

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
Northern Virginia Regional Office
Mobile Source Operations Section

OPERATIONAL ORDER	NUMBER 13	EFFECTIVE DATE: May 21, 1998 Revised: December 5, 2000
SUBJECT ENFORCEMENT PROCEDURES AND SCHEDULE OF PENALTIES	ORIGINATING UNIT MOBILE SOURCE OPERATIONS SECTION	

I. INTRODUCTION

- A. The regulations for the Virginia Vehicle Emissions Control Program are enumerated in the Regulations for the Control of Motor Vehicle Emissions, 9 VAC 5-91 (“Regulations”). The Regulations are promulgated under the authority of §§ 46.2-1176 *et seq.* of the Code of Virginia (“I&M Law”). All permitted emissions inspection stations, licensed emissions inspectors, and certified emissions repair facilities/technicians are required to operate in compliance with these rules and Regulations.
- B. The following procedures are intended to obtain compliance and correct unacceptable station operations or inspection/repair procedures. Violations of the Regulations are divided into two categories, minor and major, based on the seriousness of the violation. In the case of multiple violations considered at one time, the Department of Environmental Quality (“Department”) may, in its discretion, direct that suspensions run concurrently.
- C. The Schedule of Penalties is intended only as a guideline in the enforcement of the Regulations. Nothing shall preclude any violation from being considered as a more or less serious violation, if circumstances warrant such action. Suspension for up to one year or revocation may be imposed for any major violation.
- D. Documentation of alleged violations of the Regulations are recorded on the automated Field Inspection Report and Notice of Violation (“NOV”).
- E. The Director or a designated representative shall issue and sign Consent Orders, conduct Informal Fact Findings and Formal Hearings, make all case decisions, and impose all penalties.

II. COMPLIANCE AND ENFORCEMENT TOOLS

A. FIELD REPORT

- 1. Whenever the Department has reason to believe that a violation may have occurred, the Vehicle Emissions Compliance Officer (“VECO”) prepares a field report. The VECO uses the field report to summarize the inspection findings and document the alleged violations.

2. Informal Actions. In cases where DEQ believes that an alleged violation can be resolved either “on site” or within ninety (90) days, DEQ may choose to address the allegation with an “informal action” rather than with an NOV. Some examples of informal actions are “additional training provided” reference a particular inspection procedure, or an instruction to obtain a particular required item of equipment or reference material.
 - a. If the matter is “resolved on site,” the VECO will make appropriate entries, check the “resolved” box and enter a brief description of the informal action. The field report is saved, printed and issued. A second copy of the field report may be printed, signed and retained by MSOS if necessary.
 - b. If the matter is not resolved on site, the VECO will not check the “resolved” box, but will make other appropriate entries (including a brief description of the informal action) to document the action as not yet resolved. The field report is saved, printed and issued.
 - c. Upon resolution of an informal action previously issued but not resolved, the VECO will access the database record of the particular field report containing the informal action, check the “resolved” box (ensuring that the resolved date is correct), and then re-save the report.

B. NOTICE OF VIOLATION

1. The NOV is a written notice that informs the facility owner, inspector or technician of facts that suggest a possible violation of the law or regulations may have occurred, provides the owner, inspector or technician with a list of options, and invites a response. The VECO prepares the NOV by filling in the following information:
 - a. the applicable provisions of the law or Regulations,
 - b. a classification of the alleged violation as major or minor (The VECO classifies a violation based on enforcement procedures and the defendant/respondent's Violation History Report.), and
 - c. the number of NOVs issued within the last 24 months that resulted in a finding of non-compliance through voluntary or adversarial means. The current allegation is not included in this number.
2. The NOV is served on the defendant/respondent in person or by mail.

3. The NOV provides several courses of action for the defendant/respondent to take. The defendant/respondent may admit to the alleged violations and negotiate a consent order, may choose not to admit to the alleged violation but still choose to negotiate a consent order, or may choose not to admit the alleged violation and request an administrative proceeding. The defendant/respondent makes the appropriate entry on the NOV and returns the signed document to the Department.
4. Once an NOV is issued to a defendant/respondent, all attempts should be made to negotiate a consent order to reach a mutually agreed upon resolution regarding the action that needs to be taken. As explained below, the VECO is responsible for negotiating the consent order. This negotiation may take place at the affected party's place of business or at DEQ's Northern Virginia Regional Office. The procedures for preparing consent orders are described below.
5. If the defendant/respondent does not admit to the alleged violation and/or wishes to have an administrative proceeding, the appropriate entry is made on the NOV. The appropriate proceeding is scheduled and the defendant/respondent is properly notified.
6. If the defendant/respondent admits to the alleged violation and does not wish to have an administrative proceeding (or the defendant/respondent denies the alleged violation(s) but nevertheless voluntarily agrees to a consent order to close or settle the matter), the appropriate entry is made indicating their desire to voluntarily agree to a consent order. The VECO then negotiates the terms of the consent order and comes to a tentative or proposed agreement with the defendant/respondent.
7. The NOV and supporting documentation is then presented to the Program Manager (PM) for review and approval. If the PM agrees with the negotiated terms of the enforcement action as recommended by the VECO, a written consent order indicating the terms of the agreement is prepared. If the PM does not concur with the VECO's recommendations, the matter is discussed and an agreement reached reference any further action that needs to be taken. Upon approval by the PM, the consent order and enforcement package, which includes the NOV and supporting documentation, is presented to the Regional Compliance and Enforcement Manager (RCEM) for review and approval or other appropriate action. Upon approval, the enforcement package is presented to the Regional Director for appropriate signature on the consent order. The consent order is then delivered to the defendant/respondent for signature and appropriate action.
8. The affected party is then required to fulfill the terms of the consent order.

C. CONSENT ORDERS

1. The Department may negotiate with inspection stations, certified repair facilities and/or inspector/technicians to obtain compliance with the Regulations through the use of Consent Orders. Consent Orders can be used for the following purposes in accordance with the Schedule of Penalties:
 - a. To require that certain actions be taken to bring the station, facility, inspector, or technician into compliance;
 - b. To impose a period of suspension in accordance with the Schedule of Penalties;
 - c. To require the payment of civil charges as negotiated;
 - d. To include a period of probation or a probationary act;
 - e. To issue a Letter of Reprimand;
 - f. To take any combination of actions listed above; or
 - g. To revoke a license, permit or certification.
2. The VECO is responsible for negotiating the Consent Order with the defendant/respondent. The NOV serves as the basis for the negotiations. If the VECO and the defendant/respondent cannot reach a tentative agreement, the matter may be referred to the PM or other department enforcement staff as directed by regional management for further negotiation. The Consent Order must be mutually agreed to and signed by the Director or a designated representative as delegated on behalf of the Department. The PM, or the RCEM in the PM's absence, approves all Consent Orders before being signed by the parties.
3. If the defendant/respondent is required to pay a civil charge, the consent order shall specify whenever possible that the civil charge is due within five (5) days after the defendant/respondent signs the order. If the civil charge is not paid, further enforcement action will result. This action may take the form of an NOV for an alleged violation of a consent order, another penalty may be re-negotiated, or some other action may be taken to settle the matter.
4. Consent Orders may be used to require corrective action (*i.e.*, retraining) as well as penalties such as suspensions or civil charges. The Consent Order is to include all such terms and a statement that failure to comply will result in further enforcement action.

5. Probation may be a condition of a Consent Order. The terms of probation, whether a period of time or an act to be accomplished, are included as an agreed condition of a Consent Order, and are listed along with any other agreed term(s).
6. All Consent Orders include a statement to the effect that the defendant/respondent agrees to be in compliance with program Regulations.

D. ADMINISTRATIVE PROCEEDINGS

Two types of administrative proceedings are available for making case decisions to determine if a defendant/respondent is in compliance with the I&M Law and the Regulations: Informal Fact Findings (which include 1186 Special Order Proceedings) and Formal Hearings. The Director or his designated representative is responsible for conducting Informal Fact Findings. Records of both types of proceedings will be kept as required by 9 VAC 5-91-60.C. The Director or his designated representative makes case decisions for Informal Fact Findings and Formal Hearings.

1. Informal Fact Findings: Informal Fact Findings shall be conducted in accordance with 9 VAC 5-91-60 paragraph A.3 of the Regulations and § 9-6.14:11 of the Virginia Administrative Process Act (APA). Informal Fact Findings are held in all cases where an defendant/respondent denies the alleged violation and/or wishes to have a conference to decide the matter, unless the parties agree to waive the Informal Fact Finding and proceed directly to a Formal Hearing. The parties may agree that the Informal Fact Finding is the final action and waive the Formal Hearing. As a result of an Informal Fact Finding, the defendant/respondent and the Department may agree to a Consent Order as discussed above. If the defendant/respondent is found not to be in compliance as a result of the proceeding and the parties do not agree on a Consent Order, the presiding officer then issues a case decision and order in writing.
2. 1186 Special Order Proceedings: In accordance with Va. Code §§ 10.1-1183 and 10.1-1186, the Director may issue an “1186 Special Order” following an Informal Fact Finding Proceeding under the APA. An 1186 Special Order is an administrative order with a duration of no more than 12 months that imposes a civil penalty of no more than \$10,000. 1186 Special Orders should be used sparingly and only for severe cases where it is anticipated that such an order is the only reasonable and timely method of obtaining compliance short of a Formal Hearing under the APA and/or referral to the Office of Attorney General.
3. Formal Hearings: In all cases, an Informal Fact Finding must be held first before holding a Formal Hearing unless the parties have agreed to waive the Informal Fact Finding or an emissions inspection station has been summarily suspended pursuant to § 46.2-1185 of the I&M Law. Formal Hearings shall be conducted in accordance with 9 VAC 5-91-60 paragraph A.4 of the Regulations and § 9-6.14:12 of the APA, as modified by § 10.1-1307(D) and (F) of the Virginia Air Pollution Control Law.

4. Appeals: A case decision and order imposing penalties may be appealed to the Director by requesting a Formal Hearing unless the parties have agreed beforehand that the decision would be the final agency action and the defendant/respondent has waived the right to a Formal Hearing. With respect to appeals of penalties imposed pursuant to an informal fact finding, in accordance with § 46.2-1187.2 and 9 VAC 5-91-600.F, the presiding officer shall be a designee of the director other than the regional emissions inspection program manager or any emissions inspection program staff member.

III. PENALTIES

The statute provides the Department with a range of penalties for noncompliance with the I&M requirements. The penalties range from probation to revocation of a permit, license or certificate. Generally, penalties are imposed as part of a negotiated consent order; however, the Department may impose certain penalties through a unilateral action. The penalties follow in order of severity.

A. PROBATION:

A probationary period is a negotiable period of time, up to a maximum of 12 months, during which more intense scrutiny is appropriate, and which may be used as an additional criterion for selection for a covert inspection. As a condition of probation, terms may be imposed during the probationary period that must be complied with by the defendant/respondent. Completion of such terms to the satisfaction of the department may serve as a basis for reducing the probationary period; such reduction is part of the negotiation process resulting in a consent order containing such terms (see below). If the defendant/respondent fails to complete the probationary terms of a consent order, additional enforcement action may be taken or, at the department's discretion, the full probationary period (12 months) may be imposed.

1. Probationary Terms/Conditions: A defendant/respondent may agree through the Consent Order to perform certain negotiated corrective action measures. Such acts may include reporting to a referee facility to demonstrate competence in performing emissions inspections, attending additional training classes or other actions as negotiated and approved. If combined with a suspension, the negotiated action(s) should be accomplished prior to re-licensing, re-permitting, or re-certification, and the Consent Order will contain any such conditions.
2. Additional Violations During Probation: If another violation of the same category (*i.e.*, major/minor) occurs during the probation period, only that particular violation is addressed. The fact that the person was under probation for a previous violation, however, should be considered during negotiation of the penalty (*i.e.*, the starting point of negotiations should be at the next higher potential penalty level).

B. LETTER OF REPRIMAND

A Letter of Reprimand (LOR) is a formal document issued to the defendant/respondent, which represents an official rebuke for the violation(s) committed, and indicates the serious nature of such violation(s). Before an LOR is issued, an NOV is issued. The accompanying field report will have appropriate remarks, and an LOR will be recommended along with other conditions, if any. The LOR is prepared, signed by the PM, and then issued to the defendant/respondent immediately following execution of the related Consent Order containing the LOR provision, which is prepared and issued in accordance with the procedures in Section II.B. of this Order.

C. SUSPENSIONS AND REVOCATIONS

In response to an NOV, a defendant/respondent may wish to negotiate a period of suspension of a permit, license or certification, or agree to a revocation of such permit, license or certification. Suspensions and revocations shall be negotiated in accordance with the guidelines in Section IV of this Order.

D. SUSPENSIONS WITHOUT A HEARING

1. As authorized by Virginia Code § 46.2-1185, the Director or his designated representative may suspend an emissions inspection station and require the permit holder to cease performing emissions inspections for a period of twelve months or less for violations of the I&M Law or any order or Regulation of the Board. Generally, the Department must hold a formal hearing before suspending a station. The Department may suspend without a formal hearing; however suspensions without hearings are to be used sparingly and only in extreme situations. Some examples of acceptable situations in which to consider this action include:
 - a. Failure or refused to submit required records or documentation on request of the Department.
 - b. Fraudulent use or issuance of inspection certificates or motor vehicle inspection results.
 - c. Use of another's access code to conduct emissions inspections, or permitting or causing such use.
 - d. Performance of inspections using analyzers that are not certified or are malfunctioning to the extent that false emissions readings are being presented.
 - e. Falsification of repair documentation.

[NOTE: These are not exclusive and therefore other circumstances of a similar nature may also apply.]

2. Within ten days of a suspension without a hearing, the Director or designee must hold a formal hearing to determine whether the alleged violation(s) occurred. Based on these findings and conclusions, the Director or designee shall make a case decision affirming, modifying, amending, or canceling the suspension and the requirement to cease performing emissions inspections. If the Department fails to hold a hearing within ten days for any reason other than at the request or delay of the permit holder, the suspension will be lifted and the alleged violations pursued through normal administrative processes.
3. Before the suspension, the Department must notify the permit holder, or make a reasonable attempt to notify the permit holder, about the suspension and the requirement to cease performing emissions inspections immediately. The notice must also inform the permit holder of (1) the I&M Law, Regulations, or Board order allegedly violated; (2) the date, time, and place of the hearing; (3) the legal authority for the suspension and for the hearing; and (4) the permit holder's legal rights regarding the hearing.
4. With the consent of the permit holder, the Department may forego the hearing and allow the suspension and requirement to cease inspections to stand. The decision to let the suspension and the requirement stand shall be set forth in a Consent Order signed by the permit holder and the Department, as specified above.
5. If the Department finds that a permit holder is not complying with the suspension or the requirement to cease performing inspections, the Department may seek appropriate criminal and civil remedies and penalties under Virginia Code § 46.2-1187 or § 46.2-1187.2.
6. In accordance with §46.2-1187.2, penalties shall also apply to emissions inspectors and certified emissions repair technicians.

E. CIVIL CHARGES

1. As authorized by Virginia Code § 46.2-1187.2, a defendant/respondent may agree to pay a civil charge for violating or failing, neglecting, or refusing to obey the I&M Law or any Regulation or order of the Board. The civil charge shall be a specific sum, not to exceed \$25,000 for each violation, with each day of violation constituting a separate offense. The defendant/respondent may agree to pay a civil charge in lieu of or in addition to a suspension as negotiated between the Department and the defendant/respondent. The civil charge shall be included in an order of the Board and signed by the defendant/respondent and an authorized Department representative.
2. Civil charges may be negotiated, and will be based on a number of relevant factors including but not limited to: the number of chargeable inspections that would otherwise have been performed during the negotiated period of suspension, the size of the facility's business, and the seriousness of the violation. The following are only guidelines and may be influenced by other relevant factors in the matter:

- a. The guideline to determine the amount of civil charge in the case of an EIS is to multiply the estimated number of emissions inspections that the EIS would otherwise have performed during the negotiated term of suspension, as evidenced by historical records, by the maximum statutory inspection fee (\$20.00).
- b. The guideline to determine the amount of civil charge for an individual LEI or CRT is to multiply the negotiated number of days of suspension by ten dollars (\$10.00).
- c. In the case of a CRF, the amount shall be determined by negotiation, taking into account the specific circumstances of the alleged violation, the size of the facility's business, and the seriousness of the allegation.

IV. PENALTY GUIDELINES

A. MAJOR VIOLATIONS

- 1. Major violations are considered the most serious of offenses resulting from unacceptable performances in the conduct of emissions inspections, operation of analyzer systems, and the conduct of emissions-related repairs. Such violations are of a nature that would directly affect the integrity, credibility, and emissions reduction effectiveness of the emissions inspection program.
- 2. Any major violation may result in suspension or revocation.
- 3. A violation of the following provisions of the Regulations shall constitute a major violation:

<p>9 VAC 5-91-220 B, C 9 VAC 5-91-260 B, D 9 VAC 5-91-280 9 VAC 5-91-290 B, G, H 9 VAC 5-91-300 B, C, D, F 9 VAC 5-91-320 A, D 9 VAC 5-91-330, 340 9 VAC 5-91-360 B, C, E 9 VAC 5-91-370 9 VAC 5-91-380 F, I</p>	<p>9 VAC 5 91-400 9 VAC 5-91- 410, 420, 430, 440, 450, 460 9 VAC 5-91- 480, 490 9 VAC 5-91-510 C, H 9 VAC 5-91-520 H 9 VAC 5-91-530 A through G 9 VAC 5-91-560 C 9 VAC 5-91-570 F 9 VAC 5-91-580 A, D, E</p>
---	--

- a. Obtaining a permit, license or certification by false statement or misrepresentation or operating under a permit, license or certification while not in compliance with the conditions for such permit, license, or certification is a major violation and shall be grounds for revocation.

- b. Use of alcohol or illegal drugs while performing emissions inspections or emissions-related repairs, or while under the influence of alcohol or illegal drugs, shall be considered a major violation and shall be grounds for revocation of the license, permit or certificate.
 - c. Any third and subsequent minor violation within twenty-four (24) months shall be considered a major violation.
 - d. Any violation of the Virginia Motor Vehicle Emissions Control Law and the Regulations that is not specifically identified in this section may be treated as a major violation if the director determines, on a case-by-case basis, that the violation directly affects the integrity, credibility, and emissions reduction effectiveness of the vehicle emissions inspection program.
4. If a defendant/respondent fails to satisfy the condition(s) of a Consent Order which requires an act on the part of that defendant/respondent, then that defendant/respondent may be charged with a violation of a Consent Order (reference 9 VAC 5-91-590.B), which may be considered a major violation if the director determines, on a case-by-case basis, that the violation directly affects the integrity, credibility, and emissions reduction effectiveness of the vehicle emissions inspection program.

NOTE: Pursuant to 9 VAC 5-91-610.H, the Department will not consider an application for reinstatement for at least one year from the date of the revocation for a license, permit, or certification, and until the conditions identified in 9 VAC 5-91-610.H have been satisfied.

B. PENALTY GUIDELINES FOR A MAJOR VIOLATION

Subject to certain conditions as noted above and in B.5.b. below, the following Schedule of Penalties should be used by the VECO as a guideline for the initiation of negotiations regarding penalties for alleged major violations. Terms of suspension are negotiable, as are the terms and/or conditions of probation.

1. First Violation: The defendant/respondent may be suspended for 60 days or more, followed by a period of probation not to exceed twelve months.
2. Second Violation: The defendant/respondent may be suspended for 90 days or more, followed by a period of probation not to exceed twelve months.
3. Third Violation: The defendant/respondent may be suspended for a period not to exceed one year, followed by a period of probation not to exceed twelve months.
4. Fourth and Subsequent Violation(s): The emissions inspection station's permit, repair facility's certification and/or inspector/technician's license or certification may be revoked, or suspended for not more than one year, followed by a probation period not to exceed twelve months.

5. Cumulative Nature of Major Violations: Major violations are cumulative in nature and remain active for a period of twenty-four months.
 - a. Any first time violation may be disposed of with an official Letter of Reprimand, with negotiated terms and/or conditions of probation if appropriate, in lieu of a suspension period if circumstances warrant. This shall not preclude the possibility of two or more Letters of Reprimand within 24 months if special or extenuating circumstances warrant such action.
 - b. Any intentional falsification of an emissions inspection shall result in a revocation or in a suspension of the inspector's license, or the station permit, for not less than six months, or an equivalent civil charge, or both.

C. MINOR VIOLATIONS

1. Although they may not necessarily directly affect emissions reduction effectiveness, minor violations are considered serious enough to influence the overall effectiveness of the Motor Vehicle Emissions Control Program and pertain to station operations, quality assurance, quality control, unacceptable security of documents and records, and maintenance of required equipment and systems. Violations impacting emissions repair efficiency and such other items as are necessary to maintain program uniformity, and to ensure the ability to function as a permittee, licensee or certified emissions repair technician or facility, are included in this category.
2. A violation of any provision of the Regulations not listed in Section A above (subsections B, C and D of 9 VAC 5-91-620) shall constitute a minor violation, as it pertains to a permittee, licensee or certified emissions repair technician or a facility, unless the Director determines that the violation is a major violation in accordance with subsection F of 9 VAC 5-91-620.

D. PENALTY GUIDELINES FOR A MINOR VIOLATION

The following Schedule of Penalties should be used by the VECO as a guideline for the initiation of negotiations regarding penalties for alleged minor violations. Terms of suspension are negotiable, as are the terms and/or conditions of probation.

1. First Violation: The defendant/respondent may be issued a Letter of Reprimand.
2. Second Violation: The defendant/respondent may be issued a Letter of Reprimand, followed by negotiated terms and/or conditions of probation, if appropriate.
3. Third and Subsequent Violation(s): Third and subsequent violations accumulated within twenty-four (24) months that would otherwise be considered minor violations are considered to be major violations, and penalties for major violations shall apply.

4. Cumulative Nature of Minor Violations: Minor violations are cumulative in nature and remain active for 24 months.

V. VIOLATION HISTORY REPORT

- A. The Department maintains a Violation History Report for each permitted station, licensed inspector, certified facility, and certified technician. The Report lists each incident for which the defendant/respondent has been issued an NOV along with the ultimate disposition of each NOV. The ultimate disposition indicates whether a case decision was issued by the Department, whether a Consent Order was agreed to, or other appropriate final action.
- B. Previous NOVs, the facts of which are denied by the defendant/respondent and for which no Consent Order has been executed, cannot be considered when determining the appropriate penalty for the current matter unless the Department found in a case decision that the defendant/respondent did commit the previous violation. The appropriate penalty guideline is determined by totaling the current alleged violation(s) and the number of previous confirmed violations as listed on the Violation History Report (“confirmed violations” means those that were admitted, not admitted but for which a Consent Order has been executed, or found to be true by the Department in a case decision). Any alleged violation(s) which has been resolved or disposed of in favor of the defendant/respondent, or which has not yet been resolved, cannot be considered.
- C. Informal Action records are maintained by the Department for each permitted emissions inspection station, licensed emissions inspector, certified emissions repair facility and certified emissions repair technician. The records of informal actions are contained within the individual field report records that reference such informal actions.