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## MDNR'S TOOLBOX FOR ENCOURAGING COMPLIANCE: TITLE V PERMITS, COMPLIANCE ASSURANCE MONITORING, PERIODIC MONITORING, THE CREDIBLE EVIDENCE RULE AND COMPLIANCE CERTIFICATIONS

Robert J. Lambrechts\*

The Clean Air Act Amendments of 1990 have been called the single largest piece of environmental legislation ever passed in the United States. Intended to revamp and revitalize an air quality program that had, in many ways, become outdated, the 1990 Amendments made significant changes to the Clean Air Act, many of which are just coming into effect a decade after passage of the legislation.

As part of the 1990 Amendments, the Title V Operating Permit Program ("Title V Program") created an all encompassing federally mandated permit program, which is designed to be implemented by the states. The Environmental Protection Agency ("EPA") advocated the operating permit concept so all applicable Clean Air Act ("CAA") requirements for a source could be consolidated into a single, comprehensive document. Within the structure of the new Title V Program, the 1990 Amendments present several significant procedural modifications for regulated entities. First, the EPA's compliance assurance monitoring ("CAM") rule imposes significant new monitoring requirements on many entities that are subject to the Title V Program. Second, the Title V Program regulations create a new general obligation for entities subject to a Title V permit to conduct "periodic monitoring" if the existing regulations already applicable to the source do not specifically require such monitoring. Third, the EPA's regulatory revisions authorize the use of "any credible evidence" to prove violations of numeric emission limits. Finally, all facilities subject to the Title V Program are required to certify compliance on an annual basis. Taken together, these structural and procedural changes to the CAA provide EPA and the Missouri Department of Natural Resources ("MDNR") with an extensive and formidable array of tools to enforce Missouri's air pollution control regulations.<sup>1</sup>

This article addresses issues presented by the implementation of the above-noted regulatory requirements at the federal and state levels, with a corresponding discussion of ways the reader can counsel clients to avoid pitfalls associated with these complex air pollution control rules.

### I. COMPLIANCE ASSURANCE MONITORING ("CAM")

A rather innocuous phrase included in the statutory provisions of the new Title V Program has led to a drastic change in the focus of monitoring under the CAA: "The Administrator shall ... in the case ... of a major source ... require enhanced monitoring ...."<sup>2</sup> In response, the EPA launched a series of rule-making initiatives to define the scope of monitoring obligations under the Title V Program, first with Enhanced Monitoring<sup>3</sup> and then with CAM.<sup>4</sup> The complexity of these changes cannot be understated. The CAM rule, for instance, which spanned only 10 pages in the *Code of Federal*

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<sup>1</sup> According to a telephone conversation with Mr. Tim Hines of the Missouri Department of Natural Resources Air Pollution Control Program, conducted on October 17, 2000, the MDNR plans to ultimately issue 565 Title V permits. Mr. Hines indicated that MDNR is aware of 565 Missouri sources subject to the Part 70 (Title V) regulations. 225 sources seeking Intermediate status and 942 sources subject to the Basic State regulations. Sources seeking Intermediate permits have requested federally enforceable limits to bring emissions below the major source threshold wherein a source has the potential to emit in excess of 100 tons of a criteria pollutant, 10 tons of a single hazardous air pollutant or 25 tons of any combination of hazardous air pollutants. Basic state sources are those sources that have the potential to emit more than a *de minimis* amount but less than major source levels.

<sup>2</sup> 42 U.S.C. § 7414(a)(3) (2000).

<sup>3</sup> Section 114(a)(3) of the Clean Air Act requires enhanced monitoring and submission of compliance certificates by all major stationary sources. The purpose of this subsection is to increase the data available to EPA to determine compliance. The data would be directly enforceable, allowing EPA to use the data for enforcement purposes without conducting additional testing. On October 22, 1993, EPA issued proposed enhanced monitoring regulations. See 58 Fed. Reg. 54648 (October 22, 1993). On September 20, 1995, EPA announced a new draft document for a proposed compliance assurance monitoring rule. See 60 Fed. Reg. 48679 (September 20, 1995).

<sup>4</sup> The CAM rule was published as a final rule in the Federal Register on October 22, 1997. See 62 Fed. Reg. 54900 (October 22, 1997).

*Regulations*, eventually lead to a 200-plus page Technical Guidance Document containing a detailed discussion of the applicability of the CAM rule and decision trees for use by entities that are potentially subject to the CAM rule.

### *A. Applicability*

As an initial applicability consideration, the CAM rule only applies to major stationary sources of air pollution that are required to have a Title V operating permit. Major sources in Missouri are defined as those having the potential to emit in excess of 100 tons of a criteria pollutant,<sup>5</sup> 10 tons of a single hazardous air pollutant<sup>6</sup> or 25 tons of a combination of hazardous air pollutants. For facilities required to have a Title V permit, the applicability of the CAM rule depends upon the characteristics of each individual emission unit, or source of air pollution, at the facility. More precisely, once it is determined that the CAM rule potentially applies to a facility, because the facility is required to obtain a Title V permit, all remaining determinations concerning applicability of the CAM rule are evaluated on a "unit-by-unit" basis.

First, the CAM rule only applies to a unit if it is subject to a federally enforceable emission limitation or standard such as a New Source Performance Standard found in 40 CFR Part 60, or a National Emission Standard for Hazardous Air Pollutants found in 40 CFR Part 61 or Part 63, or a limit established by the state implementation plan.

Second, the CAM rule only applies to units that rely on a control device to achieve compliance. The rule defines "control device" to mean "equipment, other than inherent process equipment, that is used to destroy or remove air pollutant(s) prior to discharge to the atmosphere."<sup>7</sup> The definition goes on to list examples of the types of equipment that qualify as control devices and those that do not. Potentially regulated entities must carefully consult the regulations, because inclusion or exclusion of specific equipment from the "control device" listing cannot always be intuitively predicted. For example, electrostatic precipitators, scrubbers, and selective catalytic or non-catalytic reduction systems qualify as control devices.<sup>8</sup> However, seals, lids, and roofs intended to prevent the release of pollutants, and certain combustion control measures, including low nitrogen oxide burner technology, are not considered "control devices."<sup>9</sup>

In determining whether a unit is subject to the CAM rule, the regulations distinguish between a "control device" and "inherent process equipment." While control devices are subject to the CAM rule, "inherent process equipment" is not. The CAM rule defines "inherent process equipment" as:

"[E]quipment that is necessary for the proper or safe functioning of the process, or material recovery equipment that the owner or operator documents is installed and operated primarily for purposes other than compliance with air pollution regulations. Equipment that must be operated at an efficiency higher than achieved during normal process operations in order to comply with the applicable emission limitation or standard is not inherent process equipment. For purposes of this part, inherent process equipment is not considered a control device."<sup>10</sup>

Application of the inherent process equipment/control device distinction is not always straightforward. For example, one can argue that a cyclone at a grain handling facility can be categorized as either inherent process equipment or a control device. A cyclone does reduce emissions of particulate matter and hence can be characterized as a control device; however, it also serves to collect product that would otherwise be exhausted to the air thereby denying the source the economic benefit associated with the sale of the product. Thus, potentially regulated entities must carefully analyze the nature of the equipment at issue to determine whether it is properly characterized as a control device, which is subject to the CAM rule, or as inherent process equipment, which avoids regulation under the CAM rule.

Third, the CAM rule only applies where the unit has a "potential to emit" the applicable regulated pollutant in an amount equal to or greater than the amount required for the source to be classified as a "major source."<sup>11</sup> However, this "potential to emit" determination must be made without taking into account any emission reductions that could be achieved through the application of control devices. Thus, the CAM rule requirements may apply to a source even though the source is utilizing control devices to restrain pollutant emissions to levels significantly lower than the "major source" threshold levels. Sources commonly compute the "potential to emit" by mathematically removing the impact of the

<sup>5</sup> Criteria pollutants are listed at 40 CFR Part 50, Table A and include particulate matter (PM<sub>10</sub>), sulfur dioxide, carbon monoxide, photochemical oxidants (ozone), nitrogen dioxide and lead. "Major stationary source" is defined at section 302(j) of the Clean Air Act Amendments.

<sup>6</sup> Major source for hazardous air pollutants is defined at section 112(a) of the Clean Air Act Amendments of 1990. *Id.* The pollutants specifically covered are identified at section 112(b) *Id.*

<sup>7</sup> See 40 CFR § 64.1(2) (2000).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See 62 Fed. Reg. 54941 (October 22, 1997).

<sup>11</sup> 40 C.F.R. § 64.2(a).

design efficiency of the control device being utilized at the unit. For example, if a unit has the potential to emit 20 tons per year of particulate matter while equipped with a control device that has a rated removal efficiency of 95 percent, then the unit will have a pre-control device potential to emit of 400 tons per year, which is substantially above that required for the source to be classified as a "major source." Thus, the unit is potentially subject to the CAM rule even though its actual emissions are being restrained to levels well below the applicable major source threshold.

The EPA exempted sources that are subject to certain emission limitations and standards from the CAM requirements, based on its belief that these limitations and standards already require regulated sources to perform adequate monitoring. As a result, sources that are subject to any New Source Performance Standards or National Emission Standards for Hazardous Air Pollutants proposed after November 15, 1990, are not required to comply with the CAM requirements. Several other limitations that allow sources to be exempt from CAM requirements include: emission limits under approved emission trading programs; emission caps that meet requirements under Title V; and emission limits for which a continuous compliance determination method is specified.<sup>12</sup>

Sources should exercise caution in defining emissions units at a facility for regulatory purposes. For example, six independently operated spray booths in a metal coating operation may each exhibit an individual potential—to emit that falls below the major source threshold and avoids CAM regulation. However, if the individual spray booths are vented to the atmosphere through a single emission point, the units may collectively have the potential-to-emit above the major source threshold, thus arguably becoming subject to CAM regulation. These are the types of issues that will need to be worked through with the MDNR when negotiating CAM applicability.

In addition to applying the CAM regulations on a unit by unit basis, they also apply on a pollutant-specific basis. Applicability is determined with respect to each pollutant emitted by an emissions unit. For instance, one coal-fired boiler could constitute several "pollutant-specific emissions units" under the rule, because it emits particulate matter, sulfur dioxide, nitrogen oxide and carbon monoxide, all of which are regulated pollutants. The unit could be subject to the CAM rule for some of these pollutants, but not for others, depending upon the quantities of individual pollutants emitted. In addition, if the CAM rule applies to more than one pollutant emitted from the unit, the specific technical requirements imposed by the regulations may differ from one pollutant to another, requiring multiple, and sometimes duplicative, technical improvements to operations. Finally, it is important to note that an individual unit that is exempt from one CAM rule emission limitation may still be required to comply with another emission limitation from which it is not exempt. For example, a unit that emits a pollutant that is subject to a New Source Performance Standard<sup>13</sup> ("NSPS") limitation and, thus, exempt from the corresponding CAM rule requirements may not be exempt for other pollutants that are not regulated by the NSPS.

### *B. What Does the Rule Require?*

The CAM rule requires owners and operators of emissions units subject to the rule to develop an acceptable range for operation of their control equipment. These "indicator ranges" will be established by using the results of performance tests and equipment design data. The CAM rule characterizes departures from an indicator range as "excursions." The indicator ranges or conditions must be established such that excursions will indicate potential problems with operation and maintenance of the control device. An excursion from a CAM indicator range or an indicator condition does not, in and of itself, constitute an enforceable violation. An excursion would constitute an enforceable violation only if the excursion reflects a violation of the underlying applicable requirement or if the permitting authority, pursuant to its authority under an approved state implementation plan ("SIP"), includes a requirement to comply with the indicator range as a federally enforceable element of a Title V permit.<sup>14</sup>

EPA has suggested that, because it, as an agency, anticipates a wide variance in how state agencies set acceptable indicator ranges, it "intends to draw no firm inferences as to whether excursions from CAM parameter levels warrant enforcement of underlying emission levels without further investigation into the particular circumstances at the source."<sup>15</sup> Major sources should be aware that CAM monitoring data may qualify as "credible evidence" under the agency's "credible evidence rule," which will be discussed later in this article.

If monitoring suggests that control equipment is operating outside the "indicator range," then the rule requires the owner or operator to take prompt corrective action and notify the permitting authorities that potential compliance

<sup>12</sup> 40 CFR § 64.2(b).

<sup>13</sup> 40 CFR § 60 (1999).

<sup>14</sup> 62 Fed. Reg. 54900, 54928 (October 22, 1997).

<sup>15</sup> *Id.* at 54907.

problems exist. Persistent problems indicated by excessive periods of operation outside the "indicator range" may result in the imposition of a Quality Improvement Plan ("QIP") on the facility. A QIP is a comprehensive two-step evaluation and correction process that requires the owner or operator to prepare a formal plan and schedule for correcting control device problems. The plan, which is subject to review and approval by the permitting agency, could require significant repairs to, or even replacement of, control devices. A QIP, however, does not insulate an owner or operator against enforcement action for violations of an underlying emission limitation or standard. This results in the anomalous situation of a facility being in compliance with the CAM rule because it has implemented a QIP, but still subject to an enforcement action because it is in violation of the underlying emission limitation or standard.

### *C. Deadlines for Compliance*

Not only is the applicability of the CAM rule determined on a unit-by-unit basis, but the compliance deadline for each regulated unit is also determined on that basis. If the unit's potential-to-emit an applicable pollutant calculated after considering controls is equal to or greater than 100 percent of the "major source" threshold for the source – EPA refers to these as "large" units – then the date on which the unit must comply with the rule depends upon the status of the source's Title V permit. If the source has filed its application for a Title V permit by April 20, 1998, and the permitting authority has determined that the application is complete, then the unit does not need to comply until either the source seeks a significant Title V permit revision for that unit or the source files an application to renew its Title V permit.

### *D. CAM in Missouri*

Missouri will ultimately make direct reference to the EPA's compliance assurance monitoring rule at 10 CSR 10-6.280, *Compliance Monitoring Usage*.<sup>16</sup> As of October 17, 2000, there were no major sources in Missouri that were subject to the CAM requirements.<sup>17</sup> This status will inevitably change once Title V sources commence permit renewal at the end of their first five-year permit term.

## II. PERIODIC MONITORING

The Title V Program includes the so-called 1992 "periodic monitoring rule," which mandates that state permitting authorities contract their Title V Program to require sources to implement periodic monitoring programs sufficient to yield reliable data that is representative of the source's compliance with the permit, if existing requirements do not require periodic testing or monitoring (which may consist of record-keeping designed to serve as monitoring).<sup>18</sup>

In an attempt to clarify the periodic monitoring requirements under the 1992 rules, the EPA released a document in September 1998 titled "Periodic Monitoring Guidance for the Title V Operating Permits Program." In that publication, the agency stated that periodic monitoring is required for each emission point at a source covered by Title V of the CAA that is subject to an applicable requirement, such as a federal regulation or a state implementation plan emission limitation. According to the publication, if an "applicable requirement imposes a one-time testing requirement, periodic monitoring is not satisfied," presumably because one-time is not sufficient to qualify as periodic, which is what the EPA requires. But the EPA goes further, stating that with limited exceptions, "periodic monitoring is required ... when the applicable requirement does not require ... monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." Thus, the EPA's position is that periodic monitoring has a very broad range of applicability.

After the EPA issued the guidance, several industry groups challenged it, arguing that it significantly broadened the 1992 periodic monitoring rule. The EPA and the industry groups agreed that if an applicable state emission standard contains no monitoring requirement to ensure compliance, the agency's 1992 rule requires the state permitting agency to impose some sort of "periodic monitoring" on a stationary sources as a condition of the permits or to specify a reasonable frequency for any data collection mandate already in the applicable requirement. However, the parties disagreed as to whether the 1992 rule should be interpreted to allow state permitting authorities to impose additional monitoring

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<sup>16</sup> Telephone interview of Ms. Christy Scott, of the MDNR Air Pollution Control Program on September 11, 2000. Ms. Scott indicated that the current reference in 10 CSR 10-6.280 to 10 CSR 10-6.290, Enhanced Monitoring would be replaced with a direct reference to 40 CFR § 64.

<sup>17</sup> Telephone interview with Mr. Tim Hines of the Missouri Department of Natural Resources, Air Pollution Control Program on October 17, 2000.

<sup>18</sup> 40 C.F.R. § 70.6(a)(3)(i) (1996).

requirements. In *Appalachian Power Company et al. v. Environmental Protection Agency*, the court set aside EPA's Title V periodic monitoring guidance.<sup>19</sup>

Since the federal periodic monitoring guidance been set aside, the question remains as to whether periodic monitoring is required in a given state, since the Title V Program is implemented at the individual state level. MDNR's regulations still require periodic monitoring at 10 CSR 10-6.065(6)(C)1.C.(1)(b), which mirrors the language of the federal operating permit periodic monitoring regulations. Missouri's July 1998 *Operating Permit Procedures Manual* requires each Part 70 permit (as Title V permits are identified in Missouri) to contain "monitoring requirements as provided in any applicable requirement, or periodic monitoring sufficient to yield reliable data for the relevant time period that are representative (so-called gap-filling monitoring requirements)."<sup>20</sup> The language in the *Procedures Manual* and, more importantly, that found in the regulation suggests that MDNR has considerable discretion in characterizing the type of monitoring required for a particular emissions unit. This suggests that sources should be extremely vigilant in permit negotiations to guard against MDNR inserting excessive monitoring requirements in their operating permits.

Even with the elimination of the federal periodic monitoring guidance, Missouri still has the legal authority to include periodic monitoring pursuant to its own regulations. This does not preclude a source from negotiating with MDNR during the permit process regarding the type and duration of monitoring that must be employed by the source. Time spent assessing the scope of periodic monitoring satisfactory to the MDNR as well as the source is of extreme importance, because the source must comply with these requirements until the permit is renewed in five years or the occurrence of a material change in the way the facility operates requiring reopening of the permit.

### III. CREDIBLE EVIDENCE

#### A. Background

The 1990 Amendments to the CAA have expanded the enforcement exposure of major stationary sources to a level that is still not completely understood. The "Credible Evidence Rule" figures prominently in this expansion. While the Credible Evidence Rule gives little guidance as to what constitutes credible evidence for purposes of litigation, it is clear that the EPA intends to take an expansive view. Consequently, counsel for major stationary sources should familiarize themselves with Federal Rule of Evidence 702 and with the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>21</sup> The holding in *Daubert* requires lower courts to use an expanded version of the four factors listed in that case for determining the scientific validity of evidence. In addition, in order to determine the evidentiary reliability of environmental compliance data, a lower court must identify and apply factors that test the scientific validity of both the technology that generates the compliance data and the methods used to analyze the data.<sup>22</sup>

The problem created by the Credible Evidence Rule is demonstrated in a 1995 citizen suit litigation, *Sierra Club v. Public Service Company of Colorado*.<sup>23</sup> In that litigation, the Sierra Club was successful in proving almost 20,000 opacity violations by relying on the defendant's reports drawn from its continuous emission monitors or "CEMs" despite the defendant utility's arguments that the applicable regulations provided that compliance must be demonstrated by a standard test, the Method 9 procedure for visual observation. The district court relied, in part, on the 1990 Clean Air Act's legislative history, which included a Senate report noting: "[t]he amendment clarifies that courts may consider any evidence of violation or compliance admissible under the Federal Rules of Evidence, and they are not limited to consideration of evidence that is based solely on the applicable test method in the SIP or regulation."<sup>24</sup>

For many years, the EPA and the states have relied primarily on reference test methods to enforce compliance with applicable emission standards. When it initially adopted several emission standards that required sources to install CEMs, the EPA indicated in its accompanying preamble statements that it would use CEMs data only to determine whether sources were following sufficient operating procedures and as indicator monitoring to target sources for reference

<sup>19</sup> *Appalachian Power Company et al. v. Environmental Protection Agency*, 208 F.3d 1015 (D.C. Cir. 2000).

<sup>20</sup> Missouri Operating Permit Procedures Manual, Missouri

<sup>21</sup> 509 U.S. 579 (1993).

<sup>22</sup> See Susan Norton, Factors for Determining Validity of Evidence in Clean Air Act Litigation, 15 J. Land Use & Envtl. L. 235, 236 (2000).

<sup>23</sup> *Sierra Club v. Public Service Company of Colorado*, 894 F. Supp. 1455 (D. Col. 1995). see also *Unitek Environmental Services, Inc. v. Hawaiian Cement*, 27 E.L.R. 20483 (D. Haw. 1996) (holding that monitoring data from tests performed by the defendant company at the direction of EPA pursuant to Section 114 and voluntarily-performed computer modeling results were admissible "credible evidence" supporting an injunction barring further operations by the defendant.)

<sup>24</sup> Sen. Rep. No. 101-228 101st Cong., 2d Sess. 366 (Dec. 20, 1989). quoted in *Sierra Club v. Public Service Co.*, 894 F. Supp. 1455, 1461 (D. Col. 1995).

tests.<sup>25</sup> Subsequently, the EPA began adopting CEMs data as the reference method for certain emission standards.<sup>26</sup> The EPA also gave sources the option of relying on CEMs data in lieu of reference tests for determining compliance so long as the requirements in the regulations for assuring the reliability of such data were met.<sup>27</sup> In various preambles, the EPA indicated that it would provide notice in advance if it determined that CEMs data would be used for direct enforcement.<sup>28</sup>

After Congress enacted the 1990 Amendments, which directed EPA to require enhanced monitoring and compliance certifications at major sources,<sup>29</sup> EPA became concerned that implementing the compliance certification requirement in a regime where compliance is demonstrated only through stack testing would not only involve excessive costs for sources, but would be less effective than an approach that allowed sources to rely on other types of readily available and reliable data.<sup>30</sup>

### B. The Credible Evidence Rule

In an effort to resolve these compliance certification concerns, the EPA proposed, on October 22, 1993, to amend regulatory language in 40 C.F.R. Parts 51, 52, 60 and 61.<sup>31</sup> When those parts were originally promulgated, the EPA intended to specifically identify the methods by which sources could demonstrate compliance with applicable emission limits, because the EPA did not want sources to use diverse, and possibly unreliable, methods to demonstrate compliance. Over the years, however, those provisions were interpreted as a limitation on the methods by which the EPA could demonstrate violations of the CAA in its enforcement role.<sup>32</sup> Because that interpretation was inconsistent with the EPA's enforcement authorities under section 113 of the Clean Air Act, the EPA proposed the credible evidence revisions to establish that the EPA could use a broader range of evidence, including non-reference test data, for enforcement purposes.<sup>33</sup> The EPA suggested that the credible evidence revisions would maintain a "level playing field" by allowing sources to use non-reference methods to demonstrate compliance.

After providing opportunities for public comment, the EPA promulgated the final Credible Evidence Rule,<sup>34</sup> which provides that nothing shall preclude the use of credible evidence for demonstrating compliance or noncompliance with NSPS, national emission standards for hazardous air pollutants ("NESHAPs"), and SIPs.<sup>35</sup> The preamble to the rule also reconfirms that credible evidence may be used for Title V permit compliance certifications.<sup>36</sup> The EPA explained that the rule merely "corrects an anomaly that has been read into the regulations, and brings their potential enforcement into line with that of other CAA requirements ... and with other environmental statutes."<sup>37</sup>

In the revised regulatory language, the preamble and its Response to Comments document, the EPA emphasized that the Credible Evidence Rule retains the reference tests established by the NSPS and NESHAPs as the measure of compliance with the standards.<sup>38</sup> The EPA plainly stated that it "in no way intends to alter the underlying emission standards," and that "[t]he 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."<sup>39</sup>

Reference tests typically quantify the mass or concentration of a pollutant over a specified time period.<sup>40</sup> It is the EPA's position that "the use of other evidence to document a violation must take into account the averaging requirements

<sup>25</sup> See 38 Fed. Reg. 20820 (May 2, 1973).

<sup>26</sup> See 55 Fed. Reg. 51378 (Dec. 13, 1990).

<sup>27</sup> See 50 Fed. Reg. 53115 (Dec. 27, 1985).

<sup>28</sup> See 55 Fed. Reg. at 51380-81 (Dec. 13, 1990).

<sup>29</sup> See 42 U.S.C. §§ 7414(a)(9)(3), 7661b(b).

<sup>30</sup> See 58 Fed. Reg. 54648, 54658-59 (Oct. 22, 1993).

<sup>31</sup> 58 Fed. Reg. at 54675.

<sup>32</sup> See *United States v. Kaiser Steel Corp.*, No. CV-82-2623 (C.D. Cal., Jan. 17, 1984).

<sup>33</sup> 58 Fed. Reg. at 54676.

<sup>34</sup> 62 Fed. Reg. 8314, 8328 (Feb. 24, 1997).

<sup>35</sup> See 40 C.F.R. §§ 60.11(g); 61.12(g); 61.12(e); 51.212(c).

<sup>36</sup> See 62 Fed. Reg. at 8314.

<sup>37</sup> *Id.* at 8317.

<sup>38</sup> See 40 C.F.R. § 60.11(a) (providing that compliance "shall be determined in accordance with performance tests established by § 60.8"); *id.* § 60.11(g) (allowing 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"); *id.* § 61.12(a), (e).

<sup>39</sup> 62 Fed. Reg. at 8316. Parametric data includes data relevant to a source's operating parameters, such as combustion temperature, boiler pressure, or production throughput. See also *Fed. Reg.* at 8319 (non-reference test data must be "equivalent to" data generated by a reference test to establish compliance or noncompliance); *id.* at 8316 ("data from such [reference] method will continue to be the benchmark against which other emissions or parametric data, or engineering analyses, will be measured").

<sup>40</sup> 62 Fed. Reg. at 8310.

related to the data collected by such method, the pollutant constituents measured by such method (e.g., the definition of particulate matter included in Method 5), and any limitations as to the conditions under which such tests may be conducted."<sup>41</sup> As long as these elements are retained and the data from the alternative 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."<sup>42</sup> Credible evidence must prove that a violation would have been shown had the reference method been used in similar circumstances.

The EPA argues that the Credible Evidence Rule does not amend any standards or redefine the sources' compliance obligations under them. It is the EPA's position that the credible evidence revisions merely clarify that non-reference test data (such as CEMs data, admissions of noncompliance by a facility compliance officer, or expert testimony) may be used to demonstrate whether a source would have been in compliance with an emission limit if the appropriate reference test had been performed. Accordingly, non-reference test data must evaluate emissions over the same averaging periods and under the same operating conditions as the reference test and must account for any periods of excused noncompliance. In an enforcement proceeding, both the meaning of the compliance requirements under the emission standard involved and whether the credible evidence shows a violation or demonstrates compliance with that standard should be subject to intense scrutiny by the alleged violator.

The regulations revised by the Credible Evidence Rule contain no limitation on the frequency of testing. In fact, both the statute and the EPA's regulations give the EPA broad discretion to require frequent, even continuous, testing. Because the revisions do not require states to adopt any specific control measures or direct states to use credible evidence to enforce the Act, it is the EPA's position that the credible evidence revisions do not invade states' regulatory authority under the CAA.<sup>43</sup> Nonetheless, as of September 1999, fifteen states, including Missouri, had proposed amendments to their SIPs to include a Credible Evidence Rule, and the EPA had promulgated final rules approving amended SIPs incorporating the "any credible evidence" concept in seven states, including Missouri.<sup>44</sup>

#### IV. COMPLIANCE CERTIFICATIONS, SEMIANNUAL MONITORING AND PROMPT REPORTING OF DEVIATIONS

As previously discussed, the Title V requirements will dramatically change the procedures leading to government enforcement of the CAA. Companies subject to Title V will be required to self-report facts that will comprise the evidentiary foundation for attempts to enforce and implement the CAA substantive requirements by governments and citizen suit plaintiffs.

Missouri's Part 70 permittees are required to submit annual certified reports indicating a facility's current and historical compliance status and semiannual certified reports setting forth the results of any required monitoring.<sup>45</sup> In addition, under Missouri law, if a source experiences a deviation resulting from an emergency or upset condition it must report the amount exceeded within two days, if the company intends to invoke the affirmative defense of upset.<sup>46</sup> The Title V monitoring and reporting requirements require a level of diligence and detail in self-reporting that will surprise many facility managers. The Title V self-reporting and certification requirements clearly expand a facility's exposure to potential governmental and citizen suit enforcement.

Missouri's compliance certification rule requires a statement of methods used for determining compliance, including a description of monitoring, recordkeeping and reporting requirements and test methods. Missouri's rule also requires annual submission of a compliance certification schedule and a statement indicating the installation's compliance status with respect to any applicable enhanced monitoring and compliance certification requirements under the CAA,

<sup>41</sup> Final Brief of Respondent United States Environmental Protection Agency in *Clean Air Implementation Project, et al., v. U.S. EPA*, no. 97-1117 D.C. Circuit at 11.

<sup>42</sup> As an example, EPA noted that Reference Method 9 provides for opacity to be measured over a period of six minutes. A COM may record opacity as often as once every 15 seconds. EPA does not propose that a single opacity reading, spanning only 15 seconds, is sufficient evidence to establish a violation. Rather, a violation could only be established if the COMs data over a series of six minute periods demonstrated a violation. See 62 Fed. Reg. at 8319.

<sup>43</sup> Final Brief of Respondent United State Environmental Protection Agency in *Clean Air Implementation Project, et al.*, no. 97-1117 at 14.

<sup>44</sup> Approval and Promulgation of Implementation Plans: State of Missouri, 61 Fed. Reg. 4352 (Feb. 6, 1996). The credible evidence language in Missouri's regulation can be found at 10 CSR 10-6.280(3).

<sup>45</sup> Missouri's compliance certification requirements can be found at 10 CSR 10-6.065(B)1.J. The semiannual reporting of monitoring results is required pursuant to 10 CSR 10-6.065(6)(C)1.C.(III)(a).

<sup>46</sup> See 10 CSR 10-6.065(6)(C)1.C.(III)(c)I.



unless the applicable regulatory requirement requires greater frequency of submission. Finally, the compliance certification must be signed by a responsible official.<sup>47</sup>

One of the traps presented by the mandatory compliance certification is the EPA's enforcement approach with respect to CAA violations which are discovered as part of a facility's application for a Title V permit, permit renewal or annual compliance certification. The EPA has utilized information obtained during these processes as a basis for enforcement actions against facilities that are attempting to take affirmative steps toward compliance. Moreover, the EPA may deny eligibility for safe harbor under the audit policy,<sup>48</sup> on the ground that Title V compels a permit applicant or permittee to investigate and certify compliance. The EPA argues that, because the compliance certification is mandatory, the discovery of violations by way of the certification will not be deemed "voluntary" as required for audit policy protection. A facility owner, however, may ostensibly be able to rebut the presumption depending on the circumstances, e.g., the timing of the disclosure in relation to the annual certification date. The Title V program requires sources to disclose currently pending violations in annual compliance certifications, not those that have been previously resolved.<sup>49</sup> Thus, violations that are discovered and resolved between compliance certifications should be eligible for benefits under the audit policy, unless their discovery was caused by required compliance monitoring.

## V. CONCLUSION

The ability of the EPA and the MDNR to evaluate a source's emissions and the source's compliance with applicable federal and state air pollution control laws is increasing. All of the mechanisms described in this article will allow not only the government but also private citizens to closely scrutinize a facility's regulatory compliance. For those sources that are not exceedingly vigilant in their compliance with the air program's requirements, penalties—potentially substantial in nature—await them.

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<sup>47</sup> See 10 CSR 10-6.065(B)1.J.(1)-(IV) for regulations controlling who may qualify as a responsible official.

<sup>48</sup> *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*. 65 Fed. Reg. 19618 (April 11, 2000).

<sup>49</sup> See 40 CFR 70.5(c)(8) and (9)(iv).