

**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-

**THE BEST ALIGNMENT AUTO REPAIR, INC.
and MOHAMED C. DIALLO,**

DEC Case No.
CO2-20100615-29

Respondents.

This administrative enforcement proceeding concerns allegations that respondents The Best Alignment Auto Repair, Inc. and Mohamed C. Diallo 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 1409 Webster Avenue, Bronx, New York, during the period from February 1, 2009 through January 25, 2010. Department staff alleges that, during this time, The Best Alignment Auto Repair, Inc. was a domestic business corporation duly authorized to do business in New York State, and respondent Diallo was "the Chairman and/or Chief Executive Officer" of The Best Alignment Auto Repair, Inc. as well as the owner and operator of an official emissions inspection station known as Best Alignment Auto Repair (see Hearing Exhibit ["Exh."] 1 [Complaint], ¶¶ 2, 3, & 4). Department staff further alleges that respondent Diallo performed mandatory annual motor vehicle emission inspections at that facility (see id., ¶ 5).

Specifically, Department staff alleges that a device was used to substitute for and simulate the motor vehicle of record

on 128 separate inspections. Department staff contends that, of these inspections, respondent Diallo performed or is responsible for all 128 inspections and that, as a result, 126 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 18, 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 requests a civil penalty of sixty-four thousand dollars (\$64,000).

Respondents The Best Alignment Auto Repair, Inc. and Diallo submitted an answer dated October 18, 2010, through their attorney, in which they admitted that respondent Diallo owned and operated an official emissions inspection station commonly known as Best Alignment Auto Repair and worked at the emissions inspection station as a certified motor vehicle emissions inspector (see Hearing Exh. 2 [Answer], at ¶¶ 4 & 5). Respondents also admitted that The Best Alignment Auto Repair, Inc. was a domestic business corporation duly authorized to do business in the State of New York and that respondent Diallo was also "the Chairman and/or Chief Executive Officer" of The Best Alignment Auto Repair, Inc. (see id., at ¶¶ 2 & 3). Staff did not allege, however, that The Best Alignment Auto Repair, Inc. was a licensee of the emissions inspection station or the nature of its relationship, if any, to that station. Respondents asserted no affirmative defenses in their answer.

The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger, and a hearing was held on December 15, 2011. The ALJ prepared the attached hearing report. Respondents The Best Alignment Auto Repair, Inc. and Diallo appeared at the hearing through their attorney, Vincent P. Nesci, and respondent Diallo testified (see Hearing Report, at 2; Hearing Transcript, at 4).

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, in part, with the ALJ's determination that Department staff is entitled to a finding of liability as to respondent Diallo with respect to the first cause of action. The preponderance of record evidence (see 6 NYCRR 622.11[b], [c]) supports the liability of respondent Diallo, that is, respondent Diallo operated an official emissions inspection station using equipment or procedures that were not in compliance with Department procedures or standards, in violation of 6 NYCRR 217-4.2.

With respect to the first cause of action, the ALJ also found respondent The Best Alignment Auto Repair, Inc. liable for all 128 violations "because, at the time [the violations] occurred, it held the license to 'operate' the official inspection station" (Hearing Report, at 11). Previous decisions are consistent in holding the holder of the license to operate an official inspection station liable for the noncompliant inspections conducted by the licensee's employees (see Matter of Jerome Muffler Corp. [Jerome Muffler], Order of the Commissioner, May 24, 2013, at 4-5; Matter of Geo Auto Repairs, Inc., Order of the Commissioner, March 14, 2012, at 3.)

The record before me, however, is insufficient to hold corporate respondent The Best Alignment Auto Repair, Inc. liable. Respondent The Best Alignment Auto Repair, Inc. was not the licensed operator of the facility, nor was it alleged to be.¹

Mohamed Cherif Diallo submitted an original facility application to the New York State Department of Motor Vehicles ("DMV") to license "Best Alignment Auto Repair" as a motor vehicle inspection station (see Hearing Report, at 4 [Finding of Fact No. 1]). The owner of the facility was listed as "Mohamed Cherif Diallo DBA/Best Alignment Auto Repair" (see Hearing Exh. 7). The original DMV facility application also indicates that the type of ownership was "individual" and "DBA," and did not reference any corporate entity (see Hearing Report, at 4-5 [Finding of Fact No. 1]; Hearing Exh. 7).

¹ As such, I do not reach the issue of corporate officer liability nor do I adopt the Hearing Report's discussion in this regard (see Hearing Report, at 10-11).

Therefore, based on this record, respondent The Best Alignment Auto Repair, Inc. was not the licensed operator of the facility. Department staff did not allege or offer proof that the regulations that were allegedly violated applied to this corporation. The preponderance of the record evidence demonstrates that respondent Diallo licensed and operated the facility as an individual with a business name of Best Alignment Auto Repair (see Hearing Exhs. 6, 7, 14, 15).² Accordingly, respondent Diallo, as the licensee, not corporate respondent The Best Alignment Auto Repair, Inc., is liable for all 128 noncompliant inspections as the holder of the license to operate an official inspection facility.

The ALJ noted that respondent Diallo was responsible for all of the noncompliant inspections, even the 27 noncompliant inspections performed when respondent was allegedly out of the country. The ALJ concluded that it is Mr. Diallo, as the principal of the facility and the inspector who was licensed by DMV to inspect vehicles, who is responsible for the inspections that took place in his business (see, e.g., Hearing Report, at 9). In addition to being the licensee, respondent Diallo was the only certified motor vehicle inspector at the facility, and was responsible for all inspections using his inspector's certification card and number. I agree with the ALJ that the record reflects that respondent Diallo is responsible for the 128 noncompliant inspections performed using his card.³

With respect to the second cause of action, the violations of 6 NYCRR 217-1.4 cannot be determined (see Hearing Report, at 22) for the reasons that have been stated in prior Commissioner decisions (see Matter of Geo Auto Repairs, Inc., at 3-4; Matter

² The DMV proceeding, which was convened against this facility for violations of the New York State Vehicle and Traffic Law and the DMV regulations involving the inspection of vehicles, named Mohamed C. Diallo and Mohamed Cherif Diallo d/b/a/ Best Alignment Auto Repair as respondents (see Hearing Exhs. 16 [DMV Finding Sheet dated July 19, 2010] and 17 [DMV Appeals Board decision dated March 28, 2011]). This reflects the information contained in DMV's records and which were entered as exhibits in this proceeding (see, e.g., Hearing Exh. 6). The exhibit of the DMV Appeals Board decision dated March 28, 2011 that appeared in the record was missing the second page; the complete decision, of which I take official notice, is now included as part of the record.

³ Respondent Diallo presented testimony (see Hearing Report, at 9) seeking to eliminate or mitigate his liability. I agree with the ALJ that his testimony and proffered evidence is unconvincing and does not relieve him of his responsibilities as the licensee and only certified motor vehicle inspector at his facility.

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 ["Gurabo"], at 3). Accordingly, the alleged violations of 6 NYCRR 217-1.4 are hereby dismissed.

Civil Penalty

Staff requested a penalty of sixty-four thousand dollars (\$64,000), 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. The ALJ noted that, consistent with the penalty range established by ECL 71-2103(1) for such violations, the maximum penalties would approach three million dollars, significantly more than what Department staff requested (Hearing Report, at 12). Prior decisions have noted the adverse impact of automotive emissions on air quality and how the use of simulators subverts the regulatory regime designed to address and control these emissions (see, e.g., Gurabo, at 6-7). Accordingly, substantial penalties are warranted where violations are found.

In her 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 12-13). The ALJ rejected staff's proposed penalties as too high and concluded that lower penalties were appropriate due to the small business involved and the dismissal of the second cause of action.⁴ The ALJ recommended a total civil penalty of forty-five thousand dollars (\$45,000) be assessed against respondents The Best Alignment Auto Repair, Inc. and Mohamed C. Diallo, jointly and severally. For the reasons discussed above, however, I am

⁴ In considering the appropriate penalty, that respondent Diallo doing business as Best Alignment Auto Repair may be a "small business" is not, in my judgment, a mitigating factor in determining the penalty for the 128 violations committed at the facility. I therefore decline to adopt that portion of the ALJ's analysis (see Hearing Report, at 14). I have rejected the "small business" argument as a mitigating factor in other similar proceedings (see, e.g., Matter of Sheridan Garage Corp., Order of the Commissioner, October 3, 2013, at 4 n 2). The use of simulators to commit noncompliant inspections is illegal and results in adverse environmental impacts. Accordingly, I see no basis to consider reducing a civil penalty based on a facility's size. Furthermore, respondent Diallo, doing business as Best Alignment Auto Repair, offered no evidence relating to his financial status and made no showing of any inability to pay.

not holding corporate respondent The Best Alignment Auto Repair, Inc. liable in this proceeding.

I have previously addressed the structure of penalties in administrative enforcement proceedings involving OBD II inspections of motor vehicles using noncompliant equipment and procedures (see, e.g., Jerome Muffler; Matter of Autoramo, Inc., Order of the Commissioner, August 13, 2013 [Autoramo]; Matter of New Power Muffler Inc., Order of the Commissioner, July 15, 2013 [New Power]). In similar proceedings, ALJ Edward Buhrmaster has recommended an aggregate penalty that has ranged upwards to one hundred eighty dollars per noncompliant inspection, which range I have adopted for purposes of my overall penalty calculation.

I have determined that the facility where the noncompliant inspections occurred should be subject to a substantially higher percentage allocation of the aggregate penalty (see Jerome Muffler, at 4-5; Autoramo, at 4-5; New Power, at 5). With respect to individual inspectors, I have allocated the remaining penalty amount based on the number of noncompliant inspections that each inspector conducted. The aggregate penalty amount and the allocation of that amount (a) between the facility and the individual inspectors, and (b) among the inspectors themselves, may be modified based on aggravating or mitigating circumstances as appropriate in each case (see, e.g., Jerome Muffler, at 4-5 [noting examples of mitigating or aggravating factors]).

In this matter, respondent Diallo is liable both as the licensed facility operator and owner ("Mohamed Cherif Diallo DBA Best Alignment Auto Repair") and as the sole certified motor vehicle inspector. He either performed all of the noncompliant inspections, or he purposefully or by neglect allowed others who were not certified motor vehicle inspectors to perform compliant and noncompliant inspections using his inspector's card (see, e.g., Hearing Report, at 11; Exhibits 11 and 12).⁵

In consideration of the penalty range established by ECL 71-2103(1), and the penalties assessed in prior decisions (see, e.g., Jerome Muffler, Autoramo, and New Power), and the aggravating factor that respondent Diallo is liable as both the licensed facility operator and owner and the sole inspector, I have determined that an aggregate civil penalty of thirty thousand dollars (\$30,000) is authorized and appropriate.

⁵ Diallo as the licensee is responsible for the facility's compliance with all laws. As the certified motor vehicle inspector, he has the additional responsibility of safeguarding his inspector's card and ensuring it is not used by others (see Hearing Report, at 5 [Finding of Fact No. 3]).

At the time the violations occurred, Diallo doing business as Best Alignment Auto Repair held the license to "operate" the official inspection station. Pursuant to 15 NYCRR 79.8(b), the official inspection station licensee "is responsible for all inspection activities conducted at the inspection station," and is not relieved of that responsibility by the inspectors' own duties (see Hearing Report, at 11). Evidenced by the appearance of Diallo's unique certificate number on inspection records of the DMV, Diallo performed, or allowed to be performed, all 128 improper inspections. (see Hearing Report, at 6 [Finding of Fact No. 15]). Accordingly, I am assessing the entire thirty thousand dollar (\$30,000) civil penalty against respondent Diallo. This penalty is substantial in light of the number of noncompliant inspections, and should serve as a deterrent against any future noncompliant activity of this kind.

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

- I. Respondent Mohamed C. Diallo is 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. One hundred twenty-eight (128) inspections using noncompliant equipment and procedures were performed at the facility, of which Mohamed C. Diallo performed all one hundred twenty-eight (128) inspections.
- II. Department staff's first cause of action alleging respondent The Best Alignment Auto Repair, Inc. violated 6 NYCRR 217-4.2 is dismissed.
- III. Department staff's second cause of action charging that respondents The Best Alignment Auto Repair, Inc. and Mohamed C. Diallo violated 6 NYCRR 217-1.4 is dismissed.
- IV. Respondent Mohamed C. Diallo is hereby assessed a civil penalty in the amount of thirty thousand dollars (\$30,000). The penalty 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 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 respondent Mohamed C. Diallo, and his agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: March 20, 2014
Albany, New York

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

In the Matter

- of -

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

THE BEST ALIGNMENT AUTO REPAIR, INC. and MOHAMED C. DIALLO,

Respondents.

NYSDEC CASE NO. CO2-20100615-29

HEARING REPORT

- by -

/s/

Helene G. Goldberger
Administrative Law Judge

March 14, 2012

Proceedings

Pursuant to a notice of hearing and complaint, dated August 18, 2010 (Hearing Exhibit [Ex.] 1), staff of the New York State Department of Environmental Conservation (DEC or Department) charged The Best Alignment Auto Repair, Inc. and Mohamed C. Diallo (the respondents) with violations of Part 217 of Title 6 of the Official Compilation of Codes, Rules and Regulations (6 NYCRR), which concerns inspections and maintenance of motor vehicle emissions systems.

The staff alleged in its first cause of action that the respondents violated 6 NYCRR § 217-4.2 by operating an official emissions inspection station using equipment and/or procedures that were not in compliance with Department procedures and/or standards, from February 1, 2009 to January 25, 2010, in relation to 128 mandatory annual motor vehicle emissions inspections. The Department staff alleged that the respondents used a device to substitute for and simulate the motor vehicles of record.

In the second cause of action in the complaint, staff charges the respondents with violating 6 NYCRR § 217-1.4 by issuing 126 emission certificates of inspection, as defined by 15 NYCRR 79.1(a), for motor vehicles, from February 1, 2009 to January 25, 2010, based on these same simulated motor vehicle emission inspections.

Staff alleged that all of the violations occurred at the respondents' official emissions inspection station known as The Best Alignment Auto Repair, Inc. (Best Alignment), located at 1409 Webster Avenue, Bronx, New York. Staff represents that during the period in question, respondent Best Alignment was a domestic business corporation duly authorized to do business in New York. Staff alleged that respondent Mohamed C. Diallo was the chairman and/or chief executive officer of Best Alignment as well as the owner/operator and certified motor vehicle inspector at the facility.

The respondents submitted an answer (Ex. 2) by their counsel dated October 18, 2010 in which they denied the staff's charges but admitted that Best Alignment was a domestic business corporation duly authorized to do business in the State of New York. The respondents also admitted in their answer that Mr. Diallo was the chairman/and or chief executive officer, owner/operator, and certified motor vehicle inspector (#2CZ7) of Best Alignment, an official emissions inspection station. The answer did not set forth any affirmative defenses.

By a statement of readiness dated December 30, 2010 (Ex. 3), DEC staff requested that the Department's Office of Hearings and Mediation Services (OHMS) schedule this matter for hearing. Chief Administrative Law Judge James T. McClymonds informed the parties via a letter dated February 4, 2011 (Ex. 4) that the matter was assigned to Administrative Law Judge (ALJ) Edward Buhmaster. Due to scheduling issues, the matter was reassigned to me on November 23, 2011. As a result of a conference call I held with the parties on November 28, 2011, I issued a hearing notice dated November 29, 2011 that set the hearing for December 15, 2011 at DEC's Region 2 offices in Long Island City, New York. Ex. 5.

At the adjudicatory hearing held on December 15, 2011 in the Department's Region 2 offices, Mr. Diallo asserted that he was in west Africa from September 21, 2009 to November 3, 2009 and supported this claim with copies of pages from his passport. Exs.14, p. 47, Hearing Transcript page (TR) 124.¹ Mr. Diallo claimed he left his shop in the hands of an individual who lived across the street from Best Alignment. TR 124-146; Ex. 14, pp.48-49.

In addition, Mr. Diallo explained that he had been issued 100 inspection stickers and he still had 41 left. TR 151. Mr. Diallo questioned how he could have performed so many improper inspections when less than 60 stickers were used. TR 151-158.

By electronic mail, on December 28, 2011, I asked DEC staff to submit copies of the administrative decisions in a New York State Department of Motor Vehicles (DMV) matter concerning the respondents Best Alignment and Mohamed C. Diallo with respect to the substitution of another vehicle or an electronic device for a vehicle subject to exhaust emissions testing. I received these on December 29, 2011 from respondents' counsel, Vincent P. Nesci, Esq. via e-mail and included them in the record as Exs.15 and 16.

At the conclusion of the hearing, the parties agreed that closing memoranda would be due on January 27, 2012. In addition, based upon Mr. Diallo's defense regarding the inspection stickers, I allowed the respondents until that same date to produce documentary evidence that would support that defense. TR 157-158. On January 24, 2012, Mr. Nesci inquired about an extension of time to provide additional records from DMV and to submit the briefs. I agreed to allow the documents to be submitted by February 3, 2012 and the briefs by no later than February 10, 2012. By e-mail dated February 7, 2012, Mr. Nesci requested additional time to review the documents related to this defense and I provided until February 22, 2012 for him to submit the additional information. I extended the time for closing memoranda to February 29, 2012. I did not receive any additional documentation from Mr. Nesci by February 22, 2012 and no additional documentation or any closing brief was submitted on behalf of the respondents.

On March 8, 2012, I asked the parties, via e-mail, whether they knew if the alleged simulated inspections charged by DEC coincide with any of the inspections that formed the basis for the charges in the DMV proceedings. In response, on March 13, 2012, Mr. Constantakes obtained the relevant charge sheet from DMV and provided it to me and I forwarded the same to Mr. Nesci. Ex. 17. In an e-mail dated March 13, 2012, Mr. Nesci voiced his concern regarding the charge sheets – stating that “[t]hey are not evidence of anything they are allegations that are not proven.” The charge sheets formed the basis for the DMV proceedings that resulted in findings against the respondents and which were affirmed on appeal. Accordingly, I added this documentation to the record as I found it relevant to the penalty calculation. I closed the record after the receipt of this document on March 13, 2012.

¹ The hearing transcript from the New York State Department of Motor Vehicles proceedings relating to clean scan violations at Best Alignment was introduced as Ex. 14. At the DMV hearing, Mr. Diallo stated he was in west Africa from August 10, 2009 to November 2009. Ex. 14, p. 47.

Staff's Charges

As noted above, the Department staff has alleged that the respondents, as the owners/operators of the facility and emissions inspectors: 1) violated 6 NYCRR § 217-4.2 by conducting 128 mandatory annual motor vehicle emissions inspections from February 1, 2009 to January 25, 2010 using a device to substitute for and simulate the motor vehicle of record; and 2) violated 6 NYCRR § 217-1.4 by issuing 126 emission certificates of inspections based on simulated motor vehicle emission inspections from February 1, 2009 to January 25, 2010.²

Respondents' Position

The respondents' defenses are that Mr. Diallo was out of the country for at least a portion of the time that these violations were alleged to have occurred and therefore, if they did occur, it was without the involvement, knowledge or permission of the respondents. Mr. Diallo also countered that it was impossible for the respondents to have performed these illegal inspections due to the number of inspection stickers that they retained.

In addition, Mr. Nesci alluded to the possibility of problems with the New York Vehicle Inspection Program (NYVIP) computer system based upon a proposal by DMV to amend the regulations to include a mandatory dealer scan. He asked that I take judicial notice of a NYS Register notice of proposed rulemaking dated May 11, 2011 (attached hereto), regarding a proposed amendment of Part 79 of Title 15. In this proposal, DMV sought to amend the regulations by placing a limit on the number of inspection stations in the New York Metropolitan Area so that DMV would be able to have adequate staff to inspect the stations. Second, DMV sought to amend the regulations to require automobile dealers to perform advisory scans on new cars so that DMV would have notice of any "anomalies" prior to the sale of these cars and prior to the application of the emissions testing requirement on them.³ DMV has since promulgated these proposed amendments.

Based upon this regulatory proposal, Mr. Nesci made the arguments that a) DMV and DEC were using the enforcement process to reduce the number of inspection stations; and b) the anomalies that DMV sought to reduce or eliminate through the rulemaking may incorrectly identify examples of clean scanning.

At the hearing, Mr. Nesci made some allusions as well to some "conspiracy" between DMV and DEC and to the Department's decision to "relitigate" these matters apparently referencing the DMV administrative proceedings. TR 24-25.

² In paragraph 11 of the complaint, there was a typographical error indicating a violation of 6 NYCRR 217-4.2 instead of 217-1.4. At the hearing, staff counsel confirmed it was an error. While the respondent's counsel objected to the correction, I overruled this objection as the preceding paragraph of the complaint cited the correct regulation which indicated that the reference to 6 NYCRR 217-4.2 was a typographical error.

³ The mandatory emissions inspection does not apply to the last two model years.

Adjudicatory Hearing

The Department staff was represented by Blaise Constantakes, Assistant Counsel. The staff presented two witnesses, Michael Devaux, a vehicle safety technical analyst employed in the Yonkers office of the 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 were represented by Vincent P. Nesci, Esq. of Mount Kisco, New York. The respondents appeared and Mr. Nesci offered the testimony of Mr. Diallo from the DMV proceeding, which was taken into the record as Exhibit 14.

In its complaint, the staff requested a penalty of \$64,000 from the respondents, jointly and severally. Ex. 1; TR 22.

In addition to the exhibits that I marked at the start of the hearing, which the parties agreed could be entered into evidence (Exs. 1-5), the staff offered Exs. 6-12. See, exhibit list annexed hereto. Upon staff's offering of Exs. 10-12, Mr. Nesci objected to their admission as to the truth of what these documents contained. TR 10-11, 13. I overruled his objection and took in these documents because they are records (certified copies) of DMV data. TR 11, 13. As to his objection, all evidence that is submitted is subject to examination by opposing counsel and the trier of fact who will weigh it to make a determination on the outcome. However, counsel did not contest that the data originated from DMV records and he failed to produce any evidence to contest the probative value of the records. See, 6 NYCRR § 622.11(a)(11).

In addition to the records that I took in at the hearing, I held the hearing record open until February 22, 2012 for the admission of documentary evidence related to Mr. Diallo's defense concerning the alleged discrepancy between the number of inspection stickers the respondent used and the number of alleged simulated inspections. However, I did not receive any additional documentation. Via e-mail, on December 29, 2011, I requested the parties produce the findings of ALJ Walter Zulkoski in the DMV matter and any administrative appellate decision. Mr. Nesci produced these on December 29, 2011 via e-mail and I have made them part of the record as Exs. 15 and 16. The closing memoranda were due on February 29, 2012 when Department staff served its brief. I received no closing memorandum from the respondents. I sent the parties my corrections to the transcript on January 12, 2012 and invited their corrections by January 27, 2012. On January 19, 2012, via electronic mail, Mr. Nesci sent a correction to which Mr. Constantakes responded. Staff sent their additional corrections on January 26, 2012. Upon receipt of the DMV charge sheet on March 13, 2012 that I requested, the record closed.

FINDINGS OF FACT

1. In 2006, Mohamed Cherif Diallo, as owner, submitted an original facility application to DMV to license Best Alignment Auto Repair as a motor vehicle inspection station. Exs. 6 and 7. The application was approved by DMV, which assigned Best Alignment a facility number of 7100992. *Id.* The DEC complaint identifies Best Alignment as a corporation and in the answer, the respondents admitted this allegation. Exs. 1, ¶ 2; 2, ¶ 2. The DMV facility application and

inspection station (ISP) applications indicate that Mr. Diallo operated Best Alignment Auto Repair as an individual and DBA. Ex. 6. The ISP application has Mr. Diallo's titles as President, Vice President, Secretary and Treasurer. Ex. 7.

2. In August 2001, Mr. Diallo applied for certification from DMV as a motor vehicle inspector and his application was approved. He was assigned a certificate number of 2CZ7. Ex. 8.

3. To become a certified motor vehicle inspector, an individual must take a three-hour course and pass a multiple choice examination with a score of 70% or more. TR 33. DMV issues each inspector a card that must be used to access the work station at the inspection facility. TR 34-36. DMV requires inspectors to safeguard their cards at all times and not allow any other individual to use them. TR 34; 15 NYCRR § 79.18(c)(2).

4. DMV and DEC jointly administer NYVIP, a statewide annual motor vehicle emissions inspection program for gasoline-powered vehicles, which is required by the federal Clean Air Act Amendments of 1990 and U.S. Environmental Protection Agency regulations found at 40 CFR Part 51. TR 75, 79.

5. NYVIP features on-board diagnostic (also known as OBD II) testing for model years 1996 and newer light-duty vehicles. TR 79. SGS Testcom is the entity that has the contract with New York State to operate the work station analyzer system. *Id.*

6. The software used for the I/M program was evaluated by Testcom, DEC and DMV and was tested in the field with the cooperation of some stations. TR 114. When the State requests changes in the software specifications, it makes sure that they are working properly before they are released into the public domain. TR 114-115. Moreover, to the extent that problems with the software have developed, they have not involved the OBD system. TR 116.

7. During an OBD II inspection, a motorist presents his/her vehicle for inspection. TR 36, 80. The car is brought into the shop and put on the lift. *Id.* The inspector checks for safety and low enhanced emission inspection items – emission control devices (ECDs). TR 36-37, 81. The inspector must access the work station analyzer by scanning the bar code from his card with its unique identifying information. TR 37, 80. The work station will then instruct the inspector to scan in the identifying information from the vehicle. TR 37, 80.

8. The OBD II emissions inspection begins with two visual checks of the malfunction indicator light (MIL), to see if it comes on when it should, and then to see if it goes off when the vehicle is running. TR 81. The purpose of the MIL is to alert the driver when there is an emissions system problem and a repair is needed. TR 81.

9. The inspector is then instructed by the NYVIP computer to plug the work station into the diagnostic link connector (DLC) in the vehicle itself. TR 38, 82. This allows the inspection machine to read the data contained in the electronic control module (ECM), a computer that is inside the vehicle. TR 39-40. The work station will ask the inspector to provide the results of the MIL visual inspection. TR 41, 81.

10. Once the connection is established and the results of the two visual checks of the MIL provided, the system proceeds to extract information from the vehicle's electronic control module (ECM) without any intervention by the inspector. TR 40-41, 81-82. The system will identify the vehicle being inspected and determine if that vehicle meets the inspection standards. TR 41, 82.

11. After the inspection is completed, the information obtained by the system will be stored in the NYVIP work station and also transmitted to DMV via SGS Testcom within 5 to 10 seconds. TR 42-43, 82-83. Both DMV and SGS Testcom maintain the data that is captured during the inspections. TR 42, 51, 83.

12. In 2008, DMV notified DEC about irregularities it found at various emissions testing stations in the New York metropolitan area. TR 88-90. A one-year investigation by the New York State Attorney General's office, DEC, and DMV ensued in which extensive data analysis was done by the agencies. TR 90. Based upon the data reviewed, DMV concluded that a simulator was being used in these tests to substitute for the car that was to be tested. TR 91-92. Ultimately, the agencies found an electronic signature – 15 data fields that constituted a profile of a simulated inspection . TR 91-93.

13. The agencies identified 44 inspection stations out of over 10,000 inspection facilities statewide, that were involved in this illegal activity. TR 91, 93. The agencies found that between 2004 and 2008, out of 18.5 million inspections performed in New York State, none had this signature. TR 92-93. But between March 2008 and July 2010, in 44 downstate stations, the simulated electronic signature was found. TR 93. After July 2010, when the stations were notified of the suspected illegal activity by notices of violation, the agencies no longer found evidence of this electronic signature. TR 93, 95.

14. In the official DMV records of inspections that took place at Best Alignment from February 1, 2009 until January 25, 2010, there is evidence of 128 simulated inspections based upon the 15-data field electronic signature. Exs. 9-12; TR 102. Prior to March 2008, this profile had never appeared on any DMV inspection in New York State. TR 101.

15. The data provides both the unique facility number of the inspection station and the identifying number of the inspector. TR 94. From this information, it is shown that Mohamed C. Diallo or an individual using his inspection card, performed the 128 fraudulent inspections. TR 104.

16. Mr. Diallo left the United States on or about September 20, 2009 and returned to the U.S. on or about November 3, 2009. Ex. 13; TR 124. During this period, emission inspections continued at Best Alignment and included 27 fraudulent inspections. Ex. 12.

17. DMV issued a decision on July 19, 2010 in which ALJ Water Zulkoski found respondent Mohamed Cherif Diallo to have violated NYS Vehicle and Traffic Law Section 303(e)3 by substituting vehicles or using an electronic device for the exhaust emissions testing on twenty-seven separate occasions between September 11, 2009 and April 2010. Ex 14, p. 13;

Ex. 15. DMV fined the respondent \$350 per violation resulting in: Mohamed Cherif Diallo d/b/a Best Alignment Auto Repair being fined \$9,450.00 and having his inspection station license revoked. These findings were upheld on administrative appeal in a decision dated March 28, 2011. Ex. 16. These findings are based in part on twenty inspections that occurred between September 11, 2009 and January 25, 2010, and that are among the 128 simulated inspections identified by DEC staff. Ex. 17.

DISCUSSION

Background – I/M Program

In this enforcement proceeding, DEC staff charges that Best Alignment and Mr. Diallo did not check the OBD II systems as part of their inspections of 128 vehicles between February 1, 2009 and January 25, 2010. Ex. 1. Staff claims that instead, the respondents used a simulator to substitute for the vehicles, which resulted in a passing inspection for all of these cars. *Id.*

As explained above and also in greater detail in the Hearing Report of ALJ Edward Buhrmaster dated September 1, 2011, *In the Matter of Gurabo Auto Sales Corp.* (Commissioner's Order and Decision, February 16, 2010), the 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. *See also*, Department Staff's Memorandum (Staff Mem.), pp. 3-4. The 1990 Clean Air Act Amendments required an inspection and maintenance (I/M) program in areas of the country, like New York, that have failed to meet the national ambient air quality standards (NAAQS) and are thus identified as non-attainment areas.⁴ *Id.* While automobile manufacturers are required to produce cleaner-emitting cars under both federal and California laws (the latter more stringent standards having been adopted by New York State pursuant to Clean Air Act § 177), these cars will not remain clean without an inspection program that ensures that the relevant equipment is maintained and repaired as necessary over the life of the vehicle. Thus, any strategy by inspection stations that results in the issuance of inspection stickers based upon fraudulent inspections will undermine efforts to reduce air pollution in the State.

Liability

Pursuant to 6 NYCRR § 622.11(b), the Department staff bears the burden of proof on the charges it asserts in the complaint. Pursuant to 6 NYCRR § 622.11(c), the staff also has to sustain that burden by a preponderance of the evidence.

⁴ NAAQS place a cap on the allowable concentrations of the particular pollutant in question – these are primary and secondary caps – protecting health and the environment/property, respectively. 42 U.S.C. § 7409(a)(2). The six criteria pollutants that are covered by NAAQS are particulates, sulfur dioxide, nitrogen dioxide, carbon monoxide, ozone and lead. In areas that do not meet the NAAQS and are thus in non-attainment, the state submits a state implementation plan (SIP) to EPA that spells out the actions the state will take to achieve attainment. 42 USC §§ 7413, 7604. The I/M program is part of the New York SIP that is directed at ozone non-attainment. 42 USC §§ 7511a, 7512a. For more information on the State's Inspection/Maintenance program go to: <http://www.dec.ny.gov/chemical/48153.html>.

The Department’s witness, James Clyne, credibly testified as to the investigation that gave rise to establishing an “electronic signature” that demonstrated that simulated inspections were occurring at certain inspection stations in the State. TR 88-93. He was able to show how the specific 15-field electronic signature appearing in the Best Alignment inspection data (as highlighted by Mr. Clyne in Exs. 11 and 12) represents the data that would be obtained from a simulator rather than a vehicle. TR 93-105.

Specifically, Exs. 11 and 12 have a series of headings across each page that identify the data obtained for each column. The first heading is DMV VIN NUM – the vehicle identification number which is obtained from the DMV registration bar code or by manual entry by the inspector. The next column is INSP DTE which is the date of the inspection. As an example of the simulated signature, on page 6 of Ex. 11, Mr. Clyne concluded that the inspection of the 2003 Chevy Tahoe on April 29, 2009 at 10:36 a.m. was not a valid inspection but rather the product of a simulator because the data for that vehicle entry mimics the results that appear in the 15 data fields identified as that of a simulator. TR 103. Notably, on the prior day, at 12:34 p.m., this vehicle failed its inspection and a different profile is shown in the data. TR 102-103.

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

| | | |
|-----|-----------------|---------------------------------------|
| PCM | ID1 | “10” |
| PCM | ID2 | “0” |
| PID | CNT 1 | “11” |
| PIC | CNT 2 | “0” (should read as PID CNT 2) TR 97. |
| 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” |

As can be seen from all the highlighted data that appears on Exs.11 and 12 (Exs.11 and 12 are the same as 9 and 10 except that the 15-field simulator profile inspections are highlighted in orange), this data is exactly the same for each of these inspections.⁵ Mr. Clyne testified that with legitimate inspections, these results would vary. TR 99.

These data sheets identify Best Alignment as the inspection station because they contain its DMV facility number – 7100992 - on each inspection. This number corresponds to that in the

⁵ Not only are these numbers identical for the highlighted inspections in Exs. 11 and 12 at the respondents’ facility, they are also identical to the numbers that were reported in *Matter of Gurabo, et al* (ALJ Hearing Report, 9/1/11) and *Matter of AMI Auto Sales Corp., et al* (ALJ Hearing Report, 9/1/11).

inspection station's approved facility application. Ex. 6. Similarly, each inspection on the data sheets provides an inspector number that corresponds with Mr. Diallo's certificate number (2CZ7). Ex. 8.

Mr. Diallo testified that he was out of the country from September 20, 2009 until November 3, 2009. TR 124; Ex. 13. He also testified that on occasions he hired people from the neighborhood of his business to assist in the shop. TR 124-126. Among these employees, he identified an individual named "Orlando" as the person who was in charge of the shop while Mr. Diallo was in Africa. TR 125-126. Mr. Diallo claimed that upon his return he found that the lock was broken [to his desk] but Orlando told him he didn't know who broke it. TR 130. The respondent testified that his certified inspector's card was in the drawer. TR 130. Mr. Diallo said that after he received notice from DMV alleging improper practices with respect to the inspections, he attempted to locate Orlando by traveling to Pennsylvania and New Jersey, but Mr. Diallo was unable to find him. TR 130-134.

Whether Orlando was authorized by the respondent to continue inspections while Mr. Diallo was out of the country or whether he truly existed cannot be verified from the evidence presented. In any case, it is Mr. Diallo, as the principal of the shop and the inspector who was licensed by DMV to inspect vehicles, who is responsible for the inspections that took place in his business. 15 NYCRR § 79.8. It is clear from the data presented by DEC that the illegal inspections took place seven months prior to Mr. Diallo's trip and in January 2010 after his return. Exs. 11, 12. And, every illegal inspection identifies Mr. Diallo's certified motor vehicle inspector's certificate number. *Id.*

Mr. Diallo challenged the DMV data presented by DEC, claiming that he had obtained 100 inspection stickers from DMV after he came back from Africa and still had 40 left. TR 137-138. Therefore, he didn't understand how he could have performed the 128 inspections. But these statements do not help Mr. Diallo's case because the vast majority of the simulated inspections took place before November 2009. Exs. 11, 12. In fact, only nine of the simulated inspections took place after Mr. Diallo's return from Ghana. Ex. 12. Assuming that the number of stickers Mr. Diallo had in his possession at any point should correspond to the staff's allegations, the respondent did not provide any evidence to demonstrate the number he had prior to his trip abroad when most of the violations occurred. Ex. 11, 12. As noted above, the respondents were given an opportunity to provide additional support for this claim but nothing was produced.

On behalf of the respondents, Mr. Nesci raised questions about the State's motives in these enforcement cases. TR 57-64. Pointing to a DMV proposed rulemaking (see attached),⁶ Mr. Nesci claimed that the State was trying to reduce the number of motor vehicle inspection stations and one way of doing this was by closing facilities through these proceedings. TR 63-64. While the rulemaking does speak to placing a cap on the number of motor vehicle inspection stations in order to ensure there are enough State personnel to inspect them, the closing of approximately 44 noncompliant stations out of a total of almost 11,000 would hardly make a difference. From the Department staff's proof of the illegal inspections, there is no need to

⁶ This proposed rule became effective on July 13, 2011.

conjure an outside motive, as the simulated inspections provide sufficient grounds for finding liability and assessing penalties under the applicable environmental law and regulations.

The other argument Mr. Nesci made based on the DMV rulemaking was the proposal (now regulation) to require motor vehicle dealers to scan the OBD systems of their new cars so any “anomalies” could be found prior to sale and years before these vehicles would be subject to inspection. TR 57-61. However, Mr. Nesci did not provide any evidence to support a link between the potential for communication problems with the NYVIP system on new cars and the 128 inspections that were found to have a simulator signature. In fact, Mr. Clyne testified that before any software is used in the field, Testcom is required to test it to ensure that it meets the State’s specifications. TR 113. The software used for the I/M program was evaluated by Testcom, DEC and DMV and tested in the field with the cooperation of some stations. TR 114. When the State makes changes in the software specifications, it makes sure that the software is working properly before it is released into the public domain. TR 114-115. Moreover, to the extent that problems with the software have developed, they have not involved the OBD system. TR 116.

Mr. Nesci also alluded to “relitigation” of the charges based presumably upon the DMV’s administrative process. While he did not specify that he was making double jeopardy or *res judicata* arguments, assuming that he was, they are unavailing. I agree with the Department staff’s arguments in its closing memorandum that double jeopardy is not applicable as neither the DMV nor the DEC proceedings are criminal. In addition, *res judicata* is inapplicable as DEC was not a party to the DMV proceedings and different regulations were involved. Staff Mem., pp. 8-9. *See also, Matter of AMI Auto Sales, et al.*, Decision and Order of the Commissioner, February 17, 2012, p. 4.

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 for the reasons set forth in ALJ Buhrmaster’s report in *Gurabo* and the Commissioner’s Decision in that matter (February 16, 2012), I do not find violations of § 217-1.4. I also find that all the violations of § 217-4.2 are attributable to Mr. Diallo and Best Alignment. Mr. Diallo is the owner/operator and also the certified inspector, he is responsible for the violations – both those he was directly involved in as the inspector and those that other individuals may have performed in his shop under his direction. Section 79.8(b) of 15 NYCRR provides 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. 15 NYCRR § 79.17(b)(1).

In contrast to the facts in *Sheridan* (ALJ Hearing Report, February 17, 2012, p. 8) and *Gurabo* (ALJ Hearing Report, September 1, 2011, p. 18), Mr. Diallo also performed the inspections. To the extent that another individual conducted simulated inspections using Mr. Diallo’s inspector’s card, he was responsible for that person’s actions pursuant to 15 NYCRR §§ 79.17(c)(1), (2). And, as noted by staff in its closing brief (p. 13), Mr. Diallo is also liable under the corporate officer doctrine as he was involved in the day to day operation of the facility and was responsible for the inspections at Best Alignment. *See, United States v. Park*, 421 U.S.

658, 673-74 (1975); *Matter of 125 Broadway, LLC and Michael O'Brien*, Decision and Order of the Commissioner, December 15, 2006.

Violation of 6 NYCRR § 217-4.2

Section 217-4.2 of 6 NYCRR provides, “[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.” “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) sets forth that a license to operate an official inspection station shall be issued only upon written application to DMV, after DMV determines that the station is properly equipped and has competent personnel to perform inspections, and that such inspections will be properly conducted. Section 217-1.3 of 6 NYCRR along with 15 NYCRR § 79.24(b)(1)(ii), as well as the instructions found in the NYVIP vehicle inspections systems operators manual, establish the appropriate procedures and standards that the respondents were to follow to conduct accurate emissions inspections but failed to.

I find that § 217-4.2 was violated 128 separate occasions by the use of a simulator to perform OBD II emissions inspections. The use of a simulator is not consistent with the emissions inspection procedures set forth at 6 NYCRR § 217-1.3, which requires testing of the vehicle’s OBD system to ensure that it functions as designed and completes the diagnostics for necessary supported emission control systems. As Mr. Clyne explained in his testimony, if the inspector plugs the NYVIP work station into a simulator, rather than the automobile to be inspected, there can be no determination as to whether the vehicle would pass the OBD II inspection.

Best Alignment is liable for all 128 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 the responsibility by any inspector’s duties, which include performing inspections in a thorough manner. 15 NYCRR §§ 79.17(b)(1) and (c).

Mr. Diallo is also liable for all of the non-compliant inspections – both those he performed and those others did pursuant to his direction - as it was through those simulated inspections that he operated Best Alignment, a licensed emissions inspection station, improperly and in violation of 6 NYCRR § 217-4.2. As stated above, because he was involved in the day to day operations of the facility and was clearly in charge of what occurred in the shop, he holds responsibility in his corporate officer capacity.

Violation of 6 NYCRR § 217-1.4

In the Department staff’s second cause of action, it charged violations of 6 NYCRR § 217-1.4. This regulation provides: “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.”

As found by Judge Buhrmaster and the Commissioner in the *Gurabo* matter, violations of 6 NYCRR § 217-1.4 cannot be found because there is no evidence that Best Alignment 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). Since the entire focus of the staff’s case was the allegations concerning simulated emissions inspections, the established facts do not support a violation of this regulation.

As also noted by ALJ Buhrmaster in *Gurabo*, there is a newly promulgated Subpart 217-6 governing motor vehicle enhanced inspection and maintenance program requirements for the period beginning January 1, 2011. Section 217-6.4 of 6 NYCRR provides: “No official emissions inspection station or certified inspector may issue an emission certificate of inspection, as defined by 15 NYCRR section 79.1, for a motor vehicle unless the motor vehicle has been inspected pursuant to, and meets the requirements of section 217-6.3 of this Subpart.” Section 217-6.3 provides the inspection procedure that an inspection station must use to determine whether the OBD II system performs or fails consistent with the relevant motor vehicle exhaust and emissions standards. These new regulations contain the provisions relevant to the allegations set forth in the second cause of action. However, these regulations do not apply to violations that occurred prior to their promulgation and effective date. Accordingly, the second cause of action must be dismissed.

Penalties

As noted by staff in its complaint, ECL § 71-2103 provides that any person who violates a provision of Article 19 of the ECL, or any code, rule or regulation which was promulgated pursuant thereto, shall be liable for a penalty, in the case of a first violation, of at least Three Hundred Seventy-Five Dollars (\$375.00), but no more than Fifteen Thousand Dollars (\$15,000), and, in the case of a second and any further violation, a penalty of not more than Twenty-Two Thousand Five-Hundred Dollars (\$22,500.00) per violation. The staff requested a penalty of \$64,000 from the respondents – amounting to \$500 per simulated inspection. While this amount is less than the maximum that could be derived based upon the 128 separate violations, I find for the reasons set forth below that a penalty of \$45,000 is appropriate.

The 1990 Civil Penalty Policy requires that all monetary penalty calculations begin with the statutory maximum. The maximum penalty in this matter would come to close to \$3 million, clearly unreasonable given the small business involved. However, the maximum penalty is only the starting point; a number of considerations, including the economic benefit of noncompliance, the gravity of the violations, and the culpability of the respondent’s conduct are to be taken into account in determining the appropriate penalty.

With respect to economic benefit, there was no evidence presented of the financial advantage that the respondents gained by violating the law in this matter. Thus, economic benefit is not a consideration.⁷

With respect to gravity, the violations are extremely serious as they undermine the State's air pollution program by passing vehicles which may have had faulty emissions systems. To the extent these vehicles did not have their emissions systems repaired as required, they would add pollutants to the air that will increase ozone, a component of smog. Thus, a substantial penalty is warranted given the potential impact on the environment.

The Civil Penalty Policy also provides for factors that could adjust the gravity component: (a) culpability; (b) violator cooperation; (c) history of non-compliance; (d) ability to pay, and (e) unique factors. The respondents' culpability in this matter merits an upward penalty adjustment. Prior to receiving his inspection certification, Mr. Diallo received training from DMV that demonstrated the correct use of the NYVIP system. With respect to violator cooperation, the respondents were discovered to be violating the law by an investigation by DEC and DMV and therefore, there is no evidence of cooperation. Moreover, the respondents elected to proceed to an adjudicatory hearing rather than resolve the matter outside of litigation. As for ability to pay, no evidence was presented by the respondents of their financial status.

The Civil Penalty Policy does provide for the consideration of "unique factors" in calculation of the penalty. Mr. Diallo testified that at least for a portion of the time he is alleged to have been performing simulated inspections, he was out of the country. He supported this testimony with pages from his passport. Ex. 13. It is apparent that the simulator was used before, during, and after his journey and in addition, it is clear that he permitted and directed any other individual performing inspections to use the simulator. Therefore, I do not recommend a diminishment of the penalty for the period that Mr. Diallo was absent.

DMV has fined Mohamed Diallo d/b/a Best Alignment Auto Repair \$9,450 for performing simulated inspections on 27 separate occasions and revoked his inspection station license. Exs. 15, 16. Twenty of these improper inspections are among the simulated inspections that comprise the violations in this proceeding. Ex. 17. Based upon DMV's actions, the respondents can no longer perform inspections and it is likely that Best Alignment will lose business due to this circumstance. These actions, as noted by Judge Buhrmaster in *Gurabo*, will serve to discourage others from similar conduct.

Penalty Recommendation

For the 128 separate violations of 6 NYCRR § 217-4.2, Best Alignment and Mohammed Diallo should be assessed a penalty of \$45,000. As explained above, the violations are extremely serious as they undermine a key aspect of New York's efforts to reduce ozone pollution which causes health and property damage. The respondents had to be aware that they were performing noncompliant inspections given the training Mr. Diallo received, the failure to connect the

⁷ In its closing brief, staff asserts that the respondents could perform more inspections using the simulator because they were easier and faster thus potentially increasing income. Staff Mem., p. 12. However, because no proof of these claims was put forward at the hearing, I do not rely upon them.

NYVIP system to the automobiles that were to be inspected, and the affirmative activity of using a simulator during the inspections. Given that Best Alignment is a small business and the dismissal of the second cause of action, I am recommending a substantially lower penalty than what was proposed by staff. I believe that despite the lower penalty, the recommended penalty is a substantial one for a small company and will send a message to the inspection station community that simulated inspections will not be tolerated.

CONCLUSIONS

1. Between February 1, 2009 and January 25, 2010, the respondent, Mohamed Cherif Diallo and Best Alignment Auto Repair, used a simulator to perform OBD II emission inspections on 128 separate occasions.
2. Between September 20, 2009 and November 3, 2009, the respondent, Mohamed Cherif Diallo, was out of the country and left Best Alignment in the care of an employee. During this time, the respondent remained responsible for the fraudulent use of a simulator by a third party.
3. This use of a simulator was in violation of 6 NYCRR § 217-4.2, which prohibits the operation of an official emissions inspection station using equipment and/or procedures that are not in compliance with DEC procedures and/or standards.

RECOMMENDATIONS

1. For the first cause of action, which alleges violation of 6 NYCRR § 217-4.2, respondents Best Alignment and Mohamed Cherif Diallo, jointly and severally, should be assessed a civil penalty of \$45,000. The penalty should be paid within 30 days of service of the Commissioner's order.
2. The second cause of action, which alleges violations of 6 NYCRR § 217-1.4, should be dismissed.

EXHIBIT CHART

Matter of Best Alignment Auto Repair, Inc. and Mohamed C. Diallo
December 15, 2011

| Exhibit No. | Description | ID'd? | Rec'd? | Offered By |
|-------------|--|-------|--------|------------|
| 1 | August 18, 2010 Notice of Hearing and Complaint | √ | √ | N/A |
| 2 | October 18, 2010 Answer | √ | √ | N/A |
| 3 | December 30, 2010 Statement of Readiness | √ | √ | N/A |
| 4 | February 4, 2011 assignment letter | √ | √ | N/A |
| 5 | November 29, 2011 Notice of Enforcement Hearing | √ | √ | N/A |
| 6 | Original Facility Application – NYSDMV for Best Alignment Auto Repair | √ | √ | BC |
| 7 | Original Facility Application NYSDMV - ISP | √ | √ | BC |
| 8 | Application for Certification as a Motor Vehicle Inspector – Mohamed Cherif Diallo | √ | √ | BC |
| 9 | NYS DMV certified records – January 20, 2010 | √ | √ | BC |
| 10 | NYS DMV certified records – September 1, 2010 | √ | √ | BC |
| 11 | Highlighted data sheets | √ | √ | BC |
| 12 | Highlighted data sheets | √ | √ | BC |
| 13 | Copies of Mohamed Cherif Diallo's passport pages | √ | √ | VN |
| 14 | Transcript from DMV Matter dated 7/29/10 | √ | √ | VN |
| 15 | DMV ALJ Zulkoski Finding Sheet dated 7/19/10 | √ | √ | VN |
| 16 | DMV Administrative Appeals Board Decision of Appeal 2/22/11 | √ | √ | VN |
| 17 | DMV Charge Sheet - Best Alignment 9/11/09 - 1/25/10 | √ | √ | BC |