

**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

DEC Case No.
C02-20100615-11

-by-

**La Duena Auto Repair Corp.,
Jose M. Villanueva, and Nancy Taveras,**

Respondents.

This administrative enforcement proceeding concerns allegations that respondents La Duena Auto Repair Corp.¹ ("La Duena"), Jose M. Villanueva, and Nancy Taveras completed 395 motor vehicle inspections using noncompliant equipment and procedures, and issued 394 certificates of inspection for these inspections without testing the vehicles' onboard diagnostic ("OBD") systems. OBD systems are designed to monitor the performance of major engine components, including those responsible for controlling emissions.

The alleged violations arose out of respondents' operation of an official emissions inspection station located at 1900 Jerome Avenue in the Bronx, New York, between May 9, 2009 and September 28, 2009. During this period, staff of the New York State Department of Environmental Conservation ("DEC" or "Department") alleges that La Duena was a domestic business corporation duly authorized to do business in New York State, Nancy Taveras owned and operated the inspection station, and Jose M. Villanueva worked at La Duena and performed mandatory annual motor vehicle emission inspections.

In accordance with 6 NYCRR 622.3(a)(3), DEC staff commenced this proceeding against respondents by service of a notice of

¹ According to information on file with the New York State Secretary of State, the actual name of the corporation is "La Duena Auto Repair Corp." not "La Duena Auto Repair Inc.," which is in the caption of the underlying papers. I have corrected the caption in this order to read "La Duena Auto Repair Corp."

hearing and complaint dated August 31, 2010. In its complaint, DEC staff alleged that respondents violated:

- (1) 6 NYCRR 217-4.2, which states that no person shall operate an official emissions inspection station using equipment and procedures that are not in compliance with DEC procedures and standards; and
- (2) 6 NYCRR 217-1.4, by issuing emission certificates of inspection to motor vehicles that had not undergone an official emission inspection.

For these violations, DEC staff requested a civil penalty of one hundred ninety seven thousand five hundred dollars (\$197,500), and that all respondents be held jointly and severally liable.

Respondents did not appear at a pre-hearing conference held on October 20, 2010, and did not submit an answer.

The matter was referred to the Department's Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster. A hearing was held on November 29, 2011. None of the respondents, nor counsel on their behalf, appeared at the hearing. Although respondents defaulted in appearing, Department staff did not move for a default judgment. Instead, staff presented its case on the merits (see Hearing Transcript, at 6).

Based on the hearing record, the ALJ prepared the attached hearing report dated May 8, 2012. I adopt the hearing report as my decision in this matter subject to my comments below.

Liability

ALJ Buhrmaster found that respondent La Duena used a simulator to perform OBD II inspections on 395 separate occasions, that respondent Villanueva performed all 395 of these simulated inspections, and that La Duena's and Villanueva's use of a simulator violated 6 NYCRR 217-4.2. La Duena is liable because, at the time the violations occurred, it held the license to operate the official inspection station. Furthermore, Villanueva is liable for the violations attributable to his non-compliant inspections.

However, the first cause of action must be dismissed as against respondent Nancy Taveras. No proof exists in this record that Ms. Taveras was served with the notice of hearing

and complaint.² Even if such service had been made, staff's proof was insufficient to establish Ms. Taveras's personal liability for the non-compliant inspections performed (see Hearing Report, at 12-13).

With respect to the second cause of action, I concur with the ALJ's determination that violations of 6 NYCRR 217-1.4 cannot be found because DEC offered no evidence that La Duena was an official inspection station as defined by 15 NYCRR 79.1(g) (see Hearing Report, at 13-14; see also Matter of Geo Auto Repairs, Inc., Order of the Commissioner, March 14, 2012, at 3-4; Matter of AMI Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, at 3, and Matter of Gurabo Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, at 3 [addressing violations of 6 NYCRR 217-1.4]). Accordingly, the alleged violations of 6 NYCRR 217-1.4 should be dismissed as to all respondents.

Civil Penalty

The ALJ rejected the staff's requested penalty of one hundred ninety seven thousand five hundred dollars (\$197,500), which staff sought jointly and severally against each respondent. The ALJ recommended that respondent La Duena be assessed a civil penalty in the amount of thirty-five thousand dollars (\$35,000), and respondent Jose M. Villanueva be assessed a civil penalty in the amount of thirty-five thousand dollars (\$35,000). The ALJ also determined that respondents La Duena and Mr. Villanueva should be assessed civil penalties "in the same amount, to reflect their equal culpability for the inspections that were simulated" (Hearing Report, at 17).

I concur with the ALJ's penalty recommendations which are consistent with the penalty structure I have established in prior orders (see, e.g., Matter of Geo Auto Repairs, Inc., Order of the Commissioner, March 14, 2012, at 5). Although joint and several liability may be imposed in administrative enforcement proceedings, I concur with the ALJ that it is appropriate in this matter for each respondent to be assessed their own separate penalty, and that these penalties should be in the same amount, to reflect their equal culpability for the inspections that were simulated.

² DEC staff provided copies of receipts for service of the notice of hearing and complaint on the Department of State for service on La Duena (see Hearing Exhibit ["Exh"] 4), and on Jose M. Villanueva, by personal service (see Hearing Exhs 5 and 6).

The civil penalties assessed, although below the statutory maximum, are substantial and justified by the number of violations that respondents committed.

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

- I. Respondents La Duena Auto Repair Corp. and Jose M. Villanueva are adjudged to have violated 6 NYCRR 217-4.2 by operating an official emissions inspection station using equipment and procedures that are not in compliance with DEC procedures and standards. Three hundred ninety five (395) inspections using noncompliant equipment and procedures were performed at La Duena Auto Repair Corp., of which Jose M. Villanueva performed 395.
- II. DEC staff's allegations that respondent Nancy Taveras violated 6 NYCRR 217-4.2 are dismissed.
- III. DEC staff's allegations that La Duena Auto Repair Corp., Jose M. Villanueva and Nancy Taveras violated 6 NYCRR 217-1.4 are dismissed.
- IV. The following penalties are hereby assessed:
 - A. Respondent La Duena Auto Repair Corp. is assessed a civil penalty in the amount of thirty-five thousand dollars (\$35,000); and
 - B. Respondent Jose M. Villanueva is assessed a civil penalty in the amount of thirty-five thousand dollars (\$35,000).

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

Blaise Constantakes, Esq.
Assistant Counsel, 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 DEC 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 La Duena Auto Repair Corp., Jose M. Villanueva, and Nancy Taveras, and their agents, heirs, successors, and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: June 21, 2012
Albany, New York

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

In the Matter

- of -

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

**LA DUENA AUTO REPAIR CORP., NANCY TAVERAS,
AND JOSE M. VILLANUEVA**

Respondents

NYSDEC CASE NO. CO2-20100615-11

HEARING REPORT

- by -

/s/

Edward Buhrmaster
Administrative Law Judge

May 8, 2012

PROCEEDINGS

Pursuant to a notice of hearing and complaint, both dated August 31, 2010 (Exhibit No. 1), Staff of the Department of Environmental Conservation ("DEC") charged La Duena Auto Repair, Inc., Nancy Taveras and Jose M. Villanueva ("the respondents") with violations of Part 217 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), which governs motor vehicle emissions testing.

In a first cause of action, the respondents were charged with violating 6 NYCRR 217-4.2, which states that no person shall operate an official emissions inspection station using equipment and/or procedures that are not in compliance with DEC procedures and/or standards. In a second cause of action, they were charged with violating 6 NYCRR 217-1.4 by issuing emission certificates of inspection for motor vehicles that had not undergone an official emission inspection.

Both violations were alleged to have occurred during the period between May 9 and September 28, 2009, at an official emission inspection station commonly known as La Duena Auto Repair ("La Duena"), which was located at 1900 Jerome Avenue in the Bronx, New York. During this period, DEC Staff alleged, La Duena was a corporation duly authorized to do business in New York State, Nancy Taveras owned and operated the inspection station, and Jose M. Villanueva worked there, performing mandatory annual motor vehicle emission inspections.

According to DEC Staff, during the period in question, the respondents performed 395 such inspections using a device to substitute for and simulate the motor vehicle of record, and issued 394 emission certificates based on the simulated inspections.

As noted in a statement of readiness (Exhibit No. 3) provided by DEC Staff under a cover letter dated May 31, 2011 (Exhibit No. 2), Staff's action was commenced by service of its notice of hearing and complaint on the New York State Secretary of State's Office on September 24, 2010 (for service on La Duena at its place of business, pursuant to Section 306 of the Business Corporation Law, as noted in Exhibit No. 4, a receipt for service) and on Jose M. Villanueva on October 5, 2010 (by

DEC Environmental Conservation Officer Michael Mat, who personally served Mr. Villanueva and provided a receipt and affidavit marked, respectively, as Exhibits No. 5 and 6.) According to information on file with the Secretary of State, as reflected in Exhibit No. 4, the actual name of the corporation is "La Duena Auto Repair Corp.," not "La Duena Auto Repair Inc." There is no indication that the notice of hearing and complaint were served upon Ms. Taveras, La Duena's president.

Staff's notice of hearing announced a pre-hearing conference to be held on October 20, 2010, at DEC's Region 2 office in Long Island City, and informed the respondents of their duty to serve an answer to the complaint within 20 days from the date of receipt of service. According to the statement of readiness, the respondents did not appear at the scheduled pre-hearing conference and did not submit an answer, nor did they contact DEC despite Staff's efforts to reach them.

In its statement of readiness, DEC Staff requested that this matter be scheduled for hearing at DEC's Region 2 office. Upon being assigned to this matter, I issued a hearing notice dated November 9, 2011 (Exhibit No. 7), informing the parties that a hearing would be held at 1 p.m. on November 29, 2011, at DEC's Region 2 office.

DEC Staff appeared at the hearing by Blaise Constantakes, an attorney with DEC's Office of General Counsel in Albany. None of the respondents appeared, nor did an attorney or other representative appear on their behalf.

The hearing notice was sent to the respondents at addresses provided by DEC Staff, which match addresses the respondents had provided on prior applications to DMV (Exhibits No. 10, 11 and 12). The notice to La Duena, addressed to 1900 Jerome Avenue in the Bronx, was returned to my office on November 20, 2011, in its envelope (Exhibit No. 8) stickered "Return to Sender, Not Deliverable as Addressed, Unable to Forward." The notice to Mr. Villanueva, addressed to 647 Cauldwell Avenue, Apt. 62, in the Bronx, was returned to my office on November 25, 2011, in its envelope (Exhibit No. 9) stickered "Return to Sender, Attempted - Not Known, Unable to Forward." The notice to Ms. Taveras, addressed to 521 Isham Street in Manhattan, was not returned.

According to 6 NYCRR 622.15(a), a respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at a scheduled hearing or pre-hearing conference constitutes a default and a waiver of that respondent's right to a hearing, and entitles DEC Staff to make a motion to the assigned administrative law judge ("ALJ") for a default judgment. In this matter, however, DEC Staff is not seeking a default judgment; it is seeking a judgment on the merits.

The hearing went forward on November 29, 2011, with testimony from two witnesses for DEC Staff: Michael Devaux, a vehicle safety technical analyst employed by the Yonkers office of the New York State Department of Motor Vehicles ("DMV"), and James Clyne, an environmental engineer and chief of the light duty vehicle section of DEC's Division of Air Resources, Bureau of Mobile Sources and Technology Development. Mr. Constantakes made a brief closing statement after Staff's presentation. The hearing record consists of a 65-page transcript and 16 hearing exhibits. The first nine exhibits, introduced by me, show how the matter came forward, and the remaining exhibits (10 through 16) were received as part of DEC Staff's case. (A list of the hearing exhibits is attached to this report.)

The hearing transcript was received by my office on December 15, 2011, and DEC Staff was afforded an opportunity to propose corrections to it. Staff's corrections, as proposed by Mr. Constantakes, have been adopted, as have additional ones of my own, to which Staff consents.

POSITIONS OF THE PARTIES

Position of DEC Staff

According to DEC Staff, the respondents completed 395 motor vehicle inspections using noncompliant equipment and procedures, and issued 394 certificates for these inspections, without testing the vehicles' onboard diagnostic ("OBD") systems, which are designed to monitor the performance of major engine components, including those responsible for controlling emissions. Staff explains that the OBD emissions portion of the vehicle inspection involves the electronic transfer of information from the vehicle to a computerized work station and,

from there, to DMV via the Internet or a dedicated phone line. DEC Staff says that, for the inspections at issue here, the respondents did not check the vehicles' OBD systems, but instead simulated the inspections, as evidenced by a 15-field profile (or electronic signature) that Staff identified in the inspection data that was transmitted to DMV.

DEC Staff has requested a civil penalty of \$197,500, for which all the respondents would be jointly and severally liable. The penalty is not apportioned between the two causes of action, but is calculated on the basis of \$500 per illegal inspection, which Staff considers fair and reasonable given the importance of the violations from a public health perspective.

Position of Respondents

Because the respondents did not file an answer and did not appear at the hearing, their position on the charges is unknown.

FINDINGS OF FACT

1. In 2003, La Duena Auto Repair Corp. ("La Duena") applied for licenses from DMV to operate a Group 1 motor vehicle repair shop and public inspection station at 1900 Jerome Avenue in the Bronx. The application was approved, and the facility number assigned to La Duena was 7094801. (See Exhibit No. 10, the DMV application, on which the assigned facility number appears in the upper left hand corner, as well as the testimony of Mr. Devaux at page 19 of the transcript (T: 19).)

2. Since at least 2006, Nancy A. Taveras has been the president and sole stockholder of La Duena. (See updated DMV application, Exhibit No. 11; and Devaux, T: 20.)

3. On July 7, 2003, Jose M. Villanueva applied to DMV for certification as a motor vehicle inspector. Upon approval of his application, he was assigned certificate number 3QH6. (See application for certification, Exhibit No. 12; and Devaux, T: 21 and 22.)

4. Between May 9 and September 8, 2009, 395 mandatory annual motor vehicle emissions inspections were performed at La Duena using a device to substitute for and simulate the motor vehicle of record. (Clyne, T: 53.)

5. Each of these simulated inspections was performed by Mr. Villanueva, whose certificate number appears in each inspection record. (Clyne, T: 53.)

6. Vehicle emissions are tested pursuant to the New York Vehicle Inspection Program ("NYVIP"). NYVIP is a statewide inspection and maintenance program that incorporates a second-generation type of onboard diagnostic ("OBD II") testing for vehicles starting with model year 1996. (Devaux, T: 16 and 17.)

7. In order to perform an OBD II inspection, an inspection station must have a properly configured work station that has been purchased from Testcom, the NYVIP program manager. The station must also have an inspector who has been properly licensed by DMV and trained to complete such inspections. (Clyne, T: 40.)

8. The inspector must have passed a DMV certification examination as well as a computer-based examination that is taken on the work station. (Clyne, T: 40.)

9. There are three parts of a vehicle inspection: a visual safety inspection, a visual check of the emission control devices ("ECDS"), and the OBD II inspection itself, which is conducted electronically. (Devaux, T: 27 - 28; Clyne, T: 40 - 42.)

10. The inspector accesses the work station analyzer by scanning his or her certification card. The inspector then enters the vehicle information either manually or by scanning the vehicle registration, if available, or the inside of the driver's door. (Devaux, T: 27 and 28; Clyne, T: 41.)

11. The OBD II inspection is conducted by plugging the work station into the vehicle's standardized data link connector ("DLC"), which is generally under the driver's side of the dashboard. (Devaux, T: 28 and 29.) The inspection proceeds without the inspector's intervention, with the work station making standardized electronic requests to the vehicle's computer (also known as the electronic control module, or "ECM") and the computer giving responses to those requests. (Devaux, T: 29; Clyne, T: 42.)

12. The information gathered during this process is captured and securely maintained on the hard drive of the work station, from which it is transmitted to Testcom, the NYVIP contractor, via broadband or dial up, and from Testcom to DMV's main frame computer in Albany, all in a matter of five to ten seconds in most cases. (Devaux, T: 31.)

13. During this transmission, Testcom captures the inspection record and securely backs it up, as does DMV, which places the record in a secure data base. (Devaux, T: 31.)

14. Assuming the vehicle passes the inspection, a screen on the NYVIP work station instructs the inspector to scan the bar code on the next sticker to be issued and to affix the sticker to the vehicle's windshield. Then a vehicle inspection receipt is printed and handed to the motorist, completing the inspection process. (Devaux, T: 29 - 30.)

15. The placement of the inspection sticker on the vehicle windshield is, generally speaking, a certification that the vehicle's mechanical mechanisms and emissions meet New York State requirements. (Devaux, T: 30.)

16. There are a number of ways a vehicle may fail the OBD portion of an inspection. It may fail the visual component of the inspection, which involves checking the malfunction indicator light ("MIL"), also known as the check engine light, which signals an actual or potential emissions fault. With the key on and the engine off, the MIL should come on; however, with the engine started, the MIL should go off. (Clyne, T: 43 - 44.)

17. The vehicle may also fail the electronic component of the inspection, which involves the communication between the work station and the vehicle. If this communication cannot be accomplished, it would constitute a failure in that the vehicle's data could not be collected. (Clyne, T: 44.)

18. Another possibility for failure involves the readiness evaluation. If a certain number of emissions monitors are reported as not ready, it means the vehicle did not run enough diagnostic tests to make a proper pass/fail decision. (Clyne, T: 44 - 45.)

19. The most common failure occurs when the MIL is commanded "on" by the vehicle and a diagnostic trouble code ("DTC") is stored. This information is helpful to the repair of a vehicle that fails an OBD inspection, because it provides the repair shop a good starting point for determining why the vehicle failed the inspection. (Clyne, T: 45.)

DISCUSSION

This matter involves charges that La Duena as well as its alleged owner/operator, Ms. Taveras, and certified inspector, Mr. Villanueva, did not check the OBD II systems as part of 395 motor vehicle inspections conducted at the La Duena facility during the period between May 9 and September 28, 2009. In essence, DEC Staff alleges that the OBD II inspections for these vehicles were simulated by use of non-compliant equipment and procedures, and that 394 emission certificates resulting from these inspections were improperly issued.

Locating the Simulator Signature

According to Mr. Clyne, during or about October 2008, DEC was informed by DMV management that DMV believed that electronic simulators were being used as part of OBD II inspections conducted in the New York City metropolitan area. More particularly, he explained, DEC was told that, in certain instances, NYVIP work stations were being connected not to the vehicles whose identification numbers were stored in the inspection records, but to devices that would mimic or imitate the vehicles. (Clyne, T: 46.)

According to Mr. Clyne, DMV's suspicions were aroused by very high and unrealistic readings of engine RPM (meaning "revolutions per minute") that were encountered at a few inspection stations. Mr. Clyne said that a typical RPM reading during a regular OBD inspection, with the vehicle idling in park, should be between 400 and 1400. However, DMV field staff were seeing RPM readings sometimes in excess of 6,000 RPM, which he described as completely unrealistic. (Clyne, T: 47.)

Between February and July 2009, DEC and DMV conducted an undercover investigation of stations where simulator use was suspected. Based on that investigation, the agencies concluded

that RPM was not a sufficient indicator of simulator use, because some stations using a simulator still recorded RPM readings that were within normal bounds. (Clyne, T: 48.)

Eventually DEC and DMV were able to establish an electronic fingerprint (or profile) for a particular simulator. That fingerprint was identified on the basis of 15 fields of data collected and recorded, among others, during the OBD inspections, and then passed on to the two agencies. The fingerprint was then traced to 44 inspection stations in the New York City metropolitan area where DEC contends the simulator was used during the period between March 2008 and July 2010. (Clyne, T: 49.)

One of those stations was La Duena, where the simulator fingerprint appears in relation to inspections conducted between May 9 and September 28, 2009. Those inspections are highlighted in orange on Exhibits No. 15 and 16, which consist of abstracts of data collected during OBD inspections conducted at the station, which is identified by the DMV facility number (7094801) in the fourth column on each page of the abstracts. (Clyne, T: 49 - 50.)

For each inspection, the identified inspector is Mr. Villanueva, given that his inspector number (3QH6) appears in the seventh column on each page of the abstracts. (Clyne, T: 50.)

As described by Mr. Clyne, the simulator fingerprint may be identified on the basis of the following 15 column headings and the entries (shown here in quotation marks) beneath them:

PCM ID1	"10"
PCM ID2	"0"
PID CNT 1	"11"
PIC CNT 2	"0" (should read as PID CNT 2) (T: 51)
RR COMP COMPONENTS	"R"
RR MISFIRE	"R"
RR FUEL CONTROL	"R"

RR CATALYST	"R"
RR 02 SENSOR	"R"
RR EGR	"R"
RR EVAP EMISS	"R"
RR HEATED CATA	"U"
RR 02 SENSOR HEAT	"R"
RR SEC AIR INJ	"U"
RR AC	"U"

(Clyne, T: 50 - 53.)

Mr. Clyne explained that where this fingerprint appears, the vehicle identified in the record was not inspected, and that the inspector, in this case Mr. Villanueva, used an electronic simulator instead. (Clyne, T: 53.) As an indication that the fingerprint is not associated with inspection of an actual vehicle, Mr. Clyne testified that the fingerprint does not appear at all in DMV's database of 18.5 million inspections conducted between September 1, 2004 and the end of February, 2008, or in another 10 million inspections conducted since July 2010, when the commencement of enforcement action put an end to the simulator's use. (Clyne, T: 58 - 59.)

In the abstracts of La Duena OBD inspection data, the simulator profile appears for the first time in relation to the alleged inspection of a Honda Accord on May 9, 2009 (Exhibit No. 15, page 69 of 76) and for the last time in relation to the alleged inspection of a Nissan Quest on September 28, 2009 (Exhibit No. 16, page 1 of 5). In total, there are 395 simulated inspections documented in the data abstracts.

There is no question that the simulated inspections highlighted in Exhibits No. 15 and 16 were performed at La Duena, because La Duena's DMV-assigned facility number, as scanned into the NYVIP work station, appears in relation to each one. Also, there is no question that Mr. Villanueva performed the simulations, because his certificate number, which he would

have scanned into the work station, is the only one that appears in the inspection data.

DEC Staff's case included an explanation of how the OBD inspection data was generated and how it was passed from the inspection station via Testcom to DMV's Albany office, from which it was retrieved by DEC Staff. (See the record certifications of Brad Hanscom, DMV records access officer, on the front of Exhibits No. 13 and 14, La Duena's inspection data retrieved from DMV by Mr. Clyne. This is the same data that appears in Exhibits No. 15 and 16, where the simulated inspections are highlighted.) The data retrieved from DMV is presumed to be reliable, no evidence to the contrary having been offered.

Liability for Violations

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

- Violation of 6 NYCRR 217-4.2

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

DMV performs an on-site inspection to ensure compliance with applicable requirements. (Devaux, T: 17 - 18.)

I find that 6 NYCRR 217-4.2 was violated on 395 separate occasions by use of a simulator to perform OBD II emissions inspections. Simulators have no place in the administration of actual emissions tests, and their use is not consistent with emissions inspection procedure set out at 6 NYCRR 217-1.3, which requires testing of a vehicle's OBD system to ensure that it functions as designed and completes diagnostic routines for necessary supported emission control systems. If the inspector plugs the NYVIP work station into a simulator in lieu of the vehicle that has been presented, it cannot be determined whether the vehicle would pass the OBD II inspection.

La Duena is liable for all 395 violations because, at the time they occurred, it held the license to "operate" the official inspection station. Pursuant to 15 NYCRR 79.8(b), the official inspection station licensee "is responsible for all inspection activities conducted at the inspection station," and is not relieved of that responsibility by the inspector's own duties, which include performing inspections in a thorough manner. [See 15 NYCRR 79.17(b)(1) and (c).] As a private corporation, La Duena also falls within the definition of "person" at 6 NYCRR 200.1(bi).

Mr. Villanueva, as La Duena's certified inspector, is also liable for the violations attributable to his own non-compliant inspections. This liability is due to the connection between the official inspection station, which is licensed under VTL 303, and the inspector who works at the station, who is certified under VTL 304-a. Pursuant to 15 NYCRR 79.8(b)(2), the specific duties of the inspection station include employing at all times, at least one full-time employee who is a certified motor vehicle inspector to perform the services required under DMV's regulations. In this sense, the inspection station operates through the services that its inspector provides.

In summary, the 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.

DEC Staff maintains that Ms. Taveras, as the alleged owner and operator of La Duena, is also liable personally for all the station's illegal inspection activity. I disagree. While DMV records produced at the hearing (more particularly, Exhibits No. 10 and 11) indicate that Ms. Taveras is the sole stockholder of La Duena, she herself is not the official inspection station licensee. This is significant because, according to 15 NYCRR 79.8(b), the licensee is responsible for the inspection activities conducted at the station.

Exhibits No. 10 and 11 also indicate that Ms. Taveras is the president of La Duena. However, that by itself does not make her liable for the violations committed in this matter.

Under the responsible corporate officer doctrine, liability may be imposed upon parties who have, by reason of their position in a corporation, responsibility and authority to prevent or promptly correct a violation, yet fail to do so. Three elements must be established before liability is imposed upon a corporate officer: (1) the individual must be in a position of responsibility, which allows the person to influence corporate policies and activities; (2) there must be a nexus between the individual's position and the violation in question such that the person could have influenced the corporate actions that constituted the violations; and (3) the individual's actions or inaction facilitated the violations. (See United States v. Park, 421 U.S. 658, 673-74 (1975), as referred to in my hearing report attached to the Commissioner's order, dated December 29, 1994, in Matter of James McPartlin and 53rd Street Service Station. See also the discussion of corporate officer liability in Matter of 125 Broadway, LLC and Michael O'Brien, Decision and Order of the Commissioner, dated December 15, 2006.)

In this matter, Staff's proof is insufficient to establish personal liability for Ms. Taveras, as La Duena's president, for the non-compliant inspections performed by Mr. Villanueva. It is not clear to what extent Ms. Taveras, as a corporate officer, was in a position to control the activities of the inspector. Nothing was revealed about the day-to-day management of the La Duena inspection station, or what role Ms. Taveras may have had in the violations that were committed. The only information I

have about the station's operation is the record of the OBD II inspections that were performed there, and who actually performed them.

Finally, there is no proof that Ms. Taveras was even served with Staff's notice of hearing and complaint, only evidence that it was served upon La Duena and Mr. Villanueva, the other two respondents. Absent such proof, DEC Staff's charges against Ms. Taveras must be dismissed; as to her, Staff would not be entitled even to a default judgment, according to 6 NYCRR 622.15(b)(1).

- Violation of 6 NYCRR 217-1.4

In a separate cause of action, the respondents are charged with violations of 6 NYCRR 217-1.4. According to this provision: "No official inspection station as defined by 15 NYCRR 79.1(g) may issue an emission certificate of inspection, as defined by 15 NYCRR 79.1(a), for a motor vehicle, unless that motor vehicle meets the requirements of section 217-1.3 of this Subpart."

Violations of 6 NYCRR 217-1.4 cannot be found because DEC offered no evidence that La Duena was an official inspection station "as defined by 15 NYCRR 79.1(g)." Section 79.1(g) defines an "official safety inspection station" as one "which has been issued a license by the Commissioner of Motor Vehicles pursuant to Section 303 of the Vehicle and Traffic Law, to conduct safety inspections of motor vehicles exempt from the emissions inspection requirement" (emphasis added). There was no evidence that La Duena had such a license; the only evidence was that it was licensed, pursuant to VTL Section 303, to inspect vehicles that are subject to emissions inspections. Also, there was no evidence that the respondents conducted improper safety inspections, or violated any laws or regulations in this regard; the only proof was with respect to emissions (OBD II) inspections not being performed consistent with DEC procedure.

In paragraph 14 of its complaint, DEC Staff alleges that the respondents violated 6 NYCRR 217-1.4 by issuing emission certificates of inspection to vehicles that had not undergone an official emissions inspection. However, an official safety

inspection station, as defined by 15 NYCRR 79.1(g), does not issue emission certificates of inspection, because the vehicles it inspects are exempt from the emissions inspection requirement.

In summary, because there is no evidence that La Duena was an official inspection station "as defined by 15 NYCRR 79.1(g)" (i.e., an official safety inspection station), the second cause of action must be dismissed, consistent with the dismissal of similar causes of action in matters involving other stations where simulators were used. (See, for instance, Matter of Geo Auto Repairs, Order of the Commissioner, March 14, 2012, pages 3 and 4.)

Civil Penalties

In its complaint, DEC Staff proposed that the Commissioner assess a civil penalty of \$197,500 in this matter. Staff has not apportioned the penalty between the two causes of action, or among the respondents. According to DEC Staff, the respondents should be jointly and severally liable for the penalty's payment. (T: 61 - 62.)

Civil penalties are authorized pursuant to ECL 71-2103(1). At the time the violations in this matter occurred, that section stated that any person who violated any provision of ECL Article 19 (the Air Pollution Control Act) or any regulation promulgated pursuant thereto, such as 6 NYCRR 217-4.2, would be liable, in the case of a first violation, for a penalty not less than \$375 nor more than \$15,000 for each day during which such violation continued; as well as, in the case of a second or any further violation, a penalty not to exceed \$22,500 for said violation and an additional penalty not to exceed \$25,000 for each day during which such violation continued.

In its closing statement, DEC Staff said that each simulated inspection should be treated as a separate and distinct violation of DEC's regulations. (T: 61.) I agree with this assessment. Each simulated inspection was a discrete event occurring at a specific time and, by itself, constituted operation of the emissions inspection station in a manner that did not comply with DEC procedure.

Consistent with ECL 71-2103(1), the violations in this matter could subject the respondents to penalties in the millions of dollars. However, according to DEC's Civil Penalty Policy ("CPP", DEE-1, dated June 20, 1990), the computation of the maximum civil penalty for all provable violations is only the starting point of any penalty calculation (CPP Section IV.B); it merely sets the ceiling for any penalty that is ultimately assessed.

DEC is actually seeking \$500 per simulated inspection (T: 61), using the civil penalty framework and formulating what it believes to be a consistent and fair approach to calculating civil penalties in this and the other similar enforcement cases it is also pursuing. Given the number of simulated inspections that were performed, this equates to a total penalty of \$197,500 ($\500×395).

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

- Economic Benefit

DEC's penalty policy states that every effort should be made to calculate and recover the economic benefit of non-compliance. (CPP Section IV.C.1.) In this case, that economic benefit, if it does exist, is unknown.

- Gravity

According to the penalty policy, removal of the economic benefit of non-compliance merely evens the score between violators and those who comply; therefore, to be a deterrent, a penalty must include a gravity component, which reflects the seriousness of the violation. (CPP Section IV.D.1.)

The violations committed here are quite serious to the degree that they frustrate the goal of OBD II emissions testing, which is to protect air quality. As the Commissioner has explained in orders addressing similar violations by other respondents, OBD II testing helps identify vehicles with emissions problems that, if left uncorrected, contribute to ozone pollution. Ozone pollution is a major concern in urban

areas because of its impact on public health. Using a simulator to bypass required emissions testing undermines the regulatory scheme that DEC and DMV have developed. (See Matter of Gurabo Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, pages 6 and 7.)

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

- Culpability

According to the policy, the penalty derived from the gravity assessment may be adjusted in relation to factors that include the culpability of the violator. In this case, violator culpability (addressed at CPP Section IV.E.1) is an aggravating factor warranting a significant upward penalty adjustment. As Mr. Devaux explained, La Duena, at the time it was licensed, would have received a copy of the DMV regulations governing the inspection process, and both La Duena and Mr. Villanueva would have had access to the Testcom manual containing instructions for the test equipment. (Devaux, T: 25 - 26.) Also, Mr. Villanueva, prior to inspector certification, would have had to complete a DMV course, and pass a test, on the NYVIP inspection process. (Devaux, T: 23.)

Due to the training Mr. Villaneuva would have received, and the information available to him and La Duena, they would certainly have known that use of a simulator is not compliant with the procedures for a properly conducted OBD II inspection. Because of their knowing, intentional violation of inspection procedure over an extended period of time, substantial civil penalties are warranted.

DEC Staff has recommended that any penalties be assessed against the respondents jointly and severally. However, because responsibility for the violations may be apportioned between the inspection station and its inspector, I consider it appropriate that they each have their own separate penalty, and that these

penalties should be in the same amount, to reflect their equal culpability for the inspections that were simulated.

My recommendation is that, for 395 separate violations of 6 NYCRR 217-4.2, La Duena should be assessed a civil penalty of \$35,000. A separate penalty, also \$35,000, should be assessed against Mr. Villanueva. On a per violation basis, these penalties are consistent with those assessed in Matter of Geo Auto Repairs (Order of the Commissioner, March 14, 2012), which involved a similar set of facts. Even combined, they are considerably less than the \$197,500 requested by DEC Staff, which I consider excessive. As noted above, Staff derived its penalty from a formula under which \$500 is allocated to each illegal inspection. This formula has not been adopted by me or the Commissioner in other matters, such as Geo and Gurabo, where it has been offered for violations identical to these.

To account for the penalty framework in ECL 71-2103(1), the penalty apportioned to the first violation committed by each respondent should be \$375, with lesser penalties for each of the subsequent violations. The large number of violations equate to substantial penalties for La Duena and Mr. Villanueva, which are intended to punish their conduct and deter others from the same type of illegal activity.

CONCLUSIONS

1. Between May 9 and September 28, 2009, respondent La Duena Auto Repair, an official emissions inspection station, used a simulator to perform OBD II inspections on 395 separate occasions. These simulated inspections were performed by Jose M. Villanueva, a certified motor emission inspector employed at La Duena.

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

RECOMMENDATIONS

1. For the first cause of action, involving alleged violations of 6 NYCRR 217-4.2, respondent La Duena Auto Repair should be assessed a civil penalty of \$35,000, and respondent

Jose M. Villanueva should also be assessed a civil penalty of \$35,000.

2. The first cause of action should be dismissed in relation to respondent Nancy Taveras.

3. The second cause of action, for alleged violations of 6 NYCRR 217-1.4, should be dismissed in relation to all the respondents.

4. To reflect the information on file with DMV and the New York State Department of State, the caption in this matter should be corrected by substituting "La Duena Auto Repair Corp." for "La Duena Auto Repair Inc."

ENFORCEMENT HEARING EXHIBIT LIST

LA DUENA AUTO REPAIR CORP., NANCY TAVERAS, and JOSE M.
VILLANUEVA (Case No. CO2-20100615-11)

1. DEC Notice of Hearing and Complaint (8/31/10)
2. Cover letter from DEC Staff counsel Blaise Constantakes to DEC Chief Administrative Law Judge James McClymonds (5/31/11)
3. DEC Staff's Statement of Readiness (5/25/11)
4. Receipt for service of Notice of Hearing and Complaint on La Duena Auto Repair Corp., prepared by NYS Dept. of State (9/24/10)
5. General receipt for service of Notice of Hearing and Complaint on Jose M. Villanueva by DEC Environmental Conservation Officer Michael Mat (10/5/10)
6. Affidavit of personal service of Notice of Hearing and Complaint on Jose M. Villanueva by DEC Environmental Conservation Officer Michael Mat (10/5/10)
7. ALJ Edward Buhrmaster's Hearing Notice, issued to Respondents and to DEC Staff counsel (11/9/11), with notice distribution list
8. Envelope for transmission of ALJ's hearing notice to La Duena Auto Repair, as returned to ALJ on 11/20/11
9. Envelope for transmission of ALJ's hearing notice to Jose M. Villanueva, as returned to ALJ on 11/25/11
10. DMV repair shop and inspection station application for LaDuena Auto Repair, Inc. (2003)
11. Updated DMV application for LaDuena Auto Repair, Inc. (2006)
12. DMV application for certification as a motor vehicle inspector, filed by Jose M. Villanueva (7/7/03)
13. DMV abstract of OBD II inspection data for LaDuena Auto Repair (4/21/05 - 9/8/09), with certification dated 10/13/10
14. DMV abstract of OBD II inspection data for LaDuena Auto Repair (9/15/09 - 5/25/10), with certification dated 10/13/10
15. Inspection data from Exhibit No. 13, with orange highlighting of simulated inspections
16. Inspection data from Exhibit No. 14, with orange highlighting of simulated inspections