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Sierra Club v. Public Service Company of Colorado:[1] Judicial Amendment or Towards Continuous Emission Compliance; Expanding the Scope of Citizen Suits and the 1990 Amendments to the Clean Air Act

ANTHONY R. WYNNE*

I. Introduction

In *Sierra Club v. Public Service Company of Colorado*[2] (*Public Service Co.*), the United States District Court for the district of Colorado granted plaintiff's summary judgment motion, in part, finding emissions violations in excess of 19,000 times within a five year period.[3] The court held that in a citizen action under the Clean Air Act (CAA),[4] violations of opacity[5] standards may be established through data and reports from a facility's Continuous Emissions Monitoring Systems (CEMS).[6] This holds true despite the fact that it is

* The author would like to thank his sisters, Catherine and Patricia, for their unconditional support; his nieces Cailyn and Chelsea, whose company he missed throughout law school; and especially his mother who has made great sacrifices throughout her life so that he could be the person that he is today. Also thanks to Angelo Delli Carpini and his group for a great editing job.

1. 894 F. Supp. 1455 (D. Colo. 1995).
2. *Id.*
3. *See id.*
4. Clean Air Act (CAA) §§ 101-618, 42 U.S.C. §§ 7401-7671(q) (1991).
5. Opacity is defined as "the degree to which emissions reduce the transmission of light and obscure the view of an object in the background." 40 C.F.R. § 60.2 (1995).
6. *See id.* at § 402(7), 42 U.S.C § 7651a(7). Continuous Emissions Monitors measure the opacity of emissions and are composed of equipment that are used to "sample analyze, measure, and provide on a continuous basis a permanent record of emissions and flow (expressed in pounds per million British thermal units (lbs/mmBtu), pounds per hour (lbs/hr) or such other form as the Administrator may prescribe by regulation[ ] . . . .)" *Id.*

neither the applicable test method under the Environmental Protection Agency's (EPA) regulations[7] nor is it provided for in the CAA State Implementation Plan (SIP) provisions.[8]

Prior to 1990, emission violations could only be demonstrated through the applicable standards set forth in the EPA's regulations or SIPs.[9] However, with the recently enacted 1990 Amendments,[10] the Colorado court reasoned that the CAA allows *any evidence* of a violation or compliance to be considered under the Federal Rules of Evidence (FRE), including, but not limited to, bypass and control equipment malfunctions and expert testimony, regardless of whether it is an applicable test method under the EPA's regulations.[11]

This decision provides citizens with a powerful tool, particularly when governmental authorities refuse to take major enforcement action against a plant.[12] As a result of this decision, citizens are now empowered to directly monitor and bring suits against industries and utilities, especially those entities emitting pollutants regulated under the Act.[13] Moreover, citizens can prove CAA violations through any evidence admissible under the FRE.[14]

7. The Environmental Protection Agency (EPA) sets forth that the applicable test method to determine compliance with an opacity standard "shall be determined by conducting observations in accordance with Reference Method 9 in appendix A" of the Code of Federal Regulations, or any other method approved by the administrator. *See* 40 C.F.R. § 60.11(b) (1995).

8. *See* 894 F. Supp. at 1461. Each state must submit a State Implementation Plan to the EPA providing for the implementation, maintenance, and enforcement of national primary and secondary ambient air quality standards. *See* CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1). *See also* discussion *infra* part II.

9. *See* 894 F. Supp. at 1461 (noting that the amendment overrules the ruling in United States v. Kaiser Steel Corp., No. 82-2623-IH 1984 WL 186690 (C.D. Cal. 1984)). *See also* S. REP. No. 228, 101st Cong., 1st Sess. (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385.

10. *See* Pub. L. No. 101-549, 104 Stat. 2399 (1990).

11. *See* 894 F. Supp. at 1461.

12. *See* Mark Obmascik & Peter G. Chronis, *PSC Violated Clean Air Act*, DENVER POST, July 22, 1995, at A01; *Federal Court: Citizen Groups Can Sue to Enforce Plant Air Emissions Rules*, ELECTRIC UTIL. WK., July 31, 1995, at 5; *Federal Judge Finds 446-mw Hayden Plant in Colo. Broke Opacity Rules 19,000 Times*, UTIL. ENV'T REP., Aug. 4, 1995, at 1.

13. *See Federal Court: Citizen Groups Can Sue To Enforce Plant Air Emissions Rules*, ELECTRIC UTIL. WK., July 31, 1995, at 5.

14. *See* 894 F. Supp. at 1461.

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This case note discusses whether the court's ruling constituted a judicial amendment or a rational analysis of the applicable statutory and regulatory scheme. Part II provides a background of the CAA, air pollution standards, and state compliance. Part III analyzes whether the defendants are likely to succeed on appeal to the United States Court of Appeals, the impact of its decision upon industry, and how citizen groups are likely to gain power from this decision.[15] Part IV concludes that the EPA should adopt the proposed rules requiring CEMS or similar systems to be installed in all utility plants to measure emissions violations on a continuous basis.[16] These proposed rules clarify the requirements necessary to meet Congressional intent in passing the 1990 amendments. The rule will provide citizen groups with easy access to information for monitoring purposes and will ensure greater compliance with emission standards.

II. Background

A. Clean Air Act

Congress enacted the CAA with the declared purpose of "protect[ing] and enhanc[ing] the quality of the Nation's air resources so as to promote the public health and welfare and productive capacity of its population."[17] Since its inception in 1963,[18] the CAA has been amended six times,[19] with the most

15. *See PS Colorado to put $32-Million of Emissions Control on Hayden*, ELECTRIC UTIL. WK., Aug. 7, 1995 (reporting that while Public Service Co. of Colo. announced it would install a baghouse on one of the stacks to reduce pollution, it would seek an appeal of the court's decision). *See also Federal Judge Finds 446-MW Hayden Plant in Colo. Broke Opacity Rules 19,000 Times* UTIL. ENV'T REP., Aug. 4, 1995, at 1 (reporting that PSC would seek an appeal. Also noting that the district judge wanted the case to be reviewed given the ruling and complexity of the case).

16. *See* Enhanced Monitoring Program, 58 Fed. Reg. 54,648 (to be codified at 40 C.F.R. §§ 51, 52, 60, 61 and 64) (proposed Oct. 22, 1993).

17. CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1).

18. *See* Pub. L. No. 88-206, 77 Stat. 393 (1963).

19. *See* Pub. L. No. 89-675, 80 Stat. 954 (1966); Pub. L. No. 90-148, 81 Stat. 485 (1967); Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 97-28, 95 Stat. 148 (1981); Pub. L. No. 101-549, 104 Stat. 2398 (1990).

recent amendment occurring in 1990.[20] Although the purpose of the CAA has not changed since 1963, the method of attaining its goals have changed throughout the amendment process.

The 1990 amendments were predicted by scholars to significantly impact the CAA[21] by: (1) creating tougher air pollution standards,[22] (2) broadening the scope of citizen suits,[23] (3) expanding liability by authorizing penalties for past violations,[24] and (4) adding criminal penalties.[25] As evidenced by the court's decision in *Public Service Co.,*[26] these predictions were well-founded.

1. Air Pollution Standards and State Compliance

One way in which the CAA addresses air pollution is through the promulgation of National Ambient Air Quality Standards (NAAQS).[27] The CAA establishes two types of NAAQS.[28] Primary standards are designed to protect human health,[29] whereas secondary standards focus on protecting

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20. *See* Pub. L. No. 101-549, 104 Stat. 2398.

21. *See* Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions*, C127 ALI-ABA 997 (1995); Symposium, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop*, 21 Envtl. L. 2233 (1991); Alexander F. Skirpan, Jr., *Plus CA Change, Plus C'Est La Meme Chose: 1990 Amendments to Clean Air Act and Their Impact on Utility Regulation*, 55 U. Pitt. L. Rev. 171 (1993).

22. *See* William H. Rodgers, Jr., Environmental Law § 3.2 p.140 (2d ed. 1994).

23. *See* David T. Buente, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop*, 21 Envtl. L. 2233, 2235 (1991). The author notes that "[w]hether these results will actually flow from the 1990 Amendments will depend, in significant respects, upon how the federal government implements some key provisions, how federal the courts interpret the Amendments, and how the courts will continue to address significant analogous issues under the CWA." *Id.* at 2235-36.

24. *See* CAA § 113(a)(3) & (d)(1)(A), (b), 42 U.S.C. § 7413(a)(3) & (d)(1)(A), (B).

25. *See id.* § 113(c), 42 U.S.C. § 7413(c). The CAA creates two new crimes of "negligent" endangerment and "knowing" endangerment. *See id.* § 113(c)(4) & (5), 42 U.S.C § 7413(c)(4) & (5) *See also* Rodgers, *supra* note 22 at 155-6.

26. 894 F. Supp. 1455.

27. *See* CAA § 109, 42 U.S.C. § 7409.

28. *See id.* § 109(b)(1),(2), 42 U.S.C. § 7409(b)(1),(2).

29. *See id.* § 109(b)(1), 42 U.S.C. § 7409(b)(1), which states:

the public welfare.[30] The EPA Administrator promulgates both standards, publishing an air pollution list which includes specified air pollutants and "emissions which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger [the] public health and welfare."[31]

Sulfur dioxide was among the first air pollutants included on the Administrator's list.[32] Emissions of sulfur dioxide are a primary precursor to acid rain, which in turn is responsible for destroying our Nation's agriculture, lakes, and forests.[33] Notably, electric utilities are responsible for almost seventy percent of the total sulfur dioxide emissions in the United States.[34] In response to these figures, the 1990

> [N]ational primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

30. *See* CAA § 109(b)(2), 42 U.S.C. § 7409(b)(2), which states:

> any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which, in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare . . . .

31. *Id.* § 108(a)(1)(A), 42 U.S.C. § 7408(a)(1)(A).

32. *See* Union Electric Co. v. Environmental Protection Agency, 427 U.S. 246 (1976), *reh'g denied*, 429 U.S. 813 (1976) (stating in dictum that on April 30, 1971, the Administrator promulgated national primary and secondary standards for six air pollutants including sulfur dioxide). *See also* 40 C.F.R. § 50.4-50.5 (1975).

33. *See* CAA § 401(a), 42 U.S.C. § 7651(a), which states:

> The Congress finds that:
> (1) the presence of acidic compounds and their precursors in the atmosphere and in deposition from the atmosphere represents a threat to natural resources, ecosystems, materials, visibility, and public health;
> (2) the principal sources of the acidic compounds and their precursors in the atmosphere are emissions of sulfur and nitrogen oxides from the combustion of fossil fuels;
> (3) the problem of acid deposition is of national and international significance . . . .

34. *See* Carlos A. Gavilondo, Comment, *Trading Clean Air - The 1990 Acid Rain Rules: How They Will Work and Initial Responses to the Market System*,

Amendments imposed an 8.9 million-ton annual nationwide cap on sulfur dioxide emissions from coal-fired power plants.[35]

The Administrator must also promulgate monitoring methods which are subsequently used to determine emissions violations of air pollutants, including sulfur dioxide.[36] The EPA has already established regulations which "identify the test methods to be used as reference methods to the facility[,] subject to the respective standard."[37] In order to refer a case to the Department of Justice or to prove an emission violation in federal district court, or to issue a Notice of Noncompliance[38] (NON) under section 120 of the CAA, the EPA must have a compliance method to determine opacity.[39] The EPA rejected CEMS as the compliance method to determine opacity.[40] It should be noted, however, that under the Act's Title IV-A (Acid Rain) program,[41] CEMS are required to be installed at all utility and non-utility plants that produce sulfur dioxide and nitrogen oxides.[42] Although these affected facili-

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67 TUL. L. REV. 749, 753 (1993). *See also* Adam J. Rosenberg, Note, *Emissions Credit Futures Contracts on the Chicago Board of Trade: Regional and Rational Challenges to the Right to Pollute*, 13 VA. ENVTL. L.J. 501 (1994).

35. *See* CAA § 403(a)(1), 42 U.S.C. § 7651b(a)(1). This cap is to be achieved by the year 2000. *See id. See also* Carlos A. Gavilondo, Comment, *Trading Clean Air - The 1990 Acid Rain Rules: How they Will Work and Initial Responses to the Market System*, 67 TUL. L. REV. at 753.

36. *See* CAA § 108, 42 U.S.C. § 7408. *See* 40 C.F.R § 60 (1995).

37. 40 C.F.R § 60.11 (1995).

38. A Notice of Noncompliance is issued by the EPA when, on the basis of information available to the Administrator, the Administrator finds that the owner or operator is not in compliance with any emission limitation, emission standard or compliance schedule of a SIP or permit. *See* CAA § 120(a), 42 U.S.C. § 7420(a). The Administrator also assesses a noncompliance penalty against the violator. *See id.*

39. *See* Environmental Protection Agency CEM Guidance Document (Apr. 22, 1986).

40. *See id.*

41. *See* CAA § 401(b), 42 U.S.C. § 7651(b). Title IV-A is entitled Acid Deposition Control and its purpose is to "reduce the adverse affects of acid deposition through reductions in annual emissions of sulfur dioxide of ten million tons from 1980 emission levels, and, in combination with . . . nitrogen oxides emissions of approximately two million tons from 1980 emissions levels . . . ." *Id.*

42. *See* CAA § 404(a), 42 U.S.C. § 7651c(a). *See also* Dick Johnson, *Continuous Emissions Monitoring Devices*, 76 PLANT ENGINEERING 1991 (discussing the use and requirements of CEMS).

ties are required to have CEMS under the Act, the EPA does not require the owner or operator to supply it with the data for compliance purposes.[43]

Rather than utilizing CEMS to monitor opacity, the EPA has adopted a procedure known as Reference Method 9 (Method 9) analysis.[44] A Method 9 analysis is a visual observation of the plume or stack by a qualified observer.[45] The observer must be certified by the state and this certification is valid for six months.[46] When observing the stack, the observer stands with the sun to his back, and at a distance suffi-

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43. *See* 40 C.F.R. § 60.11(e)(5) (1995) "An owner or operator of an affected facility subject to an opacity standard *may* submit, for compliance purposes, continuous opacity monitoring system COMS data results produced during any performance test required under § 60.8 in lieu of Method 9 observation data." *Id.* (emphasis added).

44. *See* 40 C.F.R. § 60.11(b) "Compliance with opacity standards in this part shall be determined by conducting observations in accordance with Reference Method 9 in appendix A of this part, any alternative method that is approved by the Administrator, or as provided in paragraph (e)(5) of this section." *Id.*

45. *See* 40 C.F.R § 60, App. A. (1995). "Many stationary sources discharge visible emissions into the atmosphere; these emissions are usually in the shape of a plume. This method involves the determination of plume opacity by qualified observers." *Id.*

46. *See id.* at §§ 3.1, 3.2.

> To receive certification as a qualified observer, a candidate must be tested and demonstrate the ability to assign opacity readings in 5 percent increments to 25 different black plumes and 25 different white plumes, with an error not to exceed 15 percent opacity on any one reading and an average error not to exceed 7.5 percent opacity in each category.... The certification shall be valid for a period of 6 months, at which time the qualification procedure must be repeated by any observer in order to retain certification.
>
> The certification test consists of showing the candidate a complete run of 50 plumes - 25 black plumes and 25 white plumes - generated by a smoke generator. Plumes within each set of 25 black and 25 white runs shall be presented in random order. The candidate assigns an opacity value to each plume and records his observation on a suitable form. At the completion of each run of 50 readings, the score of the candidate is determined. If a candidate fails to qualify, the complete run of 50 readings must be repeated in any retest. The smoke test may be administered as part of a smoke school or training program, and may be preceded by training or familiarization runs of the smoke generator during which candidates are shown black and white plumes of known opacity.

Id.

cient to provide a clear view of the emissions.[47] Thus, in order to obtain accurate readings, the observer must have complete access to the plant and property.[48] Although required by the EPA, Method 9 has a margin of error greater than that of CEMS data and reports.[49] Therefore, a Method 9 analysis is not as reliable as CEMS data.

Method 9 has "received explicit judicial approval as used by the federal EPA."[50] When Method 9 has been identified as the applicable method, courts have refused to permit other evidence to establish emissions violations.[51] One reason for this action is that courts give great deference to EPA's interpretation of its regulations.[52] However, Congress' intent in passing the 1990 amendments was to establish continuous compliance with CAA.[53] For example, the 1990 Amendments limit the amount of time that may be given for a 'delayed

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47. *See id.* at § 2.1.

48. *See id.*

49. *See* 894 F. Supp. at 1459; *See also* 40 C.F.R. § 60, App. A, Method 9 (discussing controllable and uncontrollable factors that contribute to the magnitude of errors); City of Cleveland v. Cleveland Elec. Illuminating Co., No. 41808-11, 1981 WL 4710 (Ohio App. 1981) (discussing margins of error in Method 9 analysis).

50. Cleveland Elec. Illuminating Co., No. 41808-11, 1981 WL 4710, 4715; *See also* Portland Cement Ass'n. v. Train, 513 F.2d 506 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1025 (1975); Donna Hanna Coke Corp. v. Costle, 464 F. Supp. 1295 (W.D.N.Y. 1979).

51. *See* United States v. Kaiser Steel Corp., No. CV 82-2623-IH, 1984 WL 186690 (holding that compliance with visible emission limitation shall be determined in accordance with procedures specified in Method 9 analysis); United States v. SCM Corp., 667 F. Supp. 1110 (D. Md. 1987) (holding that violations of SIP emission limit could be shown only by evidence obtained according to EPA test Method 9; circumstantial evidence would not suffice). *Cf.* City of Cleveland v. Cleveland Elec. Illuminating Co., 448 N.E.2d 130 (Ohio 1983) (holding in a criminal trial that evidence of Method 9 analysis sufficient to establish violation of a city ordinance by emitting pollution greater than 20 percent opacity).

52. *See* Stinson v. United States, 508 U.S. 36, 45 (1993) (holding that the agency's interpretation of its regulation must be given controlling weight unless it is plainly erroneous); Arkansas v. Oklahoma, 503 U.S. 91, 108-11 (1992) (holding that the EPA's reasonable and consistent interpretation of its standards are entitled to substantial deference); United States v. Midwest Suspension and Brake, 49 F.3d 1197, 1203 (6th Cir. 1995) (giving great deference to the EPA's interpretation of the word "processing" in determining that defendant's rehabilitation of brake shoes constitutes "fabrication of friction products containing commercial asbestos" within the meaning of the CAA).

53. *See infra* Pt. IV.

compliance order' from a reasonable time to no more than one year after the date the order was issued.[54] Therefore, the EPA has revisited its test methods and CEMS regulations.[55]

The CAA requires each state to formulate, subject to the approval of the Administrator of the EPA, an implementation plan providing for the attainment of National Ambient Air Quality Standards (NAAQS).[56] The Supreme Court has noted that the requirements for SIPS designed to achieve NAAQS came about after Congress' "dissatisfaction with the progress of existing air pollution programs and a determination to take a stick to the states in order to guarantee the prompt attainment and maintenance of specified air quality standard."[57] Thus, states are charged with formulating pollution control strategies subject to the minimum compliance standards regardless of technological feasibility.[58] States may also include more stringent standards than the NAAQS require and, if accepted by the Administrator, the standards become enforceable under the CAA.[59] Thus, if a state's emissions regulations under the SIP provide that smoke and opacity emissions are to be measured by EPA Method 9 analysis, then that method is enforceable in both state court and fed-

54. *See* CAA § 113(a)(4), 42 U.S.C. § 7413(a)(4).

55. *See* Enhanced Monitoring Program, 58 Fed. Reg. 54,648 (1993) (to be codified at 40 C.F.R. § 60).

56. *See* CAA § 110, 42 U.S.C. § 7410.

57. *See* Union Elec. v. EPA, 427 U.S. 246, 249 (1976), *rehearing denied*, 429 U.S. 873 (1976).

58. CAA § 110, 42 U.S.C. § 7410. *See also* Senator Muskie's statement that

> the first responsibility of Congress is not the making of technological or economic judgments or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time.

116 CONG. REC. 532,901-02 (1970); Union Elec. Company v. Environmental Protection Agency, 427 U.S. 246.

59. *See* New Mexico Env't Dept. v. Roswell Tower, Inc., 32 F.3d 491, 494 (10th Cir. 1994) (holding that states may have more restrictive air quality regulations than are promulgated under the CAA); Friends of the Earth v. Potomac Elec. Power Co., 419 F. Supp. 528 (D.D.C. 1976).

eral district court.[60] If a state fails to submit a plan that satisfies the CAA requirements, the EPA is authorized to adopt a substitute plan that satisfies the CAA's requirements. This plan may also be used in both federal and state courts.[61]

2. Enforcement and Penalties

To meet the purposes set forth in the CAA, Congress armed citizens with a means to enforce the CAA's provisions by permitting citizens to bring suit against alleged polluters who violate emissions limitations.[62] Citizens may also bring suit against the Administrator "where there is alleged a failure to perform any act or duty which is not discretionary."[63] The 1990 Amendments broaden the scope of CAA citizen enforcement by adding the authority to enforce any of the provisions of the new general permit scheme of Title V, or any EPA-approved SIP.[64]

If a state has an approved SIP, primary enforcement power lies with the implementing state agency.[65] Although the state can only enforce a federally approved SIP through

60. *See supra note* 59. Most states' emission regulations provide for a EPA Method 9 analysis. *See, e.g.*, 5 C.C.R. 1001-3, § II.A(1).; Air Pollution Variance Board v. Western Alfalfa Corp., 553 P.2d 811 (Colo. 1976); Lloyd A. Fry Roofing Co. v. State, 524 S.W.2d 313 (Tex. App. 1975).

61. *See* CAA § 110(c), 42 U.S.C. § 7410(c).

62. *See id.* § 304(a)(1), 42 U.S.C. § 7604(a)(1). The provision provides that "any person may commence a civil action on his own behalf . . . against any person . . . who is alleged to have violated (if there is any evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation." *Id.* "An emission standard or limitation includes a schedule or timetable of compliance, emission limitation, standard of performance or emission standard . . . which is in effect under this chapter . . . or under an applicable implementation plan." *Id.* § 304(f)(1), 42 U.S.C. § 7604(f)(1).

63. *Id.* § 304(a)(2), 42 U.S.C. § 7604(a)(2).

64. *See* CAA § 304(f)(4), 42 U.S.C. § 7604(f)(4). The new provision authorizes suit to enforce "any other standard, limitation, or schedule established under any permit issue pursuant to [Title V] or under any applicable State Implementation Plan approved by [EPA], any permit term or condition, and any requirement to obtain a permit as a condition of operations." *Id.*

65. *See id.* § 114(b), 42 U.S.C. § 7414(b). *See also* Public Service Co. of Colo. 894 F. Supp. 1455; Roswell Tower, Inc., 32 F.3d at 492 (holding that primary responsibility to enforce the standards as manifested in the SIP are with the states).

the state administrative and judicial process,[66] the EPA has the authority to oversee state agencies.[67] If the state agency or the EPA fails for any reason to carry out its duties under the CAA, citizens may bring a suit directly against the alleged violator.[68] Thus, citizen suits are an intricate part of the Act's enforcement scheme and "reflect congressional recognition that neither the federal nor state governments have the resources to ensure that generators of air pollutants are consistently in compliance with the Act."[69]

Through citizen suits Congress also provided citizens with tools to enforce the provisions of the CAA.[70] Under section 7414(c), records, reports, or information required to be filed under the CAA, must be made available to the public for inspection with the exception of information involving trade secrets.[71] However, information and data can only be kept confidential from the public upon a showing of "overriding" necessity for protection, or if a state specifically provides for an explicit exception in the SIP.[72] Although this data is available to the public, citizens cannot use it to enforce emission standards or to establish an emissions violation.[73]

In order to enforce emissions standards under the Method 9 analysis, an observation would have to be made by an individual who is not only certified by the state, but who also has access to the premises.[74] State and federal officials have a right to enter the premises to perform the observa-

66. *See* EPA v. AM General Corp., 808 F. Supp. 1353, 1358 (N.D. Ind. 1992); Roswell Tower, Inc., 32 F.3d at 492.

67. *See* CAA § 114(b)(2), 42 U.S.C. § 7414(b)(2).

68. *See supra* text accompanying note 62.

69. Public Service Co. of Colo., 894 F. Supp. at 1459. *See also* Clean Air Act Amendments 136 CONG. REC. S.2826-01 (daily ed. Mar. 21, 1990). The debate surrounding the Amendments is proof that citizen suits provide essential means for enforcement of environmental standards in furtherance of the purpose of the CAA.

70. *See* CAA § 114, 42 U.S.C. § 7414.

71. *See id.* § 114(c), 42 U.S.C. § 7414(c).

72. *See* Natural Resources Defense Council, Inc., v. EPA, 494 F.2d 519 (2d Cir. 1974) (holding that New York should have explicitly provided an exception for emissions data in the SIP and that public disclosure prevails).

73. *See infra* Pt. B.

74. *See* 40 C.F.R. § 60, App. A, Meth. 9, at 657.

tions, but citizens do not.[75] "Thus, the only way a citizen group can obtain a Method 9 reading is to hire a certified observer who would then either enter the premises illegally or request permission from the alleged violator to enter the premises."[76] However, citizens can always file complaints with the appropriate federal and state agency.

The CAA provides for civil, administrative, and criminal penalties.[77] The EPA may issue a compliance order to a person who has violated or is violating the requirements of the CAA.[78] Compliance orders require an entity to come into compliance with emission standards or limitations "as expeditiously as practicable," but no later than one year after the order is issued.[79] EPA may also bring an enforcement action in federal district court to seek civil penalties for current or past violations and injunctive relief.[80] The 1990 Amendments allow citizens to sue for civil penalties as well as injunctive relief.[81] Citizens may also bring a suit against the Administrator where there is an "alleged failure of the Administrator to perform any act or duty . . . which is not discretionary with the Administrator . . . ."[82]

The 1990 Amendments have authorized the Administrator to impose penalties on alleged violators without the filing

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75. *See* CAA § 114(a)(2), 42 U.S.C. § 7414(a)(2). *See also* Public Service Co. of Colorado, 894 F. Supp. at 1460.

76. Public Service Co. of Colorado, 894 F. Supp at 1460.

77. *See* CAA § 113(a), (c)-(d), 42 U.S.C. § 7413(a), (c)-(d).

78. *See id.* § 113(a)(4), 42 U.S.C. § 7413(a)(4).

79. *See id.*

80. *See id.* § 113(b), 42 U.S.C. § 7413(b). Civil penalties can be assessed up to $25,000 per day and are payable to the government in citizen suits. *See id.* § 113(b), 42 U.S.C. § 7413(b). However, some courts have allowed the penalties to be channeled towards a mitigation clean up project. *See id.* § 113(b), 42 U.S.C. 7413(b).

81. *See id.* § 304, 42 U.S.C. § 7604, which states in pertinent part:

> [A]ny person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation . . . (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

82. *Id.* § 304(a)(1), 42 U.S.C. § 7604(a)(1).

of a suit.[83] This will allow the assessing of non-compliance penalties equal to the economic benefit that the source received from not complying with the CAA.[84] The CAA sets forth a "Penalty Assessment Criteria" which establishes factors to be assessed in the penalty phase of the trial.[85] Moreover, the criteria establishes that "in determining the amount of any penalty under section 7604(a) of this title, the court, as appropriate, shall take into consideration the duration of the violation as established by any credible evidence (including evidence other than the applicable test method)."[86] This section has been interpreted to mean that Congress intended to give data and reports from CEMS the same great weight of authority as Discharge Monitoring Reports are given under the Clean Water Act.[87] However, until the decision in *Public Service Co.*,[88] the EPA regulations requiring a Method 9 analysis has resulted in only a few successful citizen suits.[89]

Penalties received for violations of non-compliance are deposited into the U.S. Treasury for use by the Administrator to finance air compliance and enforcement.[90] The court, in its discretion, has the authority under the Act to order the penalties collected to be used for mitigation projects, consistent with the Act, to enhance public health and/or the environment.[91] In doing so, the court must consult with the Administrator in selecting any projects.[92] The Act also provides

83. *See id.* § 113, 42 U.S.C § 7413.

84. *See id.* § 120, 42 U.S.C. § 7420.

85. *See* CAA § 113(e)(2), 42 U.S.C. § 7413(e)(2). Factors include whether the violator can establish that there were intervening days during which no violation occurred or that the violation was not continuing in nature. *See id.*

86. *Id.* § 113(e)(1), 42 U.S.C. § 7413(e)(1).

87. *See id.* § 118, 33 U.S.C. § 1318. *See, e.g.*, Sierra Club v. Union Oil Co. of Cal., 813 F.2d 1480 (9th Cir. 1987); Natural Resources Defense Council, Inc., v. Outboard Marine Corp., 702 F. Supp. 690 (N.D. Ill. 1988); Atlantic States Legal Fund v. Al Tech Specialty Stell Corp., 635 F. Supp. 284 (N.D.N.Y. 1986).

88. 894 F. Supp. 1455.

89. *See supra* text accompanying note 46.

90. *See* CAA § 304(g)(1), 42 U.S.C. § 7604(g)(1).

91. *See id.* § 304(g)(2), 42 U.S.C. § 7604(g)(2).

92. *See id.*

that any penalty or mitigation payment shall not exceed $100,000.[93]

B. Relevant Case Law

In *United States v. Kaiser Steel Corp.*,[94] (*Kaiser*) "the EPA argued that it should be able to prove violations based on evidence other than the applicable 'reference' test method."[95] Section 113(a) of the CAA allowed the initiation of an enforcement action based on any information available to the Administrator.[96] The court rejected the EPA's argument and ruled that expert testimony, regarding the opacity of the exhaust gases of Kaiser's blast furnace, was inadmissible because the testimony did not comply with the applicable test method.[97] Thus, the EPA was limited in proving violations on days for which reference test data was available. In issuing an injunction, the court held that "pursuant to this court's ruling, compliance with the visible emission limitation shall be determined in accordance with the procedures specified in the Code of Federal Regulations."[98]

A similar result occurred in *United States v. SCM Corp.*,[99] when the court was faced with the issue of whether circumstantial evidence sufficed to establish a violation of a SIP.[100] The plaintiffs sought "injunctive relief and imposition of civil penalties" against a manufacturer of titanium dioxide.[101] The plaintiffs claimed that the manufacturer polluted the ground with sulfuric acid, thereby causing a significant health hazard.[102] In addition, the plaintiffs introduced expert testimony establishing emissions violations.[103] The

93. *See id.*
94. United States v. Kaiser Steel Corp., No. CV 82-2623-IH, 1984 WL 186690.
95. 58 Fed. Reg. 54,649 (1993) (to be codified at 40 §§ 51, 52, 60, 61, 64).
96. *See* CAA § 113(a), 42 U.S.C. § 7413(a).
97. *See* Kaiser, No. CV 82-2623-IH, 1984 WL 186690.
98. *Id.* at 4.
99. United States v. SCM Corp., 667 F. Supp. 1110 (D. Md. 1987).
100. *See id.*
101. *See id.*
102. *See id.* at 1130.
103. *See id.*

court stated: "It may be true that the ground level concentrations of sulfuric acid mist equal to those predicted by [the expert] would constitute a significant hazard to the public health. Nevertheless . . ., [the predicted] concentrations are based on unreliable data and assumptions."[104] The court held that the tests performed using the EPA "stack method" were the only reliable submissions that could be shown to establish an emissions violation.[105] Since the method was also adopted in the SIP and regulated by the EPA, it was considered to be the only method of credible evidence to establish an emission violation.[106]

Method 9 results have also been introduced in criminal enforcement actions as evidence establishing a violator's guilt.[107] In *City of Cleveland v. Cleveland Electric Co.*,[108] a criminal conviction based on Method 9 analysis was upheld by the Supreme Court of Ohio.[109] The Ohio Court of Appeals reversed the lower court, only because of contradictions found among four investigators.[110] The court recognized that although there is some human error associated with Method 9, it is still reliable evidence, and could be introduced either by testimony of the inspector performing the Method 9, or by his reports.[111] However, the State Supreme Court reversed the Ohio Court of Appeals, stating that the methodology of performing a Method 9 analysis does not have to be proven beyond a reasonable doubt.[112] The Court further held that testimony by the inspectors was sufficient to satisfy the element of the offense that the defendant violated opacity standards.[113]

104. United States v. SCM Corp. 667 F. Supp. at 1130.
105. *See id.*
106. *See id.*
107. *See* City of Cleveland v. Cleveland Elec. Illuminating Co., 448 N.E.2d 130.
108. *Id.*
109. *See id.*
110. *See* City of Cleveland v. Cleveland Elec. Illuminating Co., 1981 WL 4710.
111. *See id.*
112. *See* City of Cleveland v. Cleveland Electric Illuminating Co., 448 N.E.2d 130.
113. *See id.*

III. *Sierra Club v. Public Service Co. of Colo.*[114]

A. Facts and Procedural History

The Public Service Company (PSC) became the operator and partial owner of Hayden Station in 1992.[115] The PSC purchased its interest through the Colorado Ute Electric Association bankruptcy proceedings.[116] The PSC received an audit from the Colorado Ute Electric Association outlining the problems with the station's air pollution control equipment.[117] A control feasibility study recommended installation of baghouses[118] at the station as "the best method to reduce visible plume."[119]

Hayden Station is subject to Colorado's air quality regulation "which provide[s] that no owner or operator of either a new or existing source will permit emissions of any pollutant in excess of 20% opacity."[120] The Colorado emissions regulations provide that smoke and opacity emissions shall be measured by EPA Method 9 analysis.[121] Pursuant to Colorado regulations, Hayden Station is also required to have a "continuous emissions monitoring system for the measurement of opacity."[122]

The "PSC submits quarterly reports to the Colorado Department of Health (CDH) which document at six-minute intervals the opacity readings from the CEMS."[123] These reports also contain a computerized listing of the entire CEM data, including a listing of each occurrence in which the unit exceeded opacity and "the operator's reasons for the excess

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114. 894 F. Supp. 1455.

115. *See id.* at 1456. The "Hayden station is a fossil fuel-fired steam generating facility located near Hayden, Colorado." *Id.* By burning coal, which in turn creates steam, the plant produces electricity. *See id.*

116. *See id.* at 1456.

117. *See* 894 F. Supp. at 1456.

118. Baghouses are buildings in which bag filters are used for filtering out sentiment that is expelled in the manufacturing process. *See* WEBSTERS NEW INTERNATIONAL DICTIONARY 204 (2nd ed. 1958).

119. 894 F. Supp at 1457.

120. *Id.* *See also*, 5 C.C.R. 1001-3, § I(A), II.(A).1 (1990).

121. *See* 5 C.C.R. 1001-3, § II.A.1.

122. 5 C.C.R. 1001-3, § VI.B.1. (1990).

123. Public Service Co. of Colo., 894 F. Supp. at 1457.

emission."[124] "According to the reports [submitted], the Hayden Station has exceeded the 20% opacity at least 19,727 times in the past five years."[125]

In the past five years, Hayden Station has received two notices of violation from the CDH.[126] On February 13, 1989, the first violation was issued for excess opacity emissions from Unit 2.[127] The CDH then performed subsequent testing and chose not to seek enforcement action.[128] On September 27, 1993, the station received another notice of violation for excess opacity levels and had to pay a $3,000 dollar civil penalty pursuant to a compliance order.[129]

The Plaintiffs in *Public Service Co.*[130] allege four claims.[131] One of the claims alleges that the defendant violated the CAA in excess of 19,000 times in the past five years by exceeding 20% opacity; another claim alleges that the defendant caused excessive discharge of pollutants constituting a "modification" without the requisite permit when the defendant operated one-half of its electrostatic precipitator while dysfunctional.[132] A third claim alleges that the defendant violated Colorado regulation 5 when the Hayden Station failed to operate in a manner consistent with good air pollution control practices.[133] The Plaintiff moved for partial summary judgment on liability, and Defendant moved for summary judgment.[134]

B. Reasoning and Holding

The district court granted partial summary judgment on Plaintiff's motion. The court held that in a citizens suit under

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124. *Id.*
125. *Id.*
126. *See id.* at 1458.
127. *See id.*
128. *See* Public Service Co. of Colo., 894 F. Supp. at 1458.
129. *See id.*
130. *Id.*
131. *See id.*
132. *See id.* at 1456.
133. *See* Public Service Co. of Colo., 894 F. Supp. at 1456. The plaintiffs violated 5 C.C.R 1001-8 Part A. *See id.*
134. *See id.* at 1455.

the CAA, violations of opacity may be established by CEMS records and reports since that data carries with it high indicia of reliability and probative value.[135] The court reasoned that CEMS data and reports constitute evidence of emissions violations in light of the statutory and regulatory scheme.[136] The court stated:

> this holding is bolstered by the 1990 Amendments to the [CAA] which added a new section 113(e) . . . . The amendment clarifies that courts may consider any evidence of violation or compliance admissible under the Federal Rules of Evidence, and that they are not limited to consideration of evidence that is based solely on the applicable test method in the [SIP] or regulation.[137]

In analyzing CEMS, the court noted that "CEMS maintenance and reporting alone impart a high degree of probative reliability to the CEMS data and reports."[138] The court reasoned that "if such records are probative of compliance with the Act they are probative of the Act's violation."[139] The court relied upon a number of factors in reaching the conclusion that CEMS data is reliable to establish emission violations. First, the Colorado Dept. of Health, in its amicus brief, stated "that its exclusive reliance on Method 9 to show emissions violations stemm[ed] from ambiguity of applicable language, not unreliability of CEMS data and reports."[140] It also noted that the defendants did not dispute the reliability of CEMS data over Method 9 in an earlier proceeding involving another plant.[141]

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135. *See id.*

136. *See id.* at 1461.

137. Public Service Co. of Colo., 894 F. Supp. at 1461.

138. *Id.* at 1459 (citing Garner v. United States, 424 U.S. 648 (1976); United States v. Ward, 448 U.S. 242 (1980)).

139. Public Service Co. of Colo., 894 F. Supp. at 1459. "Given the known limitations upon the accuracy of Method 9, petitioner (PSC) requests that the COMS data be considered conclusive evidence and, accordingly, the alleged violation be dismissed." *Id.* at 1459-60.

140. *Id.* at 1460.

141. *See id.* at 1459.

The court considered the purpose of the CAA, as expressed by Congress, recognizing that citizens are an intricate part of the enforcement scheme under the Act.[142] The court scrutinized the Defendant's argument that emissions violations could only be established through Method 9, and that using CEMS data, or any other test method, would constitute a judicial amendment.[143] In doing so, the court stated that the "defendants restrictive construction of the regulatory scheme guts the interstitial remedial functions of the Act's citizen suit provisions contrary to the overriding purpose of the [CAA]."[144] The court acknowledged that both federal and state regulations (including the state SIP) promulgated Method 9.[145]

The court also recognized that an EPA guidance document states that the "legal requirement [for measuring emissions] must specify CEMS as the Compliance Method in order for EPA to rely on CEMS data alone to refer a case to the Department of Justice (DOJ), to prove a violation of an emission limitation in Federal District Court, or to issue a Notice of Noncompliance."[146] Nevertheless, the court ruled that the purpose of the CAA was to empower citizens to enforce its provisions; but the court also stated that it would be impossible for citizens to do so, especially considering that Method 9 requires a certified observer to make a determination of emission violations.[147]

The court stated "if [it were to] accept defendant's argument that only Method 9 observations may be used to prove violations of the CAA, it follows that the alleged violator is afforded a large measure of control over enforcement of the Act by citizens groups."[148] "Such a result would be contrary to the Act's purpose and undermine congressional intent."[149] Moreover, the court stated that "an entity which has notice as

142. *See id.* at 1459.
143. *See* Public Service Co. of Colo., 894 F. Supp. at 1459.
144. *Id.* at 1460.
145. *See id.* at 1459.
146. *Id.* at 1459.
147. *See id.*
148. Public Service Co. of Colo., 894 F. Supp. at 1460.
149. *Id.*

to when an observation is to occur will be motivated to meet the compliance standard at that time, but continuous compliance, not contrived compliance, is the goal."[150]

The Plaintiff's claim that a modification occurred when the Defendants continued to operate after one-half ESP[151] failed was dismissed.[152] Basing its decision upon Hayden's previous violations, the condition of the units, and the current opacity violation, the court held that Hayden Station failed to operate in a manner consistent with good air pollution control practices for minimizing emissions.[153] Following the decision, the Defendants have indicated that they would seek to have the ruling overturned in the Appellate Court, but as of this draft no appeal has been filed.[154]

IV. Analysis

Reporting requirements impart a high degree of probative reliability.[155] The United States General Accounting Office stated in its report to the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, and House of Representatives that:

> it is fair to assume that compliance data being reported by states do not indicate what is happening at a facility on a day-to-day basis, but rather whether the source has been determined to be in compliance at an announced inspection

150. *Id.*

151. ESP is an electrostatic precipitator that when dysfunctional causes an excessive discharge of pollutants. *See id.* at 1461. *See also* 5 C.C.R. § 1001-2 (1995).

152. *See* Public Service Co. of Colo., 894 F. Supp. at 1461.

153. *See id.* at 1460.

154. *See Utility Violated Opacity Standard at Colorado Power Plant*, National Environment Daily (BNA), July 27, 1995. Susan Stallworth, spokesperson for the company, told BNA that the utility will seek an appeal because the decision "has major implications for other utilities and industries in Colorado and throughout the United States." *Id.* However, the defendants have failed to file an appeal as of the date of this publication.

155. *See, e.g.*, Garner v. United States, 424 U.S. 648. Information reported on a tax return is not compelled by the taxpayer, but the information contained in returns can be used against him regardless of Fifth Amendment objections. Thus, the maintenance and reporting system have probative reliability. *See* United States v. Ward, 448 U.S. 242.

> after it has had the opportunity to optimize the performance of its control equipment. Thus, it indicates whether the source is capable of being in compliance rather than whether it is in compliance in its day-to-day operations.[156]

Congress recognized that the purpose of the Act could only be fulfilled when the entity investigated was not forewarned of an inspection.[157] The Amendments now require owners or operators to document whether an emissions unit remains in compliance with applicable emission limitations or standards over time.[158] Congress noted that similar provisions are contained in the Clean Water Act, which requires Discharge Monitoring Reports (DMRs) for companies discharging pollutants into waters.[159]

The court's reasoning in *Public Service Co.*,[160] that CEMS data imparts a high degree of reliability and thus admissible evidence to establish emissions violation, is consistent with congressional intent in enacting the 1990 Amendments.[161] Congress, in enacting the amendments, was seeking to achieve continuous compliance at pollution sources. CEMS, unlike a Method 9 analysis, measures pollution on a continuous basis, and thus achieves the goal set forth by Congress.[162] It is analogous to the DMRs that are required under the Clean Water Act.[163] However, the EPA

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156. UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, COMMITTEE ON ENERGY AND COMMERCE (1991).

157. *See* S. REP. No. 228, 101st Cong., 1st Sess. 1, 368 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385.

158. *See* CAA § 114(a), 42 U.S.C. § 7414(a). *See also* Enhanced Monitoring Program, 58 Fed. Reg. 54,648 (1993) (to be codified at 40 C.F.R. §§ 51, 52, 60, 61, 64) (proposed Oct. 22, 1993). This would provide that facilities regulated under the CAA would have to establish a CEMS and, moreover, it would set forth that data collected from CEMS can be used to establish emission violation. This regulation would, in effect, make a Method 9 analysis irrelevant. *See id.*

159. *See* David T. Buente, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop*, 21 ENVTL. L. 2233 (1991) (comparing CWA reporting requirements and the 1990 Amendments to the CAA).

160. 894 F. Supp. 1455.

161. *See id.* at 1459.

162. *See supra* text accompanying note 6.

163. *See supra* text accompanying note 156 for discussion on Discharge Monitoring Reports under the Clean Water Act.

does not require that an owner or operator submit CEMS data for compliance purposes.[164]

Congress realized the impact of the court's decision on citizen suits in *Kaiser*,[165] and in effect overruled *Kaiser*[166] with the passage of the 1990 Amendments which added a new section to the CAA; 113(e).[167] This section provides that in "determining the amount of any penalty to be assessed under [citizen suit provision] the court, as appropriate, shall take into consideration the duration of the violation as established by any credible evidence [including evidence other than the applicable test method]."[168] Therefore, the court's reasoning in *Public Service Co.*,[169] that "the amendment clarifies that courts may consider any evidence of violation or compliance admissible under the [FRE], and that they are not limited to the consideration of evidence that is based solely on the applicable test method in the [SIP] or regulation[s]," is rational and not an act of Judicial Amendment.[170]

This court was correct in looking at the plain language of the Amendments and their legislative history in deciding not to give great deference to the EPA regulations or Guidance Document requiring CEMS to be specified as the compliance method for determining emissions violations. The Supreme Court held in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*[171] that an agency's interpretation of its regulations must be given controlling weight unless it is plainly erroneous.[172] The Defendant in *Public Service Co.*[173] relied

164. *See* 40 C.F.R. § 60.11(e)(5).

165. United States v. Kaiser Steel Corp., 1984 WL 186690. *See also* United States v. SCM Corporation, 667 F. Supp. 1110 (holding that since the "stack method" was adopted in the SIP and regulated by the EPA, it was considered to be the only credible evidence to establish an emission violation).

166. *See* SCM Corporation, 1984 WL 186690.

167. *See* Public Service Co. of Colo., 894 F. Supp. at 1460 (stating that the amendment overrules the ruling in United States v. Kaiser Steel Corp., 1984 WL 186690).

168. CAA § 113(e)(1), 42 U.S.C § 7413(e)(1).

169. 894 F. Supp. 1455.

170. *See id.* at 1461.

171. Chevron, U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

172. *See id.*

upon the EPA guidance document and its regulations requiring a specific test method to be employed when determining violations.[174] The court's rejection of that argument is consistent with *Stinson*.[175] The court reasoned that "defendant's restrictive construction of the regulatory scheme guts the interstitial remedial functions of the Act's citizen suit provisions contrary to the overriding purpose of the CAA."[176] Thus, the court concluded that the EPA's regulation itself contravened Congress' intent in passing the 1990 Amendments and section 113(e).[177]

The courts decision broadens the scope for citizen enforcement. Citizen groups enforcing provisions of the CAA will now have greater ability to enforce emissions violations on a regular basis through CEMS. Citizen groups will no longer have to hire their own certified observer or rely upon the EPA or other authority to make a Method 9 observation. The CEMS data is available to the public and violations can be monitored more readily. Moreover, under the court's interpretation of the 1990 Amendments and section 113(e), citizen groups may now utilize any evidence acceptable under the FRE. For example, "courts may consider expert testimony and bypassing and control malfunctions, even if they are not the applicable test methods."[178]

However, many provisions in applicable SIPs and in existing federal regulations continue to be in conflict with the statutory provisions of the 1990 Amendments.[179] Accordingly, the EPA is "planning to call for States to amend their applicable implementation plans to ensure that owners or operators may use enhanced monitoring . . . for compliance certification purposes, and that data from this monitoring, along with any other credible evidence, may be used as evidence of a violation of an applicable plan."[180] The EPA proposed a

173. 894 F. Supp. 1455.
174. *See id.* at 1459.
175. 508 U.S. 36.
176. 894 F. Supp. at 1460.
177. *See id.*
178. 58 Fed. Reg. at 54,659.
179. *See, e.g.*, 40 C.F.R §§ 52.12(c), 60.11, 61.12 (1995).
180. 58 Fed. Reg. at 54,660 (1993).

rule pursuant to the CAA in October 1993, which has not yet become final.[181] The proposed rule would establish criteria and procedures that owners or operators must satisfy in selecting and evaluating emissions monitoring systems.[182] Specifically, it proposes a new Enhanced Monitoring Program[183] to perform enhanced monitoring at significant emissions units of air pollution.[184] The purpose of the enhanced monitoring is to "provide a means for determining and certifying whether compliance is continuous or intermittent."[185]

To achieve this goal, the EPA proposes to make amendments to the general provisions in federal regulations, and issue a call for a SIP revision to correct any deficiencies in state regulations.[186] However, it has been over two years since the EPA has issued the proposed rule, and the EPA has not made a final rule determination.[187] In 1994, the House Subcommittee on Energy and Power heard testimony that CEMS should be required in all facilities to determine compliance, however, the EPA had not acted to make them a requirement.[188] There are some reports that the EPA is hesitant in making the final rule determination because it intends to wait until there is some agreement with the electric utility industry.[189] Nevertheless, this rule should be implemented forthwith given the ambiguities amongst responsible parties.

CEMS and other similar systems impart a higher degree of reliability for emission violations than Method 9 analysis.[190] Even in situations where they are not required by the CAA regulations, CEMS can provide superior sampling test-

181. *See id.*
182. *See id.* at 54,648.
183. *See* CAA § 114(a)(3), 42 U.S.C. § 7414(a)(3).
184. *See* 58 Fed. Reg. at 54,660 (1993).
185. *Id.* at 54,659.
186. *See id.*
187. As of publication of this Case Note, the EPA has not issued a final rule.
188. *See* Prepared Testimony of David D. Hawkins Senior Attorney Natural Resources Defense Council Before the Subcommittee on Energy and Power Committee on Energy and Commerce (Oct. 5, 1994) *in* Federal News Service, Oct. 1994.
189. *See supra* text accompanying note 12.
190. *See supra* text accompanying note 46.

ing and analyses of stack gases.[191] Moreover, CEMS provides such data at consistent intervals which allows for continuous enforcement.[192] The self-monitoring program can also "quickly alert owners or operators so that they may take corrective or preventive action in order to prevent non-complying conditions and to minimize the amount of environmental harm caused."[193] By enacting this regulation the EPA would be carrying out the intent of Congress in passing the 1990 Amendments, and it would also create continuous compliance rather than contrived compliance. Moreover, "the proactive stance of an environmentally responsible corporation does not go unnoticed by government agencies (like EPA) and the surrounding community."[194]

The court's holding not only provides a direct environmental benefit of decreased emissions but it also provides an economic benefit.[195] "Increased compliance rates would lower the long-term overall costs of air pollution control by decreasing the need for additional command and control regulations to obtain the necessary emission reductions."[196] "It would alert owners or operators that potential control device problems may exist."[197] In turn, they can use this information to target control devices for routine maintenance and repair, and reduce the potential of significant, costly breakdowns.[198] Thus, the court's rationale and holding provide both a social and economic benefit to society.

191. *See supra* text accompanying note 184.

192. CEMS provides for monitoring emissions on an intermittent schedule, usually measuring emissions every fifteen minutes where a method 9 analysis must be done during the daytime hours. *See supra* pt. A.1. for a more detailed discussion.

193. 58 Fed. Reg. at 54,654.

194. *Id.* at 54,660.

195. *See id.* The proposed rules discusses the benefits of Enhanced Monitoring outlining the environmental and economic benefits. *See id.*

196. *Id.*

197. 58 Fed. Reg. at 54,654.

198. *See id.*

V. Conclusion

The court in *Public Service Co.*[199] was correct to allow CEMS data as evidence of emissions violations. It recognized the importance of continuous compliance, and the need for citizens to monitor polluters in order to create a more healthy society. Moreover, the court acknowledged the intent of Congress when Congress passed the 1990 Amendments to the CAA. The court agreed with Congress that polluters should be in continuous compliance.

The EPA should move to enact the proposed regulation requiring CEMS in all new and existing stationary sources. By enacting the regulation, owners and operators will be on notice that any evidence of emission violation can be introduced under the Federal Rules of Evidence. However, until this regulation is codified, citizens will have to rely on the holding in *Public Service Co.*[200]

Given the court's sound reasoning in holding that CEMS data is reliable and admissible, the likelihood of the Defendants' successfully overturning the court's ruling on appeal should be minimal. Therefore, the Defendants should redirect their resources to ensure clean air instead of spending their time and resources on attorneys in order to appeal the decision.

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199. 894 F. Supp 1455.
200. *Id.*