MEMORANDUM

DATE: November 3, 2006

TO: District and Local Compliance and Enforcement Coordinators

FROM: Greg DeAngelo, Administrator, Compliance & Enforcement Section, DEP/BAR

SUBJECT: **Credible Evidence**

Summary:

The EPA's position is that EPA (and the states) have and have always had the authority to use any credible evidence. The CAA, Federal regulations, and current EPA guidance all reflect this position.

History of Credible Evidence

- **Clean Air Act (1970)**

  EPA's contention throughout has been that the following language from the original Clean Air Act has always provided for the use of any credible evidence to allege a violation:

  "Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, ..." CAA §113(a)

- **US vs. Kaiser Steel (1984)**

  District Court found a "perceived limitation" in EPA's regulatory language and ruled that EPA's regulations in 40 CFR parts 60 and 61 did **not** provide for any compliance method other than the reference test method specified in the rule.

- **CEMS Data Guidance Memo (1986)**

  (Note: This memo has since been withdrawn.)

  This guidance memo was written in the context of the Kaiser decision, and explicitly notes the following:

  "The purpose of this guidance is to increase the use of [CEMS] data in the Agency's compliance and enforcement program."

  "However, the legal requirement must specify CEMS as the Compliance Method in order for EPA to rely on CEMS data alone to refer a case to [DOJ], to prove a violation of an emission limitation in Federal district court, or to issue a Notice of Noncompliance under §120."

  The memorandum stresses that CEMS data alone are sufficient to issue Notices or Violation or Findings of Violation. It supports that CEMS data are useful, noting that:

  "On technical grounds, CEMS data typically are at least comparable to Compliance Method and inspection data derived from equally well-executed and quality-assured monitoring. CEMS data certainly are more representative of actual continuous emissions than are some traditional sources of compliance data, such as emission factors and engineering calculations."

- **EPA Region 4 CEMS Enforcement Plan (1989)**

This plan was developed by EPA Region 4 in the context of the Kaiser decision and the broader (since revoked) CEMS guidance from the 1986 EPA headquarters memo. It includes some recommended enforcement responses for CEMS downtime and CEMS excess emission readings. Keep in mind that EPA is referring here to NSPS excess emissions, not to State of Florida SIP excess emissions.

The plan suggests that for NSPS and part 61 NESHAP standards – where CEMS is not the specified compliance method – CEMS data showing extreme durations of excess emissions could be grounds for alleging an operation and maintenance violation under §60.11(d) or §61.12(c). Recall that the only reason this plan did not recommend enforcing an **emissions** violation in this case is because EPA had been directed not to do so by the courts in the Kaiser decision.

- **Clean Air Act Amendments (1990)**

Congress overrode the Kaiser decision through the passage of the CAAA in 1990. As stated in the congressional record:

"[The CAAA] 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 [SIP] or regulation." S. Rep. No. 101-228, Dec 20, 1989, at 366.

Additionally, specific language was added to §113(e):

"...duration of the violation as established by any credible evidence (including evidence other than the applicable test method)..."

- **Acid Rain Guidance Memos (1993 & 1994)**

Two memoranda from this time period address CEMS for use in the Acid Rain program. One specifies the procedures for sources that want to use a single CEMS for Acid Rain and NSPS compliance. This memo notes:

"[EPA] has determined that since the CEMS requirements of [the Acid Rain program] are equivalent to or more stringent than the [NSPS requirements], EPA can accept Acid Rain CEMSs as NSPS CEMSs provided that the utility demonstrates compliance with all applicable NSPS regulations."

The second memo presents compliance and enforcement guidance for the Acid Rain program, and it notes:

"Because determinations of compliance with the acid rain requirements will likely be founded on pervasive self-reporting representative of the unit's compliance status, reported data indicating a violation will almost always be sufficient by itself to support a finding of violation. On those rare occasions when the overseeing agency decides that additional monitoring or analysis is required to determine or confirm the violation, Section 114 of the Act permits collection of any relevant information that can be used to determine whether a person is in violation of any provision of the Act."

- **Credible Evidence Rulemaking (1997)**

Through this rulemaking, EPA removed the language from its regulations that had been the basis for the District Court decision in Kaiser Steel. The EPA began this rulemaking process as soon as the CAAA were passed, but the changes were not proposed until 1993, when they were proposed along with the enhanced monitoring rule.

When it became clear that the enhanced monitoring rule was stalling, EPA split off the credible evidence rulemaking effort, promulgating it separately as the "any credible evidence" rules in 1997. (The enhanced monitoring concept eventually evolved into periodic monitoring, compliance assurance monitoring, sufficiency monitoring, et. al.)

- **Credible Evidence Guidance Memo (1997)**

This memorandum was issued as a companion to the credible evidence rulemaking. It explicitly withdrew several previously issued guidance memoranda, including the 1986 CEMS Data Guidance Memo discussed above.

It asserts in plain language that EPA and the states have and have always had the authority to use any credible evidence.

"As reflected in the credible evidence rule, EPA (and the states) have had the authority and ability to use credible evidence to enforce Clean Air Act requirements."

Continuing Guidance in Support of EPA's Position

- **Applicability Determination (1997)**

(ADI No. 9800009)

In a letter from EPA's Air Enforcement and Compliance assurance Branch to Indiana Department of Environmental Management, EPA confirmed the following:

"In addition, consistent with Section 113(a) of the Clean Air Act, which authorizes the Administrator to initiate an enforcement action based on 'any information available to the Administrator,' U.S. EPA has revised its regulations to clarify its authority to use any credible evidence to determine compliance with applicable requirements under the Clean Air Act.... Similarly, in answer to your second question, although 40 CFR 60.296 does specify Method 9 as the reference method for determining opacity, Section 60.11(g) also allows for the use of any credible evidence, including COM data, for determining compliance with opacity limits."

- **High Priority Violation Policy (1998)**

The Timely and Appropriate Enforcement Response to HPV policy outlines specific criteria for assessing whether violations are of high priority for EPA's purposes. The policy defers to credible evidence through the following language:

"Although the matrix provides specific detection methods for violations, nothing in this policy is intended to limit the agency in using other credible evidence to document a violation."

- **HPV Policy Q&A (current)**

From EPA's air enforcement webpage,

"**Comment:**

"What CEMSs are covered by Matrix Criteria 4 other than a CEMS required for NSPS units? Should data from a monitor not installed for the purpose of determining compliance be used to determine an HPV?

"Response:

"Data from any CEMS that is certified under Federal performance specifications can be used to determine whether an HPV exists. These data may also be used as credible evidence of a violation."

- **Draft Final Periodic Monitoring Guidance (1998)**

(Note: This memo has since been withdrawn.)

This memorandum was set aside by the D.C. District Court in Appalachian Power vs. EPA on the grounds that EPA was making policy through issuing guidance memoranda instead of through rulemaking. It was not (necessarily) set aside because the court disagreed with the policy itself. As such, this memorandum is useful to the extent that it shows EPA has been consistent on the question of using Acid Rain data for compliance with NSPS or SIP requirements.

"For example, most coal fired utility boilers are required to install, operate, maintain, and quality assure SO_2, NO_X, CO_2, flow, and opacity monitoring equipment under the acid rain program...In these cases, the existing monitors are to be specified as the periodic monitoring method for applicable requirements under the [SIP] and other requirements such as the NSPS. In nearly all cases, data from these monitors provide the fundamental building blocks for determining compliance with different emission limits and averaging times, at little or no additional cost."

- **Applicability Determination (2001)**

(ADI No. 0200004)

In a letter from the Air Toxics and Monitoring Branch to Florida DEP, Southwest District, EPA establishes that:

"Under the 'any credible evidence' provisions in 40 CFR 60.11(g), the [CEMS] data used for excess emission reporting can be used to cite violations for any three-hour period(s) during which the CEMS data indicate that emissions would have been in excess of the applicable standard had a performance test been conducted."

This determination is important as it establishes that Acid Rain data can be used for compliance with NSPS standards, but only if it is put on the same basis as the NSPS reference test method (and thus, the NSPS emission standards). Averaging times and oxygen correction factors are two corrections that may have to be made before using Acid Rain data to allege a NSPS violation.

- **Sufficiency Monitoring Rule (2004)**

This recently promulgated rule re-affirms EPA's position with regards to credible evidence.

"The EPA did not explicitly or implicitly seek comment on the use of monitoring data in enforcement actions or the consideration of other credible evidence. Those issues were resolved in the credible evidence rule..."

"...[The] credible evidence rule clarified that non-reference test data can be used in enforcement actions and that in addition to reference test data, 'other material information that indicates that an emission unit has experienced deviations * * * or may otherwise be out of compliance with an applicable requirement even though the unit's permit-identified data indicates compliance' must be considered in compliance certifications under title V of the Act."

Credible Evidence vs. Permit Shield

The EPA has taken a strong position against including any sort of "credible evidence buster" language in Title V permits. It is clear from EPA guidance that the concept of using credible evidence to determine compliance or non-compliance should be explicitly included in Title V permits. As Dick Dubose, EPA Region 4 Air Enforcement Section Chief noted, "Credible evidence trumps permit shield." The two items summarized below were gleamed from a quick search of EPA's webpage. Many additional sources supporting this position are available.

- **Correspondence to Indiana DEM (1998)**

(July 28, 1998)

In a letter from EPA's Air and Radiation Division to the Indiana Department of Environmental Management, EPA objected to IDEM's inclusion of "credible evidence buster" language in their Title V permits, noting that "IDEM should include in each permit general language providing for the use of other credible evidence." The EPA suggested that each permit's boilerplate section include language similar to the following:

> "Notwithstanding the conditions of this permit that state specific methods that may be used to assess compliance or noncompliance with applicable requirements, other credible evidence may be used to demonstrate compliance or noncompliance."

- **EPA's Title V Permit Writer's Tips (2003)** The EPA Title V Permit Writer's Tips (Compliance/Enforcement) webpage contains the following guidance for writing practically enforceable permit conditions:

  > "Title V permit conditions cannot limit the types of data or information (i.e., credible evidence) that may be used to prove a violation of any applicable requirement. Title V permits should contain language clarifying that any credible evidence may be used in determining a source's compliance status..."

  The guidance also notes that permits should not have language that identifies a reference test or other monitoring method as the sole or only means of determining compliance.

Addendum

Historically, CEMS in Florida were installed either as part of the Acid Rain program or because a Federal rule specified CEMS to be the compliance method. A growing number of CEMS are now SIP-based and are installed as part of a BACT determination, settlement agreement, or some other rule. The specific requirements for the operation and maintenance of these CEMS vary, but the underlying principle regarding credible evidence is the same: if the CEMS is properly certified and maintained, then the results from the CEMS can be used to demonstrate compliance (or non-compliance) with the monitored pollutant. In other words, assuming the data are meaningful, there is nothing to prevent the results from a SIP-based CEMS from being used to allege violations of a Federal emission limiting standard, or vice-versa.