

# Credible Evidence

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*UNITED STATES V. MOUNTAIN STATE CARBON*

(U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA)

# Mountain State Carbon Background

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Coke manufacturing facility in Follansbee, West Virginia

Case involved CAA and RCRA claims

EPA had continuous opacity monitoring data (COMS) that established violations of the combustion stack opacity limits.

COMS data showed that MSC violated the instantaneous 40% SIP opacity limit at least 9,915 times.

U.S. filed a summary judgment motion based on the COMS data.

# Court's Decision

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On January 14, 2014, the court denied the U.S. motion for summary judgment.

Court held that U.S. could not use COMS data as evidence of MSC's violations of the CAA.

Court construed a West Virginia regulation as allowing for the use of COMs only where no other compliance determination procedures exist.

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The West Virginia regulations states: The “opacity . . . of emissions from manufacturing process operations shall be determined visually by a qualified observer”.

Court determined this provided the exclusive method of determining compliance with the emissions limits even though the West Virginia regulations also include a provision that specifically provides other credible evidence may be used to establish a violation of SIP emission limits.

Court also concluded that because COMS data is taken every ten seconds, 24 hours per day and 365 days per year, whereas visible emissions observations are taken under prescribed conditions with less frequency, using COMs as “credible evidence” would affect the stringency of the underlying emissions standards.

Notice of Appeal is due on January 5, 2015.

# CAA Credible Evidence Provisions and the Credible Evidence Revisions Rule

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Since 1970 CAA section 113(a) states that EPA may bring an enforcement action based on “any information.”

1990 Amendments revised section 113(e) of the CAA to clarify that “any credible evidence” can be used for compliance and enforcement purposes.

1997 EPA promulgated the Credible Evidence Revisions (CER) rule to clarify that any credible evidence could be used for compliance with the new title V permit program, as well as other compliance and enforcement efforts.

Federal Credible Evidence rule states in relevant part that “nothing . . . shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements . . .” 40 C.F.R. 52.12(c).

One of several rule provisions that were changed in 1997 as part of the CER rule.

“These revisions make clear that enforcement authorities can prosecute actions based exclusively on any credible evidence, without the need to rely on any data from a particular reference test.” CER, 62 Fed. Reg. 8314, 8316 (Feb. 24, 1997).

# What to Look For

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Language that could be read to prohibit the use of credible evidence in an enforcement action.

Language that purports to limit compliance determination procedures to a specific method (e.g., “compliance with visible emissions standards shall be determined by observers certified in accordance with . . . Method 9”

- Such language can be read as providing for the exclusive method for determining compliance with a standard even when the permit includes general language providing for the use of credible evidence to establish a violation.

All SIPs should contain a provision that specifically provides other credible evidence may be used to establish a violation of an emissions limit or standard.