

**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-

**SUGAR HILL SERVICE STATION, INC.,  
Wael M. ROZEIK, and CRISTIAN A. TEJADA,**

DEC Case No.  
CO2-20100318-12

Respondents.

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This administrative enforcement proceeding concerns allegations that respondents Sugar Hill Service Station, Inc. ("Sugar Hill Service Station"), Wael M. Rozeik, and Cristian A. Tejada 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") alleged that these violations occurred at Sugar Hill Service Station, an official emissions inspection station located at 800 St. Nicholas Avenue, New York, New York, during the period from October 14, 2008 through October 27, 2008. Department staff alleged that, during this time, Sugar Hill Service Station was a domestic business corporation duly authorized to do business in New York State, respondent Rozeik owned and operated Sugar Hill Service Station, and respondents Sugar Hill Service Station, Rozeik and Tejada performed mandatory annual motor vehicle emission inspections at that facility.

Specifically, Department staff alleged that a device was used to substitute for and simulate the motor vehicle of record on five (5) separate inspections. Department staff contended that, of these inspections, respondent Tejada performed all five

(5) inspections (see Hearing Report, at 1 and 8 [Finding of Fact no. 23]) and that, as a result, certificates of inspection were issued based on these simulated inspections.

In accordance with 6 NYCRR 622.3(a)(3), Department staff commenced this proceeding against respondents by service of a notice of hearing and complaint dated August 31, 2010. In its complaint, Department 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 Department 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, Department staff requested a civil penalty of two thousand five hundred dollars (\$2,500). Department staff did not apportion the requested penalty among the respondents or request that joint and several liability be imposed against the respondents.

Respondents Sugar Hill Service Station and Rozeik submitted an answer dated December 15, 2010 in which they admitted that Rozeik owned and operated Sugar Hill Service Station and respondent Tejada worked at Sugar Hill Service Station as a certified motor vehicle emission inspector. These respondents denied Department staff's charges, asserted five affirmative defenses, and requested, among other relief, dismissal of the complaint against them (see Hearing Report, at 2; Hearing Exhibit 2). Respondent Tejada submitted an answer to the complaint by letter dated October 25, 2010 in which he stated that he has "insufficient information on all the allegations," and therefore, "can't form an opinion regarding any of the allegations" (Hearing Exhibit 3).

The matter was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell. Subsequently, the attorney for respondents Sugar Hill Service Station and Rozeik advised the ALJ that he could not continue to represent them. His request to adjourn the February 9, 2012 hearing to allow respondents Sugar Hill Service Station and Rozeik time to retain new counsel was granted by the ALJ by letter dated February 7, 2012 sent to respondents. By letter dated February 9, 2012, all of the

respondents were notified that the hearing was rescheduled for March 16, 2012 (Hearing Report, at 2-3).

The hearing was held on March 16, 2012. Respondents Sugar Hill Service Station and Rozeik did not appear at the hearing. Respondent Tejada appeared pro se, cross-examined Department staff's witnesses, and testified (see Hearing Report, at 3).

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 Department staff proved, by a preponderance of the record evidence (see 6 NYCRR 622.11[b], [c]), the liability of respondents Sugar Hill Service Station and Tejada 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 Department procedures or standards, in violation of 6 NYCRR 217-4.2. I agree with the ALJ that Sugar Hill Service Station is liable for all five (5) violations "because, at the time the inspections were conducted, it held the license to operate the official inspection station." (Hearing Report, at 21).

With respect to the individual respondents, the ALJ noted that respondent Rozeik was identified as president, vice president, treasurer, secretary and sole shareholder of Sugar Hill Service Station on the inspection station and repair shop applications that Sugar Hill Service Station filed with the Department of Motor Vehicles (see id. at 4 [Finding of Fact No. 4], and 14). Department staff did not, however, provide evidence that respondent Rozeik's decisionmaking authority at the facility established a basis for his liability. The record before me is insufficient to hold respondent Rozeik individually liable, as the responsible corporate officer, for any of the illegal inspections conducted at the station. Furthermore, respondent Rozeik did not perform any of the noncompliant inspections. I concur with the ALJ that the first cause of action alleging respondent Rozeik violated 6 NYCRR 217-4.2 should be dismissed.

I agree with the ALJ that the record reflects that respondent Tejada performed each of the five noncompliant inspections.

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 determined (see Hearing Report, at 22) for the reasons that have been stated in my prior 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 two thousand five hundred dollars (\$2,500), 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. The ALJ noted that, consistent with the penalty range established by ECL 71-2103(1) for such violations, the maximum penalties would exceed one hundred thousand dollars (\$100,000), significantly more than what Department staff requested (see Hearing Report, at 23).

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 24-26). As the ALJ noted, staff's formula has not been adopted in other proceedings where it has been offered for violations relating to the use of noncompliant equipment and procedures in OBD II inspections (see Hearing Report, at 23-27). The ALJ recommended a total civil penalty of nine hundred dollars (\$900), assessed as follows:

-respondent Sugar Hill Service Station to be assessed a civil penalty of at least four hundred fifty dollars (\$450); and

-respondent Tejada to be assessed a civil penalty of at least four hundred fifty dollars (\$450) (see Hearing Report, at 27-28).

The ALJ's recommendation, however, by conditioning the penalty language as "at least" assumes that a higher amount may be appropriately imposed.

The ALJ also rejected imposing joint and several liability on respondents, and I concur (see Hearing Report, at 22-23).

Prior decisions have noted the adverse air quality impacts 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, at 6-7), and, accordingly, appropriate penalties are warranted where violations are found. I have previously addressed the structure of penalties (see, e.g., Matter of Autoramo, Inc., Order of the Commissioner, August 13, 2013, at 3-5), which has led to the imposition of penalties somewhat lower than what Department staff has requested in those prior proceedings. In this case, however, only five (5) noncompliant inspections have been charged which is in contrast to previous matters involving hundreds or thousands of such violations (see, e.g., Matter of Jerome Muffler Corp., Order of the Commissioner, May 24, 2013 [3,532 noncompliant inspections]). In the circumstances here, where the violations are few, imposing a civil penalty less than what Department staff has requested would be an insufficient deterrent. Given the fact that respondents' conduct subverts the regulatory framework designed to address and control these air emissions, I conclude that staff's proposed penalty in the circumstances here is appropriate, and, as discussed below, I am dividing the penalty equally between respondents Tejada and Sugar Hill Service Station.

At the times the noncompliant inspections occurred, Sugar Hill Service Station held the license to "operate" the official inspection. 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 21). Sugar Hill Service Station had the over-arching responsibility to ensure that inspections conducted at its facility comported with all legal requirements. By the use of simulators, Sugar Hill Service Station allowed illegal activity as part of its operations and failed to comply with applicable law.

However, all of the noncompliant inspections were performed by respondent Tejada. As discussed in the ALJ's hearing report, Mr. Tejada has a history of performing noncompliant inspections at other facilities (see Hearing Report at 25-26; see also Matter of East Tremont Repair Corp., Order of the Commissioner, July 23, 2012 [respondent Tejada found to have performed 265 of the 312 noncompliant inspections]; Matter of Dyre Ave. Auto

Repair Corp., Order of the Commissioner, September 5, 2013 [respondent Tejada found to have performed 292 of 577 noncompliant inspections]). While respondent Tejada's illegal activities at other facilities do not relieve Sugar Hill Service Station of its responsibilities, it does mitigate against assessing a higher proportion of the penalty against the facility as has been done in prior proceedings. Although respondent Tejada presented testimony (see Hearing Report, at 3) attempting to disprove or mitigate his liability, I agree with the ALJ that his testimony and proffered evidence are unconvincing. I conclude that respondent Tejada, who performed all of the noncompliant inspections, is equally culpable in this case. Accordingly, I am assessing a civil penalty against respondent Sugar Hill Service Station in the amount of one thousand two hundred fifty dollars (\$1,250) and against respondent Tejada in the amount of one thousand two hundred fifty dollars (\$1,250).

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

- I. Respondents Sugar Hill Service Station, Inc., and Cristian A. Tejada 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 Department procedures and standards. Five (5) inspections using noncompliant equipment and procedures were performed at Sugar Hill Service Station, Inc., of which Cristian A. Tejada performed all five (5).
- II. Department staff's first cause of action alleging respondent Wael M. Rozeik violated 6 NYCRR 217-4.2 is dismissed.
- III. Department staff's second cause of action charging that respondents Sugar Hill Service Station, Inc., Wael M. Rozeik, and Cristian A. Tejada violated 6 NYCRR 217-1.4 is dismissed.
- IV. The following penalties are hereby assessed:
  - A. Respondent Sugar Hill Service Station, Inc. is hereby assessed a civil penalty in the amount of one thousand two hundred fifty dollars (\$1,250); and

B. Respondent Cristian A. Tejada is hereby assessed a civil penalty in the amount of one thousand two hundred fifty dollars (\$1,250).

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

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

- V. 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 IV of this order.
- VI. The provisions, terms and conditions of this order shall bind respondents Sugar Hill Service Station, Inc., and Cristian A. Tejada, 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: October 4, 2013  
Albany, New York

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

In the Matter

- of -

Alleged violations of New York State Environmental Conservation  
Law Article 19, and Title 6 of the Official Compilation of  
Codes, Rules and Regulations of the State of New York Part 217

by

Sugar Hill Service Station, Inc.,  
Wael M. Rozeik, and  
Cristian Tejada.

Respondents

Case No: CO2-20100318-12

Hearing Report

- by -

\_\_\_\_\_/s/\_\_\_\_\_  
Daniel P. O'Connell  
Administrative Law Judge

June 12, 2012



## Proceedings

Pursuant to a notice of hearing and complaint, dated August 31, 2010 (Exhibit 1), Staff of the Department of Environmental Conservation (Department staff) alleged that Sugar Hill Service Station, Inc. (Sugar Hill), Wael M. Rozeik, and Cristian A. Tejada (Respondents) violated provisions of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 217, which concerns emissions from motor vehicles.

The August 31, 2010 complaint asserted two causes of action. In the first, Respondents allegedly violated 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 the Department's procedures and/or standards. In the second cause of action, Respondents allegedly violated 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 from October 14, 2008 to October 27, 2008 at the Sugar Hill Service Station, an official emissions inspection station, which is located at 800 St. Nicholas Avenue in Manhattan (New York County). During this period, Department staff alleged, in the August 31, 2010 complaint, that Sugar Hill was a domestic business corporation duly authorized to do business in New York State, and that Wael M. Rozeik owned and operated the inspection station. Department staff alleged further that Cristian A. Tejada, among others, worked at the inspection station, and performed mandatory annual motor vehicle emission inspections.

According to Department staff, Respondents performed five inspections from October 14, 2008 to October 27, 2008 using a device to substitute for, and simulate, the motor vehicle of record, and issued emission certificates based on these simulated inspections.

For these alleged violations, Department staff requested a total civil penalty of \$2,500.00. Department staff did not apportion the requested civil penalty between the two causes of action. However, it appears that Department staff has requested \$500 for each of the five illegal inspections that Respondents performed.

Initially, Timothy G. Griffin, Esq. (Bronxville, New York), represented Sugar Hill and Mr. Rozeik. On behalf of his clients, Mr. Griffin filed a verified answer dated December 15, 2010 (Exhibit 2), which generally denied the violations alleged in the August 31, 2010 complaint. The December 15, 2010 verified answer asserted the following affirmative defenses: (1) the complaint fails to state a cause of action; (2) the Department's claims are barred because it has not suffered any injury; (3) the Department is equitably estopped from obtaining the relief sought because all inspections were performed by Cristian Tejada; and (4) the Department's claims are barred by the equitable doctrines of waiver, estoppel, laches and/or unclean hands. In addition, Sugar Hill and Mr. Rozeik reserved the right to assert additional defenses that may arise in the course of discovery or trial. In the December 15, 2010 verified answer, Sugar Hill and Mr. Rozeik requested, among other things, that the August 31, 2010 complaint be dismissed.

On his own behalf, Mr. Tejada answered the August 31, 2010 complaint with a letter dated October 25, 2010 (Exhibit 3). In his October 25, 2010 letter, Mr. Tejada stated that he has "insufficient information on all the allegations," and therefore, "can't form an opinion regarding any of the allegations" (Exhibit 3).

Blaise W. Constantakes, Esq., Assistant Counsel, filed a statement of readiness, dated December 30, 2010, on behalf of Department staff. Department staff requested that the Office of Hearings and Mediation Services schedule this matter for hearing. By letter dated March 18, 2011, Chief Administrative Law Judge James T. McClymonds informed the parties that the matter had been assigned to Administrative Law Judge Edward Buhrmaster. Subsequently, the matter was reassigned to me.

In a letter dated February 3, 2012, Mr. Griffin advised that because he was "relieved as counsel" in a civil proceeding pending in Supreme Court, County of Westchester, concerning Sugar Hill, he could not continue to represent Sugar Hill and Mr. Rozeik in the captioned administrative enforcement matter. In addition, Mr. Griffin requested an adjournment of the administrative hearing concerning the captioned enforcement matter scheduled for February 9, 2012 to allow Sugar Hill and Mr. Rozeik to retain alternate legal counsel. I granted the request in a letter dated February 7, 2012.

By letter dated February 9, 2012, I rescheduled the hearing for 10:00 a.m. on March 16, 2012 at the Department's Region 2 Offices. The hearing convened, as scheduled, on March 16, 2012, and concluded on that date.

Department staff offered two witnesses. Lawrence Levine is a Vehicle Safety Technical Analyst II with the New York State Department of Motor Vehicles (NYS DMV), Office of Technical Services and Clean Air (Tr. at 9). James Clyne, P.E., is an environmental engineer from the New York State Department of Environmental Conservation, and Chief of the Light Duty Vehicles Section in the Division of Air Resources (Tr. at 34).

Mr. Tejada appeared at the hearing, cross-examined Department staff's witnesses, and testified on his own behalf. The other Respondents did not appear at the hearing.

With an email dated March 21, 2012, Mr. Constantakes provided certified copies of the finding sheet and charge sheets/alleged violations notice from the New York State Department of Motor Vehicle (NYS DMV) concerning the Dayro Auto Repair Corp. matter. Respondents in the NYS DMV administrative matter were Dayro Auto Repair Corp., Haro L. Lantigua and Mr. Tejada. The finding sheet and charge sheets are identified as Exhibit 18 in the hearing record of the captioned administrative proceeding, and are received into evidence as business records (see 6 NYCRR 622.1[a][6]).

On April 5, 2012, the record of the hearing closed upon receipt of the hearing transcript. The hearing record includes 97 pages of transcript and 18 hearing exhibits. A copy of the exhibit list is attached to this hearing report as Appendix A.

## **FINDINGS OF FACT**

### **I. The Licensee**

1. Sugar Hill Service Station, Inc. (Sugar Hill) applied to the New York State Department of Motor Vehicles (NYS DMV) and, subsequently, received a license to operate a motor vehicle inspection station at 800 St. Nicholas Avenue in

Manhattan. The facility number assigned by NYS DMV to Sugar Hill was 7104636. (Tr. at 14-16; Exhibit 4.)

2. In order to receive a license to operate a motor vehicle inspection station from the NYS DMV, the facility must employ at least one full time certified inspector (see 15 NYCRR 79.8[b][2]; Tr. at 42). After receiving the license, the facility must display signs showing the fees for the various inspections, as well as a list of the certified inspectors that includes their names, their inspection numbers, the inspection groups, and the expiration dates of the inspectors' certificates (see 15 NYCRR 79.13[f]). The bar code on an inspector's certification card is not displayed on the signs posted in the facility. (Tr. at 21, 30-32.)
3. The licensee who operates a motor vehicle inspection station is responsible for all activities of the certified inspectors and must supervise them accordingly (Tr. at 16-17).
4. At the time of its application to NYS DMV, Wael M. Rozeik was Sugar Hill's president, vice president, secretary, and treasurer. Mr. Rozeik held 100% of the ownership interest in Sugar Hill. (Exhibit 4.)

## II. New York Vehicle Inspection Program

5. NYS DMV and the Department jointly administer the New York Vehicle Inspection Program (NYVIP), a statewide annual emissions inspection program for gasoline-powered vehicles. NYVIP is required by the federal Clean Air Act Amendments of 1990 and U.S. Environmental Protection Agency regulations found at 40 CFR Part 51. (Tr. at 36-37, 40-41, 49-50.)
6. For model year 1996 and newer light-duty vehicles, NYVIP requires the completion of an on-board diagnostic (OBD) emissions inspection commonly referred to as OBD II, because it succeeds a version that was previously employed. (Tr. at 10, 34-35.)

7. The OBD II inspection monitors the operation of the engine and emissions control system in vehicles that are manufactured with the technology installed. (Tr. at 10.)
8. To perform an OBD II inspection, the NYVIP work station must be properly configured. To do so, the facility must purchase the approved hardware (*i.e.*, the work station) and obtain the software configuration from SGS Testcom. SGS Testcom is under contract with NYS DMV to manage the NYVIP program. SGS Testcom is responsible for the development, maintenance, and repair of inspection equipment and software, as well as the transmittal of electronic data from the inspection station to NYS DMV. (Tr. at 12-14, 41-41, 49-50.)
9. Before an inspection can be completed with the NYVIP work station, the bar code on the facility's license must be scanned into the work station. This bar code is scanned once to assign the facility's number to the work station. (Tr. at 15, 42.)

### III. Inspector Training and Certification

10. On October 19, 2004, Mr. Tejada applied to NYS DMV for certification as a motor vehicle inspector. Upon approval of his application, NYS DMV assigned Mr. Tejada certificate number 4KR8. (Tr. at 21-22; Exhibit 5.) The information on Mr. Tejada's certification card includes his name and date of birth, and that he is authorized to conduct inspections for Groups 1, 2, 3 and D. The certification card expired on August 31, 2010. There is a bar code on the front of the certification card effective during the period at issue here. (Exhibit 10.)
11. Each candidate who applies for certification as a motor vehicle inspector must attend a three-hour training class provided by NYS DMV and, subsequently, pass a written test. During the training, the candidates are instructed, among other things, to safeguard their certification cards by securing them when not being used during the inspection process (*see* 15 NYCRR 79.17[c][2]), and to report lost or stolen certification cards to NYS DMV immediately (*see* 15 NYCRR 79.17[c][3]). The candidates are advised where to obtain a copy of the

regulations, and to become familiar with them. After a candidate passes the written test, he or she receives a temporary certificate. (Tr. at 17-20.)

12. When the candidate returns to the facility, he or she must inform the licensee about obtaining a temporary certificate. To complete the certification process, the licensee enters the candidate's name and other information into to the facility's NYVIP work station. Using the work station, the candidate can then take an on-line test. After passing the on-line test, the candidate is authorized to conduct OBD II inspections. (Tr. at 20-21, 42-43.)

#### IV. OBD II Inspections

13. To begin an OBD II inspection, the inspector scans the bar code on his or her certification card into the NYVIP work station. (Tr. at 11, 43.)
14. The OBD II inspection involves collecting information from the vehicle being presented, such as make, model, and model year. This may be done by scanning the NYS DMV registration bar code on the vehicle or manually entering information using a keyboard, or some combination of the two. At the same time, the inspector also records the NYS DMV registration-based vehicle identification number (VIN), which is a unique 17-character alphanumeric identifier. (Tr. at 11-12, 43.)
15. Based on the vehicle information, the NYVIP work station makes a determination as to what type of inspection the vehicle should receive in light of its age and weight, and a call, via the internet, is made to NYS DMV to try to match this information to that contained in the NYS DMV registration file. When the information is matched on the NYS DMV side, the inspection continues with a series of menus that allow for the completion of the safety inspection. After that, another series of screens comes up for what is known as the emission control device (ECD) checks. (Tr. at 11-12, 44-45.)
16. The OBD II inspection is the final inspection component. The first two parts of this inspection ask the inspector

to put the key in the ignition and turn it to what is known as the "key on, engine off" position, such that the key is turned but the vehicle is not running. At this point the malfunction indicator light (MIL) should come on, demonstrating that the bulb has not burned out. The next step involves moving to the "key on, engine running" position, which involves turning the ignition on, so that the engine is running, though the car remains idling while parked at the station. At this point, the light should go off, indicating that the OBD system has not found a fault. If the light remains on, it indicates an emissions failure. (Tr. at 11-12, 44-45.)

17. A complete vehicle inspection includes a safety inspection, a visual inspection of the emission control devices (including the gas cap), and the OBD II inspection itself. (Tr. at 11-12, 44.)
18. Following these initial steps, the inspector is directed to plug the NYVIP work station connector into the vehicle's diagnostic link connector (DLC), which is found in every vehicle that is OBD II compliant. With the connection established, the NYVIP work station communicates with the vehicle's onboard computer with standardized requests for which standardized responses are sent back from the vehicle. Based on the information provided during this exchange, which includes identifying information for the vehicle, it is determined whether the vehicle will pass the inspection. (Tr. at 11-12, 45-48.)
19. Once the electronic exchange between the vehicle's onboard computer and the NYVIP work station is completed, the NYVIP work station determines whether the vehicle passes the inspection. If the vehicle passes the inspection, the work station prompts the inspector to scan the inspection sticker, which the inspector then places on the windshield, so that NYS DMV can track the sticker (or certificate) to the inspection. The inspector must indicate that he or she scanned the sticker and affixed it to the vehicle. The record of the full inspection is stored on the NYVIP work station, and a copy is also sent electronically to NYS DMV. (Tr. at 12-13, 48-49.)

V. Simulator Usage

20. Department staff reviewed all of the NYVIP inspection data for 10,000 to 11,000 facilities located throughout the State. From September 2004 to February 28, 2009, Department staff reviewed some 18.5 million inspection records, and found that no vehicles matched the 15-field data signature characterized by simulator usage. A review of the inspection records collected from March 2008 to July 2010, however, showed a simulator signature at 44 inspection facilities, including Sugar Hill. After July 2010, the electronic signature for the simulator did not appear in any inspection data, which was when the enforcement initiative commenced. (Tr. at 55-57.)
21. Mr. Tejada was one of several inspectors who performed OBD II inspections at Sugar Hill during the period between October 14, 2008 and October 27, 2008 (Tr. at 52-54; Exhibits 6 and 7).
22. Data collected from the OBD II inspections performed at Sugar Hill from October 2008 show that a simulator was used there (Tr. at 57-60).
23. From October 14, 2008 to October 27, 2008, Mr. Tejada performed five inspections at Sugar Hill using a device to substitute for, and simulate, the motor vehicles of record (Tr. at 61-62; Exhibit 7). During this period, none of the other inspectors performed illegal OBD II inspections at Sugar Hill.

**Discussion**

According to the August 31, 2010 complaint, Sugar Hill and its certified inspector, Mr. Tejada, did not check the OBD II systems as part of the inspections of five motor vehicles from October 14, 2008 through October 27, 2008. Rather, Department staff alleges that Mr. Tejada simulated the OBD II inspections for these vehicles by using non-compliant equipment and procedures, and then improperly issued emission certificates.

Mr. Tejada (Certificate No. 4KR8 [Exhibits 5 and 10]) was not the only certified inspector who conducted vehicle inspections at Sugar Hill. From October 2007 through June 2009



the following inspectors, as identified by their certification numbers, in addition to Mr. Tejada, performed inspections at Sugar Hill: TD09, 3ZP6, 5VR8, XM21, 7FZ7, 3ED5, and 7SX2 (Exhibits 6 and 7). The identity of the other inspectors is not known. Of all the certified inspectors at Sugar Hill, Department staff has asserted that only Mr. Tejada violated 6 NYCRR 217-4.2 and 217-1.4.

On behalf of Department staff, Mr. Clyne explained that OBD II testing is part of the New York vehicle inspection program (NYVIP), which is required under the federal Clean Air Act, to reduce low-level ozone pollution. Pursuant to federal law and regulation, New York is required to submit a detailed State Implementation Plan (SIP) describing how it will implement and enforce its program. For the vehicle inspection program, New York submitted SIP revisions to the U.S. Environmental Protection Agency in 2006, which outlined the statewide program. In 2009, the Department committed to improved enforcement of the NYVIP program. (Tr. at 34-36, 40-41.)

#### I. Determining the Simulator Signature

According to Mr. Clyne, in September 2008, NYS DMV alerted Department staff to what DMV staff believed was fraud involving the use of simulators within the greater New York metropolitan area. DMV staff's concern was based on what it considered to be very repetitive, extremely unrealistic readings for engine revolutions per minute (RPM) that had been recorded from vehicles during OBD II inspections in excess of 5,000. Engine RPM is recorded to ensure that the vehicle is running while the vehicle is connected to the NYVIP work station. Mr. Clyne explained that such high readings were unusual because each vehicle should produce a different RPM reading. Mr. Clyne testified that during a normal inspection, with the car idling in park, the RPM reading should be from several hundred to about 1000 RPMs. (Tr. at 50-51.)

Mr. Clyne testified further that after reviewing the inspection data from the greater New York metropolitan area, Department staff identified five or six inspection stations that were reporting very high RPM readings (Tr. at 51). Then, with the assistance of other agencies (Exhibit 14), Department staff initiated an undercover investigation of these facilities in July 2009 to monitor vehicles during inspections (Tr. at 51).

Concluding that a high RPM value alone was not a sufficient indicator of simulator use, Department staff undertook an extensive data analysis in an attempt to identify a better profile. Department staff focused on 15 data fields, other than the RPM values which, together, constitute an electronic signature for a simulated OBD II inspection. Department staff reviewed all of the NYVIP inspection data for 10,000 to 11,000 facilities. From September 2004 to February 29, 2008, Department staff reviewed some 18.5 million inspection records, and found that no vehicles matched the 15-field data signature. A review of the inspection records collected from March 2008 to July 2010, however, showed a simulator profile at 44 inspection facilities, including Sugar Hill. After July 2010, the electronic signature for the simulator did not appear in any inspection data, which is subsequent to when the enforcement initiative commenced. (Tr. at 51-52, 55-57.)

Exhibits 6 and 7 are abstracts of data collected from the OBD II inspections performed at Sugar Hill from October 2007 through June 2009. Mr. Clyne explained that he requested this information from NYS DMV, and NYS DMV provided certified paper records as well as the data in electronic format. According to Mr. Clyne, the data show that a simulator was used at Sugar Hill. (Tr. at 52-53, 60-62.)

Referring to Exhibits 6 and 7, Mr. Clyne identified the column labeled "DMV\_FACILITY\_NUM," which is the inspection facility. Only the facility identification number for the Sugar Hill facility (*i.e.*, 7104636 [Exhibit 4]) appears in this column. (Tr. at 53.) Mr. Clyne also identified the column labeled "CI\_NUM," which provides the identification numbers for the inspectors (Tr. at 53, 59-60). Among them is Mr. Tejada's (*i.e.*, 4KR8 [Exhibit 5]).

From more than 100 fields generated during the course of an inspection, Mr. Clyne selected the data fields shown in Exhibits 6 and 7 (Tr. at 54). From left to right across the top of each page on Exhibits 6 and 7, there are headings for each column of data that is displayed:

DMV\_VIN\_NUM is the vehicle identification number, which is scanned or manually entered into the NYVIP work station by the inspector. The VIN number is also reported in the column labeled "PCM\_VIN" and is

reported electronically by the vehicle's computer during the OBD II inspection. The two identification numbers should be the same. (Tr. at 60.)

INSP\_DTE shows the date and time of the inspection.

DMV\_FACILITY\_NUM is the number that was assigned to the station by NYS DMV, and is programmed into the NYVIP work station when the facility bar code is scanned. In each case, the number is 7104636, which is the number that appears in the upper left hand corner of the first page of Sugar Hill's original facility application (Exhibit 4).

ODOMETER\_READING is recorded manually by the inspector.

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

CI\_NUM (certified inspector number) is the unique alphanumeric identifier the NYS DMV assigns to each inspector. Mr. Tejada's certificate number is 4KR8 (Exhibit 5). Prior to starting the inspection, the inspector scans the bar code on his or her certification card, and the inspector's certificate number is recorded for each inspection.

DATA\_ENTRY\_METHOD indicates how the vehicle information was entered into the inspection record.

GAS\_CAP\_RESULT is a pass/fail indicator for the gas cap check.

ASSIGNED\_CERT\_NUM is taken from the scanned bar code on the sticker that the inspector issued for the vehicle passing the inspection.

VEH\_YEAR is the model year of the vehicle.

DMV\_VEH\_MAKE\_CDE is the make of the vehicle.

PUBLIC\_MODEL\_NAME is the model name of the vehicle.

NYVIP\_UNIT\_NUM is the identifier for the work station that was assigned to the inspection station by SGS Testcom, the program manager. For Sugar Hill, the NYVIP work station is identified as B000007102 (Exhibits 6 and 7).

Mr. Clyne testified that to the right of these headings on Exhibits 6 and 7, are the headings for entries which, when read together, form the 15-field data electronic signature that constitutes the profile of the simulator used in the greater New York metropolitan area. The headings, and the respective entries (shown here in quotation marks) that are consistent with the profile for the simulator are as follows:

PCM_ID1	"10"
PCM_ID2	"0"
PID_CNT1	"11"
PIC_CNT2	"0"
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"

(Tr. at 57-60).

Mr. Clyne provided an example of an inspection where the simulator was used. For comparative purposes, Mr. Clyne discussed an inspection on January 19, 2008 at 17:08 (*i.e.*, 5:08

p.m.) of a 2001 Lincoln Town Car. On this date, the vehicle did not pass the inspection. (Tr. at 60-61; Exhibit 7, page 3 of 22.)

Then, referring to Exhibit 7 (page 11 of 22), Mr. Clyne said that the same vehicle was inspected on October 14, 2008 at 10:59 a.m. For the October 14, 2008 inspection, Mr. Clyne determined that the vehicle was the same one from the January 19, 2008 inspection because the VIN numbers reported in column 1 of Exhibit 7 on the two inspection dates were identical. Mr. Clyne noted, however, that the entry for the electronic VIN on the October 14, 2008 inspection was blank. With respect to the October 14, 2008 inspection, Mr. Clyne said that the 15-field data electronic signature for the simulator is reported. The January 19, 2008 inspection was proper, according to Mr. Clyne, but the October 14, 2008 inspection was a simulated inspection. Mr. Clyne noted that Mr. Tejada's certification number is associated with both inspections. (Tr. at 60-61; Exhibit 7.)

From the data presented in Exhibits 6 and 7, Mr. Clyne observed that the 15-field data signature for the simulator appears a total of five times. Mr. Clyne said that he was able to sort the data to determine who performed these inspections. Based on the certification number associated with these five inspections, which is 4KR8 (Exhibit 5), Mr. Tejada performed them. (Tr. at 53-54, 61-62.)

## II. Proof of Service

When, as here, some of Respondents do not appear at the administrative hearing, there is a threshold question of whether the non-appearing Respondents received a copy of the notice of hearing and complaint in a manner consistent with the regulations. Pursuant to 6 NYCRR 622.3(a)(3), service of the notice of hearing and complaint must be either by personal service consistent with the Civil Practice Law and Rules (CPLR), or by certified mail.

Initially, Sugar Hill Service Station, Inc., and Wael M. Rozeik were represented by counsel, who filed a verified answer dated December 15, 2010 on their behalf (Exhibit 2). The answer acknowledged receipt of the notice of hearing and complaint. Consequently, I conclude that Department staff duly served Sugar Hill and Mr. Rozeik with a copy of the notice of hearing and

complaint dated August 31, 2010 in a manner consistent with 6 NYCRR 622.3(a)(3).

### III. Individual Corporate Officer Liability

According to the August 31, 2010 complaint, Mr. Rozeik owned and operated Sugar Hill at the time of the alleged violations (¶ 3, Exhibit 1). At the hearing, Department staff offered Exhibit 4, which is a certified copy of the original facility application (DMV form VS-1) filed by Sugar Hill. With this application, Sugar Hill sought, and subsequently received, a license to inspect motor vehicles from NYS DMV. Mr. Rozeik is identified on page 2 of 4 of the application (see Exhibit 4) as the president, vice-president, secretary and treasurer of Sugar Hill, and holds 100% of the stock or ownership. Therefore, Exhibit 4 connects Mr. Rozeik to Sugar Hill, as a corporate officer. However, Sugar Hill, as a corporation, exists as a separate legal entity independent of its ownership.

In order to find that the corporate officer is individually liable for the violations alleged in the August 31, 2010 complaint, Department staff must present a legal theory and, as appropriate, evidence that the individual corporate officer was responsible for, or influenced, the corporate actions that constituted the violations. In this case, Department staff offered nothing to show that Mr. Rozeik, as a corporate officer, was personally liable for the illegal inspections performed by Mr. Tejada.

In the absence of such a showing, I cannot conclude that Mr. Rozeik is personally liable for any of the violations alleged in the complaint. Accordingly, the Commissioner should dismiss the charges alleged in the complaint against him.

### IV. Mr. Tejada's Arguments

By letter dated October 25, 2010 (Exhibit 3), which serves as his answer in this matter (see 6 NYCRR 622.4), Mr. Tejada states that he received five notices from the Department alleging violations at five different facilities. The facilities identified by Mr. Tejada are: (1) San Miguel Auto Repair Corp., (2) Dyre Auto Repair Corp., (3) East Tremont

Repair Corp., (4) RV Auto Repairs, Inc., and (5) Sugar Hill Service Station, Inc.

In his closing statement, Mr. Tejada reiterated that he received five notices of hearing and complaints from Department staff concerning five different facilities. After receiving these, Mr. Tejada stated that he reported to DMV that his certification card was either missing or stolen, and that DMV issued a new certification card to him (Exhibit 11). Mr. Tejada argued further that anybody could easily re-create the bar code on an inspector's certification card based on the information presented on the sign posted in the facility. (Tr. at 91-92.) Mr. Tejada's arguments are discussed below.

A. Working at Multiple Inspection Facilities

Department staff has identified Mr. Tejada as a respondent in five matters related to motor vehicle inspection facilities. Each complaint identifies a period when violations allegedly occurred. The following chart identifies each facility and the period when the alleged violations took place.

Facility	Period of Alleged Violations
East Tremont Repair Corp.	June 10, 2008 - August 9, 2009
Sugar Hill Service Station, Inc.	October 14 - 27, 2008
Dyre Auto Repair Corp.	June 9, 2009 - October 29, 2009
San Miguel Auto Repair Corp.	February 14, 2009 - July 20, 2010
RV Auto Repairs, Inc.	No Information Available

Neither Mr. Tejada nor Department staff offered any information about the *RV Auto Repairs, Inc.* matter.

Given his assertion, Mr. Tejada has the burden to produce evidence of a conflict concerning when the dates of the alleged violations took place at Sugar Hill and the other facilities (see 6 NYCRR 622.11[b][2]). Although the periods of the alleged violations at the various facilities are stated in the complaints, Mr. Tejada offered no evidence to identify conflicts

about working, or being present, at more than one facility at any particular time.

Moreover, all violations associated with the captioned matter allegedly occurred in October 2008. This time precedes the periods alleged in the complaints concerning the *Dyre Auto Repair Corp.* matter (June 9, 2009 - October 29, 2009) and the *San Miguel Auto Repair Corp.* matter (February 14, 2009 - July 20, 2010). Therefore, no conflicts exist among these administrative enforcement matters.

Mr. Tejada's arguments presented during his closing statement are not evidence that can be relied upon as the basis for any findings of fact (see State Administrative Procedure Act [SAPA] § 302[3]). Absent any proof, I conclude that Mr. Tejada did not meet his burden of production. I conclude further that his unsupported assertion that he could not conduct motor vehicle inspections at five different motor vehicle facilities is, therefore, not credible.

#### B. Fake Certifications

As noted in the findings of fact, the sign posted at the facility, as required by the regulations (see 15 NYCRR 79.13[f]), must include the first and last names of the inspectors, their respective certification numbers, the expiration date of the certifications, the type or types of inspections that each inspector may perform, and the fees for the inspections. The information on the posted sign is generally the same as that printed on the inspector's certification card (see Exhibits 10 and 11). However, the bar code on the certification card, which the inspector scans into the work station for each OBD II inspection, does not appear on the posted sign (Tr. at 31-33).

Certification cards issued by NYS DMV subsequent to 2009 include two features not present on Mr. Tejada's certification card effective during the period in question. The first feature is a photo of the inspector on the front of the certification card. The second relates to the back of the certification card where two bar codes are located -- one along the top and one along the bottom. The bar code along the bottom of the certification card has a red background. For OBD II inspections subsequent to 2009, the inspector scans the bar code on the



bottom of the certification card. According to Mr. Levine, the red background on the bar code is a security measure to prevent the bar code from being photocopied. (Tr. at 22-27.)

The availability of the information on the sign required by 15 NYCRR 79.13(f) is the basis for Mr. Tejada's claim that the bar code on a certification card could be reproduced and used to perform an OBD II inspection. To support this claim, Mr. Tejada offered Exhibits 8 and 9 during his testimony.

Exhibit 8 identifies a URL (uniform resource locator) address to a website maintained by CyanoSoft. From this website, Mr. Tejada testified that he downloaded software to his computer, which he then used to create a 1D (*i.e.*, one dimensional) bar code that consisted of his inspector certification number (4KR8), the groups of inspections that he is qualified to perform (1, 2, 3, D), and the expiration date of his certification (08/31/2010). Mr. Tejada did not include his name. Exhibit 9 is a copy of the 1D bar code that Mr. Tejada created on his computer. According to Mr. Tejada, the software can verify whether the bar code he created with the software (Exhibit 9) is the same as the bar code on Mr. Tejada's certification card (Exhibit 10). Mr. Tejada said that the two bar codes are the same. (Tr. at 68-75.)

Based on the record of this proceeding, however, I find that Mr. Tejada did not demonstrate that someone recreated his certification card, or at least the bar code on it, and subsequently used it to perform motor vehicle emission inspections. Conspicuously absent from Mr. Tejada's presentation is an explanation of who may have used the fake certification card and, more importantly, how someone could access the NYVIP work station at Sugar Hill.

At the hearing, Messrs. Clyne and Levine explained that by passing the certification training, the inspector would obtain a temporary certification card. The newly-certified inspector would present the temporary certification card to the licensee who, in turn, would enter information about the inspector into the NYVIP work station at the facility. Subsequently, the inspector is required to take an on-line exam to complete the process of becoming a certified inspector. Thereafter, the bar code on the certification card must be scanned into the work station each time any OBD II inspection is performed. When vehicles pass the OBD II inspection, the inspector must scan the

bar code on the new inspection sticker to complete the inspection before placing the sticker on the windshield of the vehicle. (Tr. at 11, 18-21, 42-43, 48.)

This testimony demonstrates that access to any NYVIP work station would be limited to the inspectors employed by the facility. Accordingly, Mr. Tejada failed to explain how someone could walk into Sugar Hill from off the street with a fake certification card, and conduct any inspections without being confronted by Mr. Tejada, the other inspectors, the manager, or the owner of the facility. Also, I note, that Mr. Tejada did not accuse any of the other certified inspectors at Sugar Hill of using Mr. Tejada's certification card to perform the illegal OBD II inspections, which is expressly prohibited by the regulations (see 15 NYCRR 79.17[c][2]).

Finally, Mr. Tejada offered no proof to show that the work station at Sugar Hill had been lost or stolen, and was subsequently used to conduct OBD II inspections. Under such circumstances, a supply of inspection stickers would also be needed because the bar code on the inspection sticker must be scanned in order to complete the OBD II inspection (Tr. at 12, 48).

Other than the inspector's certification number, the expiration date of the certification license, and the authorized inspection groups, Department staff's witnesses do not know whether any additional data is encoded in the bar code on the certification card. In addition, the witnesses do not know the order of the data represented by the bar code. (Tr. at 28-29.)

At the time of the alleged violations, it may have been possible to recreate a bar code from a certification card in the manner described by Mr. Tejada during his testimony. The ability to recreate a bar code, in and of itself, however, is not sufficient to prove Mr. Tejada's contention. Therefore, in the absence of any supporting evidence that addresses the circumstances outlined above concerning access to the NYVIP work station, I do not find Mr. Tejada's contention credible.

### C. Simulator Usage

During his cross-examination of Mr. Clyne, Mr. Tejada attempted to demonstrate that an owner could purchase a

simulator, and install it in his/her motor vehicle before presenting it for inspection (Tr. at 65). However, Mr. Tejada did not offer any evidence to show how a duly trained inspector could unwittingly connect the NYVIP work station to the secretly installed simulator rather than to the vehicle's onboard diagnostic computer.

Mr. Clyne testified that the inspector is not directed to inspect and evaluate the diagnostic link connector (DLC) as part of the OBD II inspection. The DLC is part of the onboard diagnostic computer and connects to the NYVIP work station during an OBD II inspection. Mr. Clyne said that if the connection is not correct, the onboard diagnostic computer and the NYVIP work station would not communicate correctly, and the OBD II inspection would not be completed, which would result in an inspection failure. (Tr. at 63-66.) In the absence of any supporting evidence, I do not find Mr. Tejada's assertion credible.

V. Department staff's Proof

Department staff's case relies on the OBD II data (Exhibits 6 and 7), as well as the application documents maintained by NYS DMV (Exhibits 4 and 5), which connect the inspections to the facility and the inspector. Department staff used the facility number that the NYS DMV assigned to the inspection station, and the certificate number assigned to the inspector, to identify the parties responsible for the inspections documented in Exhibits 6 and 7, because those exhibits do not identify them by name.

Department staff demonstrated that, as charged, Mr. Tejada, used a simulator for five OBD II inspections at the Sugar Hill facility between October 14, 2008 and October 27, 2008. This was done through a combination of the documentary evidence, all of which Mr. Clyne retrieved from NYS DMV as certified copies, and the testimony of Mr. Clyne associating simulator use with the 15-field data electronic signature that appears in the inspection data (Exhibits 6 and 7).

Respondents did not impeach Mr. Clyne's testimony about the identification and significance of the electronic signature. In particular, Mr. Tejada did not offer any evidence to demonstrate his contentions.

There is no question that the inspections documented in Exhibits 6 and 7 are attributable to Sugar Hill because its NYS DMV-assigned facility number (*i.e.*, 7104636 [Exhibit 4]), which had been scanned into the NYVIP work station, appears in relation to each of the inspections. Also, there is no question that Mr. Tejada performed the inspections because his certificate number (4KR8 [Exhibit 5]) is associated with the illegal inspections.

VI. Liability for Violations

Department staff alleges that Respondents violated both 6 NYCRR 217-4.2 (first cause of action) and 217-1.4 (second cause of action). Each cause of action is addressed below.

A. 6 NYCRR 217-4.2

Section 217-4.2 states, in pertinent part, that

"[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)].

Pursuant to VTL § 303(a)(1), a license to operate an official inspection station shall be issued only upon written application to NYS DMV, after NYS 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 conclude that Respondents Sugar Hill Service Station, Inc., and Cristian A. Tejada violated 6 NYCRR 217-4.2 on five

separate occasions by using a simulator to perform OBD II emissions inspections. A simulator is an electronic device not associated with a motor vehicle's onboard diagnostic computer; its use has no place in the administration of an actual emissions test.

Consequently, the use of a simulator is not consistent with the emissions inspection procedures outlined at 6 NYCRR 217-1.3, which requires testing of the vehicle's OBD system to ensure that it functions as designed and completes diagnostic routines for necessary supported emission control systems. If an inspector connects the NYVIP work station to a simulator in lieu of the vehicle that has been presented, whether the vehicle would pass the OBD II inspection cannot be determined.

Sugar Hill is liable for all five violations because, at the time the inspections were conducted, 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).]

The inspector is also liable for the violations attributable to the non-compliant inspections that he performed. 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 NYS 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 vehicles that had been presented. Based on Exhibits 6 and 7, and Mr. Clyne's testimony (Tr. at 61-62), Mr. Tejada performed five non-compliant inspections at Sugar Hill.

B. 6 NYCRR 217-1.4

In the second cause of action, Respondents are charged with violating 6 NYCRR 217-1.4. According to this provision:

"[n]o official inspection station as defined by 15 NYCRR 79.1(g) may issue an emission certificate of inspection, as defined by 15 NYCRR 79.1(a), for a motor vehicle, unless that motor vehicle meets the requirements of section 217-1.3 of this Subpart."

Pursuant to 15 NYCRR 79.1(g), an official inspection station, however, is one which has been issued a license by the Commissioner of DMV "to conduct *safety* inspections of motor vehicles *exempt* from the emissions inspection requirement" [emphasis added].

In cases similar to the captioned matter, the Commissioner has determined that violations of 6 NYCRR 217-1.4 cannot be found. (See *Matter of East Tremont Repair Corp. (East Tremont)*, Order, July 23, 2012 at 4; *Matter of Geo Auto Repairs, Inc. (Geo)*, Order, March 14, 2012, at 3-4; *Matter of AMI Auto Sales Corp. (AMI)*, Decision and Order of the Commissioner, February 16, 2012, at 3; and *Matter of Gurabo Auto Sales Corp. (Gurabo)*, Decision and Order of the Commissioner, February 16, 2012, at 3.) In *East Tremont*, *Geo*, *AMI* and *Gurabo*, the Commissioner determined there was no evidence that the respondent facilities were official safety inspection stations as defined by 15 NYCRR 79.1(g). Like the facilities in *East Tremont*, *Geo*, *AMI* and *Gurabo*, Sugar Hill is an emission inspection station, rather than an official safety inspection station pursuant to 15 NYCRR 79.1(g). Consequently, the Commissioner should dismiss the charge alleged in the second cause of action that Respondents in the captioned matter violated 6 NYCRR 217-1.4.

VII. Civil Penalty

In the August 31, 2010 complaint, Department staff requested that the Commissioner assess a total civil penalty of \$2,500. Staff did not apportion the requested civil penalty between the two causes of action, or among Respondents. In cases like this, however, the Commissioner has determined that it would be inappropriate to impose joint and several liability (see *Geo, supra*, at 5, n 4; *AMI, supra*, at 9; and *Gurabo, supra*,

at 8). Here, Department staff did not offer any argument about whether joint and several liability should be imposed against any of respondents.

ECL 71-2103(1) authorizes civil penalties for violations of any provision of ECL Article 19 (Air Pollution Control Act) or any regulation promulgated pursuant thereto, such as 6 NYCRR 217-4.2. For the period alleged in the complaint (*i.e.*, October 14, 2008 to October 27, 2008), ECL 71-2103(1) provided for a civil penalty of not less than \$375 nor more than \$15,000 for the first violation, and an additional civil penalty not to exceed \$15,000 for each day that a violation continues. In the case of a second or any further violation, ECL 71-2103(1) provided for a civil penalty not to exceed \$22,500, and an additional civil penalty not to exceed \$22,500 for each day that a violation continues.

Department staff argued that each illegal inspection constitutes a separate violation of the Department's regulations, and I agree. Each simulated inspection was a discrete event occurring on a specific date and time and, by itself, constituted operation of the NYVIP work station in a manner that did not comply with the Department's procedures. Simulated inspections occurred with ones that were conducted properly. Based on the total civil penalty requested and the number of demonstrated violations, Department staff requested a civil penalty of \$500 per simulated inspection ( $\$2,500 \div 5$  violations = \$500 per violation).

If each simulated inspection is deemed to be a separate violation of 6 NYCRR 217-4.2, the potential maximum civil penalty, pursuant to ECL 71-2103(1), would exceed one hundred thousand dollars. However, according to the Commissioner's Civil Penalty Policy ([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 (§ IV.B); it merely sets the ceiling for any civil penalty that is ultimately assessed.

Pursuant to DEE-1, 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 Respondents' conduct. Each is discussed below.

A. Economic Benefit

DEE-1 states that every effort should be made to calculate and recover the economic benefit of non-compliance (§ IV.C.1). In this case, however, the economic benefit, if it does exist, is unknown.

B. Gravity Component

According to DEE-1, removal of the economic benefit of non-compliance merely evens the score between violators and those who comply. Therefore, to be a deterrent, the assessed civil penalty must include a gravity component, which reflects the seriousness of the violation. (§ 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 (§ IV.D.2).

As Mr. Clyne explained, OBD II testing is how the Department and NYS DMV implement NYVIP, an annual emissions inspection program required by the federal Clean Air Act amendments of 1990 and EPA regulations at 40 CFR Part 51 (Tr. at 35-36, 40-41). It is intended to assure that motor vehicles are properly maintained, which in turn would limit emissions of ozone precursors (*i.e.*, hydrocarbons and nitrogen oxide). Ground level ozone is a pollutant found during the unhealthy air condition known as smog, and can cause a variety of respiratory problems. (Tr. at 38-40.)

The actual damage caused by Respondents' violations cannot be determined. However, there is a clear potential for harm when the required OBD II testing is not actually performed because this removes an opportunity to identify vehicles with malfunctioning emission control systems, and fails to ensure that those systems are repaired.

C. Penalty Adjustment Factors

According to DEE-1, 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



remediating the violation, any prior history of non-compliance, and the violator's ability to pay a civil penalty. (§ IV.E.)

In this case, violator culpability (§ IV.E.1) is an aggravating factor warranting a significant upward penalty adjustment. Due to the training that inspectors receive, including the training on the NYVIP work station, Mr. Tejada would have known that using a simulator is not compliant with the procedures for a properly conducted OBD II inspection.

DEE-1 states that mitigation may be appropriate where the cooperation of the violator is manifested, for example, by self-reporting, when not otherwise required by law (§ IV.E.2). Here, however, no such mitigation is appropriate because the violations were determined by an investigation, not by disclosure by any of the Respondents.

Mr. Tejada argued that he cooperated by complying with the NYS DMV regulations (see 15 NYCRR 79.17[c][3]), that require certified inspectors to notify NYS DMV when they suspect that their certification card has been lost or stolen. After he received notification by mail from Department staff of alleged violations at five different inspection facilities, Mr. Tejada stated that he advised NYS DMV that his certification card was missing. Also, Mr. Tejada said that he requested a new certification card, which NYS DMV subsequently issued with a different certification number. (Tr. at 75, 91-92; Exhibit 11.) Mr. Tejada's statements, though credible, do not establish mitigation. Mr. Tejada said that he notified NYS DMV that his certification card was lost or stolen *after* the Department commenced administrative enforcement proceedings.

Department staff offered Exhibits 14, 15, 16, and 18 to show that Mr. Tejada had a prior history of non-compliance. Exhibit 14 is a copy of a press release concerning the July 2009 investigation jointly undertaken by the Attorney General's Office and the Departments of Motor Vehicles and Environmental Conservation concerning illegal vehicle inspections at the Mobile Diagnostics Auto Services facility. Mr. Tejada was one of the inspectors charged following the investigation.

Exhibits 15, 16 and 18 are sets of NYS DMV charge sheets/alleged violations notices, and findings sheets for motor vehicle inspection facilities (East Tremont Repair Corp. [Exhibit 15], Dyre Avenue Auto Repair, Inc. [Exhibit 16], and

Dayro Auto Repair Corp. [Exhibit 18]) and the inspectors at each of these facilities, including Mr. Tejada.

In each administrative enforcement matter, NYS DMV alleged that Mr. Tejada failed to follow OBD II test procedures on various separate occasions from June 2008 to June 2010 in violation of 15 NYCRR 79.24(b)(3), and other regulatory provisions. Subsequently, Mr. Tejada waived his right to an administrative hearing in the case of East Tremont and agreed to pay a civil penalty of \$1,000 (Exhibit 15). After administrative adjudicatory hearings concerning the Dyre Avenue Auto Repair, Inc. and the Dayro Auto Repair Corp. matters, the NYS DMV administrative law judge concluded that Mr. Tejada violated 15 NYCRR 79.24(b)(3) and other regulatory provisions as alleged in the charge sheet, and assessed a civil penalties (Tr. at 75-84; Exhibit 16 and 18).

The Commissioner has determined that the DEC and DMV enforcement activities are not duplicative, in part because, like here, different regulatory standards apply (see *GEO, supra*, at 4, n 3; *AMI, supra*, at 4-5; *Gurabo, supra*, at 4). Accordingly, the Commissioner may rely on these demonstrated DMV violations as an aggravating factor relevant to this matter to justify a substantial civil penalty against Mr. Tejada.

Finally, DEE-1 states that the Commissioner may consider the ability of a violator to pay a civil penalty to determine the method or structure for payment. (§ IV.E.4.) In this case, Respondents offered no evidence that they could not afford to pay a civil penalty. In the absence of financial information, no conclusions may be drawn about their ability to pay any civil penalty the Commissioner may assess.

#### D. Civil Penalty Recommendation

As noted above, the Commissioner has considered violations similar to those alleged in the captioned matter, and assessed civil penalties for the demonstrated violations (see *East Tremont, supra*, at 4-5; *Geo, supra*, at 4-5; *AMI, supra*, at 6-9; and *Gurabo, supra*, at 5-8). Consistent with these administrative precedents, I recommend the following civil penalty.

The civil penalty assessed against Sugar Hill should be equal to the aggregate penalty imposed on the individual respondent inspector. Sugar Hill is the domestic business corporation at which five motor vehicle inspections using noncompliant equipment and procedures were conducted. Consequently, the Commissioner should assess a total civil penalty of at least \$450.

In this matter, Mr. Tejada should be held individually responsible for the violations. He performed five illegal motor vehicle inspections using noncompliant equipment and procedures. For these violations, the Commissioner should assess Mr. Tejada a total civil penalty of at least \$450.

These recommended civil penalties are substantially less than those requested by Department staff in the August 31, 2010 complaint. In addition, these recommended civil penalties only slightly exceed the minimum civil penalty required for the first violation (*i.e.*, \$375) prescribed by ECL 71-2103(1) in effect at the time of the violations. Nevertheless, the recommendations are consistent with the administrative precedents identified above.

### **Conclusions**

1. By their attorney, Sugar Hill and Wael M. Rozeik, who is president, vice president, secretary and treasurer of Sugar Hill at the time of the alleged violations, jointly filed a verified answer dated December 15, 2010 (Exhibit 2). Therefore, Department staff served a copy of the August 31, 2010 notice of hearing and complaint upon Sugar Hill and Wael M. Rozeik in a manner consistent with 6 NYCRR 622.3(a)(3).
2. Department staff served a copy of the August 31, 2010 notice of hearing and complaint upon Cristian A. Tejada in a manner consistent with 6 NYCRR 622.3(a)(3).
3. Between October 14, 2008 and October 27, 2008, Sugar Hill allowed its inspector, Cristian A. Tejada, to use a simulator to perform OBD II inspections on five separate occasions.

4. The use of a simulator is a 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 the Department's procedures and/or standards.
5. Department staff failed to show that Mr. Rozeik, as Sugar Hill's corporate officer, is personally liable for the violations alleged in the August 31, 2010 complaint.

### **Recommendations**

1. For the reasons discussed above, the Commissioner should dismiss the charges alleged in the August 31, 2010 complaint against Wael Rozeik, who was a corporate officer of Sugar Hill.
2. For five violations of 6 NYCRR 217-4.2, the Commissioner should assess Sugar Hill a total civil penalty of at least \$450.
3. For five violations of 6 NYCRR 217-4.2, the Commissioner should assess Mr. Tejada a total civil penalty of at least \$450.
4. All civil penalties should be paid within 30 days of service of the Commissioner's order.
5. The Commissioner should dismiss, with prejudice, against all Respondents, the second cause of action, which alleges violations of 6 NYCRR 217-1.4.

## Exhibit List

Sugar Hill Service Station, Inc., et al.

DEC Case No: CO2-20100318-12

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| 1.  | Notice of Hearing and Complaint dated August 31, 2010.  | Received        |
| 2.  | Verified Answer dated December 15, 2010 on behalf of Sugar Hill Service Station, Inc and Wael M. Roziek.  | Received        |
| 3.  | Letter dated October 25, 2010 from Cristian A. Tejada.  | Received        |
| 4.  | DMV form VS-1 (6/06). Certified copy of original facility application filed by Sugar Hill Service Station Inc. (pages 1 of 4 through 4 of 4).   | Received        |
| 5.  | DMV form VS-120 (9/01). Certified copy of application for certification as a motor vehicle inspector filed by Cristian A. Tejada (pages 1 and 2 of 2, and page 1 of 3).                         | Received        |
| 6.  | Cover letter dated January 20, 2010 from Brad Hanscom, DMV Records Access Officer with attached print out of 22 pages.  | Received        |
| 7.  | Print out of 22 pages. Some data highlighted.   | Received        |
| 8.  | URL address from CyanoSoft.<br><a href="http://www.enet.com/windows/cyanosoft/3260-20_4-107867.html">http://www.enet.com/windows/cyanosoft/3260-20_4-107867.html</a><br>1D and 2D Barcode Maker | Received        |
| 9.  | 1D Barcode: Tejada, Cristian CT 4KR8.   | Received        |
| 10. | DMV form VS-26 (7/93). Mr. Tejada's Inspector Certification<br>Certification No. 4KR8.<br>Expiration date 08/31/2010  | Received        |
| 11. | Mr. Tejada's Inspector Certification<br>Certification No. 8UX2.<br>Date of Issue 07/19/2010.<br>Expiration date 08/31/2010.   | Received        |
| 12. | DMV form VS-14 (6/02). Official New York State Inspection Station;<br>Certified Motor Vehicle Inspectors.   | Not<br>Received |
| 13. | DMV form SWV-06.02 (Version 5 ).<br>NYVIP Vehicle Inspection System Operators Instruction Manual<br>(Figure 2-36 Certified Motor Vehicle Inspector List).                                       | Not<br>Received |

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| 14. | Press Release from the New York State Attorney General's Office dated New York, New York, October 29, 2009.   | Received |
| 15. | Certified copies of documents from DMV concerning the East Tremont Auto Repair Corp.: Waiver of Hearing (9/30/2008); Finding Sheet (5/22/2009); Charge Sheet(Case #2-IP8-16410); and Charge Sheet (#2-IN8-16412).   | Received |
| 16. | Certified copies of documents from DMV concerning the Dyre Auto Repair Corp.: Finding Sheet (08/04/2010); Charge Sheet(Case #2-IP0-09671); and Charge Sheet (#2-IN0-09803).   | Received |
| 17. | Cover letter dated October 28, 2010 from Blaise W. Constantakes to Cristian A. Tejada, and enclosed Notice to Admit (CPLR § 3123) concerning the information presented in Mr. Tejada's Application for Certification as a Motor Vehicle Inspector dated October 19, 2004 (see Exhibit 5). | Received |
| 18. | Certified copies of documents from DMV concerning the Dyro Auto Repair Corp.: Finding Sheet (11/19/2010); Charge Sheet(Case #2-IN0-12779).  | Received |

Official Notice (6 NYCRR 622.11[5]) taken of:

1. 15 NYCRR Part 79 (Motor Vehicle Inspection), and
2. New York State Implementation Plan: New York Metropolitan Area Enhanced Inspection/Maintenance Program. Proposed Revision, June 2009.