STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations
of Article 19 of the Environmental Conservation Law
of the State of New York,
and Part 217 of Title 6 of the
Official Compilation of Codes, Rules and Regulations
of the State of New York (6 NYCRR),

-by-

AMI AUTO SALES CORP.,
MANUEL R. INOA, and RAMON B. REYES,

Respondents.

DEC Case No. C02-20100615-27

DECISION AND ORDER OF THE COMMISSIONER

February 16, 2012

DECISION AND ORDER OF THE COMMISSIONER

This administrative enforcement proceeding concerns allegations that respondents AMI Auto Sales Corp. ("AMI"), Manuel R. Inoa, and Ramon B. Reyes completed 3,956 motor vehicle inspections using noncompliant equipment and procedures, and issued 3,953 certificates of inspection for these inspections without testing the vehicles' onboard diagnostic ("OBD") systems. OBD systems are designed to monitor the performance of major engine components, including those responsible for controlling emissions.

The alleged violations arose out of respondents' operation of an official emissions inspection station located at 1476 Jerome Avenue in the Bronx, New York, during the period between March 28, 2008 and October 13, 2009. During the relevant period, staff of the New York State Department of Environmental Conservation ("DEC") alleged that AMI was a domestic business corporation duly authorized to do business in New York State, Mr. Inoa and Mr. Reyes worked at AMI, and both performed mandatory annual motor vehicle emission inspections.

In accordance with 6 NYCRR 622.3(a)(3), DEC staff commenced this proceeding against respondents by service of a notice of hearing and complaint dated August 24, 2010. In its complaint, DEC staff alleged that respondents violated:

(1) 6 NYCRR 217-4.2, which states that no person shall operate an official emissions inspection station using equipment and/or procedures that are not in compliance with DEC procedures and/or standards; and

(2) 6 NYCRR 217-1.4, by issuing emission certificates of inspection to motor vehicles that had not undergone an official emission inspection.

For these violations, DEC staff requested that a civil penalty of one million nine hundred seventy-eight thousand dollars ($1,978,000) be assessed and that all three respondents be held jointly and severally liable.

Respondents submitted an answer on October 18, 2010, in which they denied DEC staff's charges, but admitted that Mr. Inoa and Mr. Reyes were certified motor vehicle inspectors. In their answer, respondents asserted three affirmative defenses: (1) the complaint failed to state a cause of action upon which relief may be granted; (2) the incidents described in the

complaint were the result of the actions or inactions of third parties over whom the respondents had no direction or control; and (3) DEC staff's enforcement action was barred by the doctrines of collateral estoppel and res judicata.

The matter was assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster, who prepared the attached summary report. I circulated the hearing report as a recommended decision (see 6 NYCRR 622.18[a]), thereby providing the parties the opportunity to submit comments on it. DEC staff submitted their comments on September 22, 2011 ("DEC Staff Letter"), and respondents submitted their comments on September 23, 2011 ("AMI Letter").

DEC staff, in its comments, stated that it agreed with and supported the findings of fact and the conclusions in the hearing report, as well as the ALJ's rejection of respondents' affirmative defenses. Staff, however, raised objections to certain statements in the hearing report, which are addressed below.

Respondents, in their comments, argued that DEC staff had failed to meet its burden of proof, and, accordingly, the charges should be dismissed. Alternatively, respondents proposed that, if either of the two causes of action are not dismissed, a penalty of no more than $15,000 should be assessed (AMI Letter, at 3). Respondents raised other objections, which are also addressed below.

Based on the record, I adopt the ALJ's report as my decision in this matter, subject to the following comments.[1]

Liability

I concur with the ALJ's determinations that DEC staff is entitled to a finding of liability with respect to the first charge: that is, respondents operated an official emissions inspection station using equipment or procedures that are not in compliance with DEC procedures or standards, in violation of 6

[1] On this same date, I am also issuing an order that holds Gurabo Auto Sales Corp. (Gurabo), which subsequently conducted an auto inspections business at the same location (1476 Jerome Avenue, Bronx, New York), and the same two individual respondents as in this proceeding (Mssrs. Inoa and Reyes), liable for one thousand four hundred sixteen (1,416) violations of 6 NYCRR 217-4.2 during the period from October 21, 2009 to July 9, 2010. That order assesses a civil penalty with respect to Gurabo and each of the two individual respondents for those violations (see Matter of Gurabo Auto Sales Corp,, Decision and Order of the Commissioner [decided herewith]).

NYCRR 217-4.2. ALJ Buhrmaster's analysis of the evidence supporting this charge was both comprehensive and complete.

The second charge relates to alleged violations of 6 NYCRR 217-1.4. According to this provision, "[n]o official inspection station as defined by 15 NYCRR 79.1(g) may issue an emission certificate of inspection, as defined by 15 NYCRR 79.1(a), for a motor vehicle, unless that motor vehicle meets the requirements of section 217-1.3 of this Subpart." As the ALJ noted, 15 NYCRR 79.1(g) defines an "official safety inspection station" as one which has been issued a license by the Commissioner of DMV "to conduct safety inspections of motor vehicles exempt from the emissions inspection requirement" (Hearing Report, at 22 [emphasis in original]). There was no evidence that respondents held that kind of license or that AMI was an official inspection station as defined by 15 NYCRR 79.1(g)(i.e., an official safety inspection station) conducting safety inspections of motor vehicles exempt from the emissions inspection requirement (see Hearing Report, at 22-23). Accordingly, the second cause of action was properly dismissed.

In their comments on the hearing report, respondents state that "a negative inference cannot be drawn based upon the fact that the Respondents exercised their Constitutional rights" not to testify during the hearing or present evidence to refute DEC staff's charges (see AMI Letter, at 2). The ALJ drew a negative inference from respondents' failure to testify (see, e.g., Matter of Commissioner of Social Services v Philip De G., 59 NY2d 137, 141 [1983] ["it is now established that in civil proceedings an inference may be drawn against the witness because of his failure to testify"]; see also Noce v Kaufman, 2 NY2d 347, 353 [1957]). However, I do not find it necessary to draw such an inference here. Respondents' liability is fully supported by the record evidence and the reasonable conclusions that can be drawn from that evidence.[2]

Respondents claim that DEC and the New York State Department of Motor Vehicles ("DMV") worked together in prosecuting their respective cases against respondents. According to respondents, because the underlying bases of the charges are the same, the DEC is collaterally estopped and

[2] Respondents identified an error in the ALJ's Hearing Report. Finding of Fact 21 on page 8 references Mr. Inoa twice, when in fact, the second reference should be to Mr. Reyes. Accordingly, Finding of Fact 21 is amended to read: "The 2,068 inspections performed by Mr. Inoa resulted in issuance of 2,066 emission certificates of inspection. The 1,888 inspections performed by Mr. Reyes resulted in issuance of 1,887 emission certificates of inspection."

barred by res judicata from bringing charges against respondents for inspections for which DMV has already found respondents liable (see AMI Letter, at 2-3).

The legislative and regulatory context, however, demonstrates that the enforcement activities of DMV and DEC are not duplicative. Section 217-4.2 is a regulation promulgated in part under the State's air pollution control law, a law subject to the DEC's jurisdiction (see Environmental Conservation Law ["ECL"] § 19-0301). The DMV charges were prosecuted under the Vehicle and Traffic Law ("VTL")[3], which falls under the DMV's separate jurisdiction. The enforcement activities of DMV and DEC are based on separate statutes and regulations, and separate jurisdictions. Indeed, DEC staff could not have prosecuted the section 217-4.2 violations in DMV's administrative proceeding. Because the section 217-4.2 violations constitute separate and distinct offenses from violations of the VTL, collateral estoppel and res judicata do not bar the present proceeding, even though some of the offenses charged arise from inspections that previously served as the basis of proceedings before DMV.

I note that, of the 3,956 inspections set forth by DEC staff, thirty-two (32) inspections also served as the basis for the enforcement proceedings before DMV (see Hearing Report, at 26). With respect to those thirty-two (32) violations that were addressed in both this proceeding and the proceedings before DMV, the issue is whether multiple penalties may be imposed for multiple offenses arising from a single inspection. In this case, a violation of 6 NYCRR 217-4.2 required proof that respondents conducted inspections using equipment or procedures that were not in compliance with DEC's procedure or standards. DMV's penalty assessments and license revocations were "strictly on the basis of the violation of VTL [section] 303(e)(3), meaning 'fraud, deceit or misrepresentation in securing the license or certificate to inspect vehicles or in the conduct of licensed or certified activity'" (see Hearing Report, at 26).[4]

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[3] See VTL §§ 303(e)(1) and 303(e)(3); 15 NYCRR 79.24(b)(1)(see Hearing Report, at 26; see also Hearing Exhibit 10 [Finding Sheet, at 2-3]).

[4] DEC staff states that the hearing report implies that DMV's administrative decisions are final decisions for which no administrative appeal right exists (see DEC Staff Letter, at 1). In fact, station owners and individual certified inspectors have the right to appeal any adverse decisions within the DMV administrative hearing process. I do not read the hearing report, in its summary of the actions taken in the DMV proceedings, as reaching the conclusion that no appeal right exists. Administrative appeals from the DMV determinations were taken, which respondents subsequently withdrew (see Respondents' Closing Brief, dated May 18, 2011, at 19; see also Hearing

Each offense charged by DEC staff required proof of facts not required for the offense charged in the DMV proceeding (see Blockburger v United States, 284 US 299, 304 [1932]; see also Matter of Steck, Commissioner's Order, March 29, 1993, at 4; Matter of Wilder, Supplemental Order of the Acting Commissioner, Sept. 27, 2005, adopting ALJ Hearing Report, at 9-11). Accordingly, multiple offenses and penalties are authorized and respondents' argument is rejected.

Respondents further contend that because AMI has been dissolved and is no longer authorized to do business in the State of New York, AMI "cannot be held liable, nor can it be responsible for the payment of any penalties" (AMI Letter, at 4). However, it has been consistently held that a dissolved corporation continues its corporate existence to pay liabilities or obligations, be sued, and participate in administrative proceedings in its corporate name, even if the activities which gave rise to the liability occurred after corporate dissolution (see, e.g., Matter of L-S Aero Marine, Inc., Order of the Commissioner, June 29, 2010, adopting ALJ's Default Summary Report [which, in part, cited Business Corporation Law ("BCL") §§ 1005(a)(2), 1006(a) and 1009 as providing that a dissolved corporation continues its corporate existence for purposes of paying liabilities or obligations, for being sued, and to participate in administrative proceedings in its corporate name]; Matter of Salvatore Viti, Order of the Commissioner, March 7, 2008, at 2 n1; see also BCL § 1006(a)(4) [a dissolved corporation "may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served by or upon it"]).

AMI continued to operate as an official emissions inspection station licensed by DMV until October 2009, long after its dissolution by proclamation on June 25, 2003. AMI held itself out to DEC, DMV, and the general public as a corporation. It cannot now deny the existence and viability of its corporate entity in an attempt to avoid liability (see Matter of Gold Depository Unlimited, 106 Misc 2d 992, 993 [Sup Ct NY County 1980]; Matter of Perkins Eastman Architects, P.C. v Nations Academy, LLC, 2011 NY Misc LEXIS 1416 [March 25, 2011] [Sup Ct NY County 2011]).

Exhibit 10 [specifically, letter dated March 15, 2011 referencing the withdrawal of the appeal]). In any event, the procedural posture of enforcement proceedings before the DMV has no bearing on the charges in this proceeding.

Civil Penalty

The ALJ found that the staff-requested penalty of one million nine hundred seventy-eight thousand dollars ($1,978,000), which staff sought jointly and severally against all respondents, was excessive. The ALJ concluded that, in light of the penalties that DMV assessed and the revocation of AMI's inspection license, among other things (see Hearing Report at 34), a downward penalty assessment was warranted in this proceeding. He recommended that respondent AMI be assessed a civil penalty in the amount of three hundred thousand dollars ($300,000), respondent Manuel R. Inoa be assessed a civil penalty in the amount of one hundred fifty thousand dollars ($150,000), and respondent Ramon B. Reyes be assessed a civil penalty in the amount of one hundred fifty thousand dollars ($150,000).[5]

Respondents contend that DEC staff provided no explanation for its penalty request (see AMI Letter, at 4). Respondents further assert that no economic benefit arising from their activities was shown (see id.). DEC staff referenced its penalty request at the hearing, and subsequently provided a more detailed explanation in its closing brief (see DEC Staff Closing Brief, at 12-17). The ALJ, in considering economic benefit in his analysis, noted that any economic benefit, if it does exist, is unknown (see id., at 29). However, economic benefit is only one of a number of factors to be considered. In his hearing report, the ALJ, in modifying staff's penalty request, fully explained his rationale with respect to the penalty in the context of applicable legal authority, DEC policy guidance, and the record before him (see Hearing Report, at 27-34).

ALJ Buhrmaster discussed why each simulated inspection constitutes a discrete event, contrary to respondents' contention that the entire time period should be considered one continuing violation (see Hearing Report, at 28). As noted by the ALJ, the civil penalties in this matter account for "the seriousness and large number of the violations, and, as an aggravating factor, the respondents' knowing, intentional violation of inspection procedure" (see id., at 34).

[5] As the ALJ noted, for the time period during which the improper inspections were conducted, the applicable penalty provisions established a penalty of not less than three hundred seventy-five dollars in the case of the first violation, and, in the case of a second or any further violation, a penalty not to exceed twenty-two thousand five hundred dollars (see former ECL 71-2103[1]).

Respondents state that DEC staff did not address the DEC's Civil Penalty Policy (DEE-1, dated June 20, 1990) in its penalty request. This policy is intended to be used as guidance by both DEC staff and the Office of Hearings and Mediation Services. As such, an ALJ should use the policy in considering an appropriate penalty (see Civil Penalty Policy at 1 ["Administrative Law Judges . . . should consider (the Civil Penalty Policy) in recommending penalty terms for all Orders executed by or for the Commissioner of Environmental Conservation"]). This was done here.

Although respondents assert that DEC staff inordinately delayed in bringing these charges, no support for that contention is evident on this record. Respondents argue that the DEC's investigation commenced on or before March 28, 2008, but that a complaint was not issued until August 24, 2010. According to respondents, if DEC suspected respondents of any improper activity, DEC could have attempted to stop such activity after the first inspection when DEC staff found improper procedures (see AMI Letter, at 3).

Respondents' argument is meritless. Respondents provided no legal authority in support of their argument, and based on this record, no inordinate delay occurred between the commencement of the inspections and the commencement of DEC staff's enforcement action. Respondents did not demonstrate that this passage of time resulted in any prejudice to their ability to defend.

Indeed, upon the notification of DEC by DMV staff that DMV staff suspected that electronic simulators were being used in inspections within the greater New York City area, DEC staff commenced an investigation to determine the extent of that use and which stations were involved (see Hearing Transcript, at 279-280). As part of DEC staff's investigation, it reviewed data from over 11,500 stations (see id., at 290). Upon completion of the investigation, notices of violation were issued (see, e.g., Hearing Report, at 18; see also Hearing Transcript, at 409-410).

In his hearing report, the ALJ underscored the significance of the OBD II testing to the control of air pollution. OBD II testing helps identify "vehicles with emission problems that, if left uncorrected, contribute to ozone pollution" (see Hearing Report, at 34). Ozone pollution is a major concern in urban areas because it causes air pollution and results in adverse health impacts. Using a simulator to bypass required emissions

testing clearly undermines the regulatory scheme created to protect the environment and public health.

Respondents argue that no evidence was presented as to any pollutants "being emitted into the air, or the impact of same" (AMI Letter, at 4). However, adverse impacts of automotive emissions, including ozone, have been well documented. Part 217 of 6 NYCRR was promulgated to address those impacts. Pursuant to 6 NYCRR 622.11(a)(5), I am taking official notice of notices published in the January 10, 1996 and March 26, 1997 New York State Register, as part of the Part 217 rulemaking, that set forth the adverse impacts of automotive emissions of hydrocarbons, carbon monoxide, oxides of nitrogen and other toxic compounds. Ozone is an air contaminant "which impairs human health by adversely affecting the respiratory system" and is of particular concern in the heavily populated New York City metropolitan area (see, e.g., New York State Register, January 10, 1996, at 5; id., March 26, 1997, at 8). Respondents' actions subverted the regulatory regime designed to address and control the adverse impacts of automotive emissions.

In consideration of the circumstances of this record, I am modifying the ALJ's penalty recommendation. I concur with the ALJ's recommendation that the civil penalty imposed on respondent AMI should be equal to the aggregate penalty imposed on the two individual respondents. However, the significant number of improper inspections conducted at AMI warrants a higher penalty. In this matter, nearly four thousand inspections using noncompliant equipment and procedures were performed, which seriously subverts the inspection program. Accordingly, I am assessing a civil penalty on AMI of three hundred forty-five thousand dollars ($345,000) for the 3,956 improper inspections that were conducted. Although the penalty being imposed is substantially below the statutory maximum, the penalty is a significant one.

With respect to the individual respondents, I am assessing a total penalty of three hundred forty-five thousand dollars ($345,000) as follows. Respondent Inoa performed nearly two hundred more improper inspections than respondent Reyes (2,068 compared to 1,888 inspections), and this greater number should be reflected in the individual penalty assessment. Accordingly, I am assessing a penalty of one hundred eighty thousand dollars ($180,000) on respondent Inoa and one hundred sixty-five thousand dollars ($165,000) on respondent Reyes, which is generally proportional to the number of inspections that each performed.

I also concur with the ALJ that imposing joint and several liability is inappropriate here. Although joint and several liability may be imposed in administrative enforcement proceedings, in this instance Messrs. Inoa and Reyes each performed their own inspections for which it is appropriate to hold each individually responsible, and also separate from the penalty imposed on respondent AMI. To the extent that respondents have raised additional arguments in their comments on the recommended decision, those have been considered and are rejected.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Respondents AMI Auto Sales Corp., Manuel R. Inoa, and Ramon B. Reyes are adjudged to have violated 6 NYCRR 217-4.2 by operating an official emissions inspection station using equipment or procedures that were not in compliance with DEC procedures or standards. Three thousand nine hundred fifty-six (3,956) inspections using noncompliant equipment and procedures were performed at AMI Auto Sales Corp., of which respondent Manuel R. Inoa performed 2,068 and respondent Ramon B. Reyes performed 1,888.

II. DEC staff's charges that respondents violated 6 NYCRR 217-1.4 are dismissed.

III. The following penalties are hereby assessed:

A. Respondent AMI Auto Sales Corp. is assessed a civil penalty in the amount of three hundred forty-five thousand dollars ($345,000);

B. Respondent Manuel R. Inoa is assessed a civil penalty in the amount of one hundred eighty thousand dollars ($180,000); and

C. Respondent Ramon B. Reyes is assessed a civil penalty in the amount of one hundred sixty-five thousand dollars ($165,000).

The penalty for each respondent shall be due and payable within thirty (30) days of the service of this order upon that respondent. Payment shall be made in the form of a cashier's check, certified check or

money order payable to the order of the “New York State Department of Environmental Conservation” and mailed to the DEC at the following address:

Blaise Constantakes, Esq.
Assistant Counsel
NYS DEC - Division of Air Resources
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-1500

IV. All communications from any respondent to the DEC concerning this order shall be directed to Assistant Counsel Blaise Constantakes, at the address set forth in paragraph III of this order.

V. The provisions, terms and conditions of this order shall bind respondents AMI Auto Sales Corp., Manuel R. Inoa, and Ramon B. Reyes, and their agents, heirs, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By:_____/s/_____
Joseph J. Martens
Commissioner

Dated: February 16, 2012
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK
12233-1550

In the Matter

- of -

Alleged Violations of Article 19 of the New York State Environmental Conservation Law and Title 6, Part 217, of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR"), by:

AMI AUTO SALES CORP., MANUEL R. INOA, AND RAMON B. REYES,

Respondents

NYSDEC CASE NO.C02-20100615-27

HEARING REPORT

- by –

_____/s/_____
Edward Buhrmaster
Administrative Law Judge

September 1, 2011

PROCEEDINGS

Pursuant to a Notice of Hearing and Complaint, dated August 24, 2010 (Exhibit No. 1), Staff of the Department of Environmental Conservation ("DEC") charged AMI Auto Sales Corporation, Manuel R. Inoa and Ramon B. Reyes ("the respondents") with violations of Part 217 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), which concerns emissions from motor vehicles.

In a first cause of action, the respondents were charged with violating 6 NYCRR 217-4.2, which states that no person shall operate an official emissions inspection station using equipment and/or procedures that are not in compliance with DEC procedures and/or standards. In a second cause of action, they were charged with violating 6 NYCRR 217-1.4 by issuing emission certificates of inspection to motor vehicles that had not undergone an official emission inspection.

Both violations were alleged to have occurred during the period between March 28, 2008, and October 13, 2009, at an official emission inspection station commonly known as AMI Auto Sales Corporation ("AMI"), located at 1476 Jerome Avenue in the Bronx, New York. During this period, DEC Staff alleged, AMI was a domestic business corporation duly authorized to do business in New York State, Mr. Inoa owned and operated the inspection station, and both Mr. Inoa and Mr. Reyes worked there, performing mandatory annual motor vehicle emission inspections.

According to DEC Staff, during the period in question, the respondents performed 3,956 such inspections using a device to substitute for and simulate the motor vehicle of record, and issued 3,953 emission certificates based on these simulated inspections.

The respondents submitted an answer (Exhibit No. 2) on October 18, 2010, in which they denied DEC Staff's charges, but admitted that Mr. Inoa and Mr. Reyes were certified motor vehicle inspectors. The answer also asserted three affirmative defenses: (1) that the complaint failed to state a cause of action upon which relief may be granted; (2) that the incidents described in the complaint were the result of the actions and/or inactions of third parties over which the respondents had no direction or control; and (3) that DEC Staff's enforcement action was barred by the doctrines of collateral estoppel and res judicata.

By a statement of readiness, dated December 30, 2010 (Exhibit No. 3), DEC Staff requested that DEC's Office of Hearings and Mediation Services schedule this matter for hearing. By letter of December 31, 2010, Chief Administrative Law Judge James T. McClymonds informed the parties that the matter had been assigned to me. Following a conference call with the parties' counsel, I issued a hearing notice dated January 20, 2011 (Exhibit No. 4), announcing the time, date and location of the hearing. As announced in that notice, the hearing began on February 9, 2011, at DEC's Region 2 office. The hearing concluded on March 1, 2011, at the same location.

Testifying for DEC Staff were Michael Devaux, a vehicle safety technical analyst employed in the Yonkers office of the New York State Department of Motor Vehicles ("DMV"), and James Clyne, an environmental engineer and section chief within DEC's Division of Air Resources, Bureau of Mobile Sources and Technology Development. The respondents appeared at the hearing, but did not testify and called no witnesses on their behalf.

The hearing record includes 439 pages of transcript and ten hearing exhibits. The first nine exhibits were received at the hearing, after which I held the record open for documents concerning a related hearing conducted by DMV, which were provided by the respondents' counsel and received as Exhibit No. 10. A list of the hearing exhibits is attached to this report.

On March 31, 2011, I held a conference call with the parties' counsel to discuss closing briefs. As confirmed in my letter of April 19, 2011, I allowed for one round of briefs, to be submitted by each party simultaneously, and identified particular issues for discussion. Consistent with the deadline to which they agreed, the parties submitted their closing briefs on May 18, 2011.

Counsel for DEC Staff in this matter is Blaise Constantakes, an attorney in DEC's Office of General Counsel in Albany. Counsel for the respondents is Mary Beth Macina, whose office is in Yonkers.

POSITIONS OF THE PARTIES

Position of DEC Staff

According to DEC Staff, the respondents completed 3,956 motor vehicle inspections using noncompliant equipment and procedures, and issued 3,953 certificates of inspection for these inspections, without testing the vehicles' onboard diagnostic ("OBD") systems, which are designed to monitor the performance of major engine components, including those responsible for controlling emissions. Staff explains that the OBD emissions portion of the vehicle inspection involves the electronic transfer of information from the vehicle to a computerized work station and, from there, to DMV via the Internet or a dedicated phone line. DEC Staff says that, for the inspections at issue here, the respondents did not check the vehicles' OBD systems, but instead simulated the inspections, based on a 15-field profile (or electronic signature) that Staff identified in the inspection data that was transmitted to DMV.

DEC Staff has requested a civil penalty of $1,978,000, for which all three respondents would be jointly and severally liable. The penalty is not apportioned between the two causes of action, but is calculated on the basis of $500 per illegal (i.e., fraudulent) inspection that was performed.

Position of Respondents

According to the respondents, DEC Staff failed to prove the charges in its complaint. The Respondents assert that there was insufficient proof to demonstrate that AMI was an official emissions inspection station, or that any equipment other than that approved by DMV was used to perform inspections there. The respondents argue that the only evidence of a simulator, or a device used to simulate inspections, was circumstantial, as no simulator was recovered and DEC's witnesses were not present during any of the inspections at issue in this matter. They also claim that there is no proof that the station's inspection equipment was working properly, because the equipment was not inspected either prior to, or after, the charges being brought.

The respondents say it is possible that data contained within the inspection station records may have been tampered with or altered by DMV auditors, or that human error in the inspectors' manual entry of information into the equipment may have played a role in the generation of data that DEC alleges is irregular. Finally, they claim that because DEC and DMV use

simulators to augment their testing software, it is possible that they or the station were testing the inspection software and inadvertently forgot to remove the simulation equipment that they had used, if in fact a simulator was used at the station.

As to the first cause of action, the respondents claim that DEC Staff presented no evidence as to DEC's procedures and standards for emissions inspections. The respondents claim that the second cause of action cannot be supported in the absence of evidence that the respondents conducted improper safety inspections, and that the only proof offered by DEC Staff was with regard to emissions inspections.

According to the respondents, DEC did not present competent evidence that, at the time of the alleged violations, AMI was a domestic business corporation duly authorized to do business in New York State; in fact, they claim to have demonstrated that AMI was dissolved by proclamation in 2003, before the violations are alleged to have occurred.

The respondents claim that there is insufficient evidence to show that Mr. Inoa owned an emission inspection station known as AMI Auto Sales Corp., and no evidence that he operated such station. They also question why the abstract of AMI inspection data presented by DEC Staff omits certain data for each inspection, and suggest that the failure to present all data creates an inference that the data that was omitted is unfavorable to Staff's case.

The respondents claim that the penalties sought by DEC Staff to settle this matter, and the higher penalties now sought, are exorbitant and unreasonable, and left them no choice but to go to hearing. They say that if DEC Staff's true purpose was to deter the activity alleged in its complaint, it should have acted more expeditiously.

The respondents claim that all charges in this case arise from a common transaction or occurrence involving the alleged performance of simulated motor vehicle inspections. Therefore, they submit, if the charges are sustained, they should be merged into one cause of action. Also, if penalties are assessed, the respondents claim they should not be assessed on a per inspection basis; instead, they say that the entire time period of non-compliance should be viewed as one continuing violation, thus capping the penalty at $15,000. Finally, the respondents claim that they should not be held jointly and severally liable for violations that are found.

The respondents point out that in a separate proceeding maintained by DMV, they were penalized and suffered revocation of the inspection station license and their inspector certificates on the basis of DMV's findings that they used a substitute vehicle or an electronic device during exhaust emissions tests, which DMV determined after hearing to be in violation of Vehicle and Traffic Law Section 303(e)(3), as "fraud, deceit or misrepresentation . . . in the conduct of licensed or certified activity." With respect to any of DEC's charges that arise from inspections for which they have already been penalized by DMV, the respondents request that DMV's penalties be considered in DEC's penalty calculation. By revoking the inspection station's license and the inspectors' certificates, the respondents contend, DMV has already achieved the goal of deterring future violations.

FINDINGS OF FACT

1. AMI Auto Sales Corp. ("AMI") applied for and received from DMV a license to operate a motor vehicle inspection station at 1476 Jerome Avenue in the Bronx. The facility number assigned to this station was 7072751. (See page one of Exhibit No. 7, a portion of the original facility application.)

2. At the time of its application to DMV, AMI's president was Heriberto Hernandez and its vice president was Manuel R. Inoa. Each of them had an equal ownership interest. (See Exhibit No. 7, page 2.)

3. In 1999, Mr. Inoa submitted a request for business amendment to DMV, indicating that he had become president of AMI and had a 100 percent ownership interest. (See Exhibit No. 7-A, the completed request for business amendment.)

4. AMI's initial filing with the New York State Department of State was on October 13, 1995. AMI was dissolved by proclamation on June 25, 2003, and is now considered inactive by the Department of State's Division of Corporations. According to information on the website maintained by the Department of State (Exhibit No. 9), AMI's address for service of process is 1476 Jerome Avenue, the Bronx, and Mr. Inoa remains the chairman or chief executive officer of the corporation.

5. On July 18, 1998, Mr. Inoa applied to DMV for certification as a motor vehicle inspector. Upon approval of

his application, he was assigned certificate number WZ60. (See Inoa's application for certification, Exhibit No. 5.)

6. On May 3, 2003, Ramon B. Reyes applied to DMV for certification as a motor vehicle inspector. Upon approval of his application, he was assigned certificate number 3MQ1. (See Reyes's application for certification, Exhibit No. 6.)

7. DMV and DEC jointly administer the New York Vehicle Inspection Program ("NYVIP"), a statewide annual emissions inspection program for gasoline-powered vehicles which is required by the federal Clean Air Act Amendments of 1990 and U.S. Environmental Protection Agency regulations found at 40 CFR Part 51. (Transcript ("T"): 34, 238.)

8. For model year 1996 and newer light-duty vehicles, NYVIP requires the completion of an OBD emissions inspection commonly referred to as OBD II, because it succeeds a version that was previously employed. (T: 38 - 39, 238.)

9. OBD II monitors the operation of the engine and emissions control system in vehicles that are manufactured with the technology installed. The OBD II inspection requires the connection of the NYVIP test equipment, found at licensed inspection stations, to the vehicle's standardized OBD connector, which is followed by the downloading of information from the emissions system.

10. The complete state inspection for an OBD II vehicle includes a safety inspection, a visual inspection of the emission control devices (including the gas cap), and the OBD II inspection itself.

11. To perform an OBD II inspection, the NYVIP work station must be set up correctly, which means that it must receive an approved hardware configuration from SGS Testcom, the NYVIP program manager, which is under contract to DMV. SGS Testcom is responsible for the development, maintenance and repair of inspection equipment, and the transmittal of electronic data from the inspection station to DMV. (T: 238 – 239, 247.)

12. Before an inspection can be completed with the NYVIP unit purchased by the inspection station, the bar code on the inspection station license must be scanned into the work station. This bar code is scanned once to assign the station's number to the unit. Then, before each inspection, the inspector

scans into the work station the bar code on his or her own inspector certificate. (T: 247 – 251.)

13. The owner or manager of an inspection station must enter information into the NYVIP work station indicating who is authorized to perform inspections with the equipment. (T: 253 – 254.) Also, each licensed inspector must pass an OBD II certification course, which is done through the work station. The results of the course examination are transmitted to DMV, and an inspector who passes the examination is able to perform OBD II inspections at any station that gives him or her authorization. (T: 253 – 254.)

14. The first part of the OBD II inspection involves securing information from the vehicle being presented, such as make, model and model year. This may be done by scanning DMV registration bar codes on the vehicle or manually entering information using a keyboard, or some combination of the two. At the same time, the inspector also records the DMV registration-based vehicle identification number ("VIN"), which is a 17-character alphanumeric identifier for that specific vehicle. (T: 254 – 256.)

15. Based on the vehicle information, NYVIP makes a determination as to what type of inspection the vehicle should receive in light of its age and weight, and a call is made to DMV to try to match this information to that contained in the DMV registration file. When the information is matched on the DMV side, the inspection continues with a series of menus that allow for completion of the safety inspection. After that, another series of screens comes up for what is known as the emission control device ("ECD") checks, which involve visual inspection of air pollution control devices such as the catalytic converter, the exhaust gas recirculation ("EGR") valve, and the gas cap. (T: 256 – 258.)

16. The OBD II inspection is the final inspection component. The first two parts of this inspection ask the inspector to put the key in the ignition and turn it to what is known as the "key on, engine off" position, which essentially means that the key is turned but the vehicle is not running. At this point the malfunction indicator light ("MIL") should come on, demonstrating that the bulb has not burned out. The next step involves moving to the "key on, engine running" position, which involves turning the ignition on, so that the engine is running, though the car remains idling while parked at the station. At this point the light should go off, indicating that

the OBD system has not found a fault. If the light remains on, it indicates an emissions failure. (T: 258 – 259.)

17. Following these initial parts of the OBD II inspection, the inspector is directed to plug the NYVIP work station connector into the vehicle's diagnostic link connector ("DLC"), which is found in every vehicle that is OBD II compliant. With the connection established, the NYVIP work station attempts to communicate with the onboard computer with standardized requests for which standardized responses are sent back from the vehicle. Based on the information provided during this exchange, which includes identifying information for the vehicle, it is determined whether the vehicle will pass or fail the inspection. The two MIL checks and the electronic communication of information between the work station and the vehicle are typically accomplished in five minutes. (T: 259 – 263.)

18. Once this electronic transaction is completed, the NYVIP work station internally makes a pass or fail determination. If the vehicle passes the inspection, the work station instructs the inspector to scan the inspection sticker, which then goes on the windshield, so that DMV can track the sticker (or certificate) to the inspection. The inspector must indicate that he or she scanned the sticker and affixed it to the vehicle, and at that point the record of the full inspection is sent to DMV. (T: 263 – 264.)

19. AMI performed OBD II inspections during the period between April 4, 2005, and October 13, 2009, as documented in Exhibits No. 8 and 8-A. (T: 318 – 319).

20. During the period between March 28, 2008, and October 13, 2009, 3,956 of these inspections were performed using a device to substitute for and simulate the motor vehicle of record. (T: 319.) Of these 3,956 inspections, 2,068 were performed by Mr. Inoa, and 1,888 were performed by Mr. Reyes. (T: 335 – 336.)

21. The 2,068 inspections performed by Mr. Inoa resulted in issuance of 2,066 emission certificates of inspection. The 1,888 inspections performed by Mr. Inoa resulted in issuance of 1,887 emission certificates of inspection. (T: 336.)

22. No inspection certificate should issue where there has been a failure of the safety inspection, the ECD checks, or the OBD II inspection. (T: 336.)

DISCUSSION

This matter involves charges that AMI and its two certified inspectors, Mr. Inoa and Mr. Reyes, did not check the OBD II systems as part of their inspections of 3,956 motor vehicles during the period between March 28, 2008, and October 13, 2009. In essence, DEC Staff alleges that the OBD II inspections for these vehicles were simulated, using non-compliant equipment and procedures, and that the emission certificates resulting from these inspections were improperly issued.

On behalf of DEC Staff, Mr. Clyne explained that OBD II testing is part of NYVIP, the state's vehicle inspection program that is required under the federal Clean Air Act to combat ozone pollution. (T: 239 – 240, 242 – 243.) Pursuant to federal law and regulation, New York is required to submit a detailed State Implementation Plan ("SIP") describing how it will implement and enforce its program. (T: 239 – 240.) For the NYVIP program, SIP revisions were submitted to the U.S. Environmental Protection Agency in 2006 (in which the statewide program was outlined) and in 2009 (in which DEC committed to vigorous program enforcement on the basis of enhanced inspection data, which DEC reviews for evidence of fraud). (T: 240, 273, 277 - 279.)

Locating the Simulator Signature

According to Mr. Clyne, about the time of September 2008, DMV alerted DEC to what DMV's field staff believed was fraud involving the use of simulators within the greater New York City area. DMV's concern was based on what it considered to be very repetitive, extremely unrealistic readings for engine RPM (meaning "revolutions per minute") that had been recorded for vehicles during OBD II inspections. (T: 280 – 282, 358.) Engine RPM is recorded to ensure that the vehicle is running while the vehicle is connected to the NYVIP work station. (T: 281.) Mr. Clyne said that during a normal inspection, with the car idling in park, the RPM reading should be in the range of between 400 and 1200; however, some recorded RPM readings were in excess of 6,000, and repeated from inspection to inspection, which was unusual, because different vehicles should produce different readings. (T: 282 - 283.)

Mr. Clyne said that upon querying a month's worth of inspection data for the greater New York City metropolitan area, DEC identified five inspection stations that were reporting RPM readings in excess of 5,000. (T: 284, 286, 358 - 359.) Then, with the assistance of other agencies, DEC initiated an

undercover investigation of these facilities, in which vehicles were monitored as they went in and out. (T: 285.) This led to a broader investigation involving additional facilities that had reported RPM readings of less than 5,000, but whose other inspection data showed similarities to that reported by the five stations that were initially identified. (T: 286 – 287, 386.)

Concluding that RPM alone was not a sufficient indicator of simulator use, DEC did an extensive data analysis to better create a profile for simulator use, overlooking RPM and focusing instead on 15 other data fields which, together, constitute what DEC determined was an electronic signature for a simulated OBD II inspection. (T: 288, 387.)

DEC queried all of its NYVIP inspection data going back to 2004, and found that of 11,500 stations reviewed, the signature appeared at approximately 44 inspection stations (including AMI), all of them in the greater New York City area, in some cases a few times, in others very often. (T: 289 – 291.) The signature was detected for inspections attributed to about 100 different inspectors. (T: 290.) It appeared only for inspections recorded during the period between March 2008 and July 2010, and has not been found since, which Mr. Clyne attributed to DEC's commencement of enforcement action that brought an end to simulator use. (T: 290 - 291, 403.)

Mr. Clyne testified that where the 15-field electronic signature appears in the inspection data (Exhibits No. 8 and 8-A), the identified vehicle was not inspected, because the signature does not match a vehicle. (T: 292.) Mr. Clyne explained that when a vehicle is inspected every year, as required by law, its signature is repeated over time. However, he said that he could find no vehicles matching the profile created by the 15-digit signature prior to March 2008, which indicates that such vehicles never existed. (T: 291.)

Mr. Clyne explained that Exhibits No. 8 and 8-A are abstracts of data collected from all the OBD II inspections performed at AMI, as generated by DMV at his request. The data fields shown for each inspection were selected by Mr. Clyne from the more than 100 fields that are generated during the course of an inspection, omitting some, such as those related to the inspection's safety component, which Mr. Clyne said were not relevant for his purposes. (T: 302.) From left to right across the top of each page, there are headings for each column of data that is displayed:

DMV VIN NUM is the vehicle identification number, which is scanned or manually entered into the NYVIP work station.

INSP DTE shows the date and time of the inspection.

DMV FACILITY NUM is the number that was assigned to the station by DMV, and resides in the NYVIP work station when the facility bar code is scanned. In each case, the number is 7072751, the number that appears in the upper left hand corner of the first page of AMI's original facility application (Exhibit No. 7).

ODOMETER READING is recorded manually by the inspector.

REC NUM is the record number, basically a serial tally of inspections.

CI NUM (or certified inspector number) is the alphanumeric identifier for the inspector. In this case, the only two identifiers are "3MQ1" (corresponding to the assigned certificate number for Mr. Reyes, as shown in the upper right hand corner of the first page of his inspector application, Exhibit No. 6) and "WZ60" (corresponding to the assigned certificate number for Mr. Inoa, as shown in the upper right hand corner of the first page of his inspector application, Exhibit No. 5). The number is entered by the inspector scanning his or her bar code prior to the start of the inspection.

DATA ENTRY METHOD indicates how the vehicle information was entered into the inspection record.

GAS CAP RESULT is a pass-fail indicator for the gas cap check.

ASSIGNED CERT NUM is taken from the scanned bar code of the sticker that is issued for the vehicle passing the inspection.

VEH YEAR is the model year of the vehicle.

DMV VEH MAKE CDE is the make of the vehicle.

PUBLIC MODEL NAME is the model name of the vehicle.

NYVIP UNIT NUM is the identifier for the work station that was assigned to the inspection station by SGS Testcom, the program manager. It is the same for all inspections shown in Exhibits No. 8 and 8-A, meaning that the same work station was used at AMI during the entire course of the OBD II inspections performed there. (T: 303 – 307.)

To the right of these headings, Mr. Clyne testified, are the headings for entries that, read together, form the 15-field electronic signature that constitutes the profile of the simulator used most often in the greater New York City metropolitan area. (T: 316.) The headings, and the entries that are consistent with the profile (shown here in quotation marks) are as follows:

PCM ID1	“10”
PCM ID2	“0”
PID CNT1	“11”
PIC CNT2	“0” (should read as PID CNT2)
RR COMP COMPONENTS	“R”
RR MISFIRE	“R”
RR FUEL CONTROL	“R”
RR CATALYST	“R”
RR 02 SENSOR	“R”
RR EGR	“R”
RR EVAP EMISS	“R”
RR HEATED CATA	“U”
RR 02 SENSOR HEAT	“R”
RR SEC AIR INJ	“U”
RR AC	“U”

[T: 308 – 313.]

Mr. Clyne said that in the data abstracts for AMI’s OBD II inspections, the 15-field signature appears for the first time on page 157 of Exhibit No. 8, in relation to the inspection of a 2001 Mitsubishi Montero at 9:26 a.m. on March 28, 2008. (T: 315 – 319.) It reappears in relation to the next inspection done at the facility, at 9:35 a.m. on March 28, 2008, for a Ford Probe (T: 318), and then periodically throughout the remainder of Exhibit No. 8, encompassing inspections done through September 9, 2009, and in Exhibit No. 8-A, encompassing inspections done between September 10 and October 13, 2009.

According to Mr. Clyne, the 15-digit signature appears a total of 3,956 times in Exhibits No. 8 and 8-A, which he determined by re-sorting the electronic version of the inspection data compiled in these exhibits. (T: 319 – 320.)

Mr. Clyne emphasized that different vehicles should record different responses, and that on a multiple inspection basis, as a vehicle gets inspected year after year, one would see the same profile reflected in the data fields. However, if different vehicles are inspected on the same day, the profile of each vehicle should be different as well. (T: 313 – 314.)

Mr. Clyne explained how he could determine from the inspection data collected in Exhibits No. 8 and 8-A whether a particular vehicle was determined to have passed the emissions inspection and issued a certificate. (T: 320 – 322.) Moreover, he opined that where a certificate was issued for a vehicle

whose inspection data exhibited the 15-field signature, such inspection was not done consistent with 6 NYCRR Part 217, because the vehicle itself was not inspected. (T: 322 – 323.)

In its ninth paragraph, DEC Staff's complaint refers to 3,956 mandatory annual motor vehicle inspections that are alleged to have been performed "using a device to substitute for and simulate the motor vehicle of record." Asked to elaborate on this, Mr. Clyne said that the inspections were performed using a simulator, which he described as an electronic device such as that used by DEC and DMV to augment their testing software. Like vehicles, Mr. Clyne said, simulators have their own electronic fingerprints (T: 403), and these fingerprints are recorded in the inspection data. DEC Staff's case is built upon that data as well as the DMV application documents (Exhibits No. 5, 6 and 7) which connect the inspections to the inspection station and the inspectors themselves. Mr. Clyne explained how he used the facility number DMV assigned to the inspection station, and the certificate numbers DMV assigned to the inspectors, to identify the parties responsible for the inspections documented in Exhibits No. 8 and 8-A, since those exhibits do not identify them by name.

As the respondents point out, neither of DEC Staff's witnesses were present during any of the inspections at issue in this matter, and no simulator was seen or recovered during DEC's investigation. Even so, DEC Staff adequately demonstrated that, as charged, Mr. Inoa and Mr. Reyes used a simulator for 3,956 OBD II inspections at the AMI Auto Sales facility between March 28, 2008, and October 13, 2009. This was done through a combination of the documentary evidence, all of which Mr. Clyne retrieved from DMV, and the testimony of Mr. Clyne associating simulator use with the 15-field electronic signature that appears in the inspection data.

Remarkably, the respondents did nothing to impeach Mr. Clyne's testimony about the identification and significance of this signature, nor did they take the stand themselves to contradict his account of how, where and by whom the inspections were performed. Had Mr. Clyne's account been inaccurate, one would expect the respondents, who were present at the hearing, to have offered evidence to refute it, and a negative inference can be taken from their failure to do so.

There is no question that the inspections documented in Exhibits No. 8 and 8-A are attributable to AMI, because AMI's DMV-assigned facility number, which the station would have

scanned into the test equipment, appears in relation to each of the inspections. Also, there is no question that Mr. Inoa and Mr. Reyes performed the inspections, because their certificate numbers are the only ones that appear in the inspection data.

Respondents' Claims

The respondents claim that insufficient proof was provided to show that AMI was an official emissions inspection station. However, that can be inferred from its acquisition of a NYVIP unit, which would not be possible if the station was not authorized to perform inspections. Also, AMI must have had an inspection station license at the time it began performing OBD II inspections, because the license bar code must be scanned into the work station before any inspection can be completed. Finally, the respondents' own submittal (Exhibit No. 10) includes DMV's notice revoking AMI's inspection station license for fraud in the conduct of the licensed activity, which demonstrates that such license existed in the first instance. As the respondents point out, Exhibit No. 7 is an incomplete copy of AMI's original facility application; however, the application's first page, which is part of the exhibit, by itself establishes the facility number DMV assigned to AMI, and that same number appears in relation to every inspection recorded in Exhibits No. 8 and 8-A. Mr. Devaux, as a DMV employee, also testified that DMV's markings on the application demonstrated that it was approved as one for an inspection station (abbreviated "ISP" in the "office use only" section at the top of page one). (T: 85 – 86.)

The respondents claim that DEC Staff failed to prove that AMI was, at the time of the alleged violations, a domestic business corporation duly authorized to do business in New York State, as alleged in paragraph 4 of the complaint. In fact, the respondents provided documentation from the New York Department of State website indicating that AMI is inactive, having been dissolved by proclamation on June 25, 2003.

Pursuant to Tax Law Section 203-a, the New York Department of State may dissolve a New York corporation by proclamation for failure to file franchise tax returns or pay franchise taxes for two or more years. With dissolution by proclamation, the legal entity of the corporation ceases to exist and loses its ability to do business in the state, though the corporation has the opportunity to seek reinstatement, which, if granted, allows it to re-acquire the same powers, rights, and obligations it had before it was dissolved.

In its closing brief, DEC Staff says that without seeing a copy of the corporate resolution affecting AMI's dissolution, or any evidence of what AMI submitted to the Department of State, it sees no value in the website information provided by the respondents. However, unlike a voluntary dissolution, a dissolution by proclamation occurs at the initiative of the Department of State, in which case such documentation would not exist.

Based upon the information provided by the respondents, I conclude that, at the time of the alleged violations, AMI had been dissolved and was no longer authorized to do business as a corporation in New York State. However, the fact remains that it still operated as an official inspection station licensed by DMV, and on that basis had legal obligations under DMV's and DEC's regulations.

In their closing brief, the respondents claim that the NYVIP equipment was not inspected prior to, or after, the charges were brought in this case, and that there is no proof that the equipment was working properly. While Mr. Clyne said that DEC did not inspect the equipment before or after charges were filed in this case, he added that DMV most likely did, because as part of the SIP requirements, that agency schedules two visits a year to every inspection station in the New York metropolitan area. (T: 407.) If there was any problem with the equipment, there was no evidence to substantiate it.

In their closing brief, the respondents also claim that in light of evidence that DMV auditors had exclusive access to the equipment and the data contained therein, while the inspection station did not, there is a real possibility that the data contained in the inspection station records may have been tampered with or altered, whether intentionally or inadvertently. Again, there was no evidence to substantiate this assertion.

Furthermore, the respondents claim that because there is an allowance for inspectors to manually input data into the NYVIP equipment, human error in that regard may have played a role in the generation of data that DEC alleges is irregular. In fact, human error could not explain the data that is in question, because that data was generated electronically, by direct communication between the NYVIP unit and the item it was plugged into, whether that item was a vehicle or a simulator standing in for a vehicle.

Finally, the respondents claim that because DEC and DMV use simulators to augment their own testing software, it is possible that the station, DEC or DMV was testing the inspection software and inadvertently forgot to remove the simulation equipment, if in fact a simulator was used. This assertion is implausible; a valid inspection requires connecting the NYVIP unit to an actual vehicle, so a simulator could not be used inadvertently to complete such an inspection. Also, the evidence indicates the simulator was not used for each inspection, but on and off over a period of a year and a half, which suggests that when it was used, the use was intentional.

According to the respondents, the DMV inspection data in Exhibits No. 8 and 8-A cannot be relied upon, because it is incomplete for each vehicle inspection, and there is additional data for each inspection that is maintained by DMV. Mr. Clyne acknowledged that the exhibits are an abstract of a larger document that is generated from a data base containing fields not represented in the abstract. However, he added that, for his purposes, he was looking for the data related to each vehicle's OBD II emissions inspection, not other data that he said was not pertinent to his investigation, such as the vehicle's repair data and data related to its safety inspection. In summary, DEC Staff presented the data it concluded was relevant to its claim that certain of these inspections had been simulated.

The respondents claim that the information in Exhibits No. 8 and 8-A cannot be relied upon in the absence of evidence as to when the data was entered into DMV's data base, or when the queries were run. As explained in the certifications prepared by Brad Hanscom, DMV's records access officer, the data shown in these exhibits was entered "at the time the recorded transactions or events took place or within a reasonable time thereafter." As Mr. Devaux explained, the inspection data is transmitted to DMV almost contemporaneously with each inspection, the time and date of which are recorded, though the queries of the data base occurred much later, in conjunction with the investigation of suspected simulator use. Though the exact dates of the queries are unknown, that does not affect the reliability of the data, because, once entered into the data base, the data would not be expected to change.

The respondents claim that DEC's witnesses, Mr. Clyne and Mr. Devaux, lack credibility in that they contradicted each other on issues such as whether an inspector may work at more

than one station at a time, and whether a vehicle can fail an inspection for some reason unrelated to emissions. I find nothing contradictory in the testimony.

Mr. Clyne testified that an inspector can use his license at different inspection stations by having his license number added to each one's testing equipment; Mr. Devaux said nothing to the contrary. Also, both witnesses acknowledged that a vehicle could fail a state inspection for something unrelated to the OBD II testing component. Contrary to the respondents' assertion, Mr. Clyne did not say that there would never be a reason a vehicle would fail an inspection, other than a reason involving emissions. He actually said there would never be a reason a vehicle would fail an OBD II inspection for something that was detected by the NYVIP equipment but did not involve emissions. He then added that beyond an emissions-based failure, a vehicle could fail an inspection due to safety reasons or in relation to a check of its emission control devices. (T: 401.) As the record indicated, the complete state inspection for an OBD II vehicle includes not only the actual OBD II inspection, involving the retrieval of electronic data from the vehicle's on-board computer, but a safety inspection as well as a visual inspection of the ECDs, including the gas cap.

During the course of his direct examination, Mr. Clyne said that in DEC's initial query of the inspection record database for the greater New York City area, performed in October 2008, DEC identified roughly five inspection stations that had engine RPM readings above 5,000, which he considered very high and unrealistic. (T: 284, 287.) These stations were then the subject of an undercover investigation by DEC and others, which lasted from February to July of 2009, during which vehicles were monitored as they went in and out of the stations. (T: 285.)

Mr. Clyne testified that, early on, an employee of DEC's Bureau of Environmental Crimes Investigations, whom he did not identify by name, reported that the criteria used to identify those five stations were inadequate, and offered the names of about six additional stations to look at, also for suspected fraud. (T: 286, 359, 363.) Mr. Clyne said that upon checking those stations' inspection histories, DEC found that some of the stations were doing an activity known as clean scanning, which does not involve the use of a simulator per se, and is not an issue in this proceeding. (T: 286.) Others, he said, had inspection records that turned out to be very similar to those of the first five identified, in data fields other than RPM. (T: 286, 287.) Those similarities helped DEC develop the 15-field

profile for the simulators that were actually being used. (T: 288.)

During Mr. Clyne's cross-examination, counsel for the respondents attempted to explore the basis of the investigator's suspicions about the six additional stations, but Mr. Clyne said the investigator did not tell him what it was (T: 363), though he confirmed that AMI was not one of the six (T: 392). Respondents' counsel said it was important to know the basis of the investigator's suspicions to the extent that they led to additional queries of inspection data which, in turn, led to the charges against the respondents. (T: 367 – 368.) Otherwise, she said, it would appear that AMI was randomly targeted with no apparent basis, an allegation vigorously denied by DEC Staff counsel. (T: 368 – 369.)

In fact, AMI was never the target of DEC's investigation; it was identified for enforcement action only after the simulator profile had been established, and upon a search for that profile among data generated by inspection stations statewide. The respondents' counsel asserted that among the stations ultimately charged, a majority were in the Bronx and operated by people of Hispanic descent. (T: 374.) However, there was no evidence of selective prosecution; in fact, DEC Staff did not know the identities of AMI and its inspectors until it requested the application information from DMV that would connect the license numbers for the station and inspectors, as set out in the inspection data, to the entity and individuals that were assigned those numbers.

Finally, there is no evidence that DEC Staff delayed bringing charges in this matter in an attempt to run up excessive and cumulative penalties, as claimed by the respondents in their closing brief. As Mr. Clyne explained, DEC did not begin its investigation of AMI until the summer or early fall of 2009, in other words, close to the end of the violation timeframe. (T: 409 – 410.) Before querying the inspection data for the simulator profile, DEC was not aware of AMI's involvement in illegal activity.

Liability for Violations

DEC has charged the respondents with violations of both 6 NYCRR 217-4.2 (first cause of action) and 217-1.4 (second cause of action). I find that the violations of 6 NYCRR 217-4.2 have been established, but do not find additional violations of 6 NYCRR 217-1.4. Furthermore, I find that all the violations of 6

NYCRR 217-4.2 may be attributed to AMI as the licensed inspection station, and that Mr. Inoa and Mr. Reyes, as the station's certified inspectors, may be held liable for the non-compliant inspections that they performed.

- Violation of 6 NYCRR 217-4.2

According to 6 NYCRR 217-4.2, "[n]o person shall operate an official emissions inspection station using equipment and/or procedures that are not in compliance with Department [DEC] procedures and/or standards." For purposes of this regulation, "official emissions inspection station" means "[a] facility that has obtained a license from the Commissioner of Motor Vehicles, under section 303 of the VTL [Vehicle and Traffic Law], to perform motor vehicle emissions inspections in New York State" [6 NYCRR 217-1.1(k)]. VTL 303(a)(1) explains that a license to operate an official inspection station shall be issued only upon written application to DMV, after DMV is satisfied that the station is properly equipped and has competent personnel to make inspections, and that such inspections will be properly conducted.

I find that 6 NYCRR 217-4.2 was violated on 3,956 separate occasions by the use of a simulator to perform OBD II emissions inspections. As Mr. Clyne explained, a simulator is an electronic device such as that used by DEC and DMV to augment their testing software; however, it has no place in the administration of an actual emissions test. Furthermore, the use of a simulator is not consistent with the emissions inspection procedure set out at 6 NYCRR 217-1.3, which requires testing of the vehicle's OBD system to ensure that it functions as designed and completes diagnostic routines for necessary supported emission control systems. If the inspector plugs the NYVIP work station into a simulator in lieu of the vehicle that has been presented, it cannot be determined whether the vehicle would pass the OBD II inspection.

AMI is liable for all 3,956 violations because, at the time they occurred, it held the license to "operate" the official inspection station. Pursuant to 15 NYCRR 79.8(b), the official inspection station licensee "is responsible for all inspection activities conducted at the inspection station," and is not relieved of that responsibility by the inspectors' own duties, which include performing inspections in a thorough manner. [See 15 NYCRR 79.17(b)(1) and (c).]

Each inspector is also liable for the violations attributable to his own non-compliant inspections. This liability is due to the connection between the official inspection station, which is licensed under VTL 303, and the inspectors who work at the station, who are certified under VTL 304-a. Pursuant to 15 NYCRR 79.8(b)(2), the specific duties of the inspection station include employing at all times, at least one full-time employee who is a certified motor vehicle inspector to perform the services required under DMV's regulations. In this sense, the inspection station operates through the services that its inspectors provide.

In summary, each inspector should share liability with the inspection station for the OBD II inspections he performed using a device to simulate the vehicle that had been presented. However, there is no basis for holding the inspectors liable for each other's non-compliant inspections.

In its closing brief, DEC Staff argues that one of the inspectors, Mr. Inoa, "as the owner and President of AMI Auto Sales," remains personally liable for all the inspection activities at the AMI station under DMV regulations and the responsible corporate officer doctrine. I disagree. The DMV regulations cited by Staff, 15 NYCRR 79.8(b) and 79.17(c)(1), affirm the responsibility of AMI, as station licensee, for all inspection activities conducted at the inspection station, even if, as it appears from Exhibit No. 7-A, Mr. Inoa had a 100 percent ownership interest in the corporation.

As noted by Staff, the responsible corporate officer doctrine imposes liability on parties who have, by reason of their position in a corporation, responsibility and authority to prevent or promptly correct a violation, yet fail to do so. Pursuant to this doctrine, three elements must be established before liability is imposed upon a corporate officer: (1) the individual must be in a position of responsibility which allows the person to influence corporate policies and activities; (2) there must be a nexus between the individual's position and the violation in question such that the person could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inaction facilitated the violations. [See United States v. Park, 421 U.S. 658, 673-74 (1975), as referred to in my hearing report attached to the Commissioner's order, dated December 29, 1994, in Matter of James McPartlin and 53rd Street Service Station. See also the discussion of corporate officer liability in Matter of 125 Broadway, LLC and

Michael O'Brien, Decision and Order of the Commissioner, dated December 15, 2006.]

In this case, Staff's proof is insufficient to establish personal liability for Mr. Inoa, as AMI's president, for the non-compliant inspections performed by Mr. Reyes. Contrary to Staff's argument, it is not clear to what extent Mr. Inoa, as a corporate officer, was in a position to control the activities of Mr. Reyes. Nothing was revealed about the day-to-day management of the AMI inspection station, or what role Mr. Inoa may have had in the violations committed by Mr. Reyes. Neither of Staff's witnesses was ever at the AMI station, and the only information I have about its operation is the record of the OBD II inspections that were performed there, and who actually performed them.

Not only did Staff fail to prove corporate officer responsibility, Staff failed to plead it in the complaint. In fact, the complaint refers to Mr. Inoa only as the owner and operator of AMI, not as AMI's president.

In their closing brief, the respondents claim that DEC Staff failed to prove any violation of 6 NYCRR 217-4.2 because no evidence was provided as to the standards or procedures set forth by DEC for emissions inspections. On the other hand, DEC Staff argues in its closing brief that it provided numerous examples of the policies, procedures and standards that the respondents were made aware of, and were obliged to follow, including those in 6 NYCRR Part 217, 15 NYCRR Part 79, and the operators' manual that provides detailed information about the installation, operation and care of the NYVIP vehicle inspection system.

As noted above, I find that 6 NYCRR 217-1.3 sets out the emissions inspection procedure that was not followed by the respondents. DEC anticipates that, in an OBD II inspection, there will be a communication between the work station and the vehicle's OBD II system. When this does not happen, it is a violation of DEC procedure.

The failure to communicate with the vehicle's OBD II system is also a violation of the OBD II emissions inspection procedure set out at 15 NYCRR 79.24(b)(1)(ii), as well as the specific instructions regarding this procedure as found in the NYVIP vehicle inspection system operators manual, referred to at 15 NYCRR 79.24(b)(1)(iii). However, these are DMV's procedures, not DEC's procedures, which is significant because a violation

of 6 NYCRR 217-4.2 requires a violation of DEC procedures and/or standards. [See definition of "department" at 6 NYCRR 217-1.1(b).]

Violation of DMV's procedures has already been confirmed in its separate action against these respondents, where the ALJ found that their "use of a substitute vehicle or an electronic device . . . when the exhaust emissions test was done during the inspection process" was a violation of 6 NYCRR 79.24(b)(1) and VTL Sections 303(e)(1) and 303(e)(3). (See pages 2 and 3 of the ALJ's finding sheet, dated December 7, 2010, included in Exhibit No. 10.)

- Violation of 6 NYCRR 217-1.4

In a separate cause of action, the respondents are charged with violations of 6 NYCRR 217-1.4. According to this provision: "No official inspection station as defined by 15 NYCRR 79.1(g) may issue an emission certificate of inspection, as defined by 15 NYCRR 79.1(a), for a motor vehicle, unless that motor vehicle meets the requirements of section 217-1.3 of this Subpart."

Violations of 6 NYCRR 217-1.4 cannot be found because DEC offered no evidence that AMI was an official inspection station "as defined by 15 NYCRR 79.1(g)." Section 79.1(g) defines an "official safety inspection station" as one "which has been issued a license by the Commissioner of Motor Vehicles pursuant to Section 303 of the Vehicle and Traffic Law, to conduct safety inspections of motor vehicles exempt from the emissions inspection requirement" (emphasis added). There was no evidence that AMI had such a license; the only evidence was that it was licensed, pursuant to VTL Section 303, to inspect vehicles that are subject to emissions inspections. Also, as the respondents point out in their closing brief, there was no evidence that the respondents conducted improper safety inspections, or violated any laws or regulations in this regard; the only proof was with respect to emissions (OBD II) inspections.

In paragraph 15 of its complaint, DEC Staff alleges that the respondents violated 6 NYCRR 217-1.4 by issuing emission certificates of inspection to vehicles which had not undergone an official emission inspection. However, an official safety inspection station, as defined by 15 NYCRR 79.1(g), does not issue emission certificates of inspection, because the vehicles it inspects are exempt from the emissions inspection requirement. One possible reading of 6 NYCRR 217-1.4 would be

that it allows official safety inspection stations to issue emission certificates of inspection for vehicles requiring such inspections, provided such vehicles meet the requirements of 6 NYCRR 217-1.3. However, such a reading would upset DMV's licensing scheme, and cannot have been intended.

Notably, a provision similar to 6 NYCRR 217-1.4, with the same heading ("Issuance of certificate of inspection"), is included in the recently promulgated Subpart 217-6 regulations governing motor vehicle enhanced inspection and maintenance program requirements for the period beginning January 1, 2011. That provision, 6 NYCRR 217-6.4, reads as follows: "No official emissions inspection station or certified inspector may issue an emission certificate of inspection, as defined by 6 NYCRR section 79.1, for a motor vehicle unless the motor vehicle of record has been inspected pursuant to, and meets the requirements of section 217-6.3 of this Subpart" (emphasis added).

For the purposes of Subpart 217-6, an "official emissions inspection station" is "[a] facility that has obtained a license from the Commissioner of Motor Vehicles under Section 303 of the VTL and 15 NYCRR section 79.1." [See definition of "official emissions inspection station" at 6 NYCRR 217-6.1(i).] The substitution of "official emissions inspection station" in 6 NYCRR 217-6.4 for "official inspection station as defined by 15 NYCRR 79.1(g)" in 6 NYCRR 217-1.4 suggests that the reference to 15 NYCRR 79.1(g) in 6 NYCRR 217-1.4 is a mistake that, for the purposes of Subpart 217-6, has been corrected. Also, the explicit reference to certified inspectors in 6 NYCRR 217-6.4, which is not present in 6 NYCRR 217-1.4, suggests that 6 NYCRR 217-1.4, to the extent it can be applied, applies only to the station licensee, because if it were intended to apply to the inspectors as well, it would say so, as 6 NYCRR 217-6.4 does.

If the reference to 6 NYCRR 79.1(g) were read out of 6 NYCRR 217-1.4, and the term "official inspection station" were given the meaning applied to it in DMV's statute and regulations, 6 NYCRR 217-1.4 could be interpreted as a requirement applicable to AMI as an emissions inspection station, if not to Mr. Inoa and Mr. Reyes as emissions inspectors. However, such an interpretation would not give meaning to the regulation as written. Because there is no evidence that AMI was an official inspection station "as defined by 15 NYCRR 79.1(g)" (i.e., an official safety inspection station), the second cause of action must be dismissed.

Affirmative Defenses

As noted above, the respondents asserted three affirmative defenses in their answer. According to 6 NYCRR 622.4(c), the answer "must explicitly assert any affirmative defenses together with a statement of facts which constitute the grounds of each affirmative defense asserted." None of the affirmative defenses, as asserted in the answer, contained a statement of supporting facts, and on that basis alone these defenses should be dismissed. Otherwise, they should be dismissed or disregarded for the reasons stated below.

- Failure to State a Cause of Action

As a first affirmative defense, the respondents allege that the complaint fails to state a cause of action upon which relief may be granted.

As was pointed out in Matter of Grammercy Wrecking and Environmental Contractors, Inc. (DEC ALJ's Ruling, January 14, 2008), the failure to state a claim is not properly pleaded as an affirmative defense; instead, according to the Civil Practice Law and Rules, it is a ground for a motion to dismiss. As an affirmative defense, it is mere surplusage, since DEC Staff has the burden of properly pleading and then adequately proving the charges in its complaint. [See 6 NYCRR 622.11(b)(1) and (2), stating that DEC Staff bears the burden of proof on all charges and matters which it affirmatively asserts in the complaint, while the respondent bears the burden of proof regarding all affirmative defenses.]

Because the defense of failure to state a cause of action serves no purpose, it may be ignored unless and until a respondent moves to dismiss. (See Matter of Truisi, Ruling of the Chief ALJ, April 1, 2010, at 12.) Here, moreover, the issue is academic, in that DEC Staff has adequately demonstrated violations of 6 NYCRR 217-4.2, as charged in the complaint's first cause of action.

- Third Party Responsibility

As a second affirmative defense, the respondents allege that the incidents charged in the complaint were the result of the actions and/or inactions of third parties over whom the respondents had no direction or control. While these third parties were never identified at the hearing, the respondents, in their closing brief, say that because DMV auditors had

exclusive access to the inspection equipment and the data contained therein, there is a real possibility that the data contained within the inspection station records may have been tampered with or altered, whether intentionally or inadvertently. In fact, Mr. Clyne did testify that in the period after an inspection, a DMV auditor, but not the station personnel, could go in with the proper access and review the complete record on the station's NYVIP unit. (T: 353 – 356.) However, there was no evidence that, for AMI, such a review took place, or that, if it had, it would afford DMV an opportunity to change the inspection data.

Separately, the respondents' counsel claimed at the hearing that DMV erred in approving the application of Mr. Reyes for certification as a motor vehicle inspector, and therefore contributed to any violations that Mr. Reyes committed. More particularly, it was pointed out that Mr. Reyes did not complete questions on page 2 of the application (Exhibit No. 6) inquiring whether he had ever been convicted of any felony, misdemeanor or improper motor vehicle inspection, and whether he had the requisite one year of motor vehicle repair experience necessary for certification. (T: 188 – 201.) According to the respondents' counsel, these omissions affected the admissibility of the application document; however, the document was admitted only to indicate that Mr. Reyes did receive a certificate, and to show his certificate number. A copy of the entire application document was received, even if Mr. Reyes did not complete portions of the document, which would have been grounds for denying the application.

At the hearing, the respondents' counsel would not necessarily say that DMV's approval of the incomplete application went to the second affirmative defense, but then acknowledged it was part of her argument that DMV was responsible for violations flowing from this error. (T: 197, 199.) I disagree with this reasoning. Whether or not the application should have been approved, the fact that it was approved, and that Mr. Reyes was certified, obliged him to perform inspections in a way that complied with applicable procedures, and he is solely responsible for his failures in this regard.

- Collateral Estoppel and Res Judicata

As a third affirmative defense, the respondents allege that DEC's action is barred by the doctrines of collateral estoppel and res judicata. More particularly, they note that in a

separate DMV proceeding, they have already been found to have committed violations that are essentially the same as those charged here, and should not be penalized twice for them, to the extent that they arise from the same occurrences.

To evaluate this claim, I held the record open so that the respondents' attorney could present documentation about DMV's proceeding and the determinations that resulted from it. As I directed, this documentation was sent to DEC Staff's attorney, who then forwarded it to me, at which point the documentation was received as Exhibit No. 10. Among other things, the documentation includes the DMV ALJ's finding sheet, indicating case dispositions; notices of revocation, both for the inspection station license and the licenses of the certified inspectors; penalty notices; and charge sheets detailing alleged violations of DMV law and regulation.

At the time he forwarded the DMV papers to me, DEC Staff counsel acknowledged in an accompanying e-mail that the 32 alleged motor vehicle inspections that formed the basis of DMV's determinations against AMI and its inspectors were among the 3,956 that formed the basis of DEC's action against these same respondents. Sixteen of these inspections were performed by Mr. Inoa, and sixteen were performed by Mr. Reyes. DMV's ALJ found that the inspections involved "the use of a substitute vehicle or an electronic device" when the exhaust emissions tests were done by the respondents, and that this constituted a violation of 15 NYCRR 79.24(b)(1) and VTL Sections 303(e)(1) and 303(e)(3). However, the licenses were revoked and the penalties assessed strictly on the basis of the violation of VTL 303(e)(3), meaning "fraud, deceit or misrepresentation in securing the license or a certificate to inspect vehicles or in the conduct of licensed or certified activity." (The penalty notice for Mr. Inoa misstates the violations that the DMV ALJ found he committed, an error that was confirmed by the respondents' counsel in her closing brief.)

The respondents claim that while DMV charged them with violations of its law and regulations, and DEC charged them with violations of its regulations, the substance of both sets of charges is the same, and they arise from the same alleged activity, for which they have already been punished by DMV. They also point out that DEC and DMV are both responsible for the implementation of NYVIP, and argue that the two agencies have worked together to investigate and bring charges in this and other cases.

In its closing brief, DEC Staff asserts that collateral estoppel and res judicata do not apply. According to DEC Staff, collateral estoppel does not apply because this is not a relitigation between the same parties of issues that were actually determined in DMV's proceeding. To support this argument, DEC Staff points out that DMV and DEC are separate agencies, that they have not been parties to each other's litigation, and that their actions are not based on the same law and regulations.

According to DEC Staff, res judicata also does not apply, because DEC is not in privity with DMV and could not have raised its claims in DMV's action. DEC Staff again asserts that DMV and DEC have not been parties to each other's actions, that their separate actions have not been based upon violations of the same regulations, and that DEC could not have raised its issues and claims in the corresponding DMV proceeding.

I agree with DEC Staff that collateral estoppel and res judicata do not apply, and, accordingly, these affirmative defenses are hereby dismissed. While DEC Staff's charges stem from inspections that it, like DMV, considers fraudulent, DEC has not charged the respondents with fraud, but with the conduct of inspections that do not comply with DEC procedure, as embodied in DEC's own regulations. These claims could not have been brought in DMV's proceeding, even though DEC and DMV work jointly to administer NYVIP and anticipate the same procedure in the conduct of inspections, i.e., establishing communication between the NYVIP work station and the vehicle's OBD II system.

In their closing brief, the respondents recast their argument as one for penalty mitigation, not dismissal of charges. This argument is addressed in the discussion below concerning my penalty recommendation.

Civil Penalties

In its complaint, DEC Staff proposed that the Commissioner assess a civil penalty of $1,978,000 in this matter. Staff has not apportioned this penalty between the two causes of action, or among the respondents. According to DEC Staff, the respondents should be jointly and severally liable for the penalty's payment.

Civil penalties are authorized pursuant to ECL 71-2103(1). At the time the violations in this matter occurred, that section stated that any person who violated any provision of ECL Article

19 (the Air Pollution Control Act) or any regulation promulgated pursuant thereto, such as 6 NYCRR 217-4.2, would be liable, in the case of a first violation, for a penalty not less than $375 nor more than $15,000 for said violation and an additional penalty not to exceed $15,000 for each day during which such violation continued; as well as, in the case of a second or any further violation, a penalty not to exceed $22,5000 for said violation and an additional penalty not to exceed $22,500 for each day during which such violation continued.

DEC Staff contends that each illegal inspection constitutes a separate violation of DEC regulations, while the respondents argue that the inspections at issue constitute a course of conduct that, if liability is found, should be viewed as one continuous violation for the entire period referenced in the complaint, i.e., from March 28, 2008 to October 13, 2009, and, as such, subject to a maximum penalty of $15,000, pursuant to ECL 71-2103(1), as effective when the violation occurred.

I agree with the position of DEC Staff. Each simulated inspection was a discrete event occurring on a specific date and time, and, by itself, constituted operation of the emissions inspection station in a manner that did not comply with DEC procedure. There was no continuous string of simulated inspections; instead, simulated inspections alternated with ones that were conducted properly.

If, as I propose, each simulated inspection is deemed to be a separate violation of 6 NYCRR 217-4.2, the potential penalty under ECL 71-2103(1) is enormous, in the tens of millions of dollars. However, according to DEC's civil penalty policy ("CPP", DEE-1, dated June 20, 1990), the computation of the maximum potential penalty for all provable violations is only the starting point of any penalty calculation (CPP Section IV.B); it merely sets the ceiling for any penalty that is ultimately assessed.

DEC is actually seeking $500 per simulated inspection, using the civil penalty policy framework and formulating what it believes to be a consistent and fair approach to calculating civil penalties in this and the other 43 similar enforcement cases it is also pursuing. This equates to a total penalty of $1,978,000 ($500 x 3,956) given the number of simulated inspections that the respondents performed.

Pursuant to DEC's penalty policy, an appropriate civil penalty is derived from a number of considerations, including

economic benefit of noncompliance, the gravity of the violations, and the culpability of the respondents' conduct.

- Economic Benefit

DEC's penalty policy states that every effort should be made to calculate and recover the economic benefit of non-compliance. (CPP Section IV.C.1.) In this case, that economic benefit, if it does exist, is unknown. In its closing brief, DEC Staff acknowledges that while it has received several comments regarding the economic benefits received and competitive advantage gained by some of those conducting simulated inspections, it has presented no specific proof with regard to the economic benefit calculation for these respondents. For that matter, neither have the respondents provided any evidence to support their claim that they derived no economic benefit from the activities alleged by DEC Staff.

DEC Staff alleges in its closing brief that using a simulator made the inspection process easier and faster, allowing the respondents to service more customers and thereby increase their income potential. However, there was no evidence on this point; it was not demonstrated how use of a simulator expedites the inspection process, or even if it does, that this moved more vehicles through the inspection process than would have been the case had all inspections been done according to proper procedure.

- Gravity

According to the penalty policy, removal of the economic benefit of non-compliance merely evens the score between violators and those who comply; therefore, to be a deterrent, a penalty must include a gravity component, which reflects the seriousness of the violation. (CPP Section IV.D.1.) The policy states that a "preliminary gravity penalty component" is developed through an analysis addressing the potential harm and actual damage caused by the violation, and the relative importance of the type of violation in the regulatory scheme. (CPP Section IV.D.2.)

As Mr. Clyne explained, OBD II testing is how DEC and DMV implement NYVIP, an annual emissions inspection program required by the federal Clean Air Act amendments of 1990 and EPA regulations at 40 CFR Part 51. (T: 238 – 239.) It is intended to assure that motor vehicles are properly maintained, to curb hydrocarbons and nitrogen oxide, which are ozone precursors.

Ozone is a pollutant found during the unhealthy air condition known as smog, and can cause a variety of respiratory problems, especially among the elderly, children, and those affected by respiratory ailments such as asthma. While one cannot determine the actual damage caused by the respondents' violations, there is a clear potential for harm when required OBD II testing is not actually performed, as this removes an opportunity to identify vehicles with malfunctioning emission control systems and ensure those systems are repaired. Furthermore, the simulation of OBD II tests is very important in the regulatory scheme, which depends on such tests to reduce pollution from motor vehicles.

- Penalty Adjustment Factors

According to the policy, the penalty derived from the gravity assessment may be adjusted in relation to factors including the culpability of the violator, the violator's cooperation in remedying the violation, any prior history of non-compliance, and the violator's ability to pay a penalty. (CPP Section IV.E.)

In this case, violator culpability (addressed at CPP Section IV.E.1) is an aggravating factor warranting a significant upward penalty adjustment. Due to the training they would have received, including training on the NYVIP work station itself, the inspectors would certainly have known that use of a simulator is not compliant with the procedures for a properly conducted OBD II inspection.

According to the penalty policy, penalty mitigation may be appropriate where the cooperation of the violator is manifested by self-reporting, if such self-reporting was not otherwise required by law. (CPP Section IV.E.2.) Here, no such mitigation is appropriate, as the violations were unearthed by DEC investigation, not by disclosure by any of the respondents themselves.

The penalty policy states that the regulated community must not regard violation of environmental requirements as a way of aiding a financially troubled business, nor should the regulated community expect that smaller penalties will necessarily be imposed on smaller businesses or individuals. Rather, the policy states that in some circumstances, DEC may consider the ability of a violator to pay a penalty in arriving at the method or structure for payment of final penalties. (CPP Section IV.E.4.)

In their closing brief, the respondents argue that as a small, closely held, private business in the South Bronx, an area historically known to be economically disadvantaged and underprivileged, their enterprise was far from a corporation with deep pockets, and that it struggled to survive in a bad business economy, with significant competition in the same geographical area. While I have no reason to doubt this characterization, there is no actual evidence that the respondents cannot afford to pay a substantial penalty.

In their closing brief, the respondents also argue that they were essentially forced into this hearing because they could not afford to enter into a consent order under which DEC was seeking $375 for each alleged violation. They say that had DEC sought a reasonable and affordable amount, they would have willingly and voluntarily settled this case, but it was not economically feasible for them to accept the deal they were offered. The respondents claim they should not be penalized now by a penalty of $500 per violation, due to the fact they could not afford a penalty of $375 per violation to settle this case. In the absence of financial information, no conclusions may be drawn about their ability to pay any penalty DEC may assess.

Also, there is nothing unusual or improper about DEC seeking a higher penalty at hearing than it would accept in settlement. As the penalty policy indicates, because respondents must be given effective incentives to enter into voluntary settlement of their disputes with DEC, penalty amounts in adjudicated cases must, on average and consistent with consideration of fairness, be significantly higher than the penalty amounts which DEC accepts in orders which are entered into voluntarily by respondents. This variation in penalty amounts is not deemed to be a penalty for exercising one’s right to a hearing; it is a benefit and incentive offered to those who settle. (CPP Section II.)

The penalty policy allows for discretion to adjust penalties up or down for factors not anticipated in the policy itself. (CPP Section IV.E.5.) One such factor in this case would be the penalties already assessed against the respondents by DMV in its related administrative hearing. As noted above, 32 of the simulated motor vehicle inspections that are the subject of DEC’s prosecution – 16 by Mr. Inoa and 16 by Mr. Reyes – were established in DMV’s proceeding, where these respondents and AMI were penalized for violation of VTL 303(e)(3), in that their actions constituted fraud in the

conduct of activities for which they were licensed or certified. In the DMV action, AMI was assessed a civil penalty of $11,200 ($350 for each of the 32 fraudulent inspections), and Mr. Inoa and Mr. Reyes were assessed penalties of $5,600 each ($350 for each of the 16 inspections for which they were individually responsible).

Upon my inquiry of the respondents' counsel, it has been confirmed that the penalties have not been paid to DMV. Nevertheless, the assessment of the penalties, by itself, should be relevant to DEC's penalty assessment, to the extent that the state's interest in proper inspection procedure, for the purpose of achieving clean air, has also been addressed by DMV as a sister agency, in relation to a program that DEC and DMV administer jointly. DMV has remedies to collect the penalties it has assessed; according to DMV's penalty orders, failure to pay the penalties will result in a suspension of any license or registration issued to the respondents, and the civil penalty will be treated as a judgment.

Apart from assessing monetary penalties, DMV revoked AMI's inspection station license and the certified inspector licenses of Mr. Inoa and Mr. Reyes. In combination, these actions help serve the state's interests in punishing the respondents and deterring others from engaging in similar illegal conduct. According to the respondents' closing brief, AMI has ceased all operations. This was confirmed during the hearing by Mr. Clyne, who said that according to information relayed to him by DMV, he believed AMI was out of business. (T: 413 – 414.) However, a separate official inspection station named Gurabo Auto Sales Corp., with Mr. Inoa and Mr. Reyes as its inspectors, began performing OBD II inspections at the same address on October 21, 2009, eight days after AMI's last OBD II inspection. (That station is the subject of a separate enforcement action, also charging simulated OBD II inspections, for which I conducted a separate hearing earlier this year. See Matter of Gurabo Auto Sales Corp., Manuel R. Inoa and Ramon B. Reyes, DEC Case No. CO2-20100615-20.)

In their closing brief, the respondents say that the revocation of their licenses has severely hampered their ability to make a living, and that with no income coming in, it is virtually impossible for the respondents to pay monies out, let alone the potential penalties sought by DEC Staff, which the respondents consider excessive. Again, there is no evidence regarding the income of either the station or the inspectors, or

about what assets they may have which could be applied to penalty payment.

- Penalty Recommendation

As noted above, DEC Staff requests a civil penalty of $1,978,000, as derived from a formula that assesses $500 for each of the 3,956 simulated inspections. In its closing brief, DEC Staff argues that according to DEC's civil penalty policy, if the violations are proven, it should be presumed that the penalty being requested is warranted, unless the respondents document compelling evidence to the contrary. Actually, the policy states (at Section IV.A) that if the violations are proven, "it should be presumed that a penalty is warranted" unless the respondents document compelling circumstances to the contrary (emphasis added). In other words, the policy does not provide a presumption in favor of the penalty that Staff is requesting, only a presumption in favor of some penalty.

This enforcement action involves many more instances of simulated inspections than were alleged or demonstrated in DMV's related proceeding. While this justifies substantial penalties in addition to those assessed by DMV, I find that the penalty requested is excessive and that no factual basis has been provided for assessing a penalty amounting to $500 for each simulated inspection.

I also find that separate penalties against each respondent should be assessed, consistent with the practice DMV followed in its enforcement action. Joint and several liability, as proposed by DEC Staff, is most common in tort claims, whereby a plaintiff may recover all the damages from any of the defendants regardless of their individual share of responsibility. However, this is an enforcement action, not a tort action, and civil penalties are not damages. By DMV regulation, the station licensee is liable for all the inspection activities conducted at the station; however, each inspector is liable only for the inspections that he or she performs, and should not be vicariously responsible for penalties resulting from another inspector's conduct. Moreover, responsibility for violations may be apportioned between the station and its inspectors.

My recommendation is that, for 3,956 separate violations of 6 NYCRR 217-4.2, AMI should be assessed a civil penalty of $300,000. Because the violations resulted from inspections performed in almost equal number by Mr. Inoa and Mr. Reyes, and

because I find their conduct equally culpable, they should each be assessed a civil penalty of $150,000.

These civil penalties are intended to account for the seriousness and large number of the violations, and, as an aggravating factor, the respondents' knowing, intentional violation of inspection procedure. OBD II testing is a key feature of NYVIP, and is intended to identify vehicles with emission problems that, if left uncorrected, contribute to ozone pollution. The use of a simulator to bypass the required emissions testing has the obvious effect of undermining the regulatory scheme that was created to protect the public health. The respondents were in clear control of the events constituting the violations, and must have known that their conduct was in violation of established emissions testing procedure, especially in light of the OBD training they would have had, which Mr. Devaux, a DMV instructor, discussed in his testimony. Because of this, a substantial upward penalty adjustment is warranted.

On the other hand, for a modest downward penalty adjustment, the Commissioner should consider the penalties that have already been assessed by DMV for some of these simulated inspections, not as a violation of regulatory procedure, but as fraud in the conduct of activity for which the respondents were licensed by DMV. The Commissioner should also consider the fact that DMV has already revoked AMI's inspection station license, as well as the inspection certificates of Mr. Inoa and Mr. Reyes. This effectively removes them from the inspection process, and prevents a recurrence of the violations that were charged in this matter. While there is a public interest in punishing the respondents' conduct, and deterring similar conduct by others, that interest is served not only by DEC's enforcement action, but by the action that has already been taken by DMV, a sister agency, in regard to a program, NYVIP, that both agencies administer.

In my letter dated April 19, 2011, I asked the parties to consider whether the two causes of action in DEC's complaint are multiplicitous, and whether they warrant separate penalties. If, as I recommend, the second cause of action is dismissed, these issues are removed from the case, as only one cause of action remains. That remaining cause of action, violation of 6 NYCRR 217-4.2, is the sole basis for the penalties recommended in this report.

CONCLUSIONS

1. Between March 28, 2008, and October 13, 2009, the respondents, AMI Auto Sales Corp., Manuel R. Inoa and Ramon B. Reyes, used a simulator to perform OBD II inspections on 3,956 separate occasions.

2. This use of a simulator was in violation of 6 NYCRR 217-4.2, which prohibits the operation of an official emissions inspection station using equipment and/or procedures that are not in compliance with DEC procedures and/or standards.

RECOMMENDATIONS

1. For the first cause of action, which alleges violations of 6 NYCRR 217-4.2, respondent AMI Auto Sales Corp. should be assessed a civil penalty of $300,000, respondent Manuel R. Inoa should be assessed a civil penalty of $150,000, and respondent Ramon B. Reyes should be assessed a civil penalty of $150,000, all penalties to be paid within 30 days of service of the Commissioner’s order. For each respondent, this allows for a civil penalty of $375 for the first violation, and a lesser penalty for each of the subsequent violations.

2. The second cause of action, which alleges violations of 6 NYCRR 217-1.4, should be dismissed.

ENFORCEMENT HEARING EXHIBIT LIST

AMI AUTO SALES CORP., MANUEL R. INOA, AND RAMON B. REYES
Case No. CO2-20100615-27

1. DEC Notice of Hearing and Complaint (8/24/10)
2. Respondents' answer (10/18/10)
3. DEC Staff statement of readiness (12/30/10)
4. ALJ's Hearing Notice (1/20/11)
5. DMV application for certification as a motor vehicle inspector, filed by Manuel R. Inoa (7/18/98)
6. DMV application for certification as a motor vehicle inspector, filed by Ramon B. Reyes (5/3/03)
7. DMV original facility application for AMI Auto Sales Corp. (undated, partial document)

7-A. DMV request for business amendment/duplicate certificate, filed by Manuel Inoa (10/21/99)

8. DMV abstract of OBD II inspection data for AMI Auto Sales Corp. (4/4/05 – 9/9/09), with records certification of Brad Hanscom, DMV records access officer (1/20/10)

8-A. DMV abstract of OBD II inspection data for AMI Auto Sales Corp. (9/10/09 – 10/13/09)

9. NYS Dept. of State website information for AMI Auto Sales Corp. (retrieved 2/8/11)
10. Compilation of documents concerning related DMV proceeding against respondents, as supplied by respondents' counsel under cover letter dated 3/15/11