

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

**ORDER**

-by-

**JEROME MUFFLER CORP., JERRY A. RAMOS,  
FELIPE ALMONTE, and CARLOS E. BERMUDEZ,**

DEC Case No.  
CO2-20100615-26

Respondents.

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This administrative enforcement proceeding concerns allegations that respondents Jerome Muffler Corp. ("Jerome Muffler"), Jerry A. Ramos, Felipe Almonte, and Carlos E. Bermudez completed onboard diagnostic ("OBD") II inspections of motor vehicles using noncompliant equipment and procedures in violation of 6 NYCRR 217-4.2. OBD inspections, when properly conducted, are designed to monitor the performance of major engine components, including those responsible for controlling emissions.

Staff of the New York State Department of Environmental Conservation ("DEC" or "Department") alleges that these violations occurred at an official emissions inspection station located at 1572 Jerome Avenue in the Bronx, New York, during the period from November 3, 2008 through February 17, 2010. DEC staff alleges that, during this time, Jerome Muffler was a domestic business corporation duly authorized to do business in New York State, respondent Ramos owned and operated Jerome Muffler, and respondents Ramos, Almonte, and Bermudez performed mandatory annual motor vehicle emission inspections at that facility.

Specifically, DEC staff alleges that a device was used to substitute for and simulate the motor vehicle of record on 3,532 separate occasions. DEC staff contends that, of these inspections, respondent Ramos performed 143 inspections, respondent Almonte performed 3,379 inspections, and respondent Bermudez performed 10 inspections (see Hearing Report, at 7

[Finding of Fact no. 23]) and that, as a result, 3,530 certificates of inspection were issued based on these simulated 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 18, 2010. In its complaint, DEC staff alleged that respondents violated:

(1) 6 NYCRR 217-4.2, by operating an official emissions inspection station using equipment and procedures that are not in compliance with DEC procedures and 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 requests a civil penalty of one million seven hundred sixty-six thousand dollars (\$1,766,000). DEC staff requested that all three respondents be held jointly and severally liable.

Respondents submitted an answer dated October 18, 2010, in which they admitted that Ramos owned and operated Jerome Muffler and that Ramos, Almonte and Bermudez worked at Jerome Muffler as certified motor vehicle emission inspectors; otherwise they denied DEC staff's charges. Respondents asserted no affirmative defenses in their answer (Hearing Report, at 1).

The matter was assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster. A hearing was held on January 31, 2012. Respondents were represented by Vincent P. Nesci, Esq. None of respondents testified and no witnesses were called on behalf of respondents.

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

### 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. I agree with the ALJ that Jerome Muffler is liable for all 3,532 violations "because, at the time the

violations occurred, it held the license to 'operate' the official inspection station" (Hearing Report, at 15). Although the ALJ noted that Ramos was identified as president and sole stockholder of Jerome Muffler on the inspection station and repair shop applications that Jerome Muffler filed with the DMV (see id. at 4 [Finding of Fact no. 2]), he concluded that, based on the evidence presented, respondent Ramos should be held personally responsible only for the 143 noncompliant inspections that he personally conducted (see id. at 16). The ALJ also held that inspectors Almonte and Bermudez are each "liable for the violations attributable to his own non-compliant inspections" (id.). Department staff did not provide evidence on whether respondent Ramos's position with respect to Jerome Muffler (as president and sole shareholder) was a basis for liability, separate from the noncompliant inspections that he conducted. The record before me is insufficient in that regard.

With respect to the second cause of action, I concur with the ALJ's determination that violations of 6 NYCRR 217-1.4 cannot be found (see Hearing Report, at 17-18) for the reasons that have been previously stated in prior Commissioner decisions (see Matter of Geo Auto Repairs, Inc., Order of the Commissioner, March 14, 2012, at 3-4; Matter of AMI Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, at 3; Matter of Gurabo Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, at 3). Accordingly, the alleged violations of 6 NYCRR 217-1.4 are hereby dismissed as to all respondents.

#### Civil Penalty

Staff requested a penalty of one million seven hundred sixty-six thousand dollars (\$1,766,000), based on five hundred dollars (\$500) per simulated inspection. Staff referenced the Department's civil penalty policy and presented its approach to calculating civil penalties in this and similar enforcement cases. Staff also requested that each respondent be held jointly and severally liable for the penalty. The ALJ noted that, consistent with the penalty range established by ECL 71-2103(1) for such violations, the maximum penalties would amount to tens of millions of dollars, significantly more than what Department staff requested.

In his evaluation of the penalty, the ALJ considered the factors set forth in DEC's civil penalty policy, including the economic benefit of noncompliance, the gravity of the violations and respondents' culpability (see Hearing Report, at 19-20).

The ALJ rejected staff's proposed penalties as too high and concluded that lower penalties were appropriate. As the ALJ notes, staff's formula has not been adopted in other proceedings where it has been offered for violations identical to these (see Hearing Report, at 21).

The ALJ recommended a total civil penalty of five hundred seventy thousand dollars (\$570,000), assessed as follows:

- respondent Jerome Muffler to be assessed a civil penalty of two hundred eighty-five thousand dollars (\$285,000);
- respondent Ramos to be assessed a civil penalty of eleven thousand five hundred dollars (\$11,500);
- respondent Almonte to be assessed a civil penalty of two hundred seventy-two thousand five hundred dollars (\$272,500);
- and
- respondent Bermudez to be assessed a civil penalty of one thousand dollars (\$1,000) (see Hearing Report, at 22).

In addition to recommending an overall reduction in the penalty, the ALJ also rejected imposing joint and several liability on respondents. Even though joint and several liability may be imposed in administrative enforcement proceedings, I concur with the ALJ that Department staff's request for the imposition of joint and several liability in this matter is inappropriate (see Hearing Report, at 16; see also Hearing Transcript, at 92 [respondents' attorney noting unfairness of imposing joint liability on respondent Bermudez who conducted only ten of the 3,532 inspections]). No adequate rationale was provided by Department staff to support imposing joint and several liability in this proceeding.

Prior decisions have noted the adverse impact of automotive emissions and how the use of simulators subverts the regulatory regime designed to address and control these emissions (see, e.g., Matter of Gurabo, Decision and Order of the Commissioner, February 16, 2012, at 6-7), and, accordingly, substantial penalties are warranted where violations are found. I concur with the ALJ's determination that staff's request here is too high and I further concur with the ALJ's recommendation of a total civil penalty in the amount of five hundred seventy thousand dollars (\$570,000).

However, in my judgment the facility where such illegal activities are conducted should be subject to a substantially higher penalty than the aggregate of penalties that are assessed against the individual inspectors, subject to any specific

mitigating or aggravating factors. For example, where an inspector is conducting improper inspections without the knowledge of the facility or its management, the allocation of a higher penalty as against the individual inspector would be warranted. Alternatively, if a facility were directing an inspector to conduct illegal inspections, or if the facility was itself misusing the inspector's codes in conducting inspections, a higher penalty as against the facility would be justified.

In this matter, at the time the violations occurred, Jerome Muffler 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 (see Hearing Report, at 15). Jerome Muffler had the over-arching responsibility to ensure that inspections conducted at its facility comported with all legal requirements. However, by the use of simulators, it allowed illegal activity as part of its operations and failed to comply with applicable law. Its actions subverted the intended environmental and public health benefits of the legal requirements to address and control vehicular air emissions. Accordingly, a significant penalty, as proposed by the ALJ, should be assessed against Jerome Muffler.

In light of my determination that the facility where such illegal activity has occurred should bear a significantly higher penalty than the aggregate of penalties assessed against the individual inspectors, I am revisiting the penalty assessments. In consideration of the penalty range established by ECL 71-2103(1) and the impacts of this illegal activity (see Hearing Report at 18-20), I am imposing a civil penalty of four hundred fifty thousand dollars (\$450,000) on Jerome Muffler.

With respect to individual inspectors, as the number of inspections that an individual performs with noncompliant equipment increases, higher penalties shall be assessed, subject to any aggravating or mitigating circumstances.

In this proceeding, none of the three inspectors presented testimony (see Hearing Transcript, at 90) and, thus, did not avail themselves of the opportunity to present any mitigating or other relevant factors, either as to liability or penalty (including, for example, any arguments relating to ability to pay). The record is devoid of any evidence as to whether one or more of these individuals was primarily responsible for the illegal activity.

As noted, respondent Almonte conducted approximately 95% of the 3,532 noncompliant inspections, respondent Ramos performed about 4% of the noncompliant inspections, and respondent Bermudez less than 1%. Applying the penalty guidelines set forth above, and considering the number of inspections using noncompliant equipment and procedures that each inspector performed, I am assessing civil penalties as follows:

- With respect to respondent Bermudez who conducted ten noncompliant inspections, a penalty in the amount of one thousand dollars (\$1,000);
- With respect to respondent Ramos who conducted 143 noncompliant inspections, a penalty in the amount of five thousand dollars (\$5,000); and
- With respect to respondent Almonte who conducted 3,379 noncompliant inspections, a penalty in the amount of one hundred fourteen thousand dollars (\$114,000).

In sum, the overall amount of the civil penalty assessed by this order is five hundred seventy thousand dollars (\$570,000), which is substantial and should serve as a deterrent against any future noncompliant activity of this kind.

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

- I. Respondents Jerome Muffler Corp., Jerry A. Ramos, Felipe Almonte, and Carlos E. Bermudez are adjudged to have violated 6 NYCRR 217-4.2 by operating an official emissions inspection station using equipment and procedures that are not in compliance with DEC procedures and standards. Three thousand five hundred thirty-two (3,532) inspections using noncompliant equipment and procedures were performed at Jerome Muffler Corp., of which Jerry A. Ramos performed one hundred forty three (143), Felipe Almonte performed three thousand three hundred seventy-nine (3,379), and Carlos E. Bermudez performed ten (10).
- II. DEC staff's allegations that respondents Jerome Muffler Corp., Jerry A. Ramos, Felipe Almonte, and Carlos E. Bermudez violated 6 NYCRR 217-1.4 are dismissed.

III. The following penalties are hereby assessed:

A. Respondent Jerome Muffler Corp. is hereby assessed a civil penalty in the amount of four hundred fifty thousand dollars (\$450,000);

B. Respondent Jerry A. Ramos is hereby assessed a civil penalty in the amount of five thousand dollars (\$5,000);

C. Respondent Felipe Almonte is hereby assessed a civil penalty in the amount of one hundred fourteen thousand dollars (\$114,000); and

D. Respondent Carlos E. Bermudez is hereby assessed a civil penalty in the amount of one thousand dollars (\$1,000).

The penalty for each respondent shall be due and payable within thirty (30) days of the service of this order upon that respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Blaise Constantakes, Esq.  
Assistant Counsel  
Office of General Counsel  
NYS Department of Environmental Conservation  
625 Broadway, 14<sup>th</sup> Floor  
Albany, New York 12233-1500.

IV. All communications from any respondent to the Department 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 Jerome Muffler Corp., Jerry A. Ramos, Felipe Almonte, and Carlos E. Bermudez, and their agents, successors, and assigns in any and all capacities.

For the New York State Department  
of Environmental Conservation

/s/

By: \_\_\_\_\_  
Joseph J. Martens  
Commissioner

Dated: May 24, 2013  
Albany, New York



STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NY 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:

**JEROME MUFFLER CORP., JERRY A. RAMOS,  
FELIPE ALMONTE AND CARLOS E. BERMUDEZ,  
Respondents**

NYSDEC Case No. CO2-20100615-26

**HEARING REPORT**

- by -

/s/

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Edward Buhrmaster  
Administrative Law Judge

July 25, 2012

## PROCEEDINGS

Pursuant to a Notice of Hearing and Complaint, dated August 18, 2010 (Exhibit No. 1), Staff of the Department of Environmental Conservation ("DEC") charged Jerome Muffler Corp. ("Jerome Muffler"), Jerry A. Ramos, Felipe Almonte and Carlos E. Bermudez (collectively, "the respondents") with violations of Part 217 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), which governs motor vehicle emissions testing.

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 November 3, 2008, and February 17, 2010, at Jerome Muffler, an emissions inspection station located at 1572 Jerome Avenue in the Bronx, New York. During this period, DEC Staff alleged, Jerome Muffler was a corporation duly authorized to do business in New York State, respondent Ramos owned and operated the inspection station, and respondents Ramos, Almonte and Bermudez worked there, performing mandatory annual motor vehicle emission inspections.

According to DEC Staff, during the period in question, the respondents performed 3,532 such inspections using a device to substitute for and simulate the motor vehicle of record, and issued 3,530 emission certificates based on the simulated inspections.

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

By a statement of readiness dated December 30, 2010 (Exhibit No. 3), DEC Staff requested that DEC's Office of Hearings and Mediation Services schedule this matter for hearing. By a letter of February 4, 2011 (Exhibit No. 4), Chief Administrative Law Judge James T. McClymonds informed the parties that this matter had been assigned to me. On December 19, 2011, I issued a hearing notice (Exhibit No. 5) scheduling this matter for a hearing to be held on January 31, 2012, at DEC's Region 2 office in Long Island City. The hearing was held and concluded on that date.

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

Testifying for DEC Staff were Michael Devaux, a vehicle safety technical analyst employed by the Yonkers office of the New York State Department of Motor Vehicles ("DMV"), and James Clyne, an environmental engineer and section chief within DEC's Division of Air Resources, Bureau of Mobile Sources and Technology Development.

Respondents Ramos and Bermudez attended the hearing. According to Mr. Nesci, respondent Almonte was aware of the hearing date, but was being trained for a new job in a different industry, and therefore could not attend. Mr. Nesci said that because he was representing Mr. Almonte, the hearing could proceed in Mr. Almonte's absence.

None of the respondents testified at the hearing, and no witnesses were called on their behalf.

The hearing record includes 112 pages of transcript and 14 numbered exhibits that were received in evidence. (See exhibit list attached to this report.) The first five exhibits were my own, to show how the matter came forward. Exhibits No. 6 - 14 were received as part of DEC Staff's case.

The parties agreed to make oral closings at the conclusion of the hearing. I received the hearing transcript on February 15, 2012, and afforded the parties' counsel an opportunity to

propose corrections. DEC Staff proposed corrections by e-mail on March 7, 2012. Because the respondents did not object to these corrections, I have incorporated them into the transcript. The respondents proposed no corrections of their own. On July 18, 2012, I provided the parties' counsel an additional list of my own proposed corrections. These corrections have also been incorporated into the transcript, as the parties did not object to them.

## **POSITIONS OF THE PARTIES**

### Position of DEC Staff

According to DEC Staff, the respondents completed 3,532 motor vehicle inspections using noncompliant equipment and procedures, and issued 3,530 certificates of inspection for these inspections, without testing the vehicles' onboard diagnostic ("OBD") systems, which are designed to monitor the performance of major engine components, including those responsible for controlling emissions. Staff explains that the OBD emissions portion of the vehicle inspection involves the electronic transfer of information from the vehicle to a computerized work station and, from there, to DMV via the Internet or a dedicated phone line. DEC Staff says that, for the inspections at issue here, the respondents did not check the vehicles' OBD systems, but instead simulated the inspections, based on a 15-field profile (or electronic signature) that Staff identified in the inspection data that was transmitted to DMV.

DEC Staff has requested a civil penalty of \$1,766,000, for which all the respondents would be jointly and severally liable. The penalty is not apportioned between the two causes of action, but is calculated on the basis of \$500 per illegal inspection that was performed.

### Position of Respondents

The respondents submitted an answer (Exhibit No. 2) in which, for the period in question, Mr. Ramos admitted that he owned and operated Jerome Muffler, and Mr. Ramos, Mr. Almonte, and Mr. Bermudez admitted that they worked at Jerome Muffler as

certified motor vehicle emission inspectors. The respondents denied using equipment and procedures that were not in compliance with those specified by DEC, or issuing emission certificates based on simulated motor vehicle emission inspections.

In a closing statement delivered by their counsel, the respondents argued that in the absence of testimony from Testcom about the inspection data received as part of DEC Staff's case, one cannot conclude that the data is accurate. The respondents also argued that DMV's requirement of OBD II advisory emissions scans on new vehicles prior to their first emissions test, as well as the frequency of NYVIP software updates, presumably to fix "bugs" in the computer program, both suggest that there may be anomalies in the inspection data.

Finally, the respondents argued that, if liability is found, they should not be held jointly and severally liable for violations, and that joint and several liability would be particularly unjust for Mr. Bermudez, who is alleged to have done only 10 of the 3,532 simulated inspections charged in this matter.

#### **FINDINGS OF FACT**

1. In 2005, Jerome Muffler applied to DMV for a license to operate as an inspection station at 1572 Jerome Avenue in the Bronx. The application was granted, and the facility number assigned to Jerome Muffler was 7100846. (See Exhibit No. 6, a portion of Jerome Muffler's application, on which the DMV-assigned facility number is recorded in the upper left hand corner of the first page.)

2. Jerry A. Ramos was identified as president and sole stockholder of Jerome Muffler on the inspection station and repair shop applications that Jerome Muffler filed with DMV (received as Exhibits No. 6 and 7).

3. On March 6, 2005, Jerry Ramos filed an application with DMV for certification as a motor vehicle inspector. Upon

approval of the application (Exhibit No. 10), he was assigned certificate number 4XY7.

4. On December 27, 2006, Carlos E. Bermudez filed an application with DMV for certification as a motor vehicle inspector. Upon approval of the application (Exhibit No. 8), he was assigned certificate number 6HS8.

5. Felipe Almonte filed an application with DMV for certification as a motor vehicle inspector. Upon approval of his undated application (Exhibit No. 9), he was assigned certificate number 5JQ9.

6. Required by the federal government to ensure compliance with the Clean Air Act amendments of 1990, the New York Vehicle Inspection Program ("NYVIP") has been in place since the spring of 2005 in the New York metropolitan area, which includes the five boroughs of New York City. (See the testimony of Mr. Clyne at pages 54 and 55 of the transcript (Clyne, T: 54 - 55).)

7. Pursuant to NYVIP, most model year 1996 and newer light-duty non-diesel vehicles are subject to annual onboard diagnostic (OBD) emissions inspections. (Clyne, T: 55.)

8. These inspections are conducted to address ozone pollution, a public health problem that also creates damage to crops, infrastructure and buildings. (Clyne, T: 57 - 58.)

9. Mobile source emissions represent a very significant source of ozone precursors, which is why the Clean Air Act mandates motor vehicle inspection and maintenance programs for areas, like the New York metropolitan area, whose air does not meet the federal ozone standard. (Clyne, T: 58.)

10. NYVIP is administered jointly by DMV and DEC, in conjunction with SGS Testcom, a program manager that accepts the inspection records and performs maintenance of testing equipment. (Clyne, T: 59.)

11. OBD emissions inspections are performed at inspection stations licensed by DMV. Each licensed station must have one inspector who is certified by DMV to complete emissions inspections, and must purchase an approved NYVIP unit (or work station), also known as a computerized vehicle inspection system (CVIS). (Clyne, T: 60.)

12. Before the NYVIP unit can be used to conduct an OBD inspection, both the facility license and at least one inspector's certificate must be scanned into it. (Clyne, T: 60.)

13. When a vehicle comes in for an OBD inspection, a safety inspection is typically performed first, followed by a visual inspection of the vehicle's air pollution control devices, such as the catalytic converter, exhaust gas recirculation ("EGR") valve and gas cap. (Clyne, T: 60.)

14. Finally, the inspector connects the NYVIP unit to the diagnostic link connector, which is generally on the lower left hand corner of the vehicle's dashboard. (Devaux, T: 19.)

15. In this portion of the inspection, the work station communicates electronically with the vehicle's computer, to determine whether monitors are supported and whether there are any diagnostic trouble codes. (Devaux, T: 20.)

16. When a vehicle is manufactured, it has a set of monitors that are supported and can conduct actual diagnostic sequences. If supported, the monitors can either be ready, which means they have completed their diagnostic sequences, or not ready, which means they have not. If too many monitors are reported as not ready, the vehicle will fail the inspection. (Clyne, T: 63.)

17. The vehicle will also fail the inspection if the malfunction indicator light, located on the vehicle dashboard, is commanded "on" and a diagnostic trouble code is stored. Diagnostic trouble code information is important, as it helps the technician complete an effective vehicle repair. (Clyne, T: 62.)

18. Finally, the vehicle will fail the inspection if the NYVIP work station cannot communicate with the vehicle at all. (Clyne, T: 62.)

19. If a vehicle passes an OBD inspection, the inspector is directed by the NYVIP work station to assign a vehicle inspection certificate or sticker to the vehicle. (Clyne, T: 63.)

20. The NYVIP inspection record is stored on the work station and also sent through SGS Testcom to DMV in a matter of seconds after the inspection is completed. (Devaux, T: 21; Clyne, T: 65.)

21. DEC also receives a copy of the inspection data, which it uses for program evaluation. (Clyne, T: 65 - 66.)

22. Between November 3, 2008, and February 17, 2010, 3,532 annual motor vehicle inspections were performed at Jerome Muffler using a device to substitute for and simulate the motor vehicle of record. (Clyne, T: 81.)

23. Of these 3,532 inspections, Mr. Almonte performed 3,379, Mr. Ramos performed 143, and Mr. Bermudez performed 10. (Clyne, T: 82.)

## **DISCUSSION**

This matter involves charges that Jerome Muffler and its three certified inspectors did not check the OBD II systems as part of 3,532 motor vehicle inspections conducted during the period between November 3, 2008, and February 17, 2010. In essence, DEC Staff alleges that the OBD II inspections for these vehicles were simulated by use of non-compliant equipment and procedures, and that 3,530 emission certificates resulting from these inspections were improperly issued.

On behalf of DEC Staff, Mr. Clyne explained that OBD testing is part of NYVIP, the state's vehicle inspection program



that is required under the federal Clean Air Act to combat ozone pollution. Both the Clean Air Act amendments of 1990 and federal regulations at 40 CFR Part 51 require that states generate and secure U.S. Environmental Protection Agency ("EPA") approval of plans that outline their inspection and maintenance programs. In relation to NYVIP, DEC and DMV submitted two separate revisions to New York's state implementation plan, one in 2006 and the other in 2009. (Clyne, T: 56.)

### Locating the Simulator Signature

According to Mr. Clyne, during a September 2008 meeting, DMV management told DEC that it believed simulators were being used in lieu of vehicles to complete OBD II inspections in the New York metropolitan area. This suspicion was based on what DMV said were highly unrealistic readings of revolutions per minute (RPM) that were recorded for vehicle engines. (Clyne, T: 66 - 67.)

RPM is a data element that is retrieved electronically from the parked vehicle during the "key on and engine running" check of the vehicle's malfunction indicator light, which is part of the OBD inspection. Mr. Clyne said a typical RPM reading would be between 300 on the low side and 1,100 on the very high side. However, he added, DMV's review of inspection data revealed RPM readings of 6,138, which were reported repeatedly on different vehicles at different times. Upon a follow-up query of the inspection data in late October 2008, DEC traced these highly repetitive, unrealistic RPM readings to five particular inspection stations. (Clyne, T: 67, 68.)

DEC and DMV took their findings to the New York State Attorney General's office, and an undercover investigation was commenced. As a result of this investigation, which ended in the summer of 2009, DEC was informed that there were probably more stations involved, and that RPM readings alone were not a sufficient indicator of simulator use. (Clyne, T: 68.)

DEC then conducted a more extensive evaluation of the OBD database, and concluded that the electronic signature (or

profile) of a particular simulator could be identified on the basis of 15 data fields. DEC located this signature in the records of 44 inspection stations, all of them in the New York metropolitan area, for inspections performed during the period between March 2008 and July 2010. (Clyne, T: 68 - 69).

Using the first page of Exhibit No. 14, an abstract of Jerome Muffler's inspection data, Mr. Clyne delineated the signature on the basis of the following 15 column headings, which he highlighted in black ink, and the entries (shown here in quotation marks) beneath them:

PCM ID1	"10"
PCM ID2	"0"
PID CNT 1	"11"
PIC CNT 2	"0" (should read as PID CNT 2) (T: 76)
RR COMP COMPONENTS	"R"
RR MISFIRE	"R"
RR FUEL CONTROL	"R"
RR CATALYST	"R"
RR O2 SENSOR	"R"
RR EGR	"R"
RR EVAP EMISS	"R"
RR HEATED CATA	"U"
RR O2 SENSOR HEAT	"R"
RR SEC AIR INJ	"U"
RR AC	"U"

(Clyne, T: 76 - 78.)

Mr. Clyne said that this signature could not be associated with an actual vehicle because it does not appear at all in DMV's database of about 18.5 million OBD inspections conducted at more than 10,000 stations statewide between September 2004 and February 29, 2008, or in the database of about 10 million inspections conducted at these stations from August 2010 to the present time. If the signature had been related to an actual vehicle, Mr. Clyne said it would have shown up often at many different stations, but it did not. Also, he said that the signature stopped appearing in July 2010, when the issuance of notices of violation to the 44 stations where it had been found effectively put an end to the simulator's use. (Clyne, T: 69 - 70.)

Mr. Clyne was able to match the simulated inspections to Jerome Muffler and its inspectors through the numbers assigned by DMV to the inspection station license and the inspector certificates. As Mr. Clyne explained, when an inspection station goes into business, it is sent a facility license, which the operator scans into the NYVIP work station, so that the facility's number is included in the official record of each inspection performed there. (Clyne, T: 73.) Also, at the start of each inspection, the inspector is required to scan his or her identification card, so that the inspector's number also appears on the inspection record. (Clyne, T: 74.)

In total, 3,532 simulated inspections were performed at Jerome Muffler. (Clyne, T: 81.) Of these, Felipe Almonte performed 3,379, Jerry A. Ramos performed 143, and Carlos Bermudez performed 10. (Clyne, T: 82.)

Mr. Clyne highlighted the simulated inspections in orange on Exhibits No. 13 and 14, which are abstracts of inspection data for Jerome Muffler. Exhibit No. 13 covers the period between January 25, 2006, and September 9, 2009, while Exhibit No. 14 covers the period between September 10, 2009, and March 2, 2010.

Mr. Clyne called attention to the record of what he described as an appropriate inspection of a 2007 Chevy Suburban, which appears on page 64 of Exhibit No. 13. In that inspection, at 11:47 a.m. on February 6, 2009, the number under the column PCM VIN (the electronic vehicle identification number that is reported by the vehicle during the inspection) matches the DMV VIN in the first column, and the RPM reading of 609 is indicative of a newer vehicle. (Clyne, T: 79 - 80.)

The data indicates that the vehicle failed this inspection on the basis of the readiness evaluation, and was presented for inspection again the following day. For that second inspection, recorded at page 65 of Exhibit No. 13, the simulator was used, as evidenced by the appearance of the simulator signature, the failure to record an electronic VIN, and an RPM reading of 6138, which is unrealistically high and repetitive of readings

recorded for other simulated inspections on the same page. (Clyne, T: 80 - 81.) Because the inspection was simulated, meaning that the NYVIP work station was plugged into an electronic simulator, the vehicle was able to pass the inspection and receive a certificate. (Clyne, T: 81.)

Remarkably, the respondents did nothing to impeach Mr. Clyne's testimony about the identification and significance of the simulator profile, nor did they take the stand themselves to contradict his account of how, where and by whom the inspections in question were performed. Had Mr. Clyne's account been inaccurate, one would expect the respondents to refute it, particularly because, in their answer, they admitted performing Jerome Muffler's inspections during the period in question.

There is no question that the inspections documented in Exhibits No. 11-A and 12-A (and again in Exhibits No. 13 and 14) were attributable to Jerome Muffler, because Jerome Muffler'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. Ramos, Mr. Almonte and Mr. Bermudez performed the inspections, because their certificate numbers are the only ones that appear in the inspection data.

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

While no testimony was offered by or on behalf of the respondents, their counsel, in his questioning of DEC Staff's witnesses, tried to cast doubt on the reliability of the inspection data, noting that it passed through Testcom's computers on the way between the inspection station and DMV. The respondents argue that in the absence of testimony from a Testcom representative, one may not conclude that the inspection data received by DMV is accurate. However, they offered no reason to doubt the data's integrity. As DEC Staff

demonstrated, the transfer of data from the inspection station to DMV takes no more than 10 seconds, and, as it passes through Testcom on its way to DMV, Testcom, as the NYVIP program manager, offers nothing more than a secure data backup. Granted, neither Mr. Devaux nor Mr. Clyne testified as a computer expert, but they were able to explain the process that is followed in transmitting data from the inspection station to DMV and DEC as the program overseers.

Through cross-examination of Mr. Clyne, the respondents were able to bring out the fact that, during the period when the alleged simulations took place, the inspection station's NYVIP software was subject to successive updates developed by Testcom and approved by DEC and DMV. (Clyne, T: 96 - 102.) The respondents' counsel suggested that the updates were done to remove "bugs" from the software, but this was not acknowledged by Mr. Clyne, and the respondents presented no evidence demonstrating that the software was defective. Mr. Clyne explained that software revisions would account for a number of things, including DMV-instituted changes of safety inspection items, or additions of a test sequence. (Clyne, T: 100 - 101.) According to Mr. Clyne, revisions are typically forwarded to stations on CDs that the facility is required to load onto their inspection equipment, and if the facility does not do this within a set period of time, the equipment is prevented from doing new inspections. (Clyne, T: 101 - 102.)

The respondents point out that DMV's regulations for the emissions inspection procedure were amended last year to include a new provision, 15 NYCRR 79.24(j), regarding advisory emissions scans. That provision states that any vehicle required to be equipped with an OBD system that is exempt from the OBD II emissions inspection because it is less than two model years old, and is inspected at a station owned and/or operated by a registered new motor vehicle dealer, is required to have an advisory emissions scan completed during the inspection, using the NYVIP CVIS (more commonly known as the "work station").

The respondents suggest that the institution of advisory scans suggests there may have been anomalies in inspection data extracted from vehicles before such scans were instituted (in

other words, during the period in question here, which was before such scans were ordered).

However, as DMV has countered, such a suggestion has no basis, since the advisory scans are intended to identify communication anomalies, not data anomalies. As noted in DMV's rule-making proposal, which was published in the New York State Register on May 11, 2011, the advisory scan was developed as an improvement to the inspection program, as a benefit to consumers, dealers, manufacturers, and DMV itself. The scan is to be performed, at no cost to the consumer, using the CVIS, which is connected to the vehicle, communicates directly with the vehicle's onboard systems, and reports the results to DMV. Dealers are to complete the scan (which takes about 5 minutes) at the same time they conduct the vehicle safety inspection, which is required within 30 days of the sale date.

Quoting from the rule-making proposal:

"Vehicles are exempted from emissions inspection for the two most recent model years. Every year, as a new model year is subject to emissions testing, DMV becomes aware of communication problems relating to specific makes and models. This can cause registration renewal problems for consumers due to inspection non-compliance. This inconveniences the consumer, the dealer and DMV until a resolution can be found. The advisory scan will alert dealers and DMV to communication issues two years in advance of an actual emissions test. Two years after purchase, when the vehicle is tested for emissions, DMV will have had the opportunity to prepare the NYVIP CVIS for any communication anomalies relating to a specific make or model. Finally, the advisory scan will provide information to the dealer on the performance of certain elements of the vehicle's emission components. This may alert the dealer, and in turn the manufacturer, to possible problems prior to delivery of the vehicle."

In other words, the advisory scan is intended to prevent situations in which vehicles fail emissions inspections because communication cannot be established between the vehicle and the CVIS (or work station). It is not intended to address anomalies

in data that is actually drawn from vehicles where communication has been established.

In a DMV memorandum dated February 29, 2012, which was provided by DEC Staff counsel after the hearing, it is reported that the software update providing for the functionality of advisory scans is still in development, and that DMV will not be requiring dealers to perform such scans until the software is actually in production, which DMV anticipates will be later this year.

Under cross-examination, Mr. Devaux acknowledged that DMV can access and copy inspection data stored on a NYVIP work station, but added that, not being involved in any investigation of Jerome Muffler, he could not say whether DMV personnel had gone to the facility for that purpose. (T: 29 - 32.) The respondents seem to suggest that a comparison of the data stored on the work station to the data forwarded by Testcom to DMV would be a useful exercise to confirm the accuracy of the data relied on by DEC Staff. However, there was no indication as to how long data is retained on the work station, which is an important consideration, given that DMV was not aware of the simulated inspections at or close to the time they occurred; DMV was alerted to them much later, when the simulator signature was identified.

#### Liability for Violations

DEC has charged the respondents with violations of both 6 NYCRR 217-4.2 (first cause of action) and 217-1.4 (second cause of action). I find that the violations of 6 NYCRR 217-4.2 have been established, but do not find additional violations of 6 NYCRR 217-1.4. Furthermore, I find that all the violations of 6 NYCRR 217-4.2 may be attributed to Jerome Muffler as the licensed inspection station, and to Mr. Ramos, Mr. Almonte and Mr. Bermudez as the certified inspectors who actually performed the simulations.

- Violation of 6 NYCRR 217-4.2

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

I find that 6 NYCRR 217-4.2 was violated on 3,532 separate occasions by use of a simulator to perform OBD emissions inspections. Simulators have no place in the administration of actual emissions tests, and their use is not consistent with emissions inspection procedure set out at 6 NYCRR 217-1.3(a)(3)(i) and (ii), which requires testing of a vehicle's OBD system to ensure that it functions as designed and completes diagnostic routines for necessary supported emission control systems. If the inspector plugs the NYVIP work station into a simulator in lieu of the vehicle that has been presented, it cannot be determined whether the vehicle would pass the OBD inspection.

Jerome Muffler is liable for all 3,532 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, Jerome Muffler 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 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. As the respondents' counsel argued in his closing statement, joint and several liability, as applied to the inspectors, would be draconian, especially for Mr. Bermudez, who performed only 10 of the 3,532 simulated inspections. (T: 92.)

Also, there is no basis for holding Mr. Ramos, as the sole shareholder of Jerome Muffler, personally liable for all of Jerome Muffler's non-compliant inspections. In paragraph 3 of its complaint, DEC Staff says that Mr. Ramos owned and operated Jerome Muffler, an allegation that the respondents admitted in their answer. However, Staff's own evidence (Exhibit No. 6, Jerome Muffler's original inspection station application) indicates that Jerome Muffler, as a corporate entity, sought and held the inspection station license; therefore, Jerome Muffler, as licensee, was the station operator. [See 15 NYCRR 79.7(b), which discusses applications for new licenses to "operate" an official inspection station.] Mr. Ramos may be held personally liable for the 143 non-compliant inspections that he personally performed, but not for the vast majority of the non-compliant inspections, which were performed by Mr. Almonte.

- 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 Jerome Muffler 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 Jerome Muffler had such a license; the only evidence was that it was licensed, pursuant to VTL Section 303, to inspect vehicles that are subject to emissions inspections. Also, there was no evidence that the respondents conducted improper safety inspections, or violated any laws or regulations in this regard; the only proof was with respect to emissions (OBD) inspections not being performed consistent with DEC procedure.

In paragraph 17 of its complaint, DEC Staff alleges that the respondents violated 6 NYCRR 217-1.4 by issuing emission certificates of inspection to vehicles that had not undergone an official emissions inspection. However, an official safety inspection station, as defined by 15 NYCRR 79.1(g), does not issue emission certificates of inspection, because the vehicles it inspects are exempt from the emissions inspection requirement.

In summary, because there is no evidence that Jerome Muffler 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, consistent with the dismissal of similar causes of action in matters involving

other stations where simulators were used. (See, for instance, Matter of Geo Auto Repairs, Order of the Commissioner, March 14, 2012, at 3 and 4.)

### Civil Penalties

In its complaint, DEC Staff proposed that the Commissioner assess a civil penalty of \$1,766,000 in this matter. Staff has not apportioned the penalty between the two causes of action, or among the respondents. According to DEC Staff, it is meant to apply to the respondents as a whole, meaning they would be jointly and severally liable for it. (T: 12.)

Civil penalties are authorized pursuant to ECL 71-2103(1). At the time the violations in this matter occurred, that section stated that any person who violated any provision of ECL Article 19 (the Air Pollution Control Act) or any regulation promulgated pursuant thereto, such as 6 NYCRR 217-4.2, would be liable, in the case of a first violation, for a penalty not less than \$375 nor more than \$15,000 for said violation and an additional penalty not to exceed \$15,000 for each day during which such violation continued; as well as, in the case of a second or any further violation, a penalty not to exceed \$22,500 for said violation and an additional penalty not to exceed \$22,500 for each day during which such violation continued.

I agree with DEC Staff that each illegal inspection constitutes a separate violation of DEC regulations. Each simulated inspection was a discrete event occurring on a specific date and time, and, by itself, constituted operation of the emissions inspection station in a manner that did not comply with DEC procedure.

Consistent with ECL 71-2103(1), the violations in this matter could subject the respondents to penalties in the 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 civil penalty for all provable violations is only the starting point of any penalty calculation (CPP Section IV.B); it merely sets the ceiling for any penalty that is ultimately assessed.

DEC Staff is actually seeking \$500 per simulated inspection (T: 12), using the civil penalty policy framework and formulating what it believes to be a consistent and fair approach to calculating civil penalties in this and the other 43 similar enforcement cases it is pursuing.

Pursuant to DEC's civil penalty policy, an appropriate civil penalty is derived from a number of considerations, including the 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 noncompliance. (CPP Section IV.C.1.) In this case, that economic benefit, if it does exist, is unknown.

- Gravity

According to the penalty policy, removal of the economic benefit of noncompliance 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 violations committed here are quite serious to the degree that they frustrate the goal of OBD emissions testing, which is to protect air quality. As the Commissioner has explained in other orders addressing similar violations by other respondents, OBD testing helps identify vehicles with emissions problems that, if left uncorrected, contribute to ozone pollution. As noted in my findings of fact, ozone pollution is a public health problem that also creates damage to crops, infrastructure and buildings. Using a simulator to bypass required emissions testing undermines the regulatory scheme that DEC and DMV have developed. (See Matter of Gurabo Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, at 6 and 7.)

While one cannot determine the actual damage caused by the violations charged here, there is a clear potential for harm to the extent that required OBD II testing is not actually performed, as this removes an opportunity to identify vehicles with malfunctioning emission control systems and ensure those systems are repaired.

- Culpability

According to the policy, the penalty derived from the gravity component may be adjusted in relation to factors that include the culpability of the violator. In this case, violator culpability (addressed at CPP Section IV.E.1) is an aggravating factor warranting a significant upward penalty adjustment. As Mr. Devaux explained, the training of OBD vehicle inspectors includes two tests - a multiple choice test at the end of DMV's certification class, and a separate test taken on the NYVIP work station - both of which must be passed before the inspector can perform an OBD inspection. (Devaux, T: 27 - 28.) Due to the training they would have received, and the information on the inspection process that is provided to the station itself, the respondents would certainly have known that the use of a simulator is not compliant with the procedures for a properly conducted OBD inspection.

Because of their knowing, intentional violation of inspection procedure over an extended period of time, substantial civil penalties are warranted for Jerome Muffler and the inspectors themselves. Because, for each simulated inspection, responsibility may be apportioned between the inspector and the inspection station, I consider it appropriate that they each have their own separate penalty. These penalties should be in the same amount, to reflect the equal culpability of the station and its inspectors for the inspections that were simulated, consistent with the approach taken by the Commissioner in prior matters.

- Penalty Recommendation

My recommendation is that, for 3,532 separate violations of 6 NYCRR 217-4.2, Jerome Muffler should be assessed a civil

penalty of \$285,000. Given the culpability of the three inspectors, but recognizing the unequal number of violations they committed, I recommend a civil penalty of \$272,500 for Felipe Almonte, \$11,500 for Jerry A. Ramos, and \$1,000 for Carlos Bermudez. On a per violation basis, these penalties are consistent with those assessed in prior matters involving similar sets of facts. Even combined, they are considerably less than the \$1,766,000 requested by DEC Staff, which I consider excessive. As noted above, Staff derived its penalty from a formula under which \$500 is allocated to each illegal inspection. This formula has not been adopted by me or the Commissioner in other matters where it has been offered for violations identical to these.

To account for the penalty framework in ECL 71-2103(1), the penalty apportioned to the first violation committed by each respondent should be \$375, with lesser penalties for each of the subsequent violations. The large number of violations equate to substantial penalties, especially for Jerome Muffler and Mr. Almonte. Such penalties are intended to punish the respondents and to deter others from the same type of illegal activity in which they were engaged.

### **CONCLUSIONS**

1. Between November 3, 2008, and February 17, 2010, respondent Jerome Muffler Corp., an official emissions inspection station, used a simulator to perform OBD II inspections on 3,532 separate occasions. These simulated inspections were performed by respondents Jerry A. Ramos, Felipe Almonte and Carlos E. Bermudez.

2. The use of a simulator was in violation of 6 NYCRR 217-4.2, which prohibits the operation of an 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, involving alleged violations of 6 NYCRR 217-4.2, respondent Jerome Muffler Corp.

should be assessed a civil penalty of \$285,000, respondent Felipe Almonte should be assessed a civil penalty of \$272,500, respondent Jerry A. Ramos should be assessed a civil penalty of \$11,500, and respondent Carlos Bermudez should be assessed a civil penalty of \$1,000. 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, for alleged violations of 6 NYCRR 217-1.4, should be dismissed in relation to all the respondents.

**ENFORCEMENT HEARING EXHIBIT LIST**

**JEROME MUFFLER CORP., JERRY A. RAMOS, FELIPE ALMONTE AND CARLOS  
E. BERMUDEZ (Case No. CO2- 20100615-26)**

1. DEC Notice of Hearing and Complaint (8/18/10)
2. Respondents' Answer (10/18/10)
3. DEC Staff's statement of readiness (12/30/10)
4. DEC Chief ALJ's assignment letter (2/4/11)
5. ALJ's hearing notice (12/19/11)
6. DMV inspection station application for Jerome Muffler Corp.
7. DMV repair shop application for Jerome Muffler Corp.
8. DMV certified inspector application for Carlos E. Bermudez
9. DMV certified inspector application for Felipe Almonte
10. DMV certified inspector application for Jerry Ramos
11. Records certification of Brad Hanscom, DMV records access officer (1/20/10), in relation to records received as Exhibit No. 11-A
- 11-A. DMV abstract of OBD II inspection data for Jerome Muffler Corp. (1/25/06 - 9/9/09)
12. Records certification of Brad Hanscom, DMV records access officer (9/1/10), in relation to records received as Exhibit No. 12-A
- 12-A. DMV abstract of OBD II inspection data for Jerome Muffler Corp. (9/10/09 - 3/2/10)
13. Data from Exhibit No. 11-A, with orange highlighting of simulated inspections
14. Data from Exhibit No. 12-A, with orange highlighting of simulated inspections