STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

-by-

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

DEC Case No. CO2-20100615-17

Respondents.

This administrative enforcement proceeding concerns allegations that respondents Jerome Transmissions Corp. ("Jerome Transmissions"), 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 1570 Jerome Avenue in the Bronx, New York, during the period from October 31, 2008 through January 18, 2010. During this time, DEC staff alleges that Jerome Transmissions was a domestic business corporation duly authorized to do business in New York State, respondent Almonte owned and operated Jerome Transmissions, and respondents Almonte, Ramos, and Bermudez performed mandatory annual motor vehicle emission inspections at that facility.[1]

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[1] Respondents Almonte, Ramos and Bermudez were also respondents in Matter of Jerome Muffler Corp., Order of the Commissioner, May 24, 2013, which involved similar violations at a facility located at 1572 Jerome Avenue in the Bronx. The employment status of these respondents differed somewhat at the two facilities. Although all three conducted noncompliant inspections at both facilities, DEC staff alleged that respondent Almonte, who was an inspector

Specifically, DEC staff alleges that a device was used to substitute for and simulate the motor vehicle of record on 900 separate occasions. DEC staff contends that, of these inspections, respondent Ramos performed 27 inspections, respondent Almonte performed 862 inspections, and respondent Bermudez performed 11 inspections (see Hearing Report, at 6 [Finding of Fact 7]) and that, as a result, 900 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 31, 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 four hundred fifty thousand dollars ($450,000). DEC staff requested that respondents be held jointly and severally liable.

Respondents submitted an answer dated December 1, 2010, in which they denied DEC staff's charges. 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 and/or inactions of third parties over whom the respondents had no direction or control; and (3) DEC staff's enforcement proceeding is barred by the doctrines of collateral estoppel and res judicata (see Hearing Report, at 1-2).

The matter was assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster. A hearing was held on January 12, 2012. Respondents, who appeared at the hearing, were represented by

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at Jerome Muffler Corp., was the owner and operator of Jerome Transmissions. Respondent Ramos, who Department staff alleged was the owner and operator of Jerome Muffler Corp., was an inspector at Jerome Transmissions. Respondent Bermudez was an inspector at both facilities. The time period of illegal activity at these two facilities overlapped (October 31, 2008 through January 18, 2010 at Jerome Transmissions, and November 3, 2008 through February 17, 2010 at Jerome Muffler Corp.).

Mary Beth Macina, Esq. None of the respondents testified and no witnesses were called on their behalf.

Based upon my review of 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. Jerome Transmissions "is liable for all 900 violations because, at the time they occurred, it held the license to 'operate' the official inspection station" (Hearing Report, at 16). Additionally, Ramos, Almonte, and Bermudez are each "liable for the violations attributable to his own non-compliant inspections" (id.).[2] The individual respondents did not testify on their behalf at the hearing (Hearing Transcript, at 181).

The ALJ held that respondents' affirmative defense of failure to state a cause of action was not properly pleaded, and their affirmative defenses of third party responsibility, and collateral estoppel and res judicata were not supported by the evidence (see Hearing Report, at 20-22). I concur.

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 19-20) for the reasons that have been 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; and 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.

[2] Although respondent Felipe Almonte was listed as president and sole shareholder of Jerome Transmissions (see Hearing Report, at 5 [Finding of Fact no. 2]), no argument was made that his position was a basis for liability, separate from the noncompliant inspections that he performed.

Civil Penalty

Department staff requested a penalty of four hundred fifty thousand dollars ($450,000), 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 concluded that a lower penalty was warranted and recommended a total civil penalty of one hundred sixty thousand dollars ($160,000), assessed as follows:

-respondent Jerome Transmissions to be assessed a civil penalty of eighty thousand dollars ($80,000);
-respondent Ramos to be assessed a civil penalty of two thousand three hundred dollars ($2,300);
-respondent Almonte to be assessed a civil penalty of seventy-six thousand seven hundred dollars ($76,700); and
-respondent Bermudez be assessed a civil penalty of one thousand dollars ($1,000) (see Hearing Report, at 30).

I concur with the ALJ's determination that staff's penalty request should be lowered, and adopt the aggregate penalty of one hundred sixty thousand dollars ($160,000) that the ALJ recommends.

I have previously determined that the facility where such illegal activities are conducted should, in general, be subject to a substantially higher penalty than the aggregate of penalties that are assessed against the individual inspectors, subject to mitigating or aggravating factors (see Matter of Jerome Muffler Corp., Order of the Commissioner, May 24, 2013, at 4-5). In this matter, at the time the violations occurred, Jerome Transmissions held the license to "operate" the official inspection station and is responsible for the inspection activities conducted at the station (see 15 NYCRR 79.8[b]). By the use of simulators, Jerome Transmissions allowed illegal activity as part of its operations and failed to comply with applicable law. This illegal activity subverted the intended environmental and public health benefits of the legal requirements that had been adopted to address and control vehicular air emissions.

Accordingly, a significant penalty should be assessed against Jerome Transmissions and I am imposing a civil penalty

of one hundred thousand dollars ($100,000) on it. The remaining portion of the penalty (sixty thousand dollars [$60,000]) shall be allocated among the individual inspectors, generally in proportion to the number of noncompliant inspections that each performed. The penalties imposed upon the individual inspectors, although less than that recommended by the ALJ, are substantial and should serve further as a deterrent effect.

I note that the individual respondents engaged in the same pattern of illegal activity at another facility (Jerome Muffler Corp.) in the same neighborhood at or about the same time (see n 1 of this order). In other circumstances, this pattern of activity might have been a basis to impose higher penalties as against each of the individual inspectors. However, with respect to Jerome Muffler Corp. and Jerome Transmissions, these cases were not combined, and each case was heard separately and is being decided on its own record. Furthermore, because the violations alleged in relation to Jerome Muffler Corp. were contemporaneous with those alleged at Jerome Transmissions, these do not represent a history of prior misconduct (see Hearing Report, at 29).

A review of the record indicates that respondent Almonte performed well over ninety-five percent (95%) of the noncompliant inspections at this facility, with respondents Ramos and Bermudez having performed less than five percent (5%). Accordingly, the penalties as assessed against the individual respondents are as follows:

- respondent Ramos is assessed a civil penalty in the amount of two thousand dollars ($2,000);

- respondent Almonte is assessed a civil penalty in the amount of fifty-seven thousand dollars ($57,000); and

- respondent Bermudez is assessed a civil penalty in the amount of one thousand dollars ($1,000).

Department staff's request to impose these penalties jointly and severally upon the respondents (see, e.g., Hearing Transcript, at 16-17) is rejected. No adequate rationale was provided by Department staff to support imposing joint and several liability in this proceeding. Furthermore, on this record, it would be clearly inequitable to impose joint and several liability with respect to a penalty of one hundred sixty thousand dollars ($160,000) as to two inspectors who, together,

performed less than five percent (38 of 900) of the noncompliant inspections.

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

I. Respondents Jerome Transmissions 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. Nine hundred (900) inspections using noncompliant equipment and procedures were performed at Jerome Transmissions Corp., of which Jerry A. Ramos performed twenty seven (27), Felipe Almonte performed eight hundred sixty-two (862), and Carlos E. Bermudez performed eleven (11).

II. DEC staff's allegations that respondents Jerome Transmissions 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 Transmissions Corp. is hereby assessed a civil penalty in the amount of one hundred thousand dollars ($100,000);

B. respondent Jerry A. Ramos is hereby assessed a civil penalty in the amount of two thousand dollars ($2,000);

C. respondent Felipe Almonte is hereby assessed a civil penalty in the amount of fifty-seven thousand dollars ($57,000); 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 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 Jerome Transmissions 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

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

Dated: May 28, 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 TRANSMISSIONS CORP., JERRY A. RAMOS, FELIPE ALMONTE AND CARLOS E. BERMUDEZ,
Respondents

NYSDEC Case No. CO2-20100615-17

HEARING REPORT

- by –

_____/s/_____
Edward Buhrmaster
Administrative Law Judge

July 19, 2012

PROCEEDINGS

Pursuant to a notice of hearing and complaint, both dated August 31, 2010 (Exhibit No. 1), Staff of the Department of Environmental Conservation (“DEC”) charged Jerome Transmissions Corp. ("Jerome Transmissions"), 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 for vehicles that had not undergone an official emission inspection.

Both violations were alleged to have occurred during the period between October 31, 2008, and January 18, 2010, at Jerome Transmissions, an emissions inspection station located at 1570 Jerome Avenue in the Bronx, New York. During this period, DEC Staff alleged, Jerome Transmissions was a domestic business corporation owned and operated by respondent Almonte, and duly authorized to do business in New York State. Furthermore, according to DEC Staff, respondents Almonte, Ramos and Bermudez worked there, performing mandatory annual motor vehicle emission inspections.

According to DEC Staff, during the period in question, the respondents performed 900 such inspections using a device to substitute and simulate the motor vehicle of record, and issued 900 emission certificates based on the simulated inspections.

The respondents submitted an answer (included as part of Exhibit No. 2) in which they denied DEC Staff’s charges. The answer, dated December 1, 2010, 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 October 3, 2011 (Exhibit No. 3), DEC Staff requested that DEC's Office of Hearings and Mediation Services schedule this matter for hearing. By letter of October 5, 2011 (Exhibit No. 4), Chief Administrative Law Judge James T. McClymonds informed the parties that the matter had been assigned to me. On December 2, 2011, I issued a hearing notice (Exhibit No. 5) informing the parties that the hearing was scheduled for December 9, 2011, at DEC's Region 2 office. At the request of the respondents' counsel, to which DEC Staff offered no objection, the hearing was rescheduled to January 12, 2012, as confirmed in my letter of December 19, 2011 (Exhibit No. 6).

The hearing went forward on January 12, 2012, and was completed that same day. DEC Staff was represented by Blaise Constantakes, an attorney with DEC's Office of General Counsel in Albany. The respondents were represented by Mary Beth Macina, an attorney whose office is in Yonkers.

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

The hearing record includes 203 pages of transcript and 15 numbered exhibits. The first six exhibits are my own, to show how the proceeding came forward. Exhibits No. 7 to 14 were received as part of DEC Staff's case on the alleged violations. Exhibit No. 15 was received on behalf of respondents Jerome Transmissions and Felipe Almonte, in relation to the civil

penalties that might be assessed against them. A list of the hearing exhibits is attached to this report.

By agreement of the parties, written closing statements were submitted on March 2, 2012, by counsel for DEC Staff and the respondents. The closing statements were accompanied by proposed corrections to the hearing transcript.

In a memorandum dated July 3, 2012, I adopted the parties' proposed transcript corrections and proposed additional corrections of my own. Because the parties did not object to these corrections, they have been adopted as well.

POSITIONS OF THE PARTIES

Position of DEC Staff

According to DEC Staff, the respondents completed 900 motor vehicle inspections using noncompliant equipment and procedures, and issued 900 emission 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 $450,000, 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. According to Staff, 862 of the simulated inspections were performed by Mr. Almonte, 27 by Mr. Ramos, and 11 by Mr. Bermudez.

Position of Respondents

According to the respondents, DEC Staff failed to prove the charges in the complaint. The respondents claim there was insufficient proof to show that Jerome Transmissions was an official, DMV-licensed emissions inspection station, that it was owned and operated by Mr. Almonte, and that anything other than DMV-approved equipment was used to perform inspections there.

Furthermore, the respondents say it is possible that the data contained within the inspection station records may have been tampered with or altered, or that human error in the inspectors' manual entry of information into the equipment may have played a role in any data that DEC alleges is irregular.

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.

According to the respondents, 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 contend that rather than viewing each simulated inspection as a separate violation, the inspections should be viewed as one continuing violation, which would cap the potential penalty at $15,000, pursuant to ECL 71-2103. The respondents also claim that, for penalty purposes, DEC Staff's two causes of action should be merged into one, on the understanding that the first would always trigger the second. Finally, the respondents say that nothing in the complaint suggests that the respondents should be held jointly and severally liable, and that no proof was provided that Mr. Almonte, Mr. Ramos or Mr. Bermudez were employed by, or had any

control over, the activities of Jerome Transmissions. Even if it were demonstrated that Mr. Almonte was the principal of Jerome Transmissions, the respondents claim that he could not be held personally liable for the alleged actions of Mr. Ramos and Mr. Bermudez.

Addressing DEC's penalty policy, the respondents claim that there is no evidence that they derived any economic benefit from the activities alleged in the complaint, and that no potential harm or actual damage had been shown to have resulted from those activities. Furthermore, they say there is no competent proof of any culpability on their part.

The respondents note that in a separate DMV matter, the inspection station license of Jerome Transmissions, and the inspector certification of Mr. Almonte, were revoked, making it virtually impossible for them to pay any penalties DEC may assess. Furthermore, Jerome Transmissions contends it is a small, closely held, private business without deep pockets, one that struggled to survive in a bad economy and has since ceased all operations.

FINDINGS OF FACT

1. Jerome Transmissions, located at 1570 Jerome Avenue in the Bronx, applied for and received from DMV a license to operate as an official inspection station. Upon approval of the application, DMV assigned Jerome Transmissions a facility number of 7104888. (See Exhibit No. 7, the DMV application, on which the facility number appears in the upper left hand corner of the first page, as well as the testimony of Mr. Devaux at pages 48 to 53 of the transcript (T: 48 – 53).)

2. When the application for Jerome Transmissions was filed with DMV, Felipe Almonte was its president and sole shareholder. (See page 2 of Exhibit No. 7.)

3. Mr. Almonte applied to DMV for certification as a motor vehicle inspector. Upon approval of his application, he was

assigned certificate number 5JQ9. (See Almonte's application for certification, Exhibit No. 8; and Devaux, T: 53 – 54.)

4. Jerry Ramos applied to DMV for certification as a motor vehicle inspector. Upon approval of his application, he was assigned certificate number 4XY7. (See Ramos's application for certification, Exhibit No. 9; and Devaux, T: 54.)

5. Carlos E. Bermudez applied to DMV for certification as a motor vehicle inspector. Upon approval of his application, he was assigned certificate number 6HS8. (See Bermudez's application for certification, Exhibit No. 10; and Devaux, T: 54 – 55.)

6. Between October 31, 2008, and January 18, 2010, 900 annual motor vehicle emissions inspections were performed at Jerome Transmissions using a device to substitute for and simulate the motor vehicle of record. (Clyne, T: 148.)

7. Of these 900 simulated inspections, 862 were performed by Mr. Almonte, 27 by Mr. Ramos, and 11 by Mr. Bermudez. (Clyne, T: 148.)

8. Vehicle emissions are tested pursuant to the New York Vehicle Inspection Program ("NYVIP"). NYVIP is a statewide inspection and maintenance program that incorporates a second-generation type of onboard diagnostic ("OBD II") testing for vehicles starting with model year 1996. (Clyne, T: 110 - 111.)

9. In order to do an OBD II inspection, an inspection station needs a NYVIP computerized vehicle inspection system ("CVIS"), commonly known as a work station or NYVIP unit. (Devaux, T: 19 and 23.) NYVIP units are supplied by SGS Testcom, the state's NYVIP contractor, with instruction manuals explaining how to use the equipment and perform inspections. (Devaux, T: 23, 30, 38.)

10. Apart from the NYVIP unit, the station must have at least one person who is certified by DMV to perform the NYVIP inspections. (Devaux, T: 20; Clyne, T: 116.) To become an inspector, an applicant must attend a certification clinic

conducted by DMV and pass a written test that is administered at the end of the clinic. (Devaux, T: 40.)

11. The motor vehicle inspection process includes a check of safety items, a visual check of emission control devices ("ECDs"), and connection of the NYVIP unit to the vehicle's diagnostic link connector, which is typically on the lower left-hand corner of the dashboard. (Devaux, T: 42 – 44; Clyne, T: 117 – 118.)

12. To record the inspection, the inspector scans his or her certification card into the NYVIP unit and enters the information for the vehicle to be inspected, either manually or by scanning the registration bar codes. (Devaux, T: 42; Clyne, T: 117.)

13. The connection of the NYVIP unit to the vehicle's diagnostic link connector allows communication between the unit and the connector. By requests to the vehicle, the NYVIP unit looks for information on whether any diagnostic trouble codes are present, whether the malfunction indicator lamp is commanded on, and how many monitors are ready, which can affect whether the vehicle passes the inspection. (Devaux, T: 44 – 45.)

14. Assuming the vehicle passes, the NYVIP unit instructs the inspector to scan an inspection certificate and affix it to the windshield. (Devaux, T: 45.) The vehicle inspection report is then printed and can be issued to the motorist. (Devaux, T: 45 – 46; Clyne, T: 123.)

15. The information collected during the inspection is backed up on the NYVIP unit, where it can be accessed by a state inspector but not by the station licensee or its employees. At the end of the inspection process, the information is transmitted to SGS Testcom by a dial-up connection or broadband. Testcom captures the information and backs it up, and the information passes through Testcom to DMV, which also backs it up. (Devaux, T: 46, 58; Clyne, T: 123 - 125.)

16. NYVIP has been implemented at the behest of the federal government, due to the fact that the New York

metropolitan area does not meet a national air quality standard for ozone. (Clyne, T: 112.)

17. Ozone pollution is a particular problem for the elderly, children, and people with respiratory problems. It also is damaging to crops and infrastructure. (Clyne, T: 113.)

18. There are five ways a vehicle can fail the OBD-II portion of the inspection. Two involve visual inspection of the malfunction indicator light with the key on and the engine off, and then with the key on and the engine running. The other three involve the standardized requests from the NYVIP work station to the vehicle, and the standardized responses from the vehicle to the NYVIP work station. (Clyne, T: 119 – 120.)

19. A vehicle will fail the inspection if the NYVIP work station cannot communicate with the vehicle. Also, it will fail if the OBD system detects a fault, which is identified on the basis of a diagnostic trouble code. Finally, the vehicle will fail if its monitors cannot run enough of its diagnostic tests as part of a readiness evaluation. (Clyne, T: 119 – 122.)

DISCUSSION

This matter involves charges that Jerome Transmissions and its three inspectors did not check the OBD II systems as part of their inspections of 900 motor vehicles during the period between October 31, 2008, and January 18, 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.

As DEC Staff demonstrated, 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 requires those states and regions most impacted by ozone pollution, including New York State, to develop and implement a motor vehicle inspection and maintenance program designed to bring these areas into attainment for the

national ambient air quality standard (NAAQS) for ozone. As the nine downstate counties in the New York metropolitan area have been designated by the U.S. Environmental Protection Agency to be in nonattainment of the primary ozone NAAQS, and because they are located within the ozone transport region, EPA requires that they meet the federal high enhanced inspection and maintenance standard, which includes annual emissions testing and visual inspection of the emission control devices.

Locating the Simulator Signature

According to Mr. Clyne, at a September 2008 meeting between DMV and DEC officials, DMV reported that it believed electronic simulators were being substituted for the vehicles of record during inspections conducted in the greater New York City area. (Clyne, T: 127.) This belief was based on unrealistically high and very repetitive readings of engine RPM (abbreviation of "revolutions per minute") that were recorded during the inspection process. (Clyne, T: 127 – 128.)

Mr. Clyne said that typical RPM readings would be somewhere between 300 on the low side and 1,100 on the very high side; however, DMV regional staff were seeing RPM readings of 6,138 RPM, inspection after inspection. (Clyne, T: 128.) DEC verified the very high, unrealistic and repetitive readings of RPM from its own review of the inspection database. (Clyne, T: 128.) This led to an undercover operation in early 2009, which involved DEC investigators visiting stations that were identified through analysis of their inspection data. (Clyne, T: 129.) The feedback from this investigation led DEC to conclude that RPM alone was not a good indicator of a simulated inspection; based on the electronic information that was available, DEC settled on a detailed electronic profile (or signature) derived from 15 data fields. (Clyne, T: 129 – 130.)

DEC found this profile in the records of inspections conducted at 44 of about 10,000 stations participating statewide in the NYVIP program, during the period between March 2008 and July 2010. However, DEC could not locate the profile in the records of 18.5 million NYVIP inspections conducted between September 2004, when NYVIP started, and February 2008, or in the

records of another 9 million inspections conducted after July 2010, when DEC launched its enforcement action. (Clyne, T: 130 – 131.) This demonstrated to DEC that the profile could not be linked to a vehicle, because if it was, it would have shown up throughout the life of the program, since the signature of a vehicle does not change. (Clyne, T: 131.)

As Mr. Clyne explained, the simulated inspections charged in this matter are highlighted in orange on Exhibits No. 13 and 14, which are abstracts of inspection data retrieved from DMV. These inspections report the same information (shown in quotation marks) in the following data columns, as indicated below:

PCM ID1	"10"
PCM ID2	"0"
PID CNT 1	"11"
PIC CNT 2	"0" (should read as PID CNT 2) (T: 140)
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: 139 – 142.)

Mr. Clyne used the inspection history of a particular 2005 Nissan Pathfinder, as shown on Exhibit No. 13, to highlight the distinction between an actual and a simulated inspection. At 11:20 a.m. on July 10, 2008, the vehicle passes what appears to be a valid inspection, reporting a PCM VIN (a vehicle identification number stored electronically within the vehicle's on-board computer system) that matches the DMV VIN (the number under which the vehicle is registered). However, at 9:38 a.m. on July 31, 2009, the same vehicle reports no PCM VIN, along with the 15-field simulator profile, suggesting the on-board

computer system was not inspected at that time. (Clyne, T: 143 – 144.)

Apart from Mr. Clyne's testimony about the simulator profile, DEC Staff's case is built upon documentation that includes the inspection data retrieved from DMV (Exhibits No. 11-A and 12-A) as well as the certified DMV application records (Exhibits No. 7, 8, 9 and 10) connecting the simulated inspections to the inspection station and the inspectors themselves.

Among the columns of data on Exhibits No. 11-A and 12-A, the column 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, 7104888, is the same as the number that was assigned by DMV on the application of Jerome Transmissions (Exhibit No. 7), as displayed in the upper left 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, as explained in the NYVIP operators' instruction manual.

Also among the columns of data in Exhibits No. 11-A and 12-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 three identifiers in this column are 5JQ9, 4XY7 and 6HS8, those assigned to Mr. Almonte, Mr. Ramos and Mr. Bermudez, respectively, as displayed in the upper right hand corner of the first page of each of their applications. (See Almonte application, Exhibit No. 8; Ramos application, Exhibit No. 9; and Bermudez application, Exhibit No. 10.) The inspectors' assigned number appears on his or her certification card, which is scanned into the NYVIP work station prior to each inspection, as Mr. Devaux explained (T: 42). When the number then appears in the inspection data, it may be presumed that the inspector associated with that number did the 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 electronic device or simulator was seen or recovered from the inspection station. Even so, DEC Staff adequately demonstrated that a simulator was used during 900 inspections performed at Jerome Transmissions between October 31, 2008, and January 18, 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.

There is no question that the inspections documented in Exhibits No. 11-A and 12-A are attributable to Jerome Transmissions, because its 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 appear in the inspection data.

Respondents' Claims

According to the respondents, the inspection data in Exhibits No. 11-A and 12-A is unreliable because, for each inspection, there is additional data maintained by DMV that is not reflected in the exhibits. In fact, both exhibits are abstracts derived from a DMV database that includes fields of information not shown in the exhibits, as Mr. Clyne acknowledged (T: 133). However, the fields that are shown, which include all

those reflecting the OBD II emissions inspections, exhibit the entire simulator profile described in Mr. Clyne's testimony. In summary, DEC Staff presented the data it concluded was relevant to its claim that certain of these inspections were simulated. If other data, not shown in the exhibits, is also pertinent to the OBD II inspections, and could be relevant to the issue of their simulation, the respondents did not say so, or request such data's production at the hearing. Therefore, contrary to the respondents' proposal, I draw no negative inference from Staff's failure to offer, as part of its case, all the data available from DMV.

In relation to Exhibits No. 11-A and 12-A, the respondents also argue that there is no evidence as to when the data contained in these exhibits was entered into DMV's database, or when the queries of that database were run. As explained in the certifications prepared by Brad Hanscom, DMV's records access officer (Exhibits No. 11 and 12), the data shown in the exhibits 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 queries of the data base occurred much later, in conjunction with the investigation of suspected simulator use.

In their closing brief, the respondents argue that the NYVIP equipment was not inspected either prior to, or after, the charges being brought in this case, so that there is no evidence that the equipment was even working properly in the first place. In fact, while Mr. Clyne acknowledged that DEC did not inspect the equipment before or after the inspections at issue, the respondents for their part offered no evidence to suggest that 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.

Mr. Devaux explained that the station and its inspectors do not have access to the data stored on the NYVIP work station, but that the data backed up on the machine is retrievable by a

DMV automotive facilities inspector. (T: 67 – 68.) According to the respondents, the allowance for DMV access to the work station computer creates a real possibility that data contained within the inspection station records may have been tampered with or altered, whether intentionally or inadvertently. I find no evidence to support this contention; in fact, the evidence indicates that the inspection data moved rapidly, in a matter of seconds, upon completion of each inspection, from the station to DMV, where it remained securely stored until retrieved by DEC pursuant to a request under the state's Freedom of Information Law.

The respondents contend that because SGS Testcom supplies, maintains and repairs the NYVIP equipment, it is possible that SGS Testcom tampered with the inspection data, and that Testcom would have a motive to do so, since its revenue is tied to the number of inspections that are performed. Again, there is no evidence to support this argument, and I reject it accordingly.

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

Finally, the respondents point out that because no representative of DEC or DMV observed the inspections at issue, neither agency can say whether there was a simulator inside any vehicle prior to its presentation at Jerome Transmissions. It is true that, for any particular inspection, one cannot rule out the possibility that a simulator was implanted by a motorist, to fool the inspector. However, the respondents offered no explanation of how this would happen, or examples that it did, at Jerome Transmissions or any other facility. If motorists were fraudulently employing simulators, one would expect the simulator use to have been detected more broadly at stations statewide, rather than at the very few stations identified in

DEC's investigation, where violations were of a repetitive nature, with 900 at this station alone over a period of 15 months.

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 Transmissions as the licensed inspection station, and that Mr. Ramos, Mr. Almonte and Mr. Bermudez, 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 900 separate occasions by the use of a simulator to perform OBD II emissions inspections. The use of simulator is not consistent with the emissions inspection procedure set out at 6 NYCRR 217-1.3(a)(3)(i) and (ii), 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. As DEC Staff argues, a certified motor vehicle

emissions inspector cannot determine whether the OBD II system in a motor vehicle presented for inspection meets these criteria unless he or she checks the system with the inspection station's NYVIP equipment. If the inspector plugs the NYVIP work station into a simulator instead of the vehicle, it cannot be determined whether the vehicle would pass the OBD II inspection.

Jerome Transmissions is liable for all 900 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 Transmissions 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. That includes Mr. Almonte, who is identified in the complaint as the owner and operator of Jerome Transmissions. According to the original facility application of Jerome Transmissions (Exhibit No. 7), Mr. Almonte owns 100 percent of its stock; however, the corporation exists independent of its ownership, as a separate legal entity. Also, Jerome Transmissions, not Mr. Almonte, is

the licensed operator of the inspection station, which makes Jerome Transmissions responsible for the inspection activities conducted there, as noted above. Mr. Almonte performed the vast majority of the simulated inspections at issue here, and is also the corporation president. However, there is no evidence that, in his capacity as a corporate officer, he facilitated the other inspectors' violations.

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. I find that 6 NYCRR 217-1.3 and Mr. Clyne's testimony, which is consistent with that provision, adequately explain the procedures that were not complied with in this matter. DEC anticipates that, in an OBD II inspection, there will be communication between the NYVIP work station and the vehicle's OBD II system. When this does not happen, it is a violation of DEC procedure.

In their closing brief, the respondents also claim that insufficient proof was offered to show that Jerome Transmissions was an "official emissions inspection station," and that the document offered to prove that fact, Exhibit No. 7, is inconclusive. Granted, Exhibit No. 7 is a facility application, not a license; however, the number assigned by DMV to the application, 7104888, matches the DMV facility number for each inspection recorded in Exhibits No. 11-A and 12-A. As Mr. Devaux explained, the fact that a facility number was assigned by DMV, with an expiration date that is also recorded on the application, indicates not only that an application was received, but that it was approved. (T: 52, 53.)

The respondents point out that the application was for both a repair shop and inspection station, and suggest the possibility that the repair shop application was approved while the inspection station application was denied. There is no evidence to support this understanding, either in the shaded area of the application, which documents its processing by DMV, or elsewhere in the record; in fact, without approval of the inspection station application, Jerome Transmissions would not have received the NYVIP inspection equipment. As another

indication that Jerome Transmissions was a licensed inspection station, counsel for the respondents asserted that its inspection station license has been revoked and turned in for inspection-related violations that occurred subsequent to those charged in this matter. (T: 181 – 182.)

The respondents note that DEC Staff offered only two pages of what appears to be a four-page facility application that Jerome Transmissions submitted to DMV. While it is unknown what other information may have been on the missing two pages, Jerome Transmissions, which filed the application, failed to offer them, and the pages that were admitted were sufficient for DEC Staff's purpose of linking Jerome Transmissions to the DMV facility number appearing on the inspection data abstracts.

The respondents also note that two of the applications for certification as a motor vehicle inspector (Exhibit No. 8, for Mr. Almonte, and Exhibit No. 10, for Mr. Bermudez) are unsigned, and that the signature on the application for Mr. Ramos (Exhibit No. 9) is illegible. From this, they argue there is no proof that they submitted the applications, raising the possibility that they were submitted by others, who used their names and personal information. Where an application is unsigned, a question exists whether it is complete and should have been processed. However, the fact is that all the applications were processed, as evidenced by the certificate numbers assigned by DMV, and it is the linkage between those numbers and the inspector names that DEC Staff was able to demonstrate as part of its case. Whether the applications were filled out by the respondents or other people is not germane, and, of particular significance, none of the respondents testified that the applications were not their own, which one would expect them to had they not completed the applications themselves.

The respondents argue that admitting the DMV application documents (Exhibits No. 7 to 10) into evidence through Mr. Devaux's testimony was reversible error, since Mr. Devaux could not authenticate them and indicated an insufficient familiarity with the application process. Actually, the documents were admitted on the basis of DMV's certifications, appearing on the back of each page, that the documents are true and complete

copies of records on file with that agency. (T: 58, 59.) Also, Mr. Clyne testified as to how he retrieved these documents from DMV, to match the facility and certified inspector numbers on the data abstracts to the names behind them, for the purpose of issuing notices of violation. (T: 146, 147.)

- 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 Transmissions 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 Transmissions 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 that regard; the only proof was with respect to emissions (OBD II) 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 motor vehicles which 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 its closing brief, DEC Staff argues that, since the term "official inspection station" is defined within Subpart 217 itself (more precisely, at 6 NYCRR 217-1.1(k)), that definition should control for the purpose of interpreting 6 NYCRR 217-1.4. I disagree, since 6 NYCRR 217-1.4 clearly states that it applies to official inspection stations "as defined by 15 NYCRR 79.1(g)." Also, 6 NYCRR 217-1.1(k) is not a definition of "official inspection station," but a definition of "official emissions inspection station" (emphasis added).

In summary, because there is no evidence that Jerome Transmissions 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.)

Respondents' Affirmative Defenses

As noted above, the respondents asserted three affirmative defenses in their answer (Exhibit No. 2). 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 may be dismissed. At the hearing, the respondents' counsel was provided an opportunity to clarify and explain the bases for the defenses, so that DEC Staff could address their merits in its closing brief. I agree with Staff that the affirmative defenses, as outlined below, should be dismissed.

- Failure to State a Cause of Action

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

As was pointed out in Matter of Grammercy Wrecking and Environmental Contractors, Inc. (DEC ALJ's Ruling, January 14, 2008), the failure to state a claim is not properly pleaded as an affirmative defense; instead, according to the Civil Practice Law and Rules, it is a ground for a motion to dismiss. As an affirmative defense, it is mere surplusage, since DEC Staff has the burden of properly pleading and then adequately proving the charges in its complaint. (See 6 NYCRR 622.11(b)(1) and (2), stating that DEC Staff has 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. At the hearing, the respondents' counsel said that Staff failed to prove all the elements required for the charges in each cause of action (T: 198). However, that is true only for the second cause of action, as discussed above.

- Third Party Responsibility

As a second affirmative defense, the respondents allege that the alleged incidents described in DEC Staff's complaint were the result of the actions and/or inactions of third parties over whom the respondents had no control. Those third parties were not identified in the answer, which itself would be a basis for dismissal of the affirmative defense. At the hearing, the respondents' counsel argued that any violations may have been caused by alteration of, or tampering with, inspection data, either by SGS Testcom, the NYVIP program manager, which controls and forwards the data to DMV, or by state inspectors who have access to the data on the NYVIP work station. (T: 198.) No evidence was provided in support of these claims, and for that reason they may be disregarded. While it is true, as respondents' counsel argued, that the respondents would not have access to the inspection data recorded on the NYVIP work

station, they were in a position, as station licensee and certified inspectors, to control what data was entered there in the first place.

- 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 explain this claim at the hearing, respondents' counsel related it to a DMV prosecution in which two of the respondents, Jerome Transmissions and Mr. Almonte, were found to have violated VTL Section 303(e)(3) for using an unknown vehicle and/or an electronic device to produce passing results for exhaust emissions tests on 35 separate occasions between March 8 and April 22, 2010. According to the respondents' counsel, these violations arose from the same transactions or occurrences charged here (T: 199). In fact, as detailed in documentation contained in Exhibit No. 15, they arose from activities that occurred after January 18, 2010, the last inspection charged in DEC's complaint, and for that reason alone neither collateral estoppel nor res judicata apply with regard to them.

Civil Penalties

In its complaint, DEC Staff proposed that the Commissioner assess a civil penalty of $450,000 in this matter. Staff has not apportioned the penalty between the two causes of action, or among the respondents. According to DEC Staff, the respondents should be jointly and severally liable for the penalty's payment. (T: 16 – 17.)

Civil penalties are authorized pursuant to ECL 71-2103(1). At the times 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.

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 31, 2008, to January 18, 2010, and, as such, subject to a maximum penalty of $15,000, pursuant to ECL 71-2103(1), as effective when the violation occurred.

I agree with the position of DEC Staff. Each simulated inspection was a discrete event occurring at a specific time on a particular date, and, by itself, constituted operation of the emissions inspection station in a manner that did not comply with DEC procedure. While Exhibits No. 13 and 14 show clusters of simulated inspections, even they are broken up by inspections that do not reflect the simulator signature. Furthermore, within the period of violations, there are gaps of days and weeks where no simulated inspections are detected. (See, for example, the gap between November 3 and 22, 2008, as shown on Exhibit No. 13.) Under these circumstances, one cannot consider the violations to constitute a continuous course of conduct, or even conduct that continued consistently from day to day.

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

DEC is actually seeking $500 per simulated inspection, using the civil penalty policy framework and formulating what it believes to be a consistent and fair approach to calculating civil penalties in this and the other 43 similar enforcement cases it is also pursuing. This equates to a total penalty of

$450,000 ($500 x 900) given the number of simulated inspections that the respondents performed.

Pursuant to DEC's penalty policy, an appropriate civil penalty is derived from a number of considerations, including economic benefit of noncompliance, the gravity of the violations, and the culpability of the respondents' conduct.

- Economic Benefit

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

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

- Gravity

According to the penalty policy, removal of the economic benefit of non-compliance merely evens the score between violators and those who comply; therefore, to be a deterrent, a penalty must include a gravity component, which reflects the seriousness of the violations. (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 DEC Staff demonstrated, OBD II testing, as a NYVIP component, is very important both to a regulatory scheme implemented by DEC and DMV to protect the environment and public health, and to meeting the state's obligations under the federal Clean Air Act. Such testing is intended to assure that motor vehicles are properly maintained, to curb ozone pollution, which is a particular threat to the elderly, children, and people with respiratory problems. While one cannot determine the actual damage caused by the respondents' violations, there is a clear potential for harm when required OBD II testing is not actually performed, as this removes an opportunity to identify vehicles with malfunctioning emission control systems and ensure those systems are repaired. Furthermore, the simulation of OBD II tests undermines the regulatory scheme, which depends on proper testing 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, the inspectors would certainly have known that use of a simulator is not compliant with the procedures for a properly conducted OBD II inspection. In this sense, the simulated inspections may be considered intentional violations of the law.

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 Bronx, Jerome Transmissions is far from a corporation with deep pockets, and that it has struggled to survive in a bad economy, with significant competition in the same geographical area. While I have no reason to doubt this characterization, there is no actual evidence that Jerome Transmissions or Mr. Almonte, who performed all but 38 of the simulated inspections, cannot afford to pay the substantial penalties that their conduct warrants.

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 Staff was seeking $375 for each alleged violation. Appropriately so, Staff’s settlement offer is not part of the record, but even if the respondents are characterizing it correctly, there is nothing unusual or improper about DEC seeking a higher penalty 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 that DEC accepts in orders which are entered into voluntarily by respondents. Contrary to the respondents’ assertion, this variation in

penalty amounts does not penalize respondents for choosing to go to a hearing; it is a benefit and incentive offered to those who settle. (CPP Section II.)

The respondents suggest that by delaying bringing charges in this matter, DEC Staff was attempting to run up the number of alleged violations and the penalties it could seek for them. However, I find that Staff's enforcement action was launched in a timely manner, once Staff identified the simulator signature and traced it to Jerome Transmissions. Consistent with Section 301(1) of the State Administrative Procedure Act, the respondents have been afforded an opportunity for a hearing within a reasonable time, and have not demonstrated that the passage of time has prejudiced their ability to defend against Staff's charges.

The respondents also point out that as a result of DMV's prosecution (referred to above in relation to their affirmative defenses of collateral estoppel and res judicata), the inspection station license of Jerome Transmissions and Mr. Almonte's certified inspector license were revoked effective November 1, 2010, as noted in the DMV documentation received as Exhibit No. 15. According to their closing brief, these license revocations have severely hampered the respondents' ability to make a living, and, with no income coming in, it is virtually impossible for the respondents to pay any monies out, never mind the penalties sought in this matter. However, no evidence has been provided about the respondents' income or assets, so I cannot verify whether the respondents are able to pay the penalties I recommend in this report. In the DMV matter, Jerome Transmissions and Mr. Almonte were each assessed penalties of $12,250, to be paid by December 2, 2010. However, as of January 12, 2012, the date of the hearing in this matter, their counsel said she did not think those penalties had been paid. (T: 189 – 190.)

At the hearing, the respondents' counsel said that Jerome Transmissions and Mr. Almonte never appealed the revocations of their licenses, and that the licenses had been turned in to DMV. (T: 182.) The license revocations mean that these respondents cannot legally participate in the inspection process, which, by

itself, helps ensure against future violations of the type charged by DEC. However, because the revocations were not related to the violations charged in this matter, I find they should not affect the monetary penalties DEC assesses for those violations.

In a post-hearing e-mail dated January 25, 2012, respondents' counsel provided a letter, dated January 19, 2012, from the accountant for Jerome Transmissions. That letter indicated that Jerome Transmissions ceased operations in August 2011 and was in the process of dissolution. According to the e-mail, an outstanding tax matter prevented the corporation from being officially dissolved, but it was closed for all intents and purposes otherwise. According to my own check of the database maintained by the Division of Corporations of the New York State Department of State, Jerome Transmissions remained an active corporation as of July 2012, when this hearing report was completed.

Finally, the respondents argue in their closing brief that in the absence of evidence showing a prior history of violations of laws or regulations enforced by DEC, their "clean record" should be taken into account as a mitigating factor for any penalties that are assessed here. In fact, DEC's civil penalty policy says that a history of violations subsequent to environmental enforcement actions is usually evidence that the violator has not been deterred by the previous enforcement response, and that unless violations are caused by factors entirely out of the violator's control, the penalties on the subsequent enforcement actions should be more severe. In other words, a prior history of non-compliance warrants an upward penalty adjustment, but absence of such a history does not warrant a downward penalty adjustment.

While I find that it should not affect the penalties assessed in this case, the Commissioner should be aware that Mr. Almonte, Mr. Ramos and Mr. Bermudez are also charged in a separate enforcement action (DEC Case No. CO2-20100615-26) alleging use of a simulator on 3,532 occasions at Jerome Muffler Corp., an official emission inspection station at 1572 Jerome Avenue in the Bronx, apparently next door to Jerome

Transmissions. These alleged violations, also of 6 NYCRR 217-4.2, are alleged to have occurred over a period from November 3, 2008 to February 17, 2010, approximately the same period as those charged in this matter. On January 31, 2012, I conducted a hearing on the charges against Mr. Ramos, Mr. Almonte, and Mr. Bermudez, in relation to the alleged activity at Jerome Muffler, and those charges will be the subject of a separate hearing report.

According to DEC Staff, to the extent it is demonstrated that these individuals were conducting simulated inspections at two facilities adjacent to each other during the same period of time, it confirms that they were fully aware of their decision to violate the law, which warrants an upward penalty adjustment. While I agree that the respondents must have known that simulated inspections are illegal, I find that such knowledge would be conveyed by their training in proper inspection procedure. The fact that the inspectors were charged in another matter for essentially the same conduct is not relevant to my determinations here concerning culpability or penalty. Each case was heard separately, and should be decided on its own record, based on the facts and arguments presented. Because the violations alleged in relation to Jerome Muffler were contemporaneous with those alleged at Jerome Transmissions, they also do not represent a history of prior misconduct.

- Penalty Recommendation

As noted above, DEC Staff requests a total civil penalty of $450,000, as derived from a formula that assesses $500 for each of the 900 simulated inspections. In its closing brief, DEC Staff says that this approach to penalty assessment is reasonable, justified and consistent with the approach being taken in the other similar cases it is pursuing. Furthermore, DEC Staff says that, under the penalty policy and considering the nature of the evidence presented in this matter, its penalty recommendation is well within the prescribed penalty range, uncontroverted by any evidence from the respondents, and must be presumed to be warranted.

Actually, the penalty 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.

While the large number of simulated inspections justifies substantial penalties in this matter, I find that DEC Staff's proposed penalty is excessive and that no factual basis has been provided for assessing a penalty amounting to $500 per simulated inspection.

I also find that separate penalties against each respondent should be assessed, noting that, in prior cases, the Commissioner has apportioned responsibility equally between the inspection station and the inspectors. By DMV regulation, the station licensee is responsible for all the inspection activities conducted at the station; however, each inspector is liable only for the inspections that he or she performs, and should not be vicariously responsible for penalties resulting from another inspector's conduct.

My recommendation is that, for the 900 separate violations of 6 NYCRR 217-4.2, Jerome Transmissions should be assessed a civil penalty of $80,000. Because he committed 862 of the violations, Mr. Almonte should be assessed a civil penalty of $76,700. Also, for his 27 violations, Mr. Ramos should be assessed a civil penalty of $2,300. Finally, for his 11 violations, Mr. Bermudez should be assessed a civil penalty of $1,000.

On a per violation basis, these penalties are consistent with those assessed by the Commissioner in prior matters involving similar sets of facts. Even combined, they are considerably less than the $450,000 requested by DEC Staff; however, Staff's penalty formulation of $500 per simulated inspection has not been adopted by me or the Commissioner in prior matters that have already been decided.

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 penalties are intended to punish the respondents' conduct and deter others from the same type of illegal activity.

CONCLUSIONS

1. Between October 31, 2008, and January 18, 2010, respondent Jerome Transmissions, an official emissions inspection station, used a simulator to perform OBD II inspections on 900 separate occasions. These simulated inspections were performed by respondents Felipe Almonte, Jerry A. Ramos and Carols E. Bermudez, certified motor vehicle inspectors employed at Jerome Transmissions.

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

RECOMMENDATIONS

1. For the first cause of action, involving alleged violations of 6 NYCRR 217-4.2, respondent Jerome Transmissions Corp. should be assessed a civil penalty of $80,000, respondent Felipe Almonte should be assessed a civil penalty of $76,700, respondent Jerry A. Ramos should be assessed a civil penalty of $2,300, and respondent Carlos E. Bermudez should be assessed a civil penalty of $1,000, 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 subsequent violation.

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

3. To reflect the information on file with DMV and the New York State Department of State, the caption in this matter should be corrected by substituting “Jerome Transmissions Corp.” for “Jerome Transmission Corp.”

ENFORCEMENT HEARING EXHIBIT LIST

JEROME TRANSMISSIONS CORP., JERRY A. RAMOS, FELIPE ALMONTE AND CARLOS E. BERMUDEZ (Case No. CO2-20100615-17)

1. DEC Notice of Hearing and Complaint (8/31/10)
2. Respondents' Answer to Complaint, Demand for Names and Addresses of Expert Witnesses, and Demand for Production of Documents (12/1/10)
3. DEC Staff's Statement of Readiness (10/3/11)
4. Chief ALJ's Case Assignment Letter (10/5/11)
5. ALJ Edward Buhrmaster's Hearing Notice (12/2/11), issued to parties' counsel, with distribution list
6. ALJ Edward Buhrmaster's Notice of Hearing Rescheduling (12/19/11), issued to parties' counsel, with distribution list
7. DMV repair shop and inspection station application for Jerome Transmissions Corp. (undated)
8. DMV application for certification as a motor vehicle inspector, filed by Felipe Almonte (undated)
9. DMV application for certification as a motor vehicle inspector, filed by Jerry Ramos (3/6/05)
10. DMV application for certification as a motor vehicle inspector, filed by Carlos E. Bermudez (undated)
11. DMV records certification (1/20/10) for Exhibit No. 11-A

11-A. Abstract of inspection data for Jerome Transmissions Corp. (11/9/07 – 8/3/09)

12. DMV records certification (10/13/10) for Exhibit No. 11-B

12-A. Abstract of inspection data for Jerome Transmissions Corp. (9/13/09 – 4/24/10)

13. Inspection data from Exhibit No. 11-A, with orange highlighting of simulated inspections
14. Inspection data from Exhibit No. 12-A, with orange highlighting of simulated inspections
15. Documentation re: DMV enforcement action against Jerome Transmissions Corp. and Felipe Almonte