

02-049

**MOTOR VEHICLES: MOTOR VEHICLE AND EQUIPMENT SAFETY – EMISSIONS INSPECTIONS.**

**Although statutorily authorized testing equipment must be used for tailpipe exhaust emissions tests performed under the Federal Clean Air Act, Virginia's emissions inspections laws authorize the use of other equipment or software for nontailpipe tests or checks that are part of the federal motor vehicle inspection and maintenance program. Virginia law provides that its enhanced emissions inspections program shall include, and be limited to, testing procedures necessary to comply with the Clean Air Act. Virginia must include in its program, nontailpipe exhaust tests that comply with the Federal Act and may exclude tailpipe exhaust tests that the Act no longer requires.**

The Honorable Richard L. Saslaw  
Senate Minority Leader  
July 25, 2002

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

**Issue Presented**

You ask whether equipment used in performing enhanced emissions inspections tests for motor vehicles must be limited to ASM 50-15 equipment.

**Response**

It is my opinion that, although the ASM 50-15 testing equipment must be used for tailpipe exhaust emissions tests performed under the Federal Clean Air Act, Virginia's emissions inspections laws authorize the use of other equipment or software for nontailpipe tests or checks that are part of the federal motor vehicle inspection and maintenance program. Virginia law provides that its enhanced emissions inspections program shall include, and be limited to, testing procedures necessary to comply with the Clean Air Act. Accordingly, Virginia must include in its program, nontailpipe exhaust tests that comply with the Federal Act and may exclude tailpipe exhaust tests that the Act no longer requires.

**Background**

The State Air Pollution Control Board adopted final Regulations for the Control of Motor Vehicle Emissions in the Northern Virginia Area at its May 2002 Board meeting.<sup>1</sup> These regulations exempt cars built after 1995 from testing using the ASM 50-15 method and implement other testing procedures. The regulations include procedures for conducting an electronic inspection of on-board diagnostic ("OBD") systems<sup>2</sup> for 1996 and newer diesel-fueled and gasoline-powered vehicles.<sup>3</sup> Under the regulations, OBD inspections on OBD vehicles<sup>4</sup> replace tailpipe exhaust emissions tests, except as specified by the Department of Environmental Quality for quality control or program evaluation purposes.<sup>5</sup>

## Applicable Authorities and Discussion

The Commonwealth's enhanced emissions inspection program for Northern Virginia is in response to certain requirements of the Federal Clean Air Act.<sup>6</sup> The Act requires the Environmental Protection Agency to establish national primary ambient air quality standards for several types of air pollutants.<sup>7</sup> The federal agency has promulgated national standards for several air pollutants, including ozone.<sup>8</sup> A portion of Northern Virginia is designated as being in "nonattainment"<sup>9</sup> of the 1-hour standard for ozone.<sup>10</sup>

The Clean Air Act classifies ozone nonattainment areas as "marginal," "moderate," "serious," "severe," and "extreme," according to the extent to which they exceed the national standards.<sup>11</sup> The Northern Virginia area is classified as "serious."<sup>12</sup> The Clean Air Act specifies certain pollution control requirements for ozone nonattainment areas, depending on the severity of an area's classification.<sup>13</sup> Among the requirements applicable to "serious" ozone nonattainment areas is state implementation of an enhanced vehicle inspection and maintenance program.<sup>14</sup> The Clean Air Act requires such a program to include, among other things, "[c]omputerized emission analyzers, including on-road testing devices"<sup>15</sup> and "[i]nspection of emission control diagnostic systems and the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems."<sup>16</sup>

Article 22, Chapter 10 of Title 46.2, §§ 46.2-1176 through 46.2-1187.3, provides authority to implement the Clean Air Act's inspection and maintenance program in Virginia. Section 46.2-1180(A) authorizes the State Air Pollution Control Board to adopt regulations to implement and administer Article 22. Section 46.2-1178(C) provides that the emissions inspection program applicable to Northern Virginia "shall be a test and repair *enhanced emissions inspection program* with the greatest number of inspection facilities consistent with the consumer protection and fee provisions herein and may include on-road testing and remote sensing devices." (Emphasis added.) Section 46.2-1176, as amended in 1995,<sup>17</sup> defines "[e]nhanced emissions inspection program," in part, as

a motor vehicle emissions inspection system established by regulations of the [State Air Pollution Control] Board twhatic shall designate the use of the ASM 50-15 (acceleration simulation mode or method) as the only authorized testing equipment. Only those computer software programs and emissions testing procedures necessary to comply with applicable provisions of Title I of the Clean Air Act<sup>18)</sup> shall be included.

The above definition is the focus of your question.

A primary rule of statutory construction is that one must look first to the language of a statute, and if it is clear and unambiguous, the statute should be given its plain meaning, without resort to the rules of statutory interpretation.<sup>19</sup> The definition of "enhanced emissions inspection program," however, is ambiguous. Although "ASM 50-15" is not defined by statute, § 46.2-1176 indicates in the above definition that it is an "acceleration simulation mode or method" of testing. ASM is a method of analyzing tailpipe exhaust emissions while "driving a vehicle on a dynamometer at a constant speed with a load applied."<sup>20</sup> The numbers "50-15" are not a numerical designation for, or an identification of, specific

equipment. The numbers refer to operation of a vehicle on a dynamometer at 15 miles per hour and at fifty percent federal test procedure<sup>21</sup> maximum load.<sup>22</sup>

One possible reading of the meaning of the first sentence defining "enhanced emissions inspection program" might be that such a program must consist solely of a tailpipe emissions test performed in accordance with the ASM method. Such a reading, however, would be inconsistent with the second sentence of the definition and other provisions of Article 22, the Clean Air Act, and regulations implementing the Act. It would also be inconsistent with the General Assembly's apparent intent to authorize a state inspection and maintenance program that complies with the Clean Air Act in order to avoid imposition of a federal implementation plan<sup>23</sup> and possible sanctions.<sup>24</sup> The Act's sanctions include imposing a prohibition on the award of federal highway grants and requiring increased emission offsets prior to obtaining preconstruction permits for new and modified sources.<sup>25</sup> I am required to apply the rule of statutory construction that "every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary."<sup>26</sup> It must be presumed that the General Assembly did not intend to enact inconsistent legislation.<sup>27</sup>

The Clean Air Act requires state programs to include an "[i]nspection of emission control diagnostic systems."<sup>28</sup> The Environmental Protection Agency implemented that statutory requirement in 1996.<sup>29</sup> The federal agency recently extended the deadline for implementing state programs and amended its regulations to allow states the use of periodic checks of the OBD system on OBD vehicles in lieu of traditional inspection and maintenance tests.<sup>30</sup> Accordingly, to interpret the first sentence of the definition of "enhanced emissions inspection program" as precluding any checks or inspections other than the ASM tailpipe exhaust emissions inspection would be inconsistent with provisions of the Clean Air Act requiring OBD inspections. Failure to include the required OBD checks in the state program would subject Virginia to sanctions available under the Clean Air Act.<sup>31</sup>

Additionally, interpreting the first sentence as requiring ASM tailpipe exhaust emission inspections on OBD vehicles would be inconsistent with the second sentence defining "enhanced emissions inspection program," which limits the program to only those test procedures "necessary" to comply with Title I of the Clean Air Act. Under federal law, tailpipe exhaust tests may be suspended on OBD vehicles that are subject to an OBD check.<sup>32</sup>

Interpreting the first sentence of the definition to limit enhanced emissions inspections to tailpipe exhaust inspections also would be inconsistent with other provisions of Article 22. Sections 46.2-1178(C) and 46.2-1178.1 authorize, as part of the state program, on-road testing and remote sensing devices. The equipment for the ASM mode of tailpipe exhaust emissions testing is set up in fixed inspection stations and is not readily conducive to on-road testing or to being used as a method of remote sensing. Section 46.2-1180(A)(1) authorizes the State Air Pollution Control Board to adopt regulations requiring "[t]he collection of data and maintenance of records ... of the air pollution control systems or devices installed in accordance with § 46.2-1048"<sup>33</sup> and Board regulations. The OBD systems that are subject to the Board's regulation are within the meaning of the air pollution control systems or devices authorized in § 46.2-1048.<sup>34</sup> The express mandate of § 46.2-1180(A)(1), that the Board's regulations require collection of data from the inspection results of the air pollution control systems or devices installed as required by federal law,

necessarily implies that inspections of the systems and devices are to be conducted.<sup>35</sup>

Interpreting the definition of "enhanced emissions inspection program" to require tailpipe exhaust tests in addition to OBD checks would also be inconsistent with the General Assembly's expressed concern to accommodate consumer interests in the implementation of the state program. Section 46.2-1178(C) requires that the Northern Virginia emissions inspection program have "the greatest number of inspection facilities consistent with the consumer protection ... provisions [contained in Article 22]." Section 46.2-1180(A)(5) requires the State Air Pollution Control Board to include in its regulations requirements for "[t]he protection of consumer interests," including "the time spent waiting for inspections." Requiring consumers to undergo both an OBD test and a tailpipe exhaust emissions test, when only an OBD test is "necessary" to comply with the Clean Air Act, would be inconsistent with the General Assembly's mandate to consider consumer interests.

Finally, a then-unresolved controversy involving the method of tailpipe exhaust emissions inspections<sup>36</sup> may be considered in ascertaining the intent of the General Assembly in its 1995 amendment to the definition of "enhanced emissions inspection program."<sup>37</sup> As the Supreme Court of Virginia has noted, a basic rule of statutory construction is that, in considering the object and purpose of a statute, a reasonable construction should be given to promote the end for which it was enacted.<sup>38</sup> Underlying the federal regulations prior to September 1995 was a "preference" that state programs use a new method of tailpipe exhaust emissions testing that is more time-consuming and significantly more expensive than the ASM method of testing.<sup>39</sup>

In 1992, the Environmental Protection Agency "promulgated a performance standard for enhanced [inspection and maintenance] program effectiveness that was based on a new test known as IM240."<sup>40</sup> The IM240 test simulates actual driving conditions, including acceleration and deceleration, as opposed, for example, to the ASM method of testing vehicles on a dynamometer at specified speeds and loads.<sup>41</sup> Without using the IM240 method, states would have had difficulty meeting the performance standard.<sup>42</sup> Implementation of IM240, however, was troublesome.<sup>43</sup> The cost of the equipment was "about \$150,000 per testing lane, versus \$15,000 to \$40,000" for testing equipment used at that time.<sup>44</sup> Some states experienced difficulty with the reliability of the IM240 test, and some states reported public opposition because of the longer testing time involved with IM240.<sup>45</sup>

In December 1994, following a meeting with several state governors, the Environmental Protection Agency "announced that it would allow states flexibility in implementing [inspection and maintenance] programs that do not comply with the rule, as long as they result in equivalent emissions reductions."<sup>46</sup> That was the situation at the time of the General Assembly's 1995 amendment to the definition of "enhanced emissions inspection program."<sup>47</sup> Equipment for the ASM test was considerably less expensive for inspection stations, and the ASM test was more consumer-friendly. The definition of "enhanced emissions inspection program" may be reasonably understood as a direction to the State Air Pollution Control Board to use the ASM test for tailpipe exhaust emissions inspections instead of the IM240 test, rather than a mandate to limit such program to tailpipe exhaust emissions inspections.

## Conclusion

Accordingly, it is my opinion that, although the ASM 50-15 testing equipment must be used for tailpipe exhaust emissions tests performed under the Federal Clean Air Act, Virginia's emissions inspections laws authorize the use of other equipment or software for nontailpipe tests or checks that are part of the federal motor vehicle inspection and maintenance program. Virginia law provides that its enhanced emissions inspections program shall include, and be limited to, testing procedures necessary to comply with the Clean Air Act. Accordingly, Virginia must include in its program, nontailpipe exhaust tests that comply with the Federal Act and may exclude tailpipe exhaust tests that the Act no longer requires.

<sup>1</sup>See 18:20 Va. Regs. Reg. 2612 (June 17, 2002) (effective Oct. 1, 2002); 18:2 Va. Regs. Reg. 89 (Oct. 8, 2001).

<sup>2</sup>The regulations define "on-board diagnostic system" or "OBD system" as "the computerized emissions control diagnostic system installed on model year 1996 and newer affected motor vehicles." 18:20 Va. Regs. Reg., *supra*, at 2618 (to be codified at 9 VAC 5-91-20 (defining terms used in regulation)).

<sup>3</sup>See *id.* at 2629 (to be codified at 9 VAC 5-91-420(G)(3)).

<sup>4</sup>The regulations define "OBD vehicle" as "a model year 1996 and newer model affected motor vehicle equipped with an on-board diagnostic system and meeting [federal regulation] requirements." *Id.* at 2618.

<sup>5</sup>See *id.* at 2629 (to be codified at 9 VAC 5-91-420(G)(3)(d)). The Board also authorized an exhaust test in addition to the OBD check if, based on appropriate studies, the Director of the Department of Environmental Quality "determines that (i) the expected failure rate for exhaust testing for these certain vehicles would be greater than 5.0%, (ii) additional emission reductions would be achieved, and (iii) the [Environmental Protection Agency] acknowledges such emission reduction benefits." *Id.* at 2627 (to be codified at 9 VAC 5-91-410(A)(4)). Such double-testing on the same vehicle—tailpipe and OBD tests—may be conducted, other than for quality control or program evaluation purposes, only when necessary to comply with Title 1 of the Clean Air Act. See Va. Code Ann. § 46.2-1176 (Repl. Vol. 1998) (defining "enhanced emissions inspection program").

<sup>6</sup>42 U.S.C.A. ch. 85, §§ 7401-7671q (West 1995 & Supp. 2002).

<sup>7</sup>See 42 U.S.C.A. § 7409 (West 1995).

<sup>8</sup>See 40 C.F.R. §§ 50.9, 50.10 (2001) (setting forth national 1-hour and 8-hour primary and secondary ambient air quality standards for ozone).

<sup>9</sup>"Nonattainment" means an area designated by the Governor, in accordance with § 7407(d) of the Clean Air Act, as "nonattainment" with respect to any air pollutant. 42 U.S.C.A. § 7501(2) (West 1995).

<sup>10</sup>See 40 C.F.R. § 50.9, *supra* note 8. The Northern Virginia ozone nonattainment area includes the counties of Arlington, Fairfax, Loudoun, Prince William, and Stafford, and the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park. See 40 C.F.R. § 81.347, at 296 (2001).

<sup>11</sup>42 U.S.C.A. § 7511(a)(1) tbl. 1 (West 1995).

<sup>12</sup>40 C.F.R. § 81.347, *supra* note 10.

<sup>13</sup>42 U.S.C.A. § 7511a (West 1995 & Supp. 2002).

<sup>14</sup>42 U.S.C.A. § 7511a(c)(3) (West 1995). The inspection and maintenance program is subject to the approval of the Administrator of the Environmental Protection Agency. See § 7511a(a) (West 1995).

<sup>15</sup>42 U.S.C.A. § 7511a(c)(3)(C)(i) (West 1995).

<sup>16</sup>42 U.S.C.A. § 7511a(c)(3)(C)(vii) (West 1995).

<sup>17</sup>1995 Va. Acts ch. 836, at 1746, 1746; *id.* ch. 851, at 1828, 1828.

<sup>18</sup>Title I of the Clean Air Act comprises 42 U.S.C.A. §§ 7401-7431, 7470-7479, 7491, 7492, 7501-7509a, 7511-7515 (West 1995 & Supp. 2002).

<sup>19</sup>Loudoun Co. Dept. Soc. Serv. v. Etzold, 245 Va. 80, 425 S.E.2d 800 (1993); Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985); Last v. Virginia State Bd. of Medicine, 14 Va. App. 906, 421 S.E.2d 201 (1992).

<sup>20</sup>SPX Corp., N. Va. Analyzer Sys. Operator's Manual 1-5 (1998); see *id.* app. A at A-3.

<sup>21</sup>Federal test procedure refers to the federal certification test for new vehicles established in § 7525(a)(1) of the Clean Air Act.

<sup>22</sup>SPX Corp., *supra* note 20, at 5-13.

<sup>23</sup>42 U.S.C.A. § 7410(c)(1) (West 1995).

<sup>24</sup>See 42 U.S.C.A. § 7410(m) (West 1995) (authorizing Administrator of Environmental Protection Agency to apply sanctions listed in § 7509(b) of Clean Air Act).

<sup>25</sup>42 U.S.C.A. § 7509(b)(1)(A), (2) (West 1995).

<sup>26</sup>Hubbard v. Henrico Ltd. Partnership, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998), *quoted in* Brown v. Black, 260 Va. 305, 314, 534 S.E.2d 727, 731 (2000) (quoting Sansom v. Board of Supervisors, 257 Va. 589, 595, 514 S.E.2d 345, 349 (1999)).

<sup>27</sup>Williams v. Commonwealth, 190 Va. 280, 293, 56 S.E.2d 537, 543 (1949) (assuming that "the legislature did not intend to do a vain and useless thing" in enacting or amending statute).

<sup>28</sup>42 U.S.C.A. § 7511a(c)(3)(C)(vii) (West 1995).

<sup>29</sup>61 Fed. Reg. 40940 (Aug. 6, 1996) (adopting changes to 40 C.F.R. pts. 51, 85, effective Oct. 7, 1996).

<sup>30</sup>66 Fed. Reg. 18156 (Apr. 5, 2001) (effective May 7, 2001).

<sup>31</sup>See *supra* notes 24, 25.

<sup>32</sup>See *supra* note 30.

<sup>33</sup>Section 46.2-1048 provides that "[n]o motor vehicle registered in the Commonwealth and manufactured for the model year 1973 or for subsequent model years shall be operated on the highways in the Commonwealth unless it is equipped with an air pollution control system, device, or combination of such systems or devices installed in accordance with federal laws and regulations." No such vehicle shall be operated on Virginia's highways "unless it is of a type installed as standard factory equipment, or comparable to that designed for use upon the particular vehicle as standard factory equipment." *Id.* Section 46.2-1048 "shall not prohibit or prevent shop adjustments or replacements of equipment for maintenance or repair or the conversion of engines to low polluting fuels ..., so long as such action does not degrade the antipollution capabilities of the vehicle power system."

<sup>34</sup>See *supra* note 33.

<sup>35</sup>In construing the scope of an administrative agency's statutory authority, the Supreme Court of Virginia has stated that "every power expressly granted, or fairly implied from the language used, or which is necessary to enable the [State Corporation] Commission to exercise the powers expressly granted, should and must be accorded." Portsmouth v. Va. Ry. & P., No. 1244, 141 Va. 54, 61, 126 S.E. 362, 364 (1925), *quoted in* Fairfax County v. M.&S., Inc., 222 Va. 230, 237, 279 S.E.2d 158, 162 (1981). Additionally, in considering whether authority is implied from powers expressly granted by statute, the Court looks to the purpose and objective of the provision. City of Chesapeake v. Gardner Enterprises, 253 Va. 243, 247, 482 S.E.2d 812, 815 (1997). "The statute must be given a rational interpretation consistent with its purposes, and not one which will substantially defeat its objectives." *Id.* (citing Mayor v. Industrial Dev. Auth., 221 Va. 865, 869, 275 S.E.2d 888, 890 (1981); Norfolk S. Ry. Co. v. Lassiter, 193 Va. 360, 364, 68 S.E.2d 641, 643 (1952)); see also 3 Norman J. Singer, Sutherland Statutory Construction § 65.3, at 401 (6<sup>th</sup> ed. 2001) ("The grant of an express power carries with it the authority to exercise all other activities reasonably necessary to carry it into effect, and this has been employed with great liberality in interpreting statutes granting administrative powers.").

<sup>36</sup>The controversy and its eventual resolution by Congress in late 1995 is discussed in a report produced by the Congressional Research Service and redistributed by the National Library for the Environment. See CRS Report for Congress, 95034: Clean Air Act Issues, available at <http://www.cnie.org/NLE/CRSreports/Air/air-3.cfm> (updated Dec. 2, 1996).

<sup>37</sup>See 1995 Va. Acts, *supra* note 17.

<sup>38</sup>See *Ambrogio v. Koontz*, 224 Va. 381, 389, 297 S.E.2d 660, 664 (1982); *Cartwright v. Commonwealth*, 223 Va. 368, 372, 288 S.E.2d 491, 493 (1982); *Rich v. Commonwealth*, 198 Va. 445, 449, 94 S.E.2d 549, 552 (1956); *Gough v. Shaner, Adm'r*, 197 Va. 572, 575, 90 S.E.2d 171, 174 (1955); *Pirkey Bros. v. Commonwealth*, 134 Va. 713, 726, 114 S.E. 764, 768 (1922); 17 M.J. *Statutes* § 38 (1994 & Supp. 2001).

<sup>39</sup>CRS Report for Congress, *supra* note 36.

<sup>40</sup>CRS Report for Congress, *supra* note 36, under tab entitled "The Vehicle Inspection and Maintenance Program."

<sup>41</sup>Compare CRS Report for Congress, *supra*, and SPX Corp. 1-5, *supra* note 20.

<sup>42</sup>See CRS Report for Congress, *supra* note 40.

<sup>43</sup>See *id.*

<sup>44</sup>*Id.*

<sup>45</sup>See *id.*

<sup>46</sup>*Id.*

<sup>47</sup>See 1995 Va. Acts, *supra* note 17.

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