (1973); Conn. Gen. Stat. Ann. §§ 22a-170 to 22a-185 (Supp. 1983); Del. Code An. tit. 7, §§ 6000-6021, 6028, 6701-6708 (Supp. 1982); D.C. Code Ann. § 6-901 to 6-903 (1981); Fla. Stat. Ann. § 403.011 et seq. (Supp. 1982); Ga. Code Ann. §§ 12-9-1 to 12-9-23 (1982); Hawaii Rev. Stat. §§ 341.1-342.23 et seq. (Supp. 1982); Idaho Code Ann. §39-101 et seq. (Supp. 1983); Ill. Ann. Stat. Ch. 111 1/2, § 1000-1010, 1026-1051 (Supp. 1982); Ind. Ann. Stat. §§ 13-1-1-1 et seq. (1981); Iowa Code Ann. § 455B.101 et seq. (Supp. 1983); Kan. Stat. Ann. § 65-3001 et seq. (Supp. 1982); Ky. Rev. Stat. Ann. § 224.005 et seq. (Supp. 1982); La. Rev. Stat. Ann. § 30:1081 et seq. (Supp. 1983); Me. Rev. Stat. Ann. tit. 38 3581 et seq. (1978); Md. Ann. Code §§ 2-101 to 2-613 (1982); Mass. Ann. Laws Ch. 111, §§ 31C, 142A-F (Supp. 1983); Mich. Comp. Laws Ann. § 336.1 et seq. (Supp. 1983); Minn. Stat. Ann §§ 116.01 et seq. (Supp. 1983); Miss. Code Ann § 49-17-1 et seq. (1972, Supp. 1983); Mo. Ann. Stat. § 203.010 et seq. (1972, Supp. 1983); Mont. Rev. Code § 69.3904; Neb. Rev. Stat. § 81-1501 et seq. (Supp. 1979); Nev. Rev. Stat. § 445.401 et seq. (Supp. 1979); N.H. Rev. Stat. Ann. § 125:78 et seq. (1977); N.J. Rev. Stat. § 26:2C-3.1 et seq. (Supp. 1983); N.M. Stat. Ann. § 74-2-1 et seq. (1978); N.Y. Envir. Conserv. Law § 19-0101 et seq. (McKinney 1973, Supp. 1982); N.C. Gen Stat. § 143-211 et seq. (Supp. 1983); N.D. Cent. Code Ann. 323-25-01 et seq. (1978, Supp. 1981); Ohio Rev. Code Ann. §§ 3704.01 to 3704.99 (1982); Okla. Stat. Ann. tit. 63 § 1-1801 to 1-808 (Supp. 1982); Ore. Rev. Stat. §§ 468.275 et seq. (1981); Pa. Stat. Ann. tit. 35 § 4001 et seq. (1977, Supp. 1983); P.R. Laws Ann. tit. 24, § 341 et seq. (1979, Supp. 1981); R.I. Gen. Laws Ann. §§ 23-23-1 to 23-23-20, §23-23.1-3 (1979, Supp. 1981); S.C. Code Ann. § 48-1-10 et seq. (1976, Supp. 1982); S.D. Comp. Laws Ann. § 34A-1 et seq. (1977, Supp. 1982); Ten. Code Ann. § 53-3408 et seq. (1977, Supp. 1982), Tex. Rev. Civ. Stat. art. 4477-5 et seq. (1976, Supp. 1982); Utah Code Ann. § 26-24-1 et seq. (1976); Vt. Stat. Ann. tit. 10 §§ 551-572 (1973); V.I. Code Ann. tit. 12 § 204 et seq. (1983); Va. Code Ann. § 10-17.9:1 et seq. (1978, Supp. 1983); Wash. Rev. Code Ann. § 70.94.011 et seq. (1975, Supp. 1983); W. Va. Code Ann. § 16-20-1 et seq. (1979, Supp. 1983); Wis. Stat. Ann. § 144.30 et seq. (Supp. 1983); and Wyo. Stat. Ann. § 35-11-101 (1977).

orders and other formal enforcement actions designed to prevent violation of air pollution rules and regulations.^{12/} These early cases involved credible expert testimony,^{13/} area residents' testimony,^{14/} and use of the Ringelmann test -- a procedure whereby estimates of smoke density may be made by an observer using a chart that presents a series of gray rectangles of differing color densities.^{15/}

As technology advanced in more recent years, additional non-reference test data has become available for determining compliance with particular EPA air quality regulations. State and local agencies:

[r]outinely rely on engineering calculations, indirect estimates of emissions, and direct measurement of emissions by a variety of means, in order to assess compliance with Clean Air Act requirements. Where available, CEM data^{16/} and well-chosen parametric monitoring data, such as the operating temperature and air flow rate of a regenerative thermal

^{12/} See generally, City of Monmouth v. Pollution Control Bd., 313 N.E.2d 161 (Ill. 1974); Hillside Stone Corporation v. Pollution Control Bd., 356 N.E.2d 1098 (Ill. 1976).

^{13/} See e.g., Shahmoon Industries, Inc. v. Dep't. of Health, 225 A.2d 699 (1966); Department of Health v. Owens-Corning Fiberglass Corp., 242 A.2d 21 (N.J. 1968, aff'd 250 A.2d 11 (N.J. 1969)); Incinerator, Inc. v. Illinois Pollution Control Bd., 305 N.E.2d 35 (Ill. 1973), aff'd 319 N.E.2d 794 (Ill. 1974).

^{14/} See e.g., Department of Health v. Owens-Corning Fiberglass Corp., 242 A.2d 21 (N.J. 1968), aff'd 250 A.2d 11 (N.J. 1969); CPC International, Inc. v. Pollution Control Bd., 321 N.E.2d 58 (Ill. 1974); Sangamo Const. Co. v. Pollution Control Bd., 328 N.E.2d 571 (Ill. 1975); Marblehead Lime Company v. Pollution Control Bd., 355 N.E.2d 607 (Ill. 1976).

^{15/} See e.g., Freeman Coal Mining Co. v. Illinois Pollution Control Bd., 330 N.E.2d 524 (Ill. 1975) and Lloyd A. Fry Co., v. Utah Air Conservation Committee, 545 P.2d 495 (Utah 1975).

^{16/} Continuous emission monitors (hereinafter CEMs) use established scientific and engineering principles to measure pollutant emissions to determine compliance with an emission limitation or standard on a continuous bases, consistent with the averaging period established for the emission limitation or standard. Continuous opacity monitors use lasers to measure the opacity of plumes coming out of a plant stack.

oxidizer, generally provide accurate data regarding a source's compliance with emission limits and standards."^{17/}

The readings of continuous monitors are often more frequent, and usually more reliable, than the estimates prepared by even the best trained human observers called for in the EPA opacity reference test method.^{18/} When correlated with continuous monitors or reference method stack tests, the physical process parameters, referred to above, can be reliable methods for estimating whether plant emissions of certain pollutants are within allowable limits.

The fact that a particular procedure has been designated a reference test does not necessarily suggest that the test is the sole--or even the most accurate--means of determining compliance. For example, Method 9, the New Source Performance Standard reference test to determine opacity, requires that a visible emissions observer examine a smoke plume when the sun is shining on it at a certain angle. A continuous opacity monitor, however, can measure opacity precisely and accurately at any time. Furthermore, EPA uses data from such monitors to certify and re-certify the visible emissions observers. A strict requirement that only reference test data should be used to prove compliance or violation would have the perverse effect of rendering data from a continuous opacity monitor as less valuable than the observers trained by it.^{19/}

^{17/} 62 Fed. Reg. at 8315 (footnote added).

^{18/} Sierra Club v. Public Serv. Co. of Colo., 894 F. Supp. 1455, 1459-60 (D. Colo. 1995) (noting that defendant opposing use of CEMs data in instant proceeding had argued in an earlier proceeding that CEMs data were far more reliable than EPA reference test data).

^{19/} 62 Fed. Reg. at 8318.

STAPPA, ALAPCO and NESCAUM members have been on the front lines working with other governmental agencies, businesses, and communities to ensure that standards are met. Given this extensive history of state and local implementation and enforcement, STAPPA, ALAPCO and NESCAUM are keenly aware of the issues and find that the use of CE significantly enhances state and local agencies' efforts to assess a source's compliance status and respond to noncompliance.

B. State And Local Agencies Have Been Applying CE In A Reasonable And Constructive Manner To Prove Or Disprove Violations Under The CAA.

The CE revisions clarify that it is state and local air agencies' prerogative to decide what method is appropriate for determining compliance with the applicable air pollution control requirements. There are many tools in the enforcement toolbox and CE is just one method that may or may not be appropriate under a given scenario. Consistent with past practice, the CE revisions confirm that it is wholly within the state and local air agencies' authority to rely exclusively on any credible evidence to prove violations of air quality regulations. Alternately, as mentioned earlier, it may be appropriate to employ CE as an indicator of noncompliance which may provoke, initially, informal enforcement actions (e.g., warning letter or phone call), and then, ideally, corrective action on the part of the source. Absent corrective action (or proof of compliance) by the source, the state or local agency may choose to either pursue formal enforcement action based exclusively on any CE or require a reference test method. Numerous examples illustrate how state and local agencies have used CE, as well as reference test methods, in a reasonable and constructive manner.

South Carolina has routinely used CE along with reference test methods to assess a source's compliance status and to prove violations of air quality regulations. In one case, among others, the state found that a source exceeded emission limits for particulate matter and sulfur dioxide (SO₂) and also violated opacity standards; these findings were based on CE -- source data reports and inspections. The facility agreed to a Consent Order in which it was fined \$8,000.^{20/} In another case involving an incineration facility subject to NSPS and South Carolina Regulations, the agency issued a notice of violation regarding excess emissions and then pursued further action after the company failed to correct the problem that led to the exceedances.^{21/} The issue concluded with a Consent Order, with an \$85,000 fine, that established liability based on CEM data, observations during inspections and EPA Method 9 opacity measurements.^{22/} In this instance, CE was used in conjunction with a reference test method, illustrating the concept that state and local agencies have used CE in a sensible manner both independently from reference test methods and in combination with them.

In Arkansas, the air pollution control agency has the authority to take enforcement action based on CE pursuant to the authority of the Arkansas Water and Air Pollution Control Act, Act 472 of 1949, *as amended*.^{23/} Using CE as a negotiated permit condition,

^{20/} South Carolina Dep't Health and Env'tl Control, Bureau of Air Quality, Consent Order in the matter of Galey & Lord, Inc., No. 95-91-A (1995).

^{21/} South Carolina Dep't of Health and Env'tl Control Bureau of Air Quality, Notice of Violation (February 25, 1994).

^{22/} Arkansas Dep't of Pollution Control and Ecology, Air Division, Consent Order in the matter of Chambers Medical, No. 95-84-A (September 1995).

^{23/} Ark. Code Ann § 8-4-101 et seq. (Supp. 1997).

the agency found that a lumber mill, Bibler Brothers, Inc. (BBI), was violating the throughput limits established in the permit to ensure compliance with emission standards.^{24/} The violation was determined through a routine inspection of the records, as required by the applicable permit. Based on this credible evidence of noncompliance, BBI entered into a Consent Administrative Order with the agency and agreed to pay a fine and upgrade their recordkeeping.^{25/} In another case, CEMs data, as required by the applicable permit for Quanex Corporation,^{26/} revealed excess emissions of nitrogen oxide (NO_x), SO₂ and carbon monoxide (CO). Again, the source agreed to a consent administrative order requiring the facility to pay fines and to submit a Prevention of Significant Deterioration (PSD) permit application.^{27/}

Maryland has routinely taken actions on regulated sources based on non-reference test data for both violations of emission standards and permit conditions. For example, in a case involving a municipal solid waste incinerator, the continuous monitors showed that the facility was exceeding permit limits for CO and opacity. Based on the data, the agency initiated administrative action that included a consent order and civil penalty.^{28/} In another case, the agency discovered violations by a can manufacturing facility through

^{24/} Bibler Brothers Inc., West Facility, Permit # 1628-A, CSN: 58-0014 (July 1995).

^{25/} Arkansas Dep't of Pollution Control and Ecology, Air Div., Consent Administrative Order in the matter of Bibler Brothers, Inc., West Facility, LIS: 95-047 (May 1995).

^{26/} Quanex Corp., Macsteel Division, Permit # 693-AR-4, CSN: 660274.

^{27/} Arkansas Dep't of Pollution Control and Ecology, Air Div., Consent Administrative Order in the matter of Quanex Corp., Macsteel Division (July 1996).

^{28/} Maryland Dep't of Env't, Air and Radiation Mgt. Admin., Consent Order in the matter of Pulaski Co. (1993).

a sample of a coating analyzed by a certified independent lab pursuant to a reference test method. The results indicated that on the day of the test, the coating contained more volatile organic compounds than allowed by the regulations.^{29/} Based on this information, the agency extrapolated that the duration of the violation continued for as long as this particular coating was used -- these continuing violations were founded upon CE. The agency proceeded with an administrative action that included a corrective order and civil penalty of \$28,600.^{30/}

While the local air agency in Dayton, Ohio has traditionally used non-reference test data as an indicator of the need to conduct a reference test to determine compliance, there are instances where formal enforcement action was based exclusively on CE. In a case involving asbestos that was negligently spilled onto a facility's roof due to a baghouse malfunction, the agency relied upon a plant maintenance employee's inspection report to find that visible emissions were discharged to the outside air in violation of the CAA asbestos standard.^{31/} The company agreed to administrative orders to remedy the violation and also to a civil penalty of \$35,000.^{32/}

^{29/} Code of Maryland Regulations § 26.11.19.04 (1979) (limiting volatile organic compound content of side-seam spray coating to no greater than 5.5 pounds per gallon as applied minus water and exempt solvents).

^{30/} Maryland Dep't of Env't, Air and Radiation Mgt. Admin., Corrective Order No. 97-06-02 in the matter of U.S. Can Company (August 1997).

^{31/} 40 C.F.R. §§ 61.144(b)(1), 61.147 (b)(1), Subpart M (prohibits visible asbestos emissions to the outside air).

^{32/} Dayton, Ohio Regional Air Pollution Control Agency, Administrative Order in the matter of General Motors Corporation – Delphi Chassis Systems Division (September 1997).

In New Hampshire, the air agency has utilized non-reference testing techniques in determining noncompliance with regulations on two notable occasions. In 1990, the state assessed a \$60,000 penalty on an electricity and steam generating plant based on 133 opacity violations recorded during the fall of 1985.^{33/} The state relied on opacity monitor strip charts in determining the violation. In 1989, New Hampshire levied a \$10,000 fine on a wood-fired electric generating facility for violating the carbon monoxide and oxides of nitrogen emission standards set for netting out of PSD. The testing method which determined the violation was a state certified CEM system.^{34/}

Oregon has integrated CE policies into the enforcement program -- as well as the compliance certification program -- through Title V Operating Permits^{35/} and the plant site emissions limit rule.^{36/} In one case, a hardboard manufacturing facility's boiler was found to be in violation of a steaming rate associated with the grain loading limit. The violation was based on a steaming rate that served as a surrogate or parameter for grain loading. The non-reference test data used in this case was linked to grain loading by original source tests and assumptions. The agency found that the violation occurred on over 200 days, 85 of which occurred after the facility ran a source test showing that it could not demonstrate compliance with the grain loading limit. A civil penalty was

^{33/} New Hampshire Dep't of Env't Services, Air Resources Div., Consent Order #86-E-00325-B in the matter of Concord Steam Corporation (May 1990).

^{34/} New Hampshire Dep't of Env't Services, Air Resources Div., Consent Agreement in the matter of Pinetree Power-Tamworth, Inc. (February 1991).

^{35/} Oregon Dep't of Env't Quality, Air Quality Div., Title V Operating Permit No.: 10-0007 (July 1, 1997).

^{36/} Oreg. Administrative Regulations § 340-028-1020 (1981, Supp.1995).

assessed for 49 days, representing the number of days after the source test that the boiler steamed over 1.3 times the permitted limit. The total penalty was \$156,800.^{37/}

As evident from the preceding examples, STAPPA, ALAPCO and NESCAUM members have been using any CE in a constructive and reasonable manner. In some instances, violations are established exclusively through CE and, in other cases, CE triggers or complements a reference test method. Clearly, EPA's CE rule merely clarifies any ambiguity regarding state and local air agencies', as well as EPA's and citizens', authority to use CE as an integral component of an enforcement program.

C. Recent Case Law Supports The CE Revisions, As Well As State And Local Air Agencies' Use Of CE, To Prove Or Disprove Violations Of Air Pollution Control Requirements.

Two recent cases reaffirm the proposition that the CAA authorizes the use of CE to prove violations of air pollution control requirements -- a practice that STAPPA, ALAPCO and NESCAUM members have used for years.^{38/} In Sierra Club v. Public Service Company of Colorado, Inc., Defendants argued that the alleged violations may only be proved through Reference Method 9 as provided in the Colorado SIP.^{39/} The

^{37/} Oregon Dep't of Env't Quality, Air Quality Division, Notice of Assessment of Civil Penalty in the matter of Jeld-Wen, Inc., No. AQP-ER-97-102 (July 1997).

^{38/} The holding in United States v. Kaiser Steel Corp., No. 82-2623-IH (C.D. Cal. Feb. 8, 1984), which stated that the EPA reference test method was the exclusive means for determining compliance with air pollution regulations, was overruled by Congress through the 1990 Amendments' clarification that CE may be used in determining whether the Act's standards have been met. See, § 113(e)(1); SENATE COMM. ON ENVTL. AND PUB. WORKS, CAA AMENDMENTS OF 1989, S. REP. NO. 228, 101st Cong., 1st Sess. 1,358, 366 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3741 (stating that §113(e) "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.").

^{39/} Sierra Club v. Public Serv. Co. of Colorado, 894 F. Supp. 1455 (D. Colo. 1995).

Court held that continuous monitoring data may be used as the exclusive means to establish that Defendants exceeded the 20-percent opacity limit over 19,000 times in the preceding five years.^{40/}

In the citizen suit, Unitek Environmental Services, Inc. v. Hawaiian Cement,^{41/} the court found that the notice of violation issued by EPA, independent assessments conducted by the Plaintiffs in this case, emission modeling and permit applications are CE that “as a whole establish[es] that Hawaiian Cement has been continuously violating the 150 [mu] g/m³ standard since December 1993.”^{42/} The Court goes on to say that it was permitted to consider the various forms of evidence submitted by Plaintiffs by virtue of the CE language added to the Act by the 1990 Amendments.^{43/}

While the facts in the preceding cases dealt specifically with citizen enforcement of the CAA, they, nevertheless, support EPA’s authority to promulgate the CE revisions to enhance enforcement authorities of not only citizens, but of state and local governments and EPA. As the aforementioned courts have found, the 1990 Amendments clarified the ambiguity as to whether the CAA authorizes enforcement authorities to use CE to assess a source’s compliance status and to establish liability for violations.

^{40/} Id. at 1462.

^{41/} Unitek Environmental Services, Inc. v. Hawaiian Cement, No. 95-00723 (D. Haw. 1997).

^{42/} Id. at 12.

^{43/} Id.

II. THE BENEFITS OF USING CE FAR OUTWEIGH PETITIONERS' INTEREST IN RELYING EXCLUSIVELY ON REFERENCE TEST METHODS TO PROVE OR DISPROVE AIR POLLUTION VIOLATIONS.

A. The CE Revisions Ensure Compliance On An Ongoing Basis To Protect Public Health And The Environment

Of paramount importance in this case is the protection of public health and the environment. Among the stated purposes of the CAA is the directive “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population. . . .”^{44/} Congress found that “air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments. . . .”^{45/} In order to enhance state and local governments’ ability to realize the purpose of the Act, Congress enacted the 1990 Amendments to strengthen its enforcement provisions, among other things. The 1990 Amendments created new enforcement tools -- the individual operating permit under Title V^{46/} and the enhanced monitoring requirement^{47/} -- to enable state and

^{44/} § 101(b)(1).

^{45/} § 101 (a)(3) (emphasis added).

^{46/} §§ 501-507. See 40 C.F.R. § 70.6(c) (1996).

^{47/} § 114(a).

local governments, as well as EPA and citizens, to improve compliance with air quality laws and regulations.^{48/}

To this end, the widest array of data representing the actual operations of regulated sources is needed to protect public health and the environment from threats posed by air pollution violations. As stated above, many of the new alternative compliance measurement methods (e.g., continuous monitors and reliable indirect physical measurement or parametric data) offer increased accuracy and superior statistical representation of actual operating conditions.^{49/} It is unacceptable to call on state and local governments to increase their efforts to ensure compliance with regulations under the CAA, as Congress did in the 1990 Amendments, and then to force them to turn a “blind eye” to this extremely probative evidence of compliance or noncompliance.

Moreover, to ensure the protection of public health and the environment, STAPPA, ALAPCO and NESCAUM members believe that the CAA calls for continuous compliance with the emission standards adopted thereunder.^{50/} As the Sierra Club court stated, “[c]ontinuous compliance, not contrived compliance is the goal here.”^{51/} Reference method tests, which are conducted infrequently (oftentimes, once every few years), only offer a “snapshot” of data that shows what the unit is capable of achieving.

^{48/} EPA Press Release, Apr. 24, 1991 (Former EPA Administrator William Reilly stated, “The permit program is not only the most important procedural reform in the new Clean Air Act, but in many ways the key to effective enforcement and implementation of the law.”)

^{49/} See supra pg.11.

^{50/} 62 Fed. Reg. at 8323; See also, Resp’t Br. at 21-37.

^{51/} Sierra Club at 1460.

STAPPA, ALAPCO and NESCAUM members have found that although reference test methods are supposed to measure typical daily emission levels, as a matter of practice, the source is able to prepare for the test and tune its facility. The test results, therefore, merely show what the unit is capable of achieving, rather than what is actually occurring on a daily basis.^{52/}

The use of any CE, as a supplement to reference method testing, optimizes enforcement programs to produce the best information available. Armed with this highly accurate and probative evidence of compliance, STAPPA and ALAPCO members are better equipped to protect public health and the environment from harmful pollutants.

B. The CE Rule Is A Cost-Effective Enforcement Approach That Affords Flexibility To State And Local Governments, As Well As Regulated Sources.

Allowing CE to be used as a supplement to reference test methods will provide increased flexibility to state and local air agencies in ensuring that sources are complying with applicable emission limits. While reference test methods play an important role in determining compliance, including assuring uniformity, that role is often limited. The ability to rely on additional data, such as CEMs and parametric monitoring, to ensure that sources are in compliance with emission limits on a continuous basis, will provide state and local regulators with much needed flexibility, particularly in areas with large

^{52/} 62 Fed. Reg. at 8315 (citing “Air Pollution: Improvements Needed in Detecting and Preventing Violations,” GAO, No. GAO/RCED-90-155, 12 at 19-20 (September 1990)) (stating that the infrequent reference tests that have been conducted to check compliance with emission limits are inadequate without CE because “[r]eference 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”).

numbers of industrial sources. The enforcement approach set forth in the CE rule will provide states and localities with the flexibility to develop cost-effective enforcement programs tailored to local conditions and specific needs.

In addition to increased flexibility, the use of expanded compliance verification options can save state and local agencies time and money. Oftentimes, reference tests are expensive and burdensome for state and local air agencies, which have limited resources and increasing responsibilities under the Clean Air Act.^{53/}

Another cost-effective benefit of the CE rule is that it will tend to prevent costly court battles by expediting matters summarily with administrative compliance and penalty orders.^{54/} As state and local agencies have demonstrated, their sound use of CE enables officials to detect violations early and to pursue actions to correct them. Matters may be resolved through administrative orders and penalties without delay and the expense of litigation. Moreover, with infrequent reference tests as the sole source of compliance information, minor violations could escalate to major infractions by the time a reference test is conducted, thereby warranting full-blown and costly judicial proceedings.

Beneficial to regulated sources as well, sources may use CE to disprove alleged violations or limit the duration of proven violations in enforcement actions. Industry will also find that the CE revisions create a level playing field and promote economic fairness. The economic reward of intermittent compliance is eliminated by the reality of enhanced

^{53/} 62 Fed. Reg. at 8315 (EPA finding that reference tests can cost up to \$100,000, and take a week or more to complete)(citing 43 Fed. Reg. 7568, 7571 (1978)).

^{54/} See Supra § I.B.

enforcement authorities. Those sources that are in continuous compliance will not be put at an economic disadvantage by devoting resources to ensure continuous compliance.

C. The CE Rule Improves Existing Programs By Ensuring Continuous Compliance -- Thereby Reducing The Need For Further Requirements To Achieve Air Quality Goals.

Improving our nation's air quality can only be attained through full implementation of the emission standards and limitations established under the CAA. Enhanced state and local enforcement authorities are a logical outgrowth of this important statutory goal. Realizing the potential of the existing programs under the CAA will prevent the need for further, and possibly more costly and burdensome, requirements for both state and local governments and regulated sources. It follows that using CE to prove or disprove violations under the CAA will benefit all parties involved by having the best information available to assess a source's compliance status and respond to noncompliance.

With respect to attaining and maintaining health-based air quality standards, the CE rule will enhance state and local agencies' efforts to implement their SIPs. In developing their SIPs, state and local air agencies must rely on stationary sources' performance to remain in continuous compliance with emission limits. The principle of rule effectiveness (RE) is applied, particularly for areas that are not in attainment with the NAAQS. RE is a generic term for identifying and estimating the uncertainties in emission estimates caused by failures and uncertainties in emission control programs (e.g., noncompliance with existing rules, control equipment downtime, operating and maintenance problems and process upsets). It is a measure of the extent to which a rule actually achieves its desired emission reductions. The RE applications include base year

and projected emission estimates for SIP components, appraisals of proposed SIP emission reductions, periodic assessments of the progress of emission reductions and individual and category-specific source compliance determination and planning. RE provides a more reliable estimate for SIP control, planning, and modeling activities because it accounts for identifiable emission underestimates.^{55/} CE will greatly assist state and local agencies in accurately conducting the RE calculations in order to meet the SIP requirements.

If state and local agencies must rely exclusively on reference tests, their planning efforts will be undermined because reference tests are infrequent and usually represent only a “snapshot” measurement of emission levels under well-tuned operating conditions. Without continuous compliance, sources would be able to periodically surpass their emission limits -- throwing off RE calculations -- resulting in multiple exceedances that would be extremely detrimental to states’ efforts to reach attainment with air quality standards. Allowing CE in the enforcement process makes existing SIP programs work better and may obviate the need to adopt additional, and more costly, requirements.

III. THERE IS PREDICTABILITY IN WHAT, WHEN AND HOW CREDIBLE EVIDENCE WILL BE USED IN ENFORCEMENT ACTIONS

That state and local air agencies have been using CE for years (as illustrated in Section I of this Brief) in a constructive and reasonable manner is compelling evidence that regulated sources will continue to be fully aware of the evidence that pertains to their compliance performance. While the issue of what evidence is “credible” will ultimately

^{55/} EPA Memorandum, “Rule Effectiveness Guidance: Integration of Inventory, Compliance, and Assessment Applications,” G.T. Helms, Chief of Ozone/Carbon Monoxide Programs Branch (Jan. 24, 1994).

be determined by an independent arbitrator, there is, nonetheless, predictability in what, when and how CE will be used in the CAA context.

The CE revisions indicate that CE must be comparable to the reference test method and permissible under the rules of evidence to be admissible as evidence of a violation.^{56/} The reference test method remains the benchmark against which other emissions or parametric data, engineering analysis or other information will be evaluated. Basically, a reference test method is a test method specified in the final rule of an emission standard or limitation to determine compliance on a uniform basis. Oftentimes, the agency has specified training of test personnel, test procedures, instructions for analyzing test results, frequency of tests and guidance on deciding whether compliance with the applicable standard has been met.^{57/}

A. CE Is Information That Regulated Sources Already Maintain Or Will Be Required To Provide.

When enforcement actions are pursued based on CE, the non-reference test data used is information well within the control of the regulated source. From record keeping to CEM data to parametric monitoring data to visual inspections, all of this technical information is clearly within the physical possession of the regulated facility. Industry is in a unique position in that it has access to all the data and test results regarding its facilities, as well as other information not generally available to the public or the

^{56/} 62 Fed. Reg at 8317.

^{57/} See e.g., 40 C.F.R. Part 60, App. A, Reference Method 9 for opacity regulations (1996).

regulators. The issue regarding the “vagueness” of sources of CE^{58/} becomes a non-issue when one considers their unfettered access to information and their superior ability to conduct tests to ensure compliance.

The CE rule clarifies that relevant information pertaining to compliance cannot be ignored. It does not impose additional duties on regulated sources or state and local agencies to search out and review all possible information.^{59/}

B. State And Local Agencies Will Continue To Use CE In A Reasonable And Constructive Manner To Ensure Compliance With The CAA.

Industry can expect that state and local agencies will continue to use CE in the same prudent manner that they have for years. Both CE and reference test methods are vital components to any state or local enforcement program. Reference test methods will continue to be used for what they were intended – test methods of reference against which other data will be measured. In other words, the reference methods will be used as the measure for determining the credibility and reliability of other comparable emissions data and analysis. EPA provided an example in its position paper of March 1996,^{60/} with

^{58/} See Intervenors In Support of Petitioners’ Brief § II.

^{59/} The CE revisions do not require the maintenance of any additional records or reports. See 62 Fed. Reg. at 8318 (finding that with regard to sources subject to Title V permits, data that EPA would consider as potentially CE 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.”).

^{60/} “EPA’s Credible Evidence Position Paper – The Use of Information Other Than Reference Test Results for Determining Compliance With The Clean Air Act,” March 21, 1996.

respect to opacity regulations: “EPA Reference Method 9 provides for opacity measurements to be taken over a period of 6 minutes. A continuous opacity monitor may record opacity as often as once every 15 seconds. The Agency does not propose to provide that a single opacity reading, spanning only 15 seconds, is sufficient evidence to establish a violation. In this example a violation could only be established by the continuous monitor data where a series of such measurements over a six minute period demonstrated a noncompliance.” STAPPA, ALAPCO and NESCAUM support this approach and will continue to make threshold determinations regarding whether evidence is credible according to this principle of comparability.

In at least two states, the use of any CE is already authorized under applicable state regulations and policies, effectively eliminating the issue of unpredictability. Maine's state regulations governing the issuance of air emissions permits specifically states, "[n]otwithstanding any other provision in the State Implementation Plan approved by the EPA or Section 114(a) of the CAA, any credible evidence may be used for the purpose of establishing whether a person has violated or is in violation of any statute, regulation, or Part 70 license requirement."^{61/}

The use of any CE has been integrated into two separate environmental regulations in Oregon. The state's Title V operating permit contains a condition requiring compliance certification to be based, at a minimum, on the monitoring information required by the permit. Additionally, “[t]he information obtained from the

^{61/} Maine Dep't of Env'tl Protection; Bureau of Air Quality Control; Chapter 115; 06-096, "Major and Minor Source Air Emission License Regulations," (emphasis added).

monitoring required by this permit can be used directly for enforcement.”^{62/} Under the state’s plant site emissions limit (PSEL) rule, PSELs may be established for individual pollutants by using emission factors and production rates. For example, a permit may limit NO_x emissions from a boiler to 42 pounds per hour and 145 tons per year. Compliance is determined using an emission factor of 0.31 pounds of NO_x per thousand pounds of steam produced on an hourly and annual basis. In this example, an enforceable violation of the NO_x limits exists, without ever performing a reference test, if the steam production exceeds 135,000 pounds per hour or 935,500,000 pounds of steam per year.^{63/}

In sum, regulated sources are accustomed to the use of CE and can expect that state and local agencies will continue to use CE judiciously to assess compliance and respond to noncompliance.

IV. EPA’S SIP CALL HAS REAFFIRMED STATE AND LOCAL AIR AGENCIES’ AUTHORITY TO CHOOSE ENFORCEMENT STRATEGIES AND POLICIES

EPA’s lawful revision of Parts 51 and 52 enhances state and local air agencies’ ability to make policy choices with respect to enforcement. STAPPA and ALAPCO believe, as reinforced by the 1990 Amendments, that state and local air agencies have had the authority to use CE in enforcement actions. EPA’s SIP call, announced October 22, 1993 pursuant to § 110(k)(5), and the CE revisions merely reaffirm and clarify this customary practice. To close the loop on this issue, state and local agencies support EPA’s efforts to remove the ambiguity regarding the use of CE by issuing the SIP call

^{62/} Oreg. Dept. of Environmental Quality Title V Operating Permit No.: 10-0007 (July 1, 1997).

^{63/} Oreg. Administrative Regulations § 340-028-1020.

and encouraging states and localities to make expedited SIP revisions. Moreover, EPA's actions respond to the CAA directive to "encourage the enactment of improved and, so far as practicable in the light of varying conditions and needs, uniform State and local laws relating to the prevention and control of air pollution. . . ." ^{64/} The agency's actions are in complete harmony with the division of authority envisioned by Congress and amplified by the courts. ^{65/}

Contrary to Petitioners' assertions, the CE rule expands state and local agencies' ability to choose enforcement measures and policy options to meet the specific needs of the state or locality. ^{66/} The rule does not mandate any particular strategy for proving or disproving violations. Indeed, under the CE revisions, states and localities may see fit, in some cases, to rely exclusively on reference test methods to determine a source's compliance and respond to noncompliance. The point is, the revisions grant greater deference to the states and localities, and their ability to use CE in a reasonable manner. The rule has effectively removed obstacles resulting from the ambiguity over CE to create a framework that allows for flexibility and innovation to meet the heavy enforcement responsibilities of state and local air agencies.

Numerous states and localities have submitted or will soon submit SIP revisions that expressly permit the use of CE. The most recently approved revision was to the

^{64/} § 102(a).

^{65/} Train v. NRDC, 421 U.S. 60, 79 (1975); Commonwealth of Virginia v. EPA, 108 F.3d 1397, 1410, as amended on partial reh'g, 116 F.3d 499 (D.C. Cir. 1997).

^{66/} Petitioners' Brief § III.

Minnesota SIP to incorporate CE principles on April 9, 1997.^{67/} Essentially, any monitoring method that a source is required to use by either applicable requirements or a compliance document and any other CE is given evidentiary standing. The definitions of “applicable requirement” and “compliance document” are broad enough to include any monitoring approved for the source (and included in a federally enforceable operating permit). No comments were made on the rule when it was proposed in the state. In Kansas, the SIP revision provides that *any credible evidence* may be used for the purpose of establishing whether a violation has occurred at a source.^{68/} These SIP revisions correct an inadequacy in the former SIPs that allowed them to be interpreted to limit the types of testing or monitoring data that may be used for determining compliance and establishing violations.^{69/}

As illustrated by these SIP revisions, the state and local agencies can amend their SIPs to develop reasonable enforcement strategies for their programs based on the types of regulated facilities in the area and the unique mix of statutory and common law enforcement authority available to them. The CE revisions have clarified that the full range of credible information pertaining to compliance should be available to the states and localities to develop enforcement strategies that will protect public health and the environment.

^{67/} 62 Fed. Reg. 17081 (April 9, 1997); Minn. Stat. §§ 7007.0800 Subpart 6, 7017.0100 Subpart 1 and 2 (1997).

^{68/} 60 Fed. Reg. 36361 (July 17, 1995).

^{69/} See also, 60 Fed. Reg. 32601 (June 23, 1995) (Iowa SIP revisions); 60 Fed. Reg. 46222 (September 6, 1995) (South Dakota SIP revisions); 61 Fed. Reg. 13776 (March 18, 1996) (Missouri SIP revisions).

CONCLUSION

For the foregoing reasons, the Court should dismiss Petitioners' case and uphold EPA's promulgation of the CE revisions.

Respectfully submitted,

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