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-

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

Respondents.

DEC Case No. C02-20100615-20

DECISION AND ORDER OF THE COMMISSIONER

February 16, 2012

DECISION AND ORDER OF THE COMMISSIONER

This administrative enforcement proceeding concerns allegations that respondents Gurabo Auto Sales Corp. ("Gurabo"), Manuel R. Inoa, and Ramon B. Reyes completed 1,416 motor vehicle inspections using noncompliant equipment and procedures, and issued 1,416 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 October 21, 2009 and July 9, 2010. During this period, staff of the New York State Department of Environmental Conservation ("DEC") alleges that Gurabo was a domestic business corporation duly authorized to do business in New York State, and that both Mr. Inoa and Mr. Reyes worked at Gurabo 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 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 a civil penalty of seven hundred eighty thousand dollars ($780,000). To account for a calculation error, staff subsequently revised the requested penalty to seven hundred eight thousand dollars ($708,000). With respect to the requested penalty, DEC staff requested 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 with the opportunity to submit comments. DEC staff submitted their comments on September 22, 2011 ("DEC Staff Letter"), and respondents submitted their comments on September 23, 2011 ("Gurabo 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 propose that, if either of the two causes of action are not dismissed, a penalty of no more than $15,000 should be assessed (Gurabo Letter, at 3). Respondents raise 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]

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[1] On this same date, I am also issuing an order that holds AMI Auto Sales Corp. (AMI), which previously 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 nearly four thousand (4,000) violations of 6 NYCRR 217-4.2 during the period from March 28, 2008 to October 13, 2009. That order assesses a civil penalty with respect to AMI and each of the two individual respondents for those violations (see Matter of AMI Auto Sales Corp., Decision and Order of the Commissioner [decided herewith]).

Liability

I concur with the ALJ's determination 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 NYCRR 217-4.2. ALJ Buhrmaster's analysis of the evidence supporting this charge was both comprehensive and complete (see, e.g., Hearing Report, at 16-19).

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 217.3 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" (see Hearing Report, at 20) (emphasis in original). There was no evidence that respondents held that kind of license or that Gurabo 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 20-21). Accordingly, the second cause of action must be 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 Gurabo Letter, at 1). 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 do so here. Respondents' liability is fully supported by the record evidence and the reasonable conclusions that can be drawn from that evidence.

Respondents claim that the 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 brought by DEC and DMV are the same, the DEC is collaterally estopped and barred by res judicata from bringing charges against respondents for those inspections for which DMV has already found respondents liable (see Gurabo Letter, at 2).

The legislative and regulatory context, however, demonstrates that the enforcement activities of the 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),[2] 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.

All but forty (40) of the 1,416 inspections that DEC staff set forth in this proceeding are different from those inspections that formed the basis of DMV's determinations (see Hearing Report, at 23, 31). With respect to those forty (40) inspections 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. To determine whether multiple penalties are authorized for multiple offenses arising from a single course of conduct, the elements of each offense are examined to determine whether each offense requires proof of a fact not required for the other offense (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).

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

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[2] See VTL §§ 303(e)(1) and 303(e)(3); 15 NYCRR 79.24(b)(1)(see Hearing Report, at 19, 23-24; see also Hearing Exhibit 9 [Finding Sheet, at 2-3]).

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 24), and required facts not required for the proof of the offense in the DEC proceeding.[3] Similarly, each offense charged by DEC staff required proof of facts not required for the proof of the offense charged in the DMV proceeding. Accordingly, multiple offenses and penalties are authorized and respondents' argument is rejected.

Civil Penalty

The ALJ found that the staff-requested penalty of seven hundred eight thousand dollars ($708,000), which staff sought jointly and severally against each respondent, to be excessive. The ALJ concluded that, in light of the penalty that DMV assessed and the revocation of Gurabo's inspection license, among other things (see Hearing Report, at 34), a downward penalty adjustment was warranted in this DEC proceeding. He recommended that respondent Gurabo be assessed a civil penalty in the amount of one hundred twenty thousand dollars ($120,000), respondent Manuel R. Inoa be assessed a civil penalty in the amount of sixty thousand dollars ($60,000), and respondent Ramon B. Reyes be assessed a civil penalty in the amount of sixty thousand dollars ($60,000).

Respondents contend that DEC staff provided no explanation for its penalty request (see Gurabo Letter, at 3). Respondents further assert that no economic benefit arising from their activities was shown (see id., at 3-4). 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 12-16).

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[3] DEC staff states that the hearing report implies that DMV's administrative decisions are final decisions for which no administrative appeal right exists. 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 (see Hearing Report, at 31-32). Administrative appeals from the DMV determinations were taken, which respondents subsequently withdrew (see Respondents' Closing Memo, dated May 18, 2011, at 16; see also Hearing Exhibit 9 [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.

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 26-35). The ALJ considered economic benefit in his analysis, and noted that any economic benefit, if it does exist, is unknown (see id., at 28). However, economic benefit is only one of a number of factors to be considered. In his hearing report, 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 27). 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 Hearing Report, at 34).[4]

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.

In his hearing report, the ALJ underscored the significance of the OBD II testing to the control of air pollution. Such 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

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[4] DEC staff disagrees with the ALJ's statement that the penalty was, in part, "based upon a misapplication of ECL 71-2103(1)" (Hearing Report, at 33). At issue was whether the statutory minimum penalty of "not less than five hundred dollars" for a first violation applies to a "second or further violation" (see ECL 71-2103[1]). Although the statute provides a statutory maximum penalty for a second or further violation (that is, "not to exceed twenty-six thousand dollars"), the language of the statute does not provide for a statutory minimum penalty for such a second or further violation. It should also be noted that, at the time of the first violation in this matter (10/21/09), the minimum penalty was "not less than three hundred seventy-five dollars." The minimum was subsequently raised to "not less than five hundred dollars" by legislation effective as of May 28, 2010; similarly, the penalty for a second or further violation was raised from twenty-two thousand five hundred dollars to twenty-six thousand dollars (see Laws of 2010, ch 99, § 14, subd 1; see also Hearing Report, at 26-28, 35).

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" (Gurabo Letter, at 3). 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, which 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.

Although respondents assert that DEC staff inordinately delayed in bringing these charges, no support for that contention is evident on this record. Respondents state that the DEC's investigation commenced on or before October 21, 2009, 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 Gurabo 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, after DMV staff advised DEC staff that DMV staff believed 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 any such use and which stations may be involved (see Hearing Transcript, at 111-112). Inspection data from thousands of stations were reviewed (see id., at 114). Once inspection data led DEC staff to Gurabo, staff moved to issue a notice of

violation (see, e.g., Hearing Report, at 26; see also Hearing Transcript, at 114).

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 Gurabo should be equal to the aggregate penalty imposed on the two individual respondents.

I also agree with the ALJ that imposing joint and several liability would not be appropriate here. Although joint and several liability may be imposed in administrative enforcement proceedings, in this matter Messrs. Inoa and Reyes each performed their own inspections for which it is appropriate for each to be held individually responsible.

As noted, the ALJ recommends that respondent Gurabo, the domestic business corporation at which all 1,416 motor vehicle inspections using noncompliant equipment and procedures were conducted, be assessed a civil penalty of one hundred twenty thousand dollars ($120,000), and I adopt that recommendation.

In addition, the ALJ recommends the assessment of a civil penalty of sixty thousand dollars ($60,000) on respondent Inoa and sixty thousand dollars ($60,000) on respondent Reyes. However, on a review of Hearing Exhibit 8-B and this record, respondent Inoa conducted approximately one hundred more improper inspections than respondent Reyes (760 versus 656 inspections), and this greater number should be reflected in the penalty consideration. Accordingly, I am assessing a penalty of sixty-four thousand five hundred dollars ($64,500) on respondent Inoa and fifty-five thousand five hundred dollars ($55,500) on respondent Reyes, which is generally proportional to the number of improper inspections that each performed.

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 Gurabo 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 are not in compliance with DEC procedures or

standards. One thousand four hundred sixteen (1,416) inspections using noncompliant equipment and procedures were performed at Gurabo Auto Sales Corp., of which respondent Manuel R. Inoa performed 760 and respondent Ramon B. Reyes performed 656.

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

III. The following civil penalties are hereby assessed:

A. Respondent Gurabo Auto Sales Corp. is assessed a civil penalty in the amount of one hundred twenty thousand dollars ($120,000);

B. Respondent Manuel R. Inoa is assessed a civil penalty in the amount of sixty-four thousand five hundred dollars ($64,500); and

C. Respondent Ramon B. Reyes is assessed a civil penalty in the amount of fifty-five thousand five hundred dollars ($55,500).

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 Gurabo 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:

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

Respondents

NYSDEC CASE NO. C02-20100615-20

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 New York State Department of Environmental Conservation ("DEC") charged Gurabo 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 October 21, 2009, and July 9, 2010, at an official emission inspection station commonly known as Gurabo Auto Sales, located at 1476 Jerome Avenue in the Bronx, New York. During this period, DEC Staff alleged, Gurabo Auto Sales Corp. 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 1,416 such inspections using a device to substitute for and simulate the motor vehicle of record, and issued 1,416 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 whom 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, which announced that the hearing would be held on February 9, 2011, at DEC's Region 2 office. As indicated in my letter of February 23, 2011 (Exhibit No. 4), the hearing was later rescheduled to March 10, 2011, at the same location. The hearing went forward on March 10, 2011, and was completed that same day.

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.

At the start of the hearing, I led the parties through a discussion of apparent errors in the complaint, which resulted in corrections to the time frame of the violations (the complaint had a violation start date of October 21, 2008, which was corrected to October 21, 2009), the penalty request (the complaint included a request for $780,000, which was reduced to $708,000) and one regulatory citation (a reference to 6 NYCRR Subpart 217-4.2 in paragraph 16 of the complaint, which was corrected to 6 NYCRR 217-1.4, to conform to other citations to that provision in the second cause of action). (See discussion at transcript pages 11 to 17.)

The hearing record includes 200 pages of transcript and nine hearing exhibits. The first eight 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. 9. 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 1,416 motor vehicle inspections using noncompliant equipment and procedures, and issued 1,416 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 $708,000, 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 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 the data contained within the inspection station records may have been tampered with or altered by an outside contractor, SGS Testcom, that has exclusive control over the repair and maintenance of the testing equipment, 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. They claim it is possible that the inspection equipment was improperly set up, or contained incorrect data, before it was acquired by the inspection station. 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 or 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.

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 the 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 such penalties 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. On August 21, 2009, Ramon B. Reyes completed a DMV application (Exhibit No. 5) to operate Gurabo Auto Sales Corp. ("Gurabo") as a public inspection station, repair shop and used motor vehicle dealer. The application was approved by DMV, which assigned Gurabo a facility number of 7108968.

2. The Gurabo inspection station was located at 1476 Jerome Avenue in the Bronx. Mr. Reyes is the president, vice president, secretary and treasurer of Gurabo, and owns all of its stock. (See Exhibit No. 5, page 2.)

3. On May 3, 2003, Mr. 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.)

4. On July 18, 1998, Manuel R. 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. 7.)

5. 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"): 36, 97.)

6. NYVIP features on-board diagnostic (also known as OBD II) testing for model year 1996 and newer light-duty vehicles. (T: 97, 98.)

7. During an OBD II inspection, information is collected from the vehicle to determine whether it should pass or fail. Also, other electronic information is collected which DMV and DEC can use to ensure that the vehicle presented was in fact inspected, and that the inspection was proper and completed as required. (T: 100, 101.)

8. The OBD II light-duty motor vehicle inspection process is referenced in both DEC regulation (6 NYCRR Part 217) and in DMV regulation (15 NYCRR Part 79). (T: 102.)

9. Before an inspection station can conduct an OBD II inspection, it needs to purchase the official test equipment, known as a NYVIP work station, and then set it up correctly. Equipment is available for purchase from SGS Testcom, which manages NYVIP under contract with New York State. (T: 102.)

10. Also prior to conducting an OBD II inspection, the station owner needs to scan the facility's bar code into the work station, and someone in authority, typically the owner or station manager, needs to enter a certified inspector's bar code into the work station. (T: 102, 103.)

11. To become a motor vehicle inspector, one files an application with DMV and takes a class on OBD II inspections. After passing an examination offered as part of that class, the inspector must also pass an online computer test through the NYVIP work station on which he or she will be working. (T: 46, 103.)

12. Inspectors are certified after being instructed in OBD II inspection requirements, and are required to keep their certification cards with them at all times while employed as a motor vehicle inspector. An inspector is not permitted to allow anyone else, even another certified inspector, to use that inspector's card under any circumstances, and likewise is not allowed to use any other inspector's card when doing an inspection. (T: 48.) Furthermore, if an inspector loses or misplaces his or her card, that inspector is required to notify DMV's inspector certification unit immediately. (T: 49.)

13. To perform an OBD II inspection, the inspector must scan the bar code from his or her card into the NYVIP work

station. The inspector is then instructed to enter, either through manual entry or bar code scanning, the information for the vehicle that has been presented for inspection. (T: 103.)

14. The sequence of the inspection involves, first, a safety inspection, then checks of the emission control devices ("ECDs"), including a gas cap check, and, lastly, the actual OBD II emissions inspection. The OBD II emissions inspection begins with two visual checks of the malfunction indicator light ("MIL"), to see if it comes on when it should, and then to see if it goes off when the vehicle is running. The function of OBD II is to alert the motorist that an emissions fault has been encountered, with the MIL coming on to let the motorist know that a repair is needed. (T: 103 – 104.)

15. After the inspector answers questions regarding the MIL checks, the inspector is instructed to plug the work station into the diagnostic link connector ("DLC") in the vehicle itself, so that the inspection machine can read the data contained in the electronic control module ("ECM"), a computer inside the vehicle. (T: 38, 104.)

16. Once the connection has been established, and without the inspector's intervention, standardized requests are made to the vehicle and responses from the vehicle are made back to the NYVIP work station. (T: 104, 107.) Information is collected to identify the vehicle being inspected and determine if that vehicle meets inspection standards. This includes information pertaining to the MIL status, the readiness status (whether enough monitors are ready so that the vehicle will pass the inspection), and the presence of diagnostic trouble codes. (T: 40, 107.)

17. The information retrieved from the vehicle is stored in the NYVIP work station while the inspection continues. At the conclusion of the inspection, a formal record is completed, which is sent to DMV through SGS Testcom in a matter of five to ten seconds. (T: 107, 108.) DMV maintains the official database of OBD II inspections, and SGS Testcom maintains a mirror database of the data that it has captured and sent to DMV. (T: 42, 108.)

18. OBD II inspections were performed at the Gurabo inspection station during the period between October 21, 2009, and August 28, 2010, as documented in Exhibit No. 8-A.

19. During the period between October 21, 2009 and July 9, 2010, 1,416 of these inspections, as highlighted on Exhibit No. 8-B, were performed using a device to substitute for and simulate the motor vehicle of record. Approximately 54 percent of these inspections were performed by Mr. Inoa, and the rest were performed by Mr. Reyes.

20. Emission certificates were issued as a result of each of these 1,416 inspections.

DISCUSSION

This matter involves charges that Gurabo and its two certified inspectors, Mr. Reyes and Mr. Inoa, did not check the OBD II systems as part of their inspections of 1,416 motor vehicles during the period between October 21, 2009, and July 9, 2010. 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 Amendments of 1990 and 40 CFR Part 51. The Clean Air Act Amendments require an inspection and maintenance ("I&M") program in areas of the country, like New York, that have demonstrated air quality noncompliance, also known as nonattainment. NYVIP is a statewide program that features OBD testing for model year 1996 and newer light-duty vehicles. (T: 97 – 98.)

To demonstrate compliance with the federal requirements, New York submitted two revisions to its State Implementation Plan ("SIP") devoted to NYVIP specifically: one in 2006 for the roll-out of NYVIP, and another in 2009, in which the state claimed additional credit for NYVIP due in part to enhanced enforcement. According to Mr. Clyne, who was the principal author of the SIP revisions, the 2006 revision outlined the statewide OBD-II-based NYVIP program, explained how it would be implemented and enforced, and described the vehicles that are subject to the program.

Mr. Clyne said that the NYVIP program is modeled on the federal requirements (at 40 CFR Part 51) for an I&M program, and that New York's SIP is formatted to show compliance with these regulations. In the 2009 SIP revision, the state proposed to end a tailpipe-based emissions testing program, NYTEST, which in

fact concluded at the end of 2010. But to do so, Mr. Clyne added, the state needed to claim additional credit through an enhanced NYVIP program, which it was able to because of improved enforcement derived from the information that is collected during an OBD II inspection. As Mr. Clyne explained, during an OBD II inspection, information is collected from the vehicle to determine whether it should pass or fail the inspection, and additional information, not available under the NYTEST program, is collected to verify whether the vehicle presented was in fact inspected. (T: 99 – 100.)

Locating the Simulator Signature

According to Mr. Clyne, in or about September 2008, DMV Staff informed DEC of suspicious activity at particular emission inspection stations in the New York City metropolitan area. More specifically, DMV Staff reported that it believed electronic simulators were being substituted for the vehicles of record, on the basis of highly repetitive and, in some cases, extremely high and unrealistic readings for engine RPM (abbreviation for "revolutions per minute") that were recorded during the inspection process. (T: 110 – 111.)

Mr. Clyne said that during an OBD II inspection, RPM readings are taken when the vehicle is in park and at idle, so a typical RPM reading would be somewhere between 400 and 1,000. But what was seen in some cases were RPM readings in excess of 5,000, with the same reading repeating from inspection to inspection, which Mr. Clyne said would be extremely unlikely. (T: 112.)

According to Mr. Clyne, DEC, upon being alerted to the suspicious activity, queried recent inspection data and did in fact encounter five stations that had these very repetitive and highly unrealistic RPM readings. DEC and DMV then decided to conduct an undercover investigation of these stations, and, after a few weeks, learned that there were possibly other stations involved. Upon retrieving electronic inspection records for these additional stations, DEC Staff concluded that they included inspections with electronic signatures very similar to those found in the inspection records for the five stations that were first identified. As a result, DEC concluded that RPM alone was not a very good indicator of simulator use and the evaluation was expanded to include additional data fields. (T: 112 – 113.)

With additional data analysis over a period of more than several months, DEC found that it could profile or identify simulators using 15 data fields. On the basis of a statewide query, DEC then identified 44 stations, all essentially limited to the greater New York City area, where it concluded simulator use occurred roughly between March 2008 and July 2010. The simulator use was tied to inspections done by about 80 inspectors. (T: 113 – 114.)

DEC reviewed all the NYVIP inspection data going back to September 2004, when NYVIP began in the upstate area, through the end of February 2008, amounting to 18.5 million inspection records from 11,500 stations, and found no matches to the simulator profile for that period. DEC has since queried inspection records for the period after July 2010, and has not seen the simulator profile again. (T: 114 – 115.)

Mr. Clyne noted that in July 2010 DEC Staff sent notices of violation to Gurabo and the other stations suspected of simulating inspections. (T: 114.) The disappearance of the simulator profile from these stations' subsequent inspection data likely was due to this action.

As Mr. Clyne explained, where the 15-field electronic signature appears in Gurabo's inspection data (as highlighted by Mr. Clyne in Exhibit No. 8-B), it matches a simulator, not a real vehicle. (T: 116.) According to Mr. Clyne, if you inspect five different vehicles, each of a different make and model year, the inspection data will be significantly different from vehicle to vehicle. However, because each vehicle has its own signature, if the vehicle is inspected year after year, which is typical, one would see the same profile reported for each inspection. (T: 115 – 116.) As a consequence, the failure to identify vehicles having the simulator signature prior to March 2008 or after July 2010 indicates that such vehicles never existed.

Mr. Clyne explained that Exhibit No. 8-A is an abstract of data collected during OBD II inspections performed at Gurabo, and was generated by DMV at his request. (T: 117 - 122.) Mr. Clyne said that he and DMV worked together to determine which data fields to report, and that the request was made to DMV in relation to an inspection station number, 7108968, that turned out to be the one for Gurabo, meaning that the request was not targeted at the station by name. (T: 122 – 123.)

From left to right across the top of each page of Exhibit No. 8-A, there are headings for each column of data that is displayed. The first reads DMV VIN NUM, meaning the vehicle identification number, which is obtained either through the DMV registration bar code or by manual entry by the inspector. The next column, headed INSP DTE, reflects the date and time that the vehicle was presented for inspection. The first entry on Exhibit No. 8-A, at the top of the first page, indicates that a Lincoln Town Car was presented at 1 p.m. on October 21, 2009. Mr. Clyne concluded that this vehicle was not actually inspected, because of data that appears in the 15 fields he reviewed for simulator use.

These fields, and the entries that are consistent with the simulator profile (shown here in quotation marks) are as follows:

PCM ID1	"10"	
PCM ID2	"0"	
PID CNT 1	"11"	
PIC CNT 2	"0"	(should read as PID CNT 2)[T: 85.]
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: 163 -164.]

Exhibit No. 8-B is basically the same as Exhibit No. 8-A, except that the inspections with the 15-field simulator profile are highlighted in orange. (T: 142.) As is apparent from review of this document, the vast majority of the inspections conducted at Gurabo between October 21, 2009, and July 9, 2010, were simulated; however, from July 10 to August 28, 2010, the date of the last inspection performed, simulator use had ceased.

Mr. Clyne explained that a simulator is an electronic device that is used to simulate a vehicle, and is sometimes used to test scan tools to make sure that data can be communicated and retrieved. As a matter of fact, Mr. Clyne added, DEC and DMV

both own simulators, which have been used to test NYVIP work stations, avoiding the need to bring in a vehicle every time. Mr. Clyne said that a simulator typically has different adjustments, so that one could, for example, turn a knob to see the RPM reading go up or down. (T: 129 – 130.)

Referring to 6 NYCRR 217-1.3(a)(3) and 217-1.3(c)(2), Mr. Clyne explained how there are five ways for a model year 1996 and newer vehicle to fail an OBD II inspection. The first is a failure of the OBD system "to function as designed," which means a failure of communication with the vehicle. The second is a failure of the OBD system "to complete diagnostic routines for necessary supported emission control systems," which refers to failure criteria known as the readiness evaluation. The third is an indication, upon visual inspection, that "the malfunction indicator light fails to illuminate at the starter switch key-on-engine-off position," and the fourth is an indication, also upon visual inspection, that "the malfunction indicator light is illuminated when the engine is running," which is the key to OBD, because when a fault is detected, the light turns on to inform the motorist that service is needed. The fifth involves the malfunction indicator being "commanded to be illuminated," which is determined electronically. (T: 130 – 137.)

As Mr. Clyne emphasized, if the inspector plugs into a simulator in lieu of the vehicle that has been presented for inspection, it cannot be determined if the vehicle is operating properly, and the inspector has no basis to apply a sticker indicating that the vehicle has passed the inspection requirements. (T: 131, 137.)

Apart from Mr. Clyne's testimony about the simulator profile, DEC Staff's case is built upon documentation which includes the inspection data in Exhibit No. 8-A as well as the DMV application records (Exhibits No. 5, 6 and 7) which connect the inspections to the inspection station and the inspectors themselves.

Among the columns of data in Exhibit No. 8-A, the column headed DMV FACILITY NUM, fourth from the left, identifies the station where the inspection occurred, based upon the facility number assigned by DMV when it processed the station's application. The number that appears under this heading for each inspection, 7108968, is the same as the number assigned by DMV on Gurabo's application (Exhibit No. 5), as displayed in the upper right hand corner of the application's first page. This number also appears on the inspection station license, and

must be scanned into the facility's NYVIP work station before any inspections can be performed on the equipment.

Also among the columns of data in Exhibit No. 8-A, the column headed CI NUM, seventh from the left, identifies the certified inspector who performed each inspection, based upon the certificate number assigned by DMV when it processed the inspector's application. The only identifiers in this column are 3MQ1 and WZ60, those assigned by DMV to Mr. Reyes and Mr. Inoa, respectively, as displayed in the upper right hand corner of the first page of each of their applications. (See Reyes application, Exhibit No. 6, and Inoa application, Exhibit No. 7.) The inspector's assigned number appears on his or her certification card, which is scanned into the NYVIP work station prior to each inspection. When the number then appears in the inspection data, it is presumed that the inspector associated with that number did that inspection, because DMV prohibits an inspector from letting his or her card be used by any other person, and from leaving one's card unattended. [See 15 NYCRR 79.17(c)(2).]

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 a simulator was used during 1,416 inspections performed at the Gurabo facility by either Mr. Reyes or Mr. Inoa between October 21, 2009, and July 9, 2010. This demonstration was made 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 the 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-A are attributable to Gurabo, because Gurabo'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. Reyes and

Mr. Inoa performed the inspections, because their certificate numbers are the only ones that appear in the inspection data.

Respondents' Claims

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 admitted that he did not visit the facility before or after the charges were brought, and never inspected its equipment, the respondents for their part offered no evidence to suggest there had been an equipment malfunction, or that the reported inspection data was in any way inaccurate. If there was any problem with the equipment, nothing was produced to substantiate it.

In their closing brief, the respondents also claim that in light of evidence that SGS Testcom, an outside contractor, supplies, repairs and maintains the NYVIP equipment, and transmits the inspection data from the equipment to DMV, there is a real possibility that data contained within the inspection station records may have been tampered with or altered, whether intentionally or inadvertently. Again, there was no evidence presented to substantiate this assertion, nor did the respondents in any way challenge the reliability of the data presented in Exhibit No. 8-A.

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.

The respondents point out that during his cross-examination, Mr. Devaux acknowledged that a facility can purchase a work station from another facility, and that, in such an instance, DMV does not add or delete the data on that work station prior to the transfer of possession. (T: 88.) The respondents argue that, in light of this, the work station could have been improperly set up, or could have contained incorrect data, before they conducted any inspections, and that this may account for any inaccuracies in the DMV data base.

Whatever the merits of this argument, there is no claim that Gurabo's inspection data was inaccurate, only that it was deemed to be suspicious, given the repetition of the 15-field simulator profile. Also, there was no evidence about how or from whom Gurabo acquired its work station, or whether the work station had been used previously. Finally, whatever data was in the work station when it was acquired, only Gurabo's inspection data appears in Exhibit No. 8-A.

The respondents claim that because DEC and DMV use simulators for testing purposes, 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 that the simulator was not used for each inspection, but on and off over a period of nine months, which suggests that when it was used, its use was intentional.

According to the respondents, the DMV inspection data in Exhibit No. 8-A cannot be relied upon, because it is incomplete for each inspection, and there is additional data for each inspection that is maintained by DMV. Mr. Clyne acknowledged that the exhibit is an abstract of a larger document that is generated from a data base containing fields not represented in the exhibit, and that an entire inspection record would have as many as 120 to 130 column headings. However, he added that, for his purposes, he was looking only for the data related to each vehicle's OBD II emissions inspection, all of which is reflected in the exhibit. 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 inspection data reflected in Exhibits No. 8-A and 8-B was in the exclusive custody and control of DEC, and that DEC's failure to produce all the data for each inspection calls for a negative inference, in other words, an inference that the information not produced would be unfavorable to DEC and its case. I disagree. DEC explained why it queried and produced the data it did for each inspection, and the respondents did not explain how, for the OBD II inspections at issue here, the data was incomplete. While the respondents claim they were denied the opportunity to inspect "the entire document" of inspection data generated at their facility, there

is no evidence of any request having been made in this regard, either to DEC or DMV, prior to the hearing, even though the portion of the inspection data DEC Staff intended to present had been disclosed in advance.

The respondents claim that the information in Exhibit No. 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 query was run. As explained in the certification prepared by Brad Hanscom, DMV's records access officer, the data shown in Exhibit No. 8-A was entered "at the time the recorded transactions or events took place or within a reasonable time thereafter." Also, as Mr. Devaux explained, the inspection data would have been transmitted to DMV almost contemporaneously with each inspection, the time and date of which are recorded, though the query of the data base occurred much later, in conjunction with the investigation of suspected simulator use. Though the exact date of the query is 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.

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 217-1.4. Furthermore, I find that all the violations of 6 NYCRR 217-4.2 may be attributed to Gurabo as the licensed inspection station, and that Mr. Reyes and Mr. Inoa, 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 1,416 separate occasions by the use of a simulator to perform OBD II emissions inspections. As Mr. Clyne explained, a simulator is an electronic device that may be used to test the scan tools at NYVIP work stations; however, it has no place in the conduct of inspections themselves. 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. Again, as Mr. Clyne testified, 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.

Gurabo is liable for all 1,416 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, Gurabo 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 brief, DEC Staff argues that one of the inspectors, Mr. Reyes, "as the owner and President of Gurabo Auto Sales," remains personally liable for all the inspection activities at the Gurabo 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 Gurabo, as station licensee, for all inspection activities conducted at the inspection station. As indicated in its inspection station application, Gurabo is a corporation, in which Mr. Reyes holds all the stock as well as the offices of president, vice president, secretary and treasurer. While this connects Mr. Reyes to Gurabo, the corporation exists independent of its ownership, as a separate legal entity.

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. Reyes, as a corporate officer, for the non-compliant inspections performed by Mr. Inoa. Contrary to Staff's argument, it is not clear to what extent Mr. Reyes, as a corporate officer, was in a position to control Mr. Inoa's activities. Nothing was revealed about the day-to-day management of the Gurabo inspection station, or what role Mr. Reyes may have had in the violations committed by Mr. Inoa. Neither of Staff's witnesses was ever at the Gurabo 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.

Finally, in paragraph 3 of DEC Staff's complaint (Exhibit No. 1), it is alleged that Mr. Inoa, not Mr. Reyes, owned and operated the Gurabo inspection station, and there is no reference to either individual as a corporate officer. Because Staff never moved to amend its pleadings, the respondents did not have notice of, and an opportunity to respond to, Staff's theory of corporate officer liability before the hearing ended.

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 and the testimony of Mr. Clyne about that provision adequately explains the procedures that were not complied with in this case. 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 for emissions testing during the inspection process" was a violation of 15 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. 9.)

- 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 Gurabo 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 Gurabo 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 Gurabo as an emissions inspection station, if not to Mr. Reyes and Mr. Inoa as emissions inspectors. However, such an interpretation would not give meaning to the regulation as written. Because there is no evidence that Gurabo 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. However, at the close of the hearing, I asked the

respondents' counsel to elaborate on the defenses (T: 167), thus affording the parties an opportunity to discuss them on their merits.

- 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. Asked to elaborate on this at the hearing, the respondents' counsel said only that she did not believe that a proper cause of action had been set forth in the complaint, or that DEC Staff had proven its case at the hearing. (T: 167.)

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 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 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. Asked to elaborate on this at the hearing, the respondents' counsel said the defense was raised in relation to SGS Testcom, as an intermediary between the inspection station and DMV. (T: 167 - 168.) In their closing brief, the respondents explain that because SGS Testcom has exclusive control over the repair and maintenance of the NYVIP equipment, and the transmittal of data from the inspection machine to DMV, a real possibility exists that data contained

within the inspection station records may have been tampered with or altered, whether intentionally or inadvertently.

As DEC Staff argues, this defense should be dismissed because no factual basis for it was asserted or shown. There was no evidence that SGS Testcom was responsible for the violations, through the manipulation of data or in any other way. Furthermore, the respondents offered no evidence, through their own testimony or otherwise, as a challenge to the accuracy of the inspection data that was presented by DEC Staff.

- 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. Asked to elaborate on this at the hearing, the respondents' counsel said DEC's charges should be dismissed to the extent that they arise from the same transactions or occurrences that were the subject of a separate DMV proceeding which resulted in the assessment of large penalties as well as revocation of Gurabo's inspection station license and the certified inspector licenses of Mr. Reyes and Mr. Inoa. (T: 168.)

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. 9. 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 40 alleged motor vehicle inspections that formed the basis of DMV's determinations against Gurabo and its inspectors were among the 1,416 that formed the basis of DEC's action against these same respondents. Twenty of these inspections were performed by Mr. Reyes, and twenty were performed by Mr. Inoa. 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 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.

- Selective Prosecution

At the beginning of the hearing in this matter, the respondents moved to amend their answer to add selective prosecution as an affirmative defense. (T: 21.) I denied the motion on the ground that pursuing this claim would prejudice DEC Staff, which had no notice of it in advance of the hearing. According to 6 NYCRR 622.4(d), "[a]ffirmative defenses not pled in the answer may not be raised in the hearing unless allowed by the ALJ. The ALJ shall only allow such defense upon the filing of a satisfactory explanation as to why the defense was not pled in the answer and a showing that such affirmative defense is likely to be meritorious."

The respondents gave no explanation why selective prosecution was not pled as a defense in their answer, and was raised for the first time at the hearing. Even if it had been pled in the answer, it is settled law that selective prosecution is not a defense to the underlying enforcement proceeding, and must be raised in a judicial forum. (See Matter of 303 W. 42nd St. Corp. v. Klein, 46 NY2d 686, 693 & n 5 [1979]; and Matter of McCulley, Chief ALJ's Ruling on Motion for Order Without Hearing, September 7, 2007, at 8.)

In any event, the respondents made no showing that this enforcement action was undertaken in bad faith or in a discriminatory fashion. As Mr. Clyne's testimony made clear, Gurabo was not even among the five stations initially targeted in DEC's undercover investigation of suspicious activity, and was identified for enforcement only after DEC established the simulator profile and then searched for it in the data generated from inspection stations statewide.

There is no evidence that DEC targeted the respondents in relation to their ethnicity or for any other reason. In fact, DEC Staff did not know the identities of Gurabo 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 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 charged by the respondents in their closing brief. When the simulated inspections began at the Gurabo facility, DEC Staff was not aware of them, and when the inspection data led Staff to Gurabo, it moved promptly by issuing a notice of violation, after which the illegal activity stopped.

Civil Penalties

In its complaint, DEC Staff proposed that the Commissioner assess a civil penalty of $708,000 in this matter. At the hearing, Staff said that the penalty was not apportioned between the two causes of action, and that the respondents should be jointly and severally liable for payment of the penalty. (T: 20.)

Civil penalties are authorized pursuant to ECL 71-2103(1). At the time the violations in this matter began, 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 $22,500 for said violation and an additional penalty not to exceed $22,500 for each day during which such violation continued. (These penalties were raised in an amendment of ECL 71-2103(1) effective May 28, 2010, to no less than $500 nor more than $18,000 for a first violation, with an additional penalty not to exceed $15,000 for each day during which such violation continues; as well as a penalty not to exceed $26,000 for a second or further violation, and an additional penalty not to exceed $22,500 for each day that the violation continues.)

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 October 21, 2009 to July 9, 2010, and, as such, subject to a maximum penalty of $15,000, pursuant to ECL 71-2103(1), as effective when the violation began.

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. My own tally indicates that about 54 percent of these inspections were performed by Mr. Inoa, and 46 percent by Mr. Reyes. As shown in Exhibit No. 8-B, where the simulated inspections are highlighted, proper inspections alternated with simulated inspections, usually within the same day, with clusters of simulated inspections, alternating between the two inspectors, with less than a half hour between one inspection and the next. There were some periods during which the simulated inspections occurred on a daily basis, and other periods, the longest being between April 24 and May 20, 2010, when no simulated inspections were performed at all.

If, as I propose, each simulated inspection is deemed to be a separate violation of 6 NYCRR 217-4.2, the potential maximum 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 Staff is actually seeking $500 per simulated inspection, based upon the $500 minimum penalty now available under ECL 71-2103(1) for a first violation of ECL Article 19 or the regulations promulgated pursuant thereto. (T: 15 – 16.) This equates to a total penalty of $708,000 ($500 x 1,416) given the number of simulated inspections that the respondents performed.

At the hearing, the respondents' counsel objected to Staff's penalty formulation because the $500 amount is derived from the statute as it currently reads, not as it read when the violations began or when most of the violations occurred. Respondents' counsel also said that in the complaint, Staff sought only $375 per violation, and that to ask for $500 per violation at the hearing was a violation of due process, because the respondents had no prior notice of this higher penalty.

Actually, Staff never sought $375 per violation; the complaint's reference to $375, in paragraph 17, is in a reference to ECL 71-2103(1) as the applicable penalty provision. The penalty request is in the "wherefore" clause at the end of the complaint; when the complaint was issued, the request was

for an assessed penalty of $780,000, and Staff lowered that figure to $708,000 after I noted that that would be the correct amount according to Staff's penalty formulation, which was based upon $500 per illegal inspection. (T: 16 – 17.)

When the violations began, the statutory minimum penalty was $375 for a first violation; such penalty was raised to $500 effective May 28, 2010, after most of the violations were committed. Because of this, the respondents objected to a penalty based upon $500 per violation; however, when the first violation occurred, the statutory minimum penalty for that violation was $375, and any penalty up to $15,000 would have been authorized by statute. Also, in the case of second and further violations, the statutory maximum penalty was $22,500, which was raised to $26,000 before the period of violations concluded. Therefore, a penalty of $500 per violation for the full period during which violations occurred would certainly be authorized by ECL 71-2703(1), though whether such penalty would be warranted involves other considerations, as reflected in DEC's penalty policy.

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 a key feature of NYVIP, which is a required program according to the federal Clean Air Act amendments and EPA regulations at 40 CFR Part 51. (T: 97 – 98.) It is intended to insure that motor vehicles are properly maintained, to curb hydrocarbons and nitrogen dioxide, 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 clearly a 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.

Mr. Inoa and Mr. Reyes came to work for Gurabo after several years of performing OBD II inspections for AMI Auto Sales, another official inspection station which also operated at the same address. Therefore, they had not only training, but prior experience in the use of the NYVIP equipment, which bears on their culpability. They and AMI have also been cited by DEC for simulated OBD II inspections, and I conducted a separate hearing on those charges earlier this year. (See Matter of AMI Auto Sales Corp., Manuel R. Inoa and Ramon B. Reyes, DEC Case No. CO2-20100615-27.)

According to the penalty policy, a history of violations subsequent to environmental enforcement actions is usually evidence that the violator has not been deterred by the previous enforcement response, meaning that the penalties on subsequent enforcement actions should be more severe. (CPP Section IV.E.3.) However, the AMI and Gurabo enforcement actions were launched simultaneously; the complaints in each are both dated August 24, 2010. Because the AMI matter cannot be considered a prior enforcement proceeding, I do not view it as part of a prior history of non-compliance, for purposes of the penalty policy. Furthermore, it has not been shown that any of the respondents have committed other violations of the ECL or DEC regulations.

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, Gurabo is far from a corporation with deep pockets, and that Gurabo has struggled to survive in a bad business economy, with significant competition in the same geographical area. While I have no reason to doubt Gurabo's characterization of itself, there is no actual evidence that Gurabo 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 proceeding. As noted above, 40 of the simulated motor vehicle inspections that are the subject of DEC's prosecution – 20 by Mr. Inoa and 20 by Mr. Reyes - were established in DMV's proceeding, where these respondents and Gurabo 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, Gurabo was assessed a civil penalty of $14,000 ($350 for each of the 40 fraudulent inspections), and Mr. Inoa and Mr. Reyes were assessed penalties of $7,000 each ($350 for each of the 20 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 Guarbo's inspection station license and the certified inspector licenses of Mr. Reyes and Mr. Inoa. 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, Gurabo has ceased all operations, though there is no evidence on that point; apart from being an official inspection station, Gurabo applied for and may also be operating under DMV licenses as a repair shop and used motor vehicle dealer.

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 $708,000, as derived from a formula that assesses $500 for each of the 1,416 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 by DEC Staff is excessive and based upon a misapplication of ECL 71-2103(1), as discussed below. While I appreciate Staff's interest in employing a consistent approach to calculating penalties in this and the other similar pending enforcement cases, the penalty policy (at Section II) cautions that, for any given violation, there is no single "correct" penalty amount that can be determined by any formula; rather, it is more reasonable to attempt to identify a penalty figure which lies within a range of amounts which would be fair and effective.

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 misconduct. Moreover, responsibility for the violations may be apportioned between the station and its inspectors.

My recommendation is that, for 1,416 separate violations of 6 NYCRR 217-4.2, Gurabo should be assessed a civil penalty of $120,000. 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 $60,000.

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 moderate downward penalty adjustment, the Commissioner should consider the penalties that already have 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 Gurabo'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.

According to DEC Staff, its penalty recommendation of $500 per illegal inspection is derived from the framework of the civil penalty policy, and represents a consistent and fair approach to be applied in this and similar pending cases. While Staff's defense of its penalty, as articulated in its closing brief, does reference the policy's penalty factors, the $500 figure itself was calculated from the current statutory minimum penalty, under ECL 71-2103(1), for a first violation of a regulation promulgated pursuant to ECL Article 19, which includes the Part 217 regulations governing motor vehicle emissions. (T: 15 - 16.) I see no basis for applying the statute in this way.

As noted above, the $500 figure in ECL 71-2103(1) became effective on May 28, 2010, toward the end of the period of violations; more important, it applies only in the case of a first violation, not for second or further violations, as to which there is no statutory minimum penalty. Assessing the same $500 penalty for each illegal inspection after the first has the effect, in this case, of driving the total penalty to a level unwarranted by the evidentiary record, particularly in the absence of proof concerning the economic benefit that the respondents derived from their misconduct.

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 October 21, 2009, and July 9, 2010, the respondents, Gurabo Auto Sales Corp., Manuel R. Inoa and Ramon B. Reyes, used a simulator to perform OBD II emission inspections on 1,416 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 Gurabo Auto Sales Corp. should be assessed a civil penalty of $120,000, respondent Manuel R. Inoa should be assessed a civil penalty of $60,000, and respondent Ramon B. Reyes should be assessed a civil penalty of $60,000, 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

GURABO AUTO SALES CORP., MANUEL R. INOA, AND RAMON B. REYES
Case No. C02-20100615-20

1. DEC Notice of Hearing and Complaint (8/24/10), with documentation of service
2. Respondents' answer (10/18/10)
3. DEC Staff statement of readiness (12/30/10)
4. ALJ's letter to parties' counsel (2/23/11), including confirmation of 3/10/11 hearing date
5. DMV original facility application for Gurabo Auto Sales Corp. (8/21/09)
6. DMV application for certification as a motor vehicle inspector, filed by Ramon B. Reyes (5/3/03)
7. DMV application for certification as a motor vehicle inspector, filed by Manuel R. Inoa (7/18/98)
8. Records certification of Brad Hanscom, DMV records access officer (9/1/10), in relation to documents received as Exhibit No. 8-A

8-A. DMV Abstract of OBD II inspection data for Gurabo Auto Sales Corp. (10/21/09 – 8/28/10)

8-B. Data from Exhibit No. 8-A, with orange highlighting of simulated inspections

9. Compilation of documents concerning related DMV proceeding against respondents, as supplied by respondents' counsel under cover letter dated 3/15/11