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),

ORDER

-by-

GEO AUTO REPAIRS, INC., CHOUDHRY M. AFZAL, HAJI N. CHAUDHRY, AND MOHAMMAD A. CHAUDHRY,

DEC Case No. C02-20100615-13

Respondents.

This administrative enforcement proceeding concerns allegations that respondents Geo Auto Repairs, Inc. ("Geo"),[1] Choudhry M. Afzal, Haji N. Chaudhry, and Mohammad A. Chaudhry completed 677 motor vehicle inspections using noncompliant equipment and procedures, and issued 560 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 495 East 180th Street in the Bronx, New York, during the period between August 17, 2009 and February 1, 2010. During this period, staff of the New York State Department of Environmental Conservation ("DEC") alleges that Geo was a domestic business corporation duly authorized to do business in New York State, Choudhry M. Afzal owned and operated the inspection station, and both Haji Chaudhry and Mohammad Chaudhry worked at Geo and 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

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[1] The Notice of Hearing and Complaint refer to Geo as "Geo Auto Repair, Inc." but the evidence indicates that the correct name is "Geo Auto Repairs, Inc." (see Hearing Report, at 1).

hearing and complaint dated August 18, 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 a civil penalty of three hundred eighty-eight thousand five hundred dollars ($388,500). With respect to the requested penalty, DEC staff asserted that all respondents be held jointly and severally liable.

Respondents submitted an answer on October 18, 2010, in which they denied DEC staff's charges and asserted no affirmative defenses. The matter was assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster, and a hearing was held on July 19, 2011. Once the hearing was concluded, respondents submitted a closing statement dated July 29, 2011 and staff submitted a closing statement dated August 8, 2011.

At the close of the hearing, the ALJ gave respondents the opportunity to submit documentation about a New York State Department of Motor Vehicle ("DMV") proceeding that respondents' counsel said was relevant to the charges in this matter. Respondents, however, provided an incomplete set of documents. ALJ Buhrmaster further allowed respondents an opportunity to file a complete set of documents as well as a written explanation of their relevance, but respondents failed to do so.[2]

In his hearing report, ALJ Buhrmaster found that all the violations of 6 NYCRR 217-4.2 (that is, the 677 improper inspections) may be attributed to Geo as the licensed inspection station. Of these inspections, respondent Mohammad A. Chaudhry performed 526, and respondent Haji N. Chaudhry performed 151 of the simulated inspections. The ALJ found that the two individual respondents may be held liable for the non-compliant inspections that they performed. ALJ Buhrmaster, however, found that the alleged violations of 6 NYCRR 217-4.2 should be dismissed as to respondent Choudhry M. Afzal, and that the

[2] ALJ Buhrmaster excluded the documents relating to the DMV proceeding from evidence but marked them for identification to preserve them for my review.

alleged violations of 6 NYCRR 217-1.4 should be dismissed as to all of the respondents.

The ALJ, upon review of Department staff's penalty request, found that it was incorrectly calculated, and that the correct penalty amount (based upon staff's calculation of five hundred dollars [$500] per inspection) was three hundred thirty-eight thousand five hundred dollars ($338,500).

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

Liability

I concur with the ALJ's determinations that DEC staff is entitled to a finding of liability with respect to the first charge against respondents Geo, Haji N. Chaudhry, and Mohammad A. Chaudhry for operating an official emissions inspection station using equipment or procedures that are not in compliance with DEC procedures or standards, in violation of 6 NYCRR 217-4.2. Geo is liable "because, at the time [the 677 violations] occurred, it held the license to 'operate' the official inspection station" (Hearing Report, at 11). Further, Haji N. Chaudhry and Mohammad A. Chaudhry are each "liable for the violations attributable to his own non-compliant inspections" (id.).

DEC staff argued that Choudhry M. Afzal, as Geo's president and owner, was personally responsible for all of the inspection activities at the station under DMV's regulations and the responsible corporate officer doctrine (see Hearing Report, at 12). The ALJ found that staff did not prove that "Mr. Afzal, as a corporate officer, was in a position to control the activities of" Haji N. Chaudhry and Mohammad A. Chaudhry, "or what role Mr. Afzal may have had in the violations that were committed" (id., at 13). The station is under corporate (i.e., Geo's), not individual, ownership, and the licensee is Geo, not Mr. Afzal. Further, a violation of 6 NYCRR 217-4.2 requires a violation of DEC procedures, not DMV regulations (see id., at 13). Upon review of the record, I concur with the ALJ's reasoning and conclusion.

With respect to the second cause of action, I concur with the ALJ's determination that "[b]ecause there is no evidence that Geo 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" (see Hearing

Report, at 15; see also Matter of AMI Auto Sales Corp. [AMI], Decision and Order of the Commissioner, February 16, 2012, at 3; Matter of Gurabo Auto Sales Corp. [Gurabo], Decision and Order of the Commissioner, February 16, 2012, at 3).

Although not pled in their answer, respondents argued at the hearing and in their closing statement that DEC "was prohibited from maintaining this hearing on the basis of double jeopardy" because "respondents have been 'convicted' on the same charges brought by DEC" in a separate DMV proceeding (Hearing Report, at 15). ALJ Buhrmaster determined that double jeopardy does not apply "because none of the violations found by DMV relate to inspections that are the basis of DEC's complaint" (see Hearing Report, at 16). Moreover, no evidence exists in the record that any of the violations alleged by DEC staff have previously been addressed by DMV. As the ALJ noted, the DMV documentation produced by respondents' counsel concerns a different type of violation (substitution of one vehicle for another in the context of emissions testing, rather than the use of a simulator) as well as different regulatory standards (see, e.g., Hearing Report, at 15-16, 21; Hearing Transcript, at 95).[3]

Civil Penalty

The ALJ found that the corrected penalty of three hundred thirty-eight thousand five hundred dollars ($338,500), which staff sought jointly and severally against each respondent, to be excessive. The ALJ concluded that, in light of the repetitive nature of the violations extending over five and a half months, a substantial penalty is warranted, but that staff's requested penalty was excessive and no factual basis existed for assessing such a penalty (see Hearing Report, at 20).

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[3] See also DEC Closing Argument Letter dated August 8, 2011, at 6 (noting inapplicability of the "double jeopardy" defense in this proceeding).

At the hearing, respondents "also referenced DMV's proceeding as part of a defense of issue preclusion" (or collateral estoppel) (see Hearing Report, at 16). Respondents, however, failed to provide a full set of records relating to the DMV proceeding and failed to explain the documents' relevance to the charges in this matter. That said, I have reviewed the record and, as determined in prior proceedings, the DEC and the DMV enforcement activities are not duplicative (see Matter of Gurabo, Decision and Order of the Commissioner, February 16, 2012, at 3-5; Matter of AMI, Decision and Order of the Commissioner, February 16, 2012, at 3-5; 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).

The ALJ recommended that respondent Geo be assessed a civil penalty in the amount of seventy thousand dollars ($70,000), respondent Mohammad A. Chaudhry be assessed a civil penalty in the amount of fifty thousand dollars ($50,000), and respondent Haji N. Chaudhry be assessed a civil penalty in the amount of twenty thousand dollars ($20,000) (see Hearing Report, at 20-21).[4]

In consideration of the record of this proceeding, including the number of inspections involved, I conclude that the penalties should be reduced to more closely correspond on a per violation basis to those imposed in prior proceedings involving the use of simulators. Accordingly, I am hereby imposing a penalty of sixty thousand dollars ($60,000) upon the corporate respondent Geo. With respect to the individual respondents, Mohammed A. Chaudhry and Haji N. Chaudhry, I am also imposing a penalty which totals $60,000, but apportioned to reflect the considerably higher number of inspections that Mohammed A. Chaudhry conducted (526) as compared to Haji N. Chaudhry (151). The disparity in the number of improper inspections that each conducted is significant and should be reflected in the penalty assessment with respect to these individual respondents. Accordingly, I am assessing a civil penalty in the amount of forty-six thousand seven hundred fifty dollars ($46,750) with respect to Mohammed A. Chaudhry and a civil penalty in the amount of thirteen thousand two hundred fifty dollars ($13,250) with respect to Haji N. Chaudry. The penalties assessed against these individual respondents are generally proportional to the number of inspections that each conducted.

The civil penalties assessed, although below the statutory maximum, are substantial and justified by the number of violations that respondents committed.

[4] As discussed, the ALJ found that DEC staff presented insufficient proof to establish that respondent Choudhry M. Afzal was personally liable for the inspection activities performed by respondents Geo, Haji N. Chaudhry, and Mohammed A. Chaudhry at the station. Additionally, although joint and several liability may be imposed in administrative enforcement proceedings, I concur with the ALJ that imposing joint and several liability is inappropriate here. Respondents Mohammad A. Chaudhry and Haji N. Chaudhry each performed their own inspections for which it is appropriate to hold each individually responsible.

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

I. Respondents Geo Auto Repairs, Inc., Mohammad A. Chaudhry, and Haji N. Chaudhry are adjudged to have violated 6 NYCRR 217-4.2 by operating an official emissions inspection station using equipment and/or procedures that are not in compliance with DEC procedures or standards. Six hundred seventy-seven (677) inspections using noncompliant equipment and procedures were performed at Geo Auto Repairs, Inc., of which respondent Mohammed A. Chaudhry performed 526 and respondent Haji N. Chaudhry performed 151.

II. DEC staff's charges that respondent Choudhry M. Afzal violated 6 NYCRR 217-4.2 are dismissed.

III. DEC staff's charges that respondents Geo Auto Repairs, Inc., Choudhry M. Afzal, Mohammad A. Chaudhry, and Haji N. Chaudhry violated 6 NYCRR 217-1.4 are dismissed.

IV. The following penalties are hereby assessed:

A. Respondent Geo Auto Repairs, Inc. is hereby assessed a civil penalty in the amount of sixty thousand dollars ($60,000);

B. Respondent Mohammad A. Chaudhry is hereby assessed a civil penalty in the amount of forty-six thousand seven hundred fifty dollars ($46,750); and

C. Respondent Haji N. Chaudhry is hereby assessed a civil penalty in the amount of thirteen thousand two hundred fifty dollars ($13,250).

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.

V. 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 IV of this order.

VI. The provisions, terms and conditions of this order shall bind respondents Geo Auto Sales, Inc., Choudhry M. Afzal, Mohammad A. Chaudhry, and Haji N. Chaudhry, and their agents, heirs, successors, and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:_____
Joseph J. Martens
Commissioner

Dated: March 14, 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:

GEO AUTO REPAIRS, INC., CHOUDHRY M. AFZAL, HAJI N. CHAUDHRY, AND MOHAMMAD A. CHAUDHRY,

Respondents

NYSDEC CASE NO. C02-20100615-13

HEARING REPORT

- by -

/s/

Edward Buhrmaster
Administrative Law Judge

October 28, 2011

PROCEEDINGS

Pursuant to a Notice of Hearing and Complaint, dated August 18, 2010 (Exhibit No. 1), Staff of the Department of Environmental Conservation ("DEC") charged Geo Auto Repairs, Inc., Choudhry M. Afzal, Haji N. Chaudhry and Mohammad A. Chaudhry ("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 governs motor vehicle emissions testing. (The notice of hearing and complaint refer to Geo Auto Repair; however, the evidence indicates the proper name is Geo Auto Repairs.)

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 August 17, 2009, and February 1, 2010, at an official emission inspection station commonly known as Geo Auto Repairs ("Geo"), located at 495 East 180th Street in the Bronx, New York. During this period, DEC Staff alleged, Geo was a corporation duly authorized to do business in New York State, Choudhry M. Afzal owned and operated the inspection station, and Haji N. Chaudhry and Mohammad A. Chaudhry worked there, performing mandatory annual motor vehicle emission inspections.

According to DEC Staff, during the period in question, the respondents performed 677 such inspections using a device to substitute for and simulate the motor vehicle of record, and issued 560 emission certificates based on the simulated inspections.

The respondents submitted an answer dated October 18, 2010 (Exhibit No. 2), in which they denied DEC Staff's charges while asserting no affirmative defenses.

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 a letter of February 4, 2011 (Exhibit No. 4), Chief Administrative Law Judge James T. McClymonds informed the

parties that the matter had been assigned to me. On March 28, 2011, I issued a letter (Exhibit No. 5) scheduling the matter for a hearing to be held on April 6, 2011, at DEC's Region 2 office in Long Island City. That hearing date was cancelled at the request of the respondents' counsel, which was not opposed by DEC Staff, as noted in my letter of March 31, 2011 (Exhibit No. 6). After a conference call with the parties' counsel, I rescheduled the hearing for July 19, 2011, again at DEC's Region 2 office in Long Island City, and confirmed that in a hearing notice dated June 2, 2011 (Exhibit No. 7). The hearing was held on July 19, 2011, and concluded on that date.

DEC Staff appeared by Blaise Constantakes, an attorney in DEC's Office of General Counsel in Albany. The respondents appeared by Vincent P. Nesci, Esq., of Mount Kisco.

Testifying for DEC Staff were Michael Devaux, a vehicle safety technical analyst employed by 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 called no witnesses on their behalf, and Mohammad A. Chaudhry was the only respondent to attend the hearing.

The hearing record includes 120 pages of transcript and 14 hearing exhibits. (See exhibit list attached to this report.) The first seven exhibits were my own, to show how the matter came forward. Exhibits No. 8 – 13 were received as part of DEC Staff's case, without objection by the respondents. Exhibit No. 14, which was not received, consists of DMV documentation produced by respondents' counsel after the hearing, as discussed below.

Consistent with a schedule established at the hearing's conclusion, the respondents provided a closing statement dated July 29, 2011, and DEC Staff provided a closing statement dated August 8, 2011. I received the hearing transcript on August 2, 2011, and afforded the parties an opportunity to propose corrections. DEC Staff proposed corrections by e-mail on August 19, 2011, and I adopted the corrections in a memorandum dated September 13, 2011. As an attachment to that memorandum, and as an attachment to a subsequent memorandum dated October 25, 2011, I proposed additional corrections of my own, which have also been adopted, there being no objection by the parties.

At the close of the hearing, the respondents were given an opportunity to provide, with their closing statement, documentation about a DMV proceeding that their counsel said was relevant to the charges in this matter. However, as I noted in an e-mail dated July 29, 2011, the documentation submitted by respondents' counsel was incomplete. By e-mail dated August August 9, 2011, I held the record open until August 16, 2011, for the missing documentation to be provided. When nothing further was produced, I issued a memorandum dated September 13, 2011, questioning the relevance of the documentation I had received, and affording the respondents' counsel until September 22, 2011, to provide a complete set of documents as well as a written explanation of their relevance, if in fact he still wanted them received in evidence. Because he did not respond to my memorandum, the documents he provided previously have been excluded from evidence, on the ground that they are not relevant to DEC's charges. On the other hand, they have been marked for identification as Exhibit No. 14, to preserve them for review in relation to the defenses asserted by the respondents at the hearing and in their closing brief.

POSITIONS OF THE PARTIES

Position of DEC Staff

According to DEC Staff, the respondents completed 677 motor vehicle inspections using noncompliant equipment and procedures, and issued 560 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 $388,500, for which all the 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 meet its evidentiary burden in relation to the charges in its complaint. More particularly, the respondents argue that neither Mr. Devaux nor Mr. Clyne was presented as a computer expert, and neither witness commented whether Geo's NYVIP computer was analyzed, or whether the data that flowed through Testcom to DMV was audited or accurate. The respondents contend that no one testified as to the clarity of the transmission lines from the inspection station to Testcom, and no one from Testcom testified as to the reliability of its data. In summary, the respondents contend there is no "chain of custody" for the inspection data presented by DEC Staff.

The respondents also allege that the charges and the legal requirements on which they are based are vague, and that DMV has already "convicted" them in relation to the same charges brought by DEC Staff, so that this proceeding amounts to double jeopardy.

FINDINGS OF FACT

1. In 2008, Geo Auto Repairs, Inc. ("Geo") applied for licenses from DMV to operate a motor vehicle repair shop and public inspection station at 495 East 180th Street in the Bronx. The applications were granted, and the facility number assigned to Geo was 7106358. (See the testimony of Mr. Devaux at transcript ("T") pages 34 to 36, as well as Exhibit No. 8, which includes most of Geo's repair shop application and its entire inspection station application.)

2. The inspection station license application was completed by Geo's president, Choudhry M. Afzal, on July 17, 2008, and was received by DMV on July 22, 2008. At the time of the application, Mr. Afzal had a 60 percent ownership interest in Geo, and Mohammad A. Chaudhry, Geo's vice president, had a 40 percent ownership interest. (See Exhibit No. 8, page 10.)

3. In April of 2007, Mohammad A. Chaudhry applied to DMV for certification as a motor vehicle inspector. Upon approval of his application, he was assigned certificate number 6NP1. (See application for certification, Exhibit No. 9.)

4. Also in April of 2007, Haji N. Chaudhry applied to DMV for certification as a motor vehicle inspector. Upon approval

of his application, he was assigned certificate number NJ52. (See application for certification, Exhibit No. 10.)

5. These inspectors were identified by name and certificate number as the only two working at Geo in Geo's inspection station license application (Exhibit No. 8, page 12).

6. DMV and DEC jointly administer the New York Vehicle Inspection Program ("NYVIP"), a statewide mandatory annual emissions inspection program for most 1996 and newer light-duty vehicles. (Clyne, T: 45 – 46.)

7. Required by the federal Clean Air Act and U.S. Environmental Protection Agency regulations at 40 CFR Part 51, NYVIP is a second-generation on board diagnostics ("OBD II") based inspection and maintenance program of the type used in areas that do not meet national ozone standards. (Clyne, T: 45 – 46.)

8. In OBD II testing, a vehicle's onboard computer completes diagnostics to determine emissions-related faults. The key to OBD is that it notifies the motorist by illumination of the malfunction indicator light ("MIL"), also known as the check engine light, that an actual or potential emissions fault has been detected, prompting the motorist to fix the vehicle. (Clyne, T: 47.)

9. Inspectors are essentially guided through the inspection process by the NYVIP work station, a unit which is purchased from Testcom, DMV's NYVIP contractor. Station personnel must enter the facility's information into the work station, where it is stored and included in every inspection record that is completed there. (Clyne, T: 48.)

10. The station must have at least one certified inspector, and that inspector must pass an OBD exam on the station's NYVIP unit before performing an actual inspection. The inspector's certificate number is captured on the unit whenever he or she completes an inspection, and is also included in the inspection record. (Clyne, T: 48.)

11. After setting up the unit, the inspector enters a card containing that inspector's certificate number. Vehicle information is entered into the NYVIP unit from bar codes or manual entry, and the unit determines whether an OBD II inspection is required. (Clyne, T: 49.)

12. The first part of the OBD inspection is a visual component involving a check of the MIL with the ignition halfway turned (at which point the MIL should be illuminated) and then with the vehicle started (at which point the MIL should go off).

13. The second part of the OBD inspection is an electronic component, where the NYVIP unit is plugged into the vehicle's standardized diagnostic link connector, which has 16 pins in it, and is generally located about knee-high underneath the steering wheel. This allows a connection with the vehicle's OBD II computer, which is followed by standardized requests being made to the vehicle and standardized responses being sent back to the NYVIP work station. These responses are used to make a pass-fail determination, and to identify the vehicle for enforcement purposes. (Devaux, T: 19; Clyne, T: 49 - 52.)

14. If the vehicle passes the inspection, the inspector is told to affix a sticker, and to confirm that this has been done. If the vehicle fails the inspection, the reasons are identified in a vehicle inspection receipt. (Clyne, T: 53 – 54.)

15. All of the inspection data - for the OBD II inspection, for a separate safety inspection, and for a check of the vehicle's emission control devices - as well as the information identifying the vehicle presented for inspection, is stored in the NYVIP work station in an electronic file containing more than 100 data fields. From the work station, the data is then transmitted by phone line using a modem (or, more recently, by broadband) to SGS Testcom, where it is captured, backed up, and passed rapidly, in a matter of seconds, to DMV's Albany office. (Devaux, T: 30; Clyne, T: 54.)

16. Between August 17, 2009, and February 1, 2010, Geo performed 677 OBD II inspections using a device to substitute for and simulate the motor vehicle of record. Of these 677 inspections, 526 were performed by Mohammad A. Chaudhry, and 151 were performed by Haji N. Chaudhry. (Clyne, T: 66.)

DISCUSSION

This matter involves charges that GEO and its two certified inspectors, Haji N. Chaudhry and Mohammad A. Chaudhry, did not check the OBD II systems as part of 677 motor vehicle inspections conducted during the period between August 17, 2009, and February 1, 2010. In essence, DEC Staff alleges that the OBD II inspections for these vehicles were simulated by use of

non-compliant equipment and procedures, and that 560 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. The initial NYVIP program was based on a 2006 State Implementation Plan ("SIP") submitted to the U.S. Environmental Protection Agency. In another SIP, submitted in 2009, New York took credit for NYVIP enforcement as a basis for ending tailpipe-based emission testing in the state. (Clyne, T: 68 – 69.)

Locating the Simulator Signature

According to Mr. Clyne, about the time of September 2008, DMV told DEC that it suspected that simulators were being used in the greater New York City area. DMV's suspicion was based on its review of inspection records documenting highly repetitive and unrealistic readings of engine RPM (meaning "revolutions per minute"). A typical RPM reading, said Mr. Clyne, would be somewhere between 300 and 1,200, but reviewers were seeing the same number, 6,138, for hundreds of inspections. (T: 54.)

Upon a closer look at the inspection data, DEC realized that RPM readings alone were insufficient to identify simulator use, and expanded its review to other fields captured on each inspection record. Eventually DEC settled on 15 different data fields that evinced a particular simulator profile (or electronic signature). DEC then identified the profile in the records of 44 inspection stations during the period between March 2008 and July 2010. (Clyne, T: 55.)

Geo was one of the stations identified as using the simulator associated with the profile. Using Exhibit No. 11-A, one of two sets of DMV-certified Geo OBD II inspection records, Mr. Clyne delineated the profile on the basis of the following 15 column headings and the entries (shown here in quotation marks) beneath them:

PCM ID1	"10"	
PCM ID2	"0"	
PID CNT 1	"11"	
PIC CNT 2	"0"	(should read as PID CNT 2)(T: 56)
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: 56 – 58.)

Mr. Clyne said this profile could not be associated with an actual vehicle because it does not appear at all in DMV's database of 18.5 million OBD inspection records generated from September 1, 2004 to February 29, 2008, or in the 7 million OBD inspection records generated since July 2010, when DEC's issuance of notices of violation put an end to the simulator's use. (T: 59 – 60.)

The simulator profile appears for the first time in Geo's records for an inspection alleged to have been performed at 11:48 a.m. August 17, 2009, on a Lincoln Town Car. (See page 33 of Exhibit No. 12-B, where the simulated inspections are highlighted in orange.) It appears for the last time in Geo's records for an inspection alleged to have been performed at 1:19 p.m. February 1, 2010, on a Plymouth Voyager. (See page 14 of Exhibit No. 11-B, where the simulated inspections are also highlighted in orange.)

Mr. Clyne testified that, in total, 677 simulated inspections occurred at Geo, 526 by Mohammad Chaudhry and 151 by Haji Chaudhry. This was determined on the basis of a sort of the highlighted inspection data by inspector identification, based on the column heading "CI NUM" (which stands for certified inspector number, the alphanumeric identifier assigned by DMV when the inspector's certificate was issued). (T: 65 – 66.)

The 677 simulated OBD II inspections, Mr. Clyne testified, resulted in the issuance of 560 inspection certificates, meaning that the vehicle was deemed to have passed the safety and emission control device checks as well as the OBD II inspection. In instances where no certificate was issued, Mr. Clyne said that the simulator was used to pass the OBD II inspection, but the inspector failed the vehicle on the basis of safety. Where this happened, he added, the vehicle was reinspected within a

few days, and did receive an inspection certificate, just not at the time that the OBD II inspection was completed. (T: 67.)

Turning to page 13 of Exhibit No. 11-B, Mr. Clyne pointed out that at 5:01 p.m. January 30, 2010, a Chevrolet Astro all-wheel-drive vehicle was inspected and failed its OBD II inspection because too many of its monitors did not test as ready. ("RR", as shown in the column headings on the data sheets, stands for readiness result, and "N", where it appears in the column, means "not ready.") (T: 62 - 63.)

When the same vehicle was presented at 12:19 p.m. on February 1, 2010, it passed the inspection because a simulator stood in for it, as indicated by the appearance of the simulator profile in the inspection data. (T: 63 - 64.)

Remarkably, the respondents did nothing to impeach Mr. Clyne's testimony about the identification and significance of the simulator profile, nor did they did 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 to have offered evidence to refute it.

There is no question that the inspections documented in Exhibits 11-A and 12-A were attributable to Geo, because Geo'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 Haji N. Chaudhry and Mohammad A. Chaudhry performed the inspections, because their certificate numbers are the only ones that appear in the inspection data.

As noted above, DEC Staff's case included an explanation of how the OBD II inspection data was generated and how it was passed from the inspection station via Testcom to DMV's Albany office, where it was retrieved by DEC Staff. (See Exhibits No. 11 and 12, DMV's records certifications, which were provided to DEC Staff with the inspection data.)

While no testimony was offered by or on behalf of the respondents, their counsel, in his questioning of DEC Staff's witnesses, tried to cast doubt on the reliability of the inspection data, noting that it had passed through Testcom's computers. As the respondents point out in their closing statement, no one from Testcom was called to testify about the data's reliability, and neither Mr. Devaux nor Mr. Clyne was

presented as a computer expert. On the other hand, Mr. Clyne said that before the initial NYVIP units were approved for release, DEC did testing to ensure that data inputs were accurately recorded. He also explained how there are multiple checks to ensure that work station inspection records match those maintained by Testcom, DEC and DMV. (T: 84.)

Mr. Clyne testified that the proprietary software developed by Testcom for its NYVIP work stations is tested by DEC and DMV before it is allowed to be used. (T: 81.) Respondents' counsel suggested that if there was something wrong with the software, Testcom would see no advantage in telling people about it. (T: 83.) However, he produced no evidence suggesting any problem existed.

Under cross-examination, Mr. Clyne admitted having no knowledge whether anyone had gone to Geo and downloaded the inspection data from the hard drive of its NYVIP unit, to compare it to the data that had passed through Testcom. (T: 86.) On the other hand, the respondents offered no reason to believe that such a comparison would show any differences. As the respondents point out, there was also no testimony about the clarity of the telephone transmission lines from the inspection station to Testcom. Again, however, there was no evidence of a problem in this regard.

Questioned by respondents' counsel, Mr. Devaux agreed that what he understood about the transmittal of data from a vehicle to the NYVIP unit and from there through Testcom to DMV was based on what he had been told, but added that he had no reason to believe that data would be corrupted during the transmission from the vehicle to the NYVIP computer. (T: 41 – 42.) Mr. Devaux's testimony about the inspection process was basically corroborated by Mr. Clyne, and by the NYVIP vehicle inspection system operators' instruction manual (Exhibit No. 13), which was received as part of Mr. Devaux's testimony.

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 Geo as the licensed inspection station, and that Haji N. Chaudhry and Mohammad A.

Chaudry, 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 677 separate occasions by use of a simulator to perform OBD II emissions inspections. Simulators have no place in the administration of actual emissions tests, and their use is not consistent with the emissions inspection procedure set out at 6 NYCRR 217-1.3, which requires testing of a 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.

Geo is liable for all 677 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).] As a private corporation, Geo also falls within the definition of "person" at 6 NYCRR 200.1(bi).

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 statement, DEC Staff argues that Choudhry M. Afzal, "as the owner and President" of Geo, remains personally responsible for all of the inspection activity at the station under both 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 Geo, as station licensee, for all inspection activities conducted at the inspection station, even if, as it appears from Exhibit No. 8, Mr. Afzal had a 60 percent ownership interest in the corporation.

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. As noted by DEC Staff, 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 a person could have influenced the corporate actions that 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. Afzal, as Geo's president, for the

non-compliant inspections performed by Haji N. Chaudhry and Mohammad A. Chaudhry. Contrary to Staff's argument, it is not clear to what extent Mr. Afzal, as a corporate officer, was in a position to control the activities of the inspectors. Nothing was revealed about the day-to-day management of the Geo inspection station, or what role Mr. Afzal may have had in the violations that were committed. Neither of Staff's witnesses was ever at the Geo 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.

In its closing statement, DEC Staff points out that, in their answer, the respondents admitted the allegation in Staff's complaint that Mr. Afzal owned and operated the Geo inspection station. However, Staff's own evidence (Exhibit No. 8) indicates that the station was under corporate, not individual, ownership. Also, under DMV's regulatory scheme, the station is "operated" by the licensee, which in this case was Geo, not Mr. Afzal. [See 15 NYCRR 79.7(b), which discusses applications for new licenses to "operate" an official inspection station.]

As noted above, 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.

In its closing statement, DEC Staff also says that the simulation of OBD II emissions tests is a violation of particular provisions of 15 NYCRR Part 79 as well the NYVIP vehicle inspection system operators instruction manual (Exhibit No. 13), which is referred to at 15 NYCRR 79.24(b)(1)(iii). However, these are DMV'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 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 Geo 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 Geo 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, 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 not being performed consistent with DEC procedure.

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 that had not undergone an official emissions 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) 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 Geo as an emissions inspection station, if not to the inspectors themselves. However, such an interpretation would not give meaning to the regulation as written.

At the hearing, I discussed with the parties my difficulty applying 6 NYCRR 217-1.4, as written, in a sensible way. (T: 103 – 111.) DEC Staff agreed that, in defining "official inspection station," there was a "wrong reference" to DMV regulation, but reiterated the intent of 6 NYCRR 217-1.4 that emissions inspections be conducted properly. Respondents' counsel argued that 6 NYCRR 217-1.4 is vague; however, I find it to be clear enough, though impossible to apply in the way Staff apparently intended when it was promulgated. Because there is no evidence that Geo 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.

Respondents' Affirmative Defenses

Though not pled in its answer, the respondents claimed as an affirmative defense that, in a separate proceeding already concluded at DMV, the respondents had been "convicted" on the same charges brought by DEC. At the hearing and in his closing statement, the respondents' counsel said DEC was prohibited from maintaining this hearing on the basis of double jeopardy. This ignores the fact that DMV's and DEC's proceedings involve different charges stemming from different alleged activities. Here, the respondents have been charged with violation of DEC regulations for the use of a device to simulate motor vehicle

emissions inspections on 677 different occasions. In DMV's proceeding, respondent Geo and its two inspectors were found to have committed fraud, in violation of Vehicle and Traffic Law Section 303(e)(3), in relation to 31 separate instances involving the substitution of one motor vehicle for another during emissions testing. Mohammad A. Chaudhry was found to have conducted 29 of the fraudulent inspections, and Haji N. Chaudhry was found to have conducted the other two. (See the findings sheet of DMV ALJ Walter Zulkoski, dated September 21, 2010, included in Exhibit No. 14, which was marked for identification.) The use of emissions data from a "clean" vehicle as a substitute for a vehicle whose conditions might have caused it to fail emissions tests, a practice commonly referred to as "clean-scanning," is different from the use of a simulator to substitute for the motor vehicle of record. Because of this difference, and because none of the violations found by DMV relate to inspections that are the basis of DEC's complaint, double jeopardy has no possible application to this proceeding.

At the hearing, respondents' counsel also referenced DMV's proceeding as part of a defense of issue preclusion. For the principle of issue preclusion, or collateral estoppel, to apply, there must be an identity of issue which has necessarily been decided in the prior action, and the party to be estopped must have had a full and fair opportunity to litigate the issue. [See Richard Locaparra d/b/a L and L Scrap Metals, Final Decision and Order of the Commissioner, June 16, 2003, page 6, citing Gilberg v. Barbieri, 53 NY2d 285, 291 (1981).] Because the issues here are entirely separate from those determined in DMV's earlier proceeding, issue preclusion is not a defense.

After reviewing the incomplete documentation provided with the respondents' closing statement, I provided respondents' counsel the opportunity to provide a full set of records pertaining to DMV's proceeding, as well as an explanation of their relevance to DEC's charges. (See my memorandum to the parties' counsel, dated September 13, 2011.) However, he provided nothing further. Therefore, the DMV documentation shall not be received in evidence, though it will be retained with the other exhibits as Exhibit No. 14, marked as such for identification purposes only.

Civil Penalties

In its complaint, DEC Staff proposed that the Commissioner assess a civil penalty of $388,500 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 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 $22,500 for said violation and an additional penalty not to exceed $22,500 for each day during which such violation continued.

I agree with DEC Staff that each illegal inspection constitutes a separate violation of DEC regulations. 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.

Consistent with ECL 71-2103(1), the violations in this matter could subject the respondents to penalties in the millions of dollars. However, according to DEC's civil penalty policy ("CPP", DEE-1, dated June 20, 1990), the computation of the maximum civil 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. Given the number of simulated inspections that were performed, this equates to a total penalty of $338,500 ($500 x 677), not $388,500, the penalty requested by DEC Staff.

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 statement, DEC Staff asserts that using a simulator made the inspection process easier and faster, allowing the respondents to service more customers and thereby increase their potential income. 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. It is intended to assure that motor vehicles are properly maintained, to curb hydrocarbons and nitrogen oxide, which form ozone on hot, sunny days. Ozone pollution is a particular problem in metropolitan New York, which is in non-attainment of the federal ambient air quality standard for this pollutant. Ozone, Mr. Clyne testified, is a threat to public health and the environment, particularly crops. (T: 68 – 69.)

While one cannot determine the actual damage caused by the violations charged in this matter, there is a clear potential for harm to the extent that 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 to 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.

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. As Mr. Devaux explained, becoming an inspector requires taking classroom instruction and passing tests addressing both the inspection regulations and OBD II technology. (Devaux, T: 27 – 28.)

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 respondents offered no evidence about their ability to pay any penalties that may be assessed; therefore, this should not be a factor in determining the amount of the penalty, or the structure or method of payment. Finally, there was no evidence that the respondents had a prior history of non-compliance with regulations governing their auto inspection activities.

As noted above, the respondents' counsel produced documentation indicating that Geo and its inspectors were found by DMV to have engaged in emissions inspection fraud involving the substitution of one vehicle for another. However, DMV established that this activity occurred over a period from January 30 to May 2, 2010, commencing at about the time the simulator use stopped. DMV's hearing occurred on September 21, 2010, DMV rendered determinations the following month, and those determinations were affirmed by DMV's appeals board on March 29, 2011. At DEC's hearing, on July 19, 2011, respondents' counsel

said he intended to challenge DMV's determinations in a court proceeding under Article 78 of the New York State Civil Practice Law and Rules ("CPLR").

- Penalty Recommendation

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 it requests 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.

I find that substantial penalties are warranted against Geo and its inspectors, particularly in light of the repetitive nature of the violations, which extended over a period of five and a half months. On the other hand, Staff's requested penalty is excessive. Not only is it based on a miscalculation, as noted above, Staff has provided no factual basis for a penalty amounting to $500 per simulated inspection.

I also find that separate penalties against Geo and its two inspectors should be assessed, consistent with the practice DMV followed in its enforcement action against them. 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 677 separate violations of 6 NYCRR 217-4.2, Geo should be assessed a civil penalty of $70,000. Given the equal culpability of the two inspectors, but recognizing the unequal number of violations they committed, I

recommend a civil penalty of $50,000 for Mohammad A. Chaudhry and a civil penalty of $20,000 for Haji N. Chaudhry.

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 and environment. Geo and its inspectors 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. Because of this, a substantial upward penalty adjustment is warranted.

Finally, there is no evidence that any of the violations alleged by DEC Staff have previously been addressed by DMV. In fact, the DMV documentation produced by the respondents' counsel concerns a separate type of violation (substitution of one vehicle for another in the context of emissions testing) that occurred on other occasions.

CONCLUSIONS

1. Between August 17, 2009, and February 1, 2010, respondent Geo Auto Repair used a simulator to perform OBD II inspections on 677 separate occasions. Respondent Mohammad A. Chaudhry performed 526 of these simulated inspections, and respondent Haji N. Chaudhry performed the remainder.

2. The 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 Geo Auto Repair should be assessed a civil penalty of $70,000, respondent Mohammad A. Chaudhry should be assessed a civil penalty of $50,000, and

respondent Haji N. Chaudhry should be assessed a civil penalty of $20,000.

2. The first cause of action should be dismissed in relation to respondent Choudhry M. Afzal.

3. The second cause of action, which alleges violations of 6 NYCRR 217-1.4, should be dismissed in relation to all the respondents.

ENFORCEMENT HEARING EXHIBIT LIST

GEO AUTO REPAIRS, INC., CHOUDHRY M. AFZAL, HAJI N. CHAUDHRY, and MOHAMMAD A. CHAUDHRY (Case No. C02-20100615-13)

1. DEC Notice of Hearing and Complaint (8/18/10)
2. Respondents' answer (10/18/10)
3. DEC Staff's statement of readiness (12/30/10)
4. DEC Chief ALJ's assignment letter (2/4/11)
5. ALJ's letter announcing 4/6/11 hearing date (3/28/11)
6. ALJ's letter confirming cancellation of 4/4/11 hearing date (3/31/11)
7. ALJ's letter confirming rescheduling of hearing to 7/19/11 (6/2/11)
8. DMV repair shop and inspection station applications for Geo Auto Repair, Inc.
9. DMV application for certification as a motor vehicle inspector, filed by Mohammad A. Chaudhry (4/2/07)
10. DMV application for certification as a motor vehicle inspector, filed by Haji N. Chaudhry (4/13/07)
11. Records certification of Bard Hanscom, DMV records access officer (9/1/10), in relation to records received as Exhibit No. 11-A

11-A. DMV abstract of OBD II inspection data for Geo Auto Repair, Inc. (9/10/09 – 2/15/10)

11-B. Data from Exhibit No. 11-A, with orange highlighting of simulated inspections

12. Records certification of Brad Hanscom, DMV records access officer (1/20/10), in relation to records received as Exhibit No. 12-A

12-A. DMV abstract of OBD II inspection data for Geo Auto Repair, Inc. (9/8/08 – 9/9/09)

12-B. Data from Exhibit No. 12-A, with orange highlighting of simulated inspections

13. NYVIP vehicle inspection system operators' instruction manual (issued 11/19/04, as revised 6/18/08)
14. Documentation about DMV proceeding against respondents (as furnished with respondents' closing statement dated July 29, 2011)

(NOTE: Exhibit No. 14 was marked for identification only.)