

Non-Mandatory Emission Testing: To Test or Not to Test?

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Roadmap

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- Mandatory Emission Testing
- Non-Mandatory Emission Testing
- ADEM Protocol & Requirements
- The Attorney-Client Privilege
- Attorney Work Product Doctrine

Mandatory Emission Testing

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Mandatory Emission Testing

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- Mandatory or “compliance testing” is required by either the EPA or your State/local agency at nearly all industrial facilities in the US. However, the frequency of testing is dependent on a large number of factors.

Mandatory Emission Testing

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- Factors that Influence Testing Frequency
 - NSPS/MACT
 - Age of facility/unit (construction date)
 - Location of facility (State)
 - Facility type (NAICS Code)
 - Major or Area Source of HAPs

Mandatory Emission Testing

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With the varying range of compliance testing frequency, facilities with less frequent testing requirements may be inadvertently exposed to an increased risk of non-compliance.

Mandatory Emission Testing

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- Example: NESHAP (MACT) 5 Year Testing
 - Facility conducts initial performance test and passes but fails subsequent test.
 - When did the non-compliance begin?
 - What could the facility have done to mitigate this situation?

Non-Mandatory Emission Testing

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Non-Mandatory Emission Testing

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- Non-Mandatory or “engineering testing” is any testing that a facility conducts outside of EPA/State mandated compliance testing.

Non-Mandatory Emission Testing

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- Question 1 – Should your facility conduct engineering testing?
- Question 2 – What steps should you take prior to conducting engineering testing?

Non-Mandatory Emission Testing

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➤ Pros

- Limits the duration of any non-compliance
- Provides more accurate emissions data (annual emissions inventory, emissions fees, modeling, semi-annual reporting, etc.)

➤ Cons

- Cost and scheduling/logistics
- Failed engineering test

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Non-Mandatory Emission Testing

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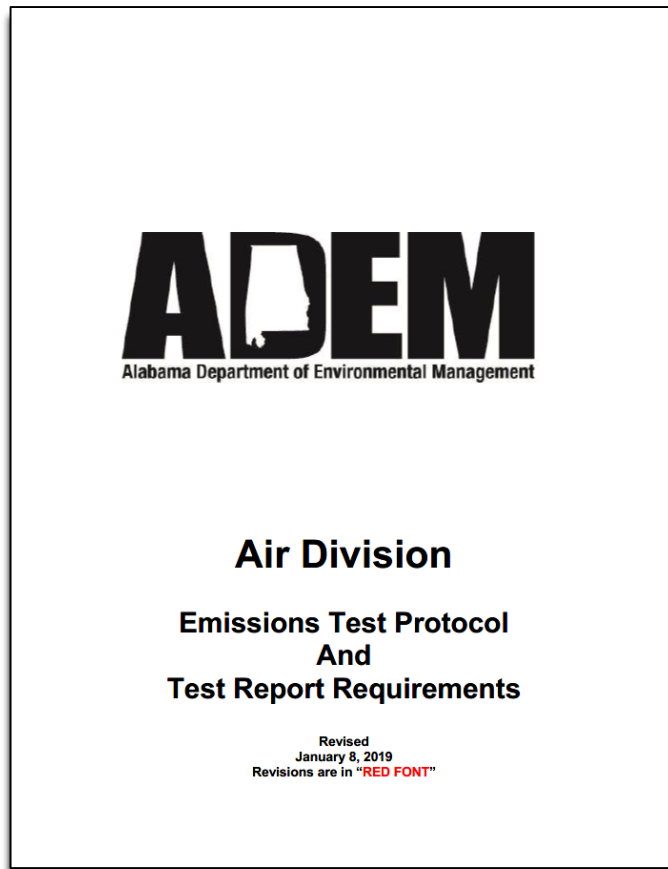
- Question 1 – Should your facility conduct engineering testing?

Dependent on your individual situation: frequency of required testing, additional cost, and your risk tolerance.

If you decide to move forward, don't do so blindly.

ADEM Protocol & Report Requirements

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ADEM Protocol & Report Requirements

In addition, any results from “engineering” testing (testing conducted to determine compliance status immediately prior to official performance testing) that indicates the source was not in compliance with any applicable regulation must be reported to the Department in the time specified in the facility’s Air Permit.

Question 2 – What steps should your facility take prior to conducting engineering testing?

The Attorney-Client Privilege

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The Attorney-Client Privilege

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- A client has a privilege not to disclose confidential communications made to facilitate the provision of professional legal services.

The Attorney-Client Privilege

The attorney-client privilege rests upon the premise that an attorney cannot properly defend a client, and thus the judicial system cannot effectively do justice, unless the client knows that he is fully free to disclose to an attorney the details of his case in strict confidentiality.

The Attorney-Client Privilege

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The attorney-client privilege may be waived and there are limited exceptions.

Attorney Work Product Doctrine

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Attorney Work Product Doctrine

An attorney's work product is protected from discovery by other litigants. Work product is defined as any tangible materials or their intangible equivalent prepared by an attorney in the anticipation and preparation for litigation.

Federal Rules of Civil Procedure 26(b)(3)

Attorney Work Product Doctrine

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- This protection from disclosure can extend to third-party consultants retained by an attorney in the anticipation and preparation for trial.

Attorney Work Product Doctrine

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The protection from disclosure is not absolute. Those materials may be discovered if:

- They are otherwise discoverable under Rule 26(b)(1); and
- The party shows that it has “substantial need for the materials to prepare its case and cannot without undue hardship, obtain their substantial equivalent by other means.”

Federal Rules of Civil Procedure 26(b)(3)(i) and (ii)

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Attorney Work Product Doctrine

Courts are cautious in upholding:

- The burden of establishing the existence of the privilege rests with the person asserting it.
- The “driving force” must be anticipated litigation and not “ordinary business purposes.”

Why Does E-mail Present Special Challenges?

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- Ease of forwarding increases likelihood of disclosure.
- Distribution to large groups is inconsistent with expectation of confidentiality.
- E-mail chain morphs from legal advice to another purpose.

Muro v. Target Corporation, 243 F.R.D. 301 (N.D. Ill. 2007)

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(It is difficult to imagine how communications circulated among such a large number of corporate employees in spite of expression of confidentiality and limitation on further dissemination combined with so many instances of non-business discussion could have been created with the intention of being attorney-client privileged and could have, in fact, remained confidential communications.)



Questions? Ask now or contact me by email?
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