**NSC Technical-Subcommittee Conference Call Minutes –July 15, 2014**

***Attending:***

Reg 1: Sara Johnson – NH; Louis Fountain, Ed Cousins, Pete Carleton, Jaimee Farrin – ME DEP (for Julie Churchill)

Reg 3: Patty Higgins - VA; Susan Foster, Jeremy Hancher - PA

Reg 4: Donovan Grimwood – TN; Tony Pendola – NC; Emily Ohde – KY; Mary Talukder - GA

Reg 5: Rick Carleski – OH; Erin Conley, Reshoma Banerjee - IL; Mark Stoddard – IN

Reg 6: Patty Avery – TX

Reg 7: Barb Goode – KS; Ryan Green, Adam Yarina –NE

Reg 8: John Podolinsky - MT

Reg 9: Genevieve Salmonson – HI

EPA: Paula Hoag – SBO; Debra Dalcher- OAQPS/RTP

**Temporary Tech-Subcommittee folder: Check out link below and let Jeremy or Rick know if you have problems**

<https://upenn.box.com/s/doptddztmkcv98zefar7>

**2014 Annual Training Conference Recap of Technical Subcommittee Breakout Sessions** Genevieve (HI): both sessions helpful, but room was too tight and cramped. Susan (PA): new dry cleaning technologies session was good (attended via webinar). Also sent follow-up questions to Mary Scalco and she responded promptly. Session slide shows are posted at <http://www.epa.gov/sbo/environmental_training.htm>

**Affirmative Defense and Startup/Shutdown/Malfunction Issues in Rules/Permits – Debra Dalcher**

Guest speaker Debra Dalcher (EPA/ OAQPS – Sector Policies and Programs Division) introduced herself and stated a main objective of her division is rule consistency across sections 111, 112, and 129 of the CAA. Debra explained the background and ramifications of the [recent court decision](http://www.velaw.com/resources/DCCircuitStrikesDownAffirmativeDefenseWhileUpholdingPortlandCementMACTRules.aspx) that vacated the use of “affirmative defense” as referenced in the cement manufacturing MACT standards for periods of excess emissions during equipment startup, shutdown, or malfunction (SSM). Although the vacatur ruling relates to cement MACT, it can affect many other rules having similar SSM provisions.

Some background: 2008 Sierra Club case vacated Part 63 general provisions for startup and shutdown and exemptions from applicable 112 stds, and more broadly to Sect 111 (NSPS) stds, during SSM periods. Court ruled compliance must be continuous and all rules having provisions that exempt the source from standards during certain activities must be reviewed. Example = 200 hrs/yr maintenance allowed in rule likely to not be retained in the future.

For periods of startup/shutdown, EPA had to consider if source could comply with standards anyway, if different standards were needed during those times, of if EPA might instead establish alternative work practice standards using applicable data.

Historically, sources emit a lot during malfunctions. Part 63 defines malfunction as a process not operating normally and Part 60 has similar, but not exactly identical, definition. EPA previously determined malfunction periods are outside of operator control and expecting the source to comply during these times is unreasonable. EPA included affirmative defense provisions, first in cement MACT in 2010, and in 40 rules to date as a way to address this malfunction issue.

Affirmative defense is defined within the context of an enforcement proceeding as the defendant having the burden of proof, which is to be evaluated in an administrative proceeding. In my (Ms. Dalcher’s) previous enforcement work, the defendant would explain why the malfunction was beyond their control and nothing else could have been done, and EPA would evaluate reasoning and circumstances. EPA then developed a more formal approach having nine criteria with documentation (only when violation has occurred). Examples of criteria include sudden failure was unforeseen, is not a recurring pattern, not in operator control, etc. EPA wanted company to provide root cause analysis for past malfunction. DC appeals court vacated the cement mfg. MACT affirmative defense provisions, holding that EPA lacked authority in private civil suits and that courts need to decide if civil penalties are warranted, not EPA.

EPA is not including affirmative defense in new rule makings, but can use case by case enforcement discretion to decide penalties. Susan (PA): 1) can we have a list of the 40 rules containing affirmative defense provisions? Yes, (Debra), and 2) are SSM provisions still in effect for other MACT standards? Debra - EPA redoing these upon review of each rule, not wholesale, because rule amending process to do this was put on hold. EPA is now removing SSM exemptions in any already-proposed rules, but not including affirmative defense language and is evaluating if source could comply during SSM events.

For rules that are final, EPA is working with OGC to consider waiting for mandated rule review cycle or removing affirmative defense language wholesale as well as responding to petitions received. If rule writers are developing rules now, no affirmative defense will be included. If between proposal and final, affirmative defense will be removed as well as references in the rule packages. EPA will also take out affirmative defense if amending rule for something else.

ME DEP: Should state regulatory agencies consider that affirmative defense is still usable? Debra- Affirmative defense is voluntary anyway, and EPA is considering whether affirmative defense is still available now without changing Title V permit language.

Exemptions and SIPs – EPA petitioned by Sierra Club after they found SSM exemptions in many state SIPs. The Court wanted EPA to retract approval of these state SIPs. EPA proposed rule to remove these from a large number of state SIPs – might result in state SIP call. Susan (PA): Because PA incorporates MACT standards by reference, would that require state to modify SIP? Debra - probably not, but many state SSM provisions are outside of MACTs, and MACT affirmative defense is vacated.

How many enforcement cases included affirmative defense claims? Debra –the number is not known. It means a company can present defense on why violation happened. In rulemakings, EPA estimated burden associated with providing affirmative defense will not occur very often.

Mark (IN) – would the affirmative defense 40-rule list cover area source rules? Debra – yes, but not many. Mark (IN) – for due diligence, it is still in business’ interest to self-assess and self-correct any malfunctions (may be done through regular deviation reports using rule recordkeeping and reporting provisions). Susan (PA) - PA always considers circumstances in state enforcement.

Debra – these will extend to 111 NSPS and 129 rules as well (EPA decided this –the court didn’t say)

**EPA’s May 22 Solvent-Contaminated Wipes Rule Webinar**

Mark (IN): this is still a good topic for future discussion. The rule will involve more recordkeeping, and limits on storage time and volume. Barb (KS) agreed.

**Recent Federal Register Notices:**

* EPA Semiannual Regulatory Agenda: <http://www.gpo.gov/fdsys/pkg/FR-2014-06-13/pdf/2014-13130.pdf>
  + Includes reviews of rule with significant impacts on small entities.
    - Section 610 Review of Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuels
    - Section 610 Review of NPDES Regulation and Effluent Limitations for CAFOs.
* Proposed Rule – Carbon Pollution Emission Standards for Modified and Reconstructed EGUs: <http://www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13725.pdf>

Not discussed –send any feedback to Jeremy

**OTHER:** Paula (SBO) will be sending out SBEAP annual reporting form and request soon.

**Next Call:** August 19, 2014

2-3pm EST (3rd Tuesday of month)

Action items:

1. Debra Dalcher to provide list of 40 EPA rules having affirmative defense provisions and the Sierra Club petition about state SSM rules in SIPs.

Minutes prepared by: Rick Carleski (OH) – Co-Chair