MEMORANDUM

DATE: December 1, 2004

TO: District and Local Compliance and Enforcement Contacts

FROM: Greg DeAngelo

SUBJECT: **Stack Testing: "Operational Tests" versus "Compliance Tests"**

Summary

What is the difference in the general procedures to be followed when evaluating a compliance test versus an operational test?

- Compliance test – notification is required; a passing test demonstrates compliance; and a failing test is evidence of a violation.
- Operational test – notification is not required; a passing test cannot be used to demonstrate compliance; and a failing test is a good reason to believe that there is a violation (but the failed test alone may not constitute evidence of a violation).

Background

For purposes of this memo, the following terms are defined:

- Compliance test is a test required by permit, Federal rule, county rule, or SIP (see Rule 62-297.700, F.A.C.). The purpose of this type of stack test is to demonstrate compliance with an applicable emissions limit.
- Operational test is an optional, internal test performed at a facility's discretion. The purpose of this type of test is to evaluate an emissions unit, gauge the effectiveness of adjustments to process or control equipment, or something similar.

Historically, Department of Environmental Protection (DEP) has suggested treating these two types of stack tests differently. Each stack test will be of one type or the other, and the types have the following characteristics:

- Compliance tests...
  - ...the facility follows the specified U.S. Environmental Protection Agency (EPA) test method.
  - ...the facility must notify the compliance authority prior to conduction the test. This is a necessary step; without notification of the test, the test cannot be considered a "compliance test." Instead, the test would be considered an "operational test."
  - ...the facility can use a passing test to demonstrate compliance with an applicable emissions limit.
  - ...the compliance authority can use a failing test as evidence of a violation and should pursue an appropriate enforcement response.
- Operational tests...
  - ...the facility may follow the EPA test methods or it may use an alternative or truncated method. For example, the facility might performed a visible emissions evaluation instead

of a specified Method 5 particulate matter test, or it may only conduct one run of a three-run test method.

- ...the facility does not need to notify the compliance authority. If the facility does provide notification, however, the test becomes a "compliance test."
- ...the facility cannot use a passing test to demonstrate compliance with an applicable emissions limit.

  Note: A common example is an application for permit modification submitted for changing the method of operation or the allowable fuel mix. The applicant claims that compliance with the current emission limits can be achieved under the new, modified conditions; these claims are often based on a series of internally conducted stack tests. These tests are "operational tests," as the District Office or Local Program had no opportunity to observe the tests. These tests cannot be used (by themselves) as reasonable assurance for permit issuance.
- ...a failing test may not be sufficient evidence to make a determination of an emissions violation.

  Note: This last point is somewhat contentious and is discussed in detail below. A common example is a series of operational tests conducted after a failed compliance test; the series of tests is conducted to help the plant determine how to return to compliance. Some operational tests show compliance with the emission limits, and some show violations. The continuing violation in this case would run from the failed <u>compliance test</u> to the next passing <u>compliance test</u>, as supported by the failed operational tests that fell in between the two.

Supporting Guidance

Rule 62-297.310(7)(a)9., F.A.C., requires notification to the Department for all "formal compliance tests." The rule applies only where stack testing is required (see Rule 62-297.310(7), F.A.C.), therefore notification is necessary for all required stack tests. Guidance memorandum DARM-OGG-04 (Mar 1, 2000) confirms that the owner must notify the Department prior to a required stack test; it also notes that if the results of a required test "show a failure to meet the applicable standard or permit condition, the Department shall initiate appropriate enforcement action." Taken together, these two references support the <u>compliance test</u> position outlined above.

For <u>operational tests</u>, the EPA's stack test guidance (Feb 2, 2004) confirms:

> Notification is not necessary if the stack test is being conducted for the facility's own benefit (i.e., not required by regulation, permit or enforcement order). However, if the facility fails such a test and is a Title V major source, the facility must report the failure and submit the relevant test data to the delegated agency pursuant to the reporting requirements of Title V.

Note that all SIP-issued permits will contain a similar condition requiring all facilities to report any non-compliance, regardless of whether the source is subject to Title V. See permit general conditions or Rule 62-4.160(8), F.A.C.

Operational tests cannot be used by the facility to support a claim that the facility is in compliance with the applicable emission limits; only compliance tests can be used for this purpose. This position is in accord with the Emissions Monitoring Section. As an example letter from the Emissions Monitoring Section to Jefferson Smurfit Corporation (August 18, 2004) indicates:

> [More importantly,] JSC did not provide notification of the Method 29 testing because it was for internal purposes and, as a result, the testing was not witnessed by the department. Because the department was not afforded the opportunity to observe the testing, it would be inappropriate to accept the results of this test for any sort of compliance determination.

Credible Evidence Implications

The gray area, case-by-case determination aspect of this issue comes into play when a facility fails an <u>operational test</u> and subsequently reports the failure to the compliance authority (as required by 62-4.160(8), F.A.C.).

On the one hand, EPA's stack test guidance notes that "failing a stack test at any time is a violation for which appropriate enforcement should be taken." EPA's interim policy and guidance on the use of credible evidence in air enforcement activities (April 29, 1997) supports the idea that EPA and the states can rely upon any credible evidence to establish a violation and seek appropriate relief. On the other hand, since the compliance authority did not witness the operational test, the results may be questionable; the test may not be sufficient evidence on its own to establish a violation.

For an operational test (which by definition is an unobserved stack test), the compliance authority must decide whether the results constitute credible evidence of a violation. This is a case-by-case decision that should be made at the local level, where the compliance authority is familiar with the stack testing companies, the facilities, the operating conditions, and other factors. Regardless of whether there is enough evidence to support an emissions violation, a source that does not report an operational test showing non-compliance is in violation of the notification requirements of 62-4.160(8), F.A.C. This is an important notification because the compliance authority must be given an opportunity to review the failed operational test to see if it provides evidence of an emissions violation or an incentive for requiring a follow-up compliance test.

Summary

For state purposes, a failed <u>operational test</u> may not constitute the sole evidence of a violation. Corroborating evidence (e.g., continuous monitor data, known equipment failures, other records, or failed compliance tests) may support the finding of an emissions violation. But at a minimum, a failed operational test must be considered to be good reason to believe that the applicable emission standard is being violated. The compliance authority must require the owner to conduct a <u>compliance test</u> pursuant to Rule 62-297.310(7)(b), F.A.C.; the facility must therefore provide notification prior to the compliance test, and upon a failure, the compliance test results can clearly be used to establish a violation.