

**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-

**NEW POWER MUFFLER INC., MIGUEL MARTE,
JOHANN GONZALEZ, REYNALDO A. MEDINA AND
JOVANNY F. ORTEGA,**

DEC Case No.
CO2-20100615-23

Respondents.

This administrative enforcement proceeding concerns allegations that respondents New Power Muffler Inc. ("New Power Muffler"), Miguel Marte, Johann Gonzalez, Reynaldo A. Medina and Jovanny F. Ortega 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 1447 Inwood Avenue in the Bronx, New York, during the period from April 9, 2009 through February 18, 2010. Department staff alleges that, during this time, New Power Muffler was a domestic business corporation duly authorized to do business in New York State, respondent Marte owned and operated New Power Muffler, and respondents Marte, Gonzalez, Medina and Ortega performed mandatory annual motor vehicle emission inspections at that facility.

Specifically, Department staff alleges that a device was used to substitute for and simulate the motor vehicle of record on 2,523 separate inspections. Department staff contends that, of these inspections, respondent Marte performed 1,311 inspections, respondent Ortega performed 501 inspections,

respondent Medina performed 417 inspections and respondent Gonzalez performed 294 inspections (see Hearing Report, at 9 [Finding of Fact No. 31]) and that, as a result, 2,521 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 one million two hundred sixty-one thousand five hundred dollars (\$1,261,500). Staff requested that all five respondents be held jointly and severally liable.

Respondents submitted an answer dated October 18, 2010, in which they admitted that respondent Marte was the president, vice president, treasurer and secretary of New Power Muffler and that Marte, Ortega, Medina and Gonzalez worked at New Power Muffler as certified motor vehicle emission inspectors; otherwise they denied Department staff's charges. Respondents asserted no affirmative defenses in their answer (Hearing Report, at 1-2; Hearing Exhibit 2).

The matter was assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster. A hearing was held on May 4, 2012. Respondents were represented by Vincent P. Nesci, Esq. who was accompanied by respondents Marte and Ortega at the hearing. Respondents Medina and Gonzalez did not attend the hearing. None of the respondents present at the hearing testified and no witnesses were called on behalf of any of the respondents.

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

Liability

I concur with the ALJ's determination that Department staff is entitled to a finding of liability with respect to the first charge: that is, respondents operated an official emissions inspection station using equipment or procedures that are not in compliance with Department procedures or standards, in violation of 6 NYCRR 217-4.2. Furthermore, I agree with the ALJ that New Power Muffler is liable for all 2,523 violations "because, at the time [the violations] occurred, it held the license to 'operate' the official inspection station" (Hearing Report, at 17).

With respect to individual respondents, the ALJ noted that respondent Marte was identified as president, vice president, treasurer and secretary of New Power Muffler on the inspection station and repair shop applications that New Power Muffler filed with the DMV (see id. at 5 [Finding of Fact No. 1]). In fact, one application (Hearing Exhibit 8) also identifies respondent Marte as the sole shareholder. Department staff did not, however, provide evidence establishing respondent Marte's decision making authority within New Power Muffler as a basis for liability, separate from the noncompliant inspections that he conducted. The ALJ concluded that, based on the evidence presented, respondent Marte should be held personally responsible only for the 1,311 noncompliant inspections that he personally conducted (see id. at 18), and I concur. The record before me is insufficient to hold respondent Marte individually liable, as the responsible corporate officer, for all of the illegal inspections conducted at the station. The ALJ also properly held that inspectors Ortega, Medina and Gonzalez are each "liable for the violations attributable to his own non-compliant inspections" (id. at 17).

With respect to the second cause of action, I concur with the ALJ's determination that violations of 6 NYCRR 217-1.4 cannot be found (see Hearing Report, at 18-19) for the reasons that have been stated in prior Commissioner decisions (see Matter of Geo Auto Repairs, Inc., Order of the Commissioner, March 14, 2012, at 3-4; Matter of AMI Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, at 3; Matter of Gurabo Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, at 3). Accordingly, the alleged violations of 6 NYCRR 217-1.4 are hereby dismissed as to all respondents.

Civil Penalty

Staff requested a penalty of one million two hundred sixty-one thousand five hundred dollars (\$1,261,500), based on five hundred dollars (\$500) per simulated inspection. Staff referenced the Department's civil penalty policy and presented its approach to calculating civil penalties in this and similar enforcement cases. Staff also requested that each respondent be held jointly and severally liable for the penalty. The ALJ noted that, consistent with the penalty range established by ECL 71-2103(1) for such violations, the maximum penalties would amount to tens of millions of dollars, significantly more than what Department staff requested.

In his evaluation of the penalty, the ALJ considered the factors set forth in the Department's civil penalty policy, including the economic benefit of noncompliance, the gravity of the violations and respondents' culpability (see Hearing Report, at 20-24). The ALJ rejected staff's proposed penalties as too high and concluded that lower penalties were appropriate. As the ALJ notes, staff's formula has not been adopted in other proceedings where it has been offered for violations similar to these (see Hearing Report, at 24).

The ALJ recommended a total civil penalty of four hundred forty-eight thousand six hundred dollars (\$448,600), assessed as follows:

- respondent New Power Muffler to be assessed a civil penalty of two hundred twenty-four thousand three hundred dollars (\$224,300);
- respondent Marte to be assessed a civil penalty of one hundred sixteen thousand six hundred dollars (\$116,600);
- respondent Ortega to be assessed a civil penalty of forty-four thousand five hundred dollars (\$44,500);
- respondent Medina to be assessed a civil penalty of thirty-seven thousand one hundred dollars (\$37,100); and
- respondent Gonzalez to be assessed a civil penalty of twenty-six thousand one hundred dollars (\$26,100) (see Hearing Report, at 23-24).

In addition to recommending an overall reduction in the penalty, the ALJ also rejected imposing joint and several liability on respondents. Even though joint and several liability may be imposed in administrative enforcement proceedings, I concur with the ALJ that no basis exists for holding the individual respondents liable for each other's non-

compliant inspections (see Hearing Report, at 18). No adequate rationale was provided by Department staff to support imposing joint and several liability in this proceeding.

Prior decisions have noted the adverse impact of automotive emissions and how the use of simulators subverts the regulatory regime designed to address and control these emissions (see, e.g., Matter of Gurabo, Decision and Order of the Commissioner, February 16, 2012, at 6-7), and, accordingly, substantial penalties are warranted where violations are found. However, I concur with the ALJ's determination that staff's request here is too high and I further concur with the ALJ's recommendation of a total civil penalty in the amount of four hundred forty-eight thousand six hundred dollars (\$448,600).

In this matter, at the time the violations occurred, New Power Muffler held the license to "operate" the official inspection station. Pursuant to 15 NYCRR 79.8(b), the official inspection station licensee "is responsible for all inspection activities conducted at the inspection station," and is not relieved of that responsibility by the inspectors' own duties (see Hearing Report, at 17). For the reasons set forth in the Matter of Jerome Muffler Corp. (see Order of the Commissioner, May 24, 2013, at 4-5), and in the absence of any mitigating factors (see id.), New Power Muffler should be subject to a substantially higher penalty than its employees. New Power Muffler had the over-arching responsibility to ensure that inspections conducted at its facility comported with all legal requirements. By the use of simulators, it allowed illegal activity as part of its operations and failed to comply with applicable law, and its actions subverted the intended environmental and public health benefits of the legal requirements to address and control vehicular air emissions.

In light of my determination that the facility where such illegal activity has occurred should bear a significantly higher penalty than the aggregate of penalties assessed against the individual inspectors, I am revisiting the penalties that have been recommended. In consideration of the penalty range established by ECL 71-2103(1) and the impacts of this illegal activity (see Hearing Report at 21), I am imposing a civil penalty of three hundred fifty thousand dollars (\$350,000) on New Power Muffler.

With respect to individual inspectors, as the number of inspections that an individual performs with noncompliant

equipment increases, higher penalties shall be assessed, subject to any aggravating or mitigating circumstances.

In this proceeding, none of the four inspectors presented testimony (see Hearing Report, at 3) and, thus, did not avail themselves of the opportunity to present any mitigating or other relevant factors, either as to liability or penalty (including, for example, any arguments relating to ability to pay) though counsel for respondents did present a plea agreement that respondent Medina had entered in an unrelated criminal case in an attempt to offset the penalties in the present case. I agree with the ALJ that the unrelated criminal plea for different activities, which occurred at a later date and at an unrelated facility, has no bearing on this case or the assessment of penalties. Furthermore, the record is devoid of any evidence as to whether one or more of these individuals was primarily responsible for the illegal activity.

As noted, respondent Marte conducted approximately 52% of the 2,523 noncompliant inspections, respondent Ortega performed about 20% of the noncompliant inspections, respondent Medina performed about 17% of the noncompliant inspections, and respondent Gonzalez about 11%. Applying the penalty guidelines set forth above, and considering the number of inspections using noncompliant equipment and procedures that each inspector performed, I am assessing civil penalties as follows:

- With respect to respondent Marte who conducted 1,311 noncompliant inspections, a penalty in the amount of fifty-one thousand six hundred dollars (\$51,600);
- With respect to respondent Ortega who conducted 501 noncompliant inspections, a penalty in the amount of twenty thousand dollars (\$20,000);
- With respect to respondent Medina who conducted 417 noncompliant inspections, a penalty in the amount of sixteen thousand dollars (\$16,000); and
- With respect to respondent Gonzalez who conducted 294 noncompliant inspections, a penalty in the amount of eleven thousand dollars (\$11,000).

In sum, the overall amount of the civil penalty assessed by this order is four hundred forty-eight thousand six hundred dollars (\$448,600), which is substantial and should serve as a deterrent against any future noncompliant activity of this kind.

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

- I. Respondents New Power Muffler Inc., Miguel Marte, Johann Gonzalez, Reynaldo A. Medina and Jovanny F. Ortega 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 the Department's procedures and standards. Two thousand five hundred twenty-three (2,523) inspections using noncompliant equipment and procedures were performed at New Power Muffler Inc., of which Miguel Marte performed one thousand three hundred eleven (1,311), Johann Gonzalez performed two hundred ninety-four (294), Reynaldo A. Medina performed four hundred seventeen (417) and Jovanny F. Ortega performed five hundred one (501).
- II. Department staff's allegations that respondents New Power Muffler Inc., Miguel Marte, Johann Gonzalez, Reynaldo A. Medina and Jovanny F. Ortega violated 6 NYCRR 217-1.4 are dismissed.
- III. The following penalties are hereby assessed:
 - A. Respondent New Power Muffler Inc. is hereby assessed a civil penalty in the amount of three hundred fifty thousand dollars (\$350,000);
 - B. Respondent Miguel Marte is hereby assessed a civil penalty in the amount of fifty-one thousand six hundred dollars (\$51,600);
 - C. Respondent Johann Gonzalez is hereby assessed a civil penalty in the amount of eleven thousand dollars (\$11,000);
 - D. Respondent Reynaldo A. Medina is hereby assessed a civil penalty in the amount of sixteen thousand dollars (\$16,000); and
 - D. Respondent Jovanny F. Ortega is hereby assessed a civil penalty in the amount of twenty thousand dollars (\$20,000).

The penalty for each respondent shall be due and payable within thirty (30) days of the service of this

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

In the Matter

- of -

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

**NEW POWER MUFFLER INC., MIGUEL MARTE,
JOHANN GONZALEZ, REYNALDO A. MEDINA AND
JOVANNY F. ORTEGA,
Respondents**

NYSDEC Case No. CO2-20100615-23

HEARING REPORT

- by -

/s/

Edward Buhrmaster
Administrative Law Judge

February 11, 2013

PROCEEDINGS

Pursuant to a Notice of Hearing and Complaint, dated August 18, 2010 (Exhibit No. 1), Staff of the Department of Environmental Conservation ("DEC") charged New Power Muffler Inc. ("New Power Muffler"), Miguel Marte, Johann Gonzalez, Reynaldo A. Medina and Jovanny F. Ortega (collectively, "the respondents") with violations of Part 217 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), which governs motor vehicle emissions testing.

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

Both violations were alleged to have occurred during the period between April 9, 2009, and February 18, 2010, at New Power Muffler, an emissions inspection station located at 1447 Inwood Avenue in the Bronx, New York. During this period, DEC Staff alleged, New Power Muffler was a corporation duly authorized to do business in New York State, and respondent Marte was the corporation's president, vice president, secretary and treasurer. According to DEC Staff, respondents Marte, Gonzalez, Medina and Ortega all worked at the station as certified motor vehicle emissions inspectors.

DEC maintains that, during the period in question, the respondents performed 2,523 mandatory annual motor vehicle emission inspections using a device to substitute for and simulate the motor vehicle of record, and issued 2,521 emission certificates of inspection based on the simulated inspections.

By their counsel, Nesci-Keane PLLC, the respondents submitted an answer dated October 18, 2010 (Exhibit No. 2), in

which they denied DEC Staff's charges while asserting no affirmative defenses.

By a statement of readiness dated December 30, 2010 (Exhibit No. 3), DEC Staff requested that DEC's Office of Hearings and Mediation Services schedule this matter for hearing. In a letter of February 4, 2011 (Exhibit No. 4), Chief Administrative Law Judge James T. McClymonds informed the parties that this matter had been assigned to me. An updated statement of readiness, dated December 22, 2011 (Exhibit No. 5), indicated that the respondents were represented by Vincent Nesci, Esq., from his office in Mount Kisco.

By a hearing notice dated April 11, 2012 (Exhibit No. 6), I confirmed the scheduling of a hearing in this matter for 10 a.m. May 4, 2012, at DEC's Region 2 office in New York City. The notice was sent to DEC Staff counsel Blaise Constantakes and to Mr. Nesci as counsel for New Power Muffler, Mr. Marte and Mr. Medina. Because Mr. Nesci had not been able to locate Mr. Ortega or Mr. Gonzalez, I sent them a separate hearing notice, dated April 24, 2012 (Exhibit No. 7), to the addresses they had on file with the NYS Department of Motor Vehicles ("DMV"). I did so with Mr. Nesci's permission, and said in the notice that if Mr. Nesci was still representing them, they should call him promptly to prepare for the hearing; otherwise, I wrote, they could contact me with any questions about DEC's hearing procedure.

As announced in the hearing notices, the hearing went forward on May 4, 2012. DEC Staff appeared by Mr. Constantakes, an attorney in DEC's Office of General Counsel in Albany. Mr. Nesci confirmed his appearance on behalf of all the respondents. Of the individual respondents, only Mr. Marte and Mr. Ortega were present. Mr. Nesci said that Mr. Medina, through his wife, had sent him an e-mail saying he would not be at the hearing and that Mr. Nesci could proceed for him. Mr. Nesci said that he had lost contact with Mr. Gonzalez, but continued to represent him.

At Mr. Nesci's request prior to the hearing, arrangements were made for a Spanish language interpreter, who appeared at

the hearing and translated the proceedings for Mr. Marte and Mr. Ortega.

Testifying for DEC Staff were Lawrence Levine, a technical analyst in DMV's Office of Technical Services and Clean Air, in Hempstead, and James Clyne, an environmental engineer and section chief in DEC's Division of Air Resources, Bureau of Mobile Sources and Technology Development, in Albany.

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

The hearing record includes a 130-page transcript and 17 numbered exhibits that were received in evidence. (See exhibit list attached to this report.) The first seven exhibits were my own, to show how the matter came forward. Exhibits No. 8 - 16 were received as part of DEC Staff's case, and Exhibit No. 17 was received during the cross-examination of Mr. Levine.

The parties made oral closings at the conclusion of the hearing on May 4, 2012. I then held the record open for Mr. Nesci to submit documentation about a criminal matter involving Mr. Medina. He provided that documentation by e-mail on May 4, 2012, and the parties discussed its relevance in a series of e-mails between May 6 and 10, 2012.

DEC Staff provided a list of proposed transcript corrections on November 15, 2012. On November 16, 2012, I issued a memorandum proposing additional corrections and addressing apparent typographical errors in Staff's list. I also told the parties' counsel to advise me by November 28, 2012, if they had any objection to the proposals in my memorandum. No objections having been raised, I have corrected the transcript consistent with my and DEC Staff's proposals.

POSITIONS OF THE PARTIES

Position of DEC Staff

According to DEC Staff, the respondents completed 2,523 motor vehicle inspections using noncompliant equipment and

procedures, and issued 2,521 certificates of inspection for these inspections, without testing the vehicles' onboard diagnostic ("OBD") systems, which are designed to monitor the performance of major engine components, including those responsible for controlling emissions. Staff explains that the OBD emissions portion of the vehicle inspection involves the electronic transfer of information from the vehicle to a computerized work station and, from there, to DMV via the Internet or a dedicated phone line. DEC Staff says that, for the inspections at issue here, the respondents did not check the vehicles' OBD systems, but instead simulated the inspections, based on a 15-field profile (or electronic signature) that Staff identified in the inspection data that was transmitted to DMV.

DEC Staff has requested a civil penalty \$1,261,500, 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 that was performed.

Position of Respondents

The respondents submitted an answer (Exhibit No. 2) in which they denied DEC Staff's charges.

In his closing statement, respondents' counsel said that DEC had not demonstrated that the individual respondents committed the charged violations, only that their inspector cards or the numbers assigned to the inspectors had been used in the course of the inspections at issue. He said that copies of inspectors' cards are made for various reasons, and that it is not necessarily the inspector who uses the card at the NYVIP machine.

Furthermore, respondents' counsel maintained that DEC has presented what is essentially an electronic case which relies on the accuracy of inspection data, but does not include key testimony from Testcom, the reliability of whose software is in doubt.

FINDINGS OF FACT

1. By application dated February 2, 2009, New Power Muffler requested from DMV a license to operate as a repair shop and public inspection station at 1447 Inwood Avenue, the Bronx. Miguel Marte signed the application (Exhibit No. 8) as president, vice president, secretary and treasurer of New Power Muffler. (Mr. Marte's first name is recorded as "Miquel" in the notice of hearing and complaint, but this hearing report identifies him as "Miguel" Marte, consistent with the spelling in his applications to DMV.) DMV approved the application submitted by Mr. Marte and assigned New Power Muffler a facility number of 7107905. (Levine, T: 42.)

2. On January 26, 2007, Mr. Marte submitted an application to DMV for certification as a motor vehicle inspector. DMV approved the application (Exhibit No. 11) and assigned Mr. Marte a certificate number of 4GA3.

3. On January 15, 2007, Reynaldo A. Medina submitted an application to DMV for certification as a motor vehicle inspector. DMV approved the application (Exhibit No. 9) and assigned Mr. Medina a certificate number of 6JS3.

4. On April 10, 2006, Johann Gonzalez submitted an application to DMV for certification as a motor vehicle inspector. DMV approved the application (Exhibit No. 10) and assigned Mr. Gonzalez a certificate number of 5VR8.

5. On July 2, 2008, Jovanny F. Ortega submitted an application to DMV for certification as a motor vehicle inspector. DMV approved the application (Exhibit No. 12) and assigned Mr. Ortega a certificate number of 7MZ5.

6. Required by the federal government under the Clean Air Act amendments of 1990 and 40 CFR Part 51, the New York Vehicle Inspection Program ("NYVIP") is a motor vehicle inspection and maintenance program that has been in place since 2005 in the New York metropolitan area, which includes all of New York City as well as Long Island and Westchester and Rockland counties. (Clyne, T: 69 - 70.)

7. Implemented due to ozone pollution in the downstate area, NYVIP requires OBD emissions testing of light duty vehicles on an annual basis. (Clyne, T: 70.)

8. The NYVIP inspection begins with the certified inspector scanning the barcode on his or her inspection certificate into the inspection analyzer. Through onscreen menus, the inspection equipment then prompts the inspector to scan the vehicle's registration off the windshield or to enter the information manually, if necessary, so that the vehicle's year, make, model, field type and weight are recorded on the test equipment. (Levine, T: 26.)

9. The test equipment communicates with a state database by phone line or broadband connection for the purpose of identifying whether the vehicle exists in that database and whether the inspection is an original inspection or a re-inspection. (Levine, T: 26 - 27.)

10. The inspector conducts various equipment checks as part of the safety portion of the vehicle inspection, and then does a visual check for the presence and connection of various emission control devices. The results of these checks are recorded on the test equipment. (Levine, T: 27.)

11. Upon completion of these checks, the test equipment prompts the inspector to check the malfunction indicator light ("MIL"), which is located on the vehicle dashboard. This light, also known as the check engine light, is checked as to whether it illuminates with the key on and the engine off, and then extinguishes with the key on and the engine running. (Levine, T: 27 - 28.)

12. Finally, the test equipment prompts the inspector to connect the equipment to the vehicle's diagnostic link connector, which is generally underneath the steering column. (Levine, T: 28.)

13. With the connection established, there is an electronic communication between the test equipment and the

vehicle. The test equipment extracts data from the powertrain control module ("PCM"), a computer within the vehicle. The software then evaluates whether there are diagnostic trouble codes stored in the PCM, whether the PCM is commanding the MIL on the dashboard to illuminate, and whether there are sufficient non-continuous emissions readiness monitors set to ready in order for the vehicle to pass the OBD II emissions portion of the inspection. (Levine, T: 28 - 29.)

14. Once the communication is completed, the diagnostic link connector is unplugged from the test equipment. If the vehicle has passed all the tests, the inspector is prompted to scan the barcode on the next inspection certificate and that certificate, or sticker, is affixed to the vehicle. The equipment will then generate a vehicle inspection receipt, which is given to the vehicle's owner. If the vehicle did not pass, the owner receives a rejection notice indicating whether the failure relates to emissions, safety equipment, or emission control device items. (Levine, T: 29 - 30.)

15. The NYVIP software is menu driven, which means that many of the screens will ask that the inspector make an entry through the keyboard or tool link portion of the communications line, or instruct the inspector to take certain actions. (Levine, T: 30.)

16. The test equipment through which the NYVIP inspection is conducted is also known as a work station, which is a machine that belongs to the licensed inspection facility. (Levine, T: 31 - 32.)

17. To operate the test equipment, one must become an inspector certified by DMV. One applies to DMV by completing a form and paying fees. Applicants are then scheduled to attend a clinic addressing the inspection process, the regulations governing that process, and the procedure by which information is entered into the test equipment. (Levine, T: 32 - 34.)

18. Clinic attendees are told of requirements that their inspector certificate may not be photocopied, that it must be safeguarded at all times, and that no one but the inspector may

have access to it. They are informed that they must have knowledge of the relevant inspection regulations and conform their conduct to them. They are told that by affixing an inspection certificate to a vehicle, they are certifying that the entire vehicle has been checked for compliance with the regulations, and that it does in fact comply. (Levine, T: 33.)

19. Attendees who pass the multiple choice test administered at the end of the clinic are given temporary certifications which allow them to take a second test on the NYVIP inspection equipment at the facility where they will be working. That inspection equipment also contains a training module which allows inspectors to familiarize themselves with the OBD II procedure. (Levine, T: 34 - 35.)

20. To perform inspections on the test equipment, the inspector must pass both the test administered at the clinic and the test administered on the equipment itself. (Levine, T: 35.)

21. When a facility applies to become a licensed public inspection station, a DMV inspector visits the facility to verify that it has the necessary tools and equipment. (Levine, T: 36.)

22. Once the application is approved, the facility is mailed a bar-coded license. To initialize the NYVIP equipment, this license is scanned into it. (Levine, T: 37.)

23. The NYVIP equipment is shipped with an operator's manual containing information on both the use of the equipment and the inspection process, with details on the various on-screen menus that appear during the inspection. (Levine, T: 38.)

24. The NYVIP software is provided by a state contractor, SGS Testcom. DMV subjects the software to "beta testing" to identify any adjustments that are needed before the software is put into use. (Levine, T: 48 - 50.)

25. By regulation added July 3, 2011, DMV is requiring that advisory emissions scans be conducted on any vehicle that is required to be equipped with an OBD system, but which is

exempt from the OBD emissions inspection requirement because the vehicle is less than two model years old. Such scans are being required as part of inspections conducted at stations owned and/or operated by registered new motor vehicle dealers, and are to be done with the NYVIP test equipment. (15 NYCRR 79.24(j).)

26. The purpose of the advisory emissions scans is to ensure that new model vehicles introduced by manufacturers will interface with the existing NYVIP hardware and software. In other words, the scans are intended to see if information will pass from those vehicles' computers to the NYVIP equipment. (Levine, T: 56.)

27. The advisory emissions scans are designed to identify possible communication issues in new vehicles, so that DMV and SGS Testcom may address such issues before the vehicles become subject to actual OBD emissions inspections. (See Exhibit No. 17, DMV memorandum dated February 29, 2012.)

28. Historically, these issues have been addressed by adjusting timing sequences to facilitate the "electronic handshake" between particular vehicles and the NYVIP equipment. (Levine, T: 57.)

29. As of February 29, 2012, the NYVIP test equipment software update providing for the functionality of advisory scans was still in development, and DMV was not requiring dealers to perform these scans until the software was actually in production, which DMV then anticipated would be sometime later in 2012. (Exhibit No. 17.)

30. Between April 9, 2009, and February 18, 2010, 2,523 annual motor vehicle inspections were performed at New Power Muffler using a device to substitute for and simulate the motor vehicle of record. (Clyne, T: 100.)

31. Of these 2,523 inspections, Mr. Marte performed 1,311, Mr. Ortega performed 501, Mr. Medina performed 417, and Mr. Gonzalez performed 294. (Clyne, T: 101.)

DISCUSSION

This matter involves charges that New Power Muffler and its four certified inspectors did not check the OBD systems as part of 2,523 motor vehicle inspections conducted during the period between April 9, 2009, and February 18, 2010. In essence, DEC Staff alleges that the OBD inspections for these vehicles were simulated by use of non-compliant equipment and procedures, and that 2,521 emissions certificates resulting from these inspections were improperly issued.

On behalf of DEC Staff, Mr. Clyne explained that OBD testing is part of NYVIP, the state's vehicle inspection program, which is required under the federal Clean Air Act to combat ozone pollution in the New York City metropolitan area. (Clyne, T: 69 - 70.)

Also referred to as smog, ozone is created on warm days between hydrocarbons and oxides of nitrogen, and poses a significant public health threat. Ozone is very corrosive and damages nasal, throat and bronchial airways, especially in people already afflicted with respiratory problems, such as asthmatics. Ozone also damages agricultural crops as well as buildings, bridges and other infrastructure. (Clyne, T: 71.)

Because New York State is part of an ozone transport region comprised of 11 states and the District of Columbia, the entire state is subject to the NYVIP program. (Clyne, T: 71 - 72.) Emissions from motor vehicles, mostly light duty vehicles (i.e., vehicles less than 8,500 pounds), represent between one-third and one-half of the ozone precursors. By proper inspection of these vehicles, one can determine whether particular vehicles may need repair or maintenance. (Clyne, T: 73 - 74.)

As Mr. Clyne explained, for a station to perform an OBD inspection, it must purchase a certified NYVIP work station from SGS Testcom, and then scan its DMV license into the test equipment. (This records the station's facility number for reference in every inspection that the facility completes.)

The station must also have qualified inspectors, certified by DMV, whose identities are entered into the test equipment by station management or ownership. (Clyne, T: 75.) Before an inspector conducts each inspection, the inspector must scan his or her barcode identifier into the work station, and that number is recorded on each inspection record. (Clyne, T: 76.)

Locating the Simulator Signature

According to Mr. Clyne, in late 2008, DMV informed DEC that it believed a simulator or simulators were being used during emissions testing in the New York City metropolitan area. This suspicion was based on what DMV said were unrealistically high and repetitive readings of revolutions per minute (RPM) that were being recorded for vehicle engines. (Clyne, T: 81 - 82.)

RPM is a data element that is retrieved electronically from the parked vehicle during the "key on and engine running" check of the vehicle's malfunction indicator light. During a typical OBD II inspection, Mr. Clyne said, one would expect an RPM reading in the range between several hundred and 1,200. However, in DEC's independent query of the downstate inspection database, DEC found highly repetitive RPM readings that were greater than 5,000. (Clyne, T: 82 - 83.)

With this information, DEC and DMV sought the assistance of the New York State Attorney General's office, which prompted an undercover investigation of stations in the greater New York City area. This investigation continued into the spring and early summer of 2009, during which time it was learned that RPM alone probably was not a sufficient indicator of simulator use, and that other data fields should be considered as well. (Clyne, T: 83 - 84.)

According to Mr. Clyne, DEC eventually found that entries in a combination of 15 data fields could accurately identify use of a particular simulator. Such use was then traced to 44 inspection stations, including New Power Muffler, out of approximately 9,000 to 10,000 inspection stations licensed in New York State. (Clyne, T: 84 - 85.)

Mr. Clyne testified that the simulator's use at the 44 stations was limited to the period between March 2008 and July 2010. He said his staff looked at 18.5 million initial inspections conducted statewide during the period between September 2004 and February 29, 2008, and found no vehicles that produced the simulator profile. Also, he said that for inspections conducted since July 2010, the simulator profile has disappeared, which he concluded is because a simulator, and not an actual vehicle, was being used at the 44 stations. (Clyne, T: 84 - 85.)

As part of its case, DEC Staff retrieved from DMV abstracts of New Power Muffler's OBD II inspection data for the period between April 8, 2009, and March 4, 2010 (Exhibits No. 13 and 14). (Clyne, T: 87, 103.) (OBD II is a second-generation OBD system mandated by EPA for 1996 and newer model year vehicles at the time of manufacture.)

According to Mr. Clyne, the abstracts, certified by Brad Hanscom, DMV records access officer, contain columns of data extracted during the OBD II inspections. (Clyne, T: 90.) Mr. Clyne delineated the simulator profile on the basis of the following 15 column headings, and the data 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: 94)
RR COMP COMPONENTS	"R"
RR MISFIRE	"R"
RR FUEL CONTROL	"R"
RR CATALYST	"R"
RR O2 SENSOR	"R"
RR EGR	"R"
RR EVAP EMISS	"R"
RR HEATED CATA	"U"
RR O2 SENSOR HEAT	"R"
RR SEC AIR INJ	"U"
RR AC	"U"

(Clyne, T: 93 - 96)

The inspections exhibiting these entries under the 15 column headings are highlighted in orange on Exhibits No. 15 and 16, which are otherwise the same as Exhibits No. 13 and 14, respectively. (Clyne, T: 93 - 94.) For each highlighted inspection, Mr. Clyne testified that the NYVIP test equipment was plugged into an electronic simulator, rather than into the vehicle of record. (Clyne, T: 86, 96, 100.)

Mr. Clyne was able to match the simulated inspections to New Power Muffler and its inspectors through the numbers assigned by DMV to the inspection station license and the inspectors' certificates. New Power Muffler's facility number (7107905) appears in relation to each inspection under the heading "DMV FACILITY NUM" on the data abstracts. (Clyne, T: 91.) Also, the certified inspector numbers assigned to Mr. Marte, Mr. Ortega, Mr. Medina and Mr. Gonzalez appear under the heading "CI NUM" for those inspections highlighted in orange, so that tallying up those numbers for each inspector allows one to determine how many simulated inspections may be attributed to that inspector's conduct. (Clyne, T: 91.)

Mr. Clyne explained the difference between a proper and a simulated inspection with reference to two inspections performed on a particular 2004 Chevy Trailblazer four-wheel drive vehicle, identified by the DMV vehicle identification number ("DMV VIN NUM") "1GNET16S146148292". Referencing page 19 of Exhibit No. 15, Mr. Clyne noted that at 8:06 a.m. on August 8, 2009, Mr. Marte ("CI NUM 4GA3") performed a simulated inspection for this vehicle, based on the appearance of the simulator signature, coupled with an unrealistically high engine RPM reading of 6,078, which matches the RPM readings of other simulated inspections performed at New Power Muffler. (The RPM readings are under the "PHASE 1 RPM" column on the data abstracts.) Then, referencing page 17 of Exhibit No. 16, Mr. Clyne noted that at 1:02 p.m. on January 18, 2010, Mr. Marte performed a proper, appropriate inspection of the same vehicle. According to Mr. Clyne, one indication that this second inspection was proper is that the vehicle's computer electronically reported its DMV vehicle identification number in the column "PCM VIN", something that did not happen during the first inspection

because a simulator stood in for the vehicle. (Clyne, T: 96 - 98.)

Consistent with DEC Staff's charges, Mr. Clyne testified that 2,523 simulated inspections were performed by the respondents, and that 2,521 emissions certificates were issued as a result of these simulated inspections. (Clyne, T: 100.) He also testified that 1,311 of the simulated inspections were performed by Mr. Marte, 501 by Mr. Ortega, 417 by Mr. Medina, and 294 by Mr. Gonzalez. (Clyne, T: 101.)

Remarkably, the respondents did nothing to impeach Mr. Clyne's testimony about the identification and significance of the simulator profile, nor did they take the stand themselves to contradict his account of how, where and by whom the inspections in question were performed. Had Mr. Clyne's account been inaccurate, one would expect the respondents to refute it, particularly because, in their answer, they admitted working at New Power Muffler as certified motor vehicle emission inspectors during the time frame of the alleged violations.

There is no question that the inspections documented in Exhibits No. 13 and 14 (and again in Exhibits No. 15 and 16) were attributable to New Power Muffler, because New Power Muffler's DMV-assigned facility number, which the station would have scanned into the test equipment, appears in relation to each of the inspections. Also, there is no question that Mr. Marte, Mr. Ortega, Mr. Medina and Mr. Gonzalez performed the inspections, because their certificate numbers are the only ones that appear in the inspection data.

While no testimony was offered by or on behalf of the respondents, their counsel, in his questioning of Mr. Clyne, tried to cast doubt on whether the respondents actually did the inspections charged to them. Though inspectors are told not to photocopy their cards, Mr. Clyne acknowledged being aware that photocopies are made, and that the inspector's barcode, which is scanned into the test equipment at the start of each inspection, would read the same on both the card and the photocopy. (T: 109 - 110.) These concessions, during his cross-examination, opened the possibility that someone other than the inspector, using a

photocopy of the inspector's card, could perform an inspection that would be falsely attributed to the inspector whose card was copied. However, there was no testimony that this actually happened at New Power Muffler, despite the presence of two of its inspectors at the hearing. Nor was there testimony that someone else used an inspector's card that had been left next to the inspection equipment, another possibility suggested by respondents' counsel. (T: 114.) In the absence of actual evidence to the contrary, I find that the inspection records accurately pinpoint who performed each of the non-compliant inspections.

Under cross-examination, Mr. Clyne admitted that he had never been to New Power Muffler and did not observe any of the inspections that he claims were simulated. (Clyne, T: 112 - 113.) In his closing statement, respondents' counsel emphasized that DEC Staff's case basically relies on electronic data, and that Testcom, the conduit for that data from the inspection station to DMV, was not present at the hearing. Respondents' counsel surmised that the reason Testcom did not appear was that it could not defend its software, which he said had gone through many permutations, due to "bugs" that it contained. (T: 123 - 124.) He also alleged that the software was being bid out again in 2013, and that bids were being solicited from other software vendors, an indication, he proposed, of problems with Testcom's product. (T: 124.)

As DEC Staff counsel countered, the respondents offered no actual evidence of "bugs" in the Testcom software, only speculative arguments. (T: 125.) While no Testcom representative appeared at the hearing, there is no evidence that Testcom was subpoenaed or otherwise requested to appear by either DEC Staff or the respondents; therefore, I read nothing into its absence.

Under a proper inspection, the NYVIP test equipment communicates with the vehicle's computer, and Testcom forwards in "near real time" whatever data is recorded from the test equipment, located at the inspection station, to DMV. (Clyne, T: 106.) Because of the possibility that computers in new model vehicles may not be able to communicate with the NYVIP test equipment, DMV requires advisory emissions scans, as discussed

above. According to Mr. Levine, the scans are intended to ensure that information will pass from a vehicle's computer to the test equipment, not that the passed information is accurate. (Levine, T: 59 - 60.) Therefore, the fact of such scans, and the explanation of them in Exhibit No. 17, a DMV memorandum, do not bear on the reliability of either the Testcom software or the inspection data received by DMV.

Mr. Clyne traced the simulator profile he found in the data to an Ozen simulator, which is manufactured in Turkey. (Clyne, T: 111 - 112.) Mr. Clyne said that an Ozen simulator was obtained by the New York State Attorney General's office during the course of its investigation, but not at New Power Muffler. Also, he said that the electronic signature of an Ozen simulator purchased subsequently by DEC matches the signature produced during the emissions inspections at issue in this matter (Clyne, T: 110 - 112). This tends to prove that the signature was produced by the simulator, and not by a glitch in the Testcom software. Furthermore, Mr. Clyne said that the Ozen simulator he has used does not have a field allowing one to enter into it an inspector's identification number (Clyne, T: 112). This tends to confirm that the simulated inspections were actually performed by the inspectors whose certificate numbers appear in the data abstracts.

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 both to New Power Muffler as the licensed inspection station, and to Mr. Marte, Mr. Ortega, Mr. Medina and Mr. Gonzalez as the certified inspectors who actually performed the simulations.

- Violation of 6 NYCRR 217-4.2

According to 6 NYCRR 217-4.2, "[n]o person shall operate an official emissions inspection station using equipment and/or

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

I find that 6 NYCRR 217-4.2 was violated on 2,523 separate occasions by use of a simulator to perform OBD emissions inspections. Simulators have no place in the administration of actual emissions tests, and their use is not consistent with emissions inspection procedure set out at 6 NYCRR 217-1.3(a)(3)(i) and (ii), which requires testing of a vehicle's OBD system to ensure that it functions as designed and completes diagnostic routines for necessary supported emission control systems. If the inspector plugs the NYVIP test equipment into a simulator in lieu of the vehicle that has been presented, it cannot be determined whether the vehicle would pass the OBD inspection.

New Power Muffler is liable for all 2,523 violations because, at the time they occurred, it held the license to "operate" the official inspection station. Pursuant to 15 NYCRR 79.8(b), the official inspection station licensee "is responsible for all inspection activities conducted at the inspection station," and is not relieved of that responsibility by the inspectors' own duties, which include performing inspections in a thorough manner. [See 15 NYCRR 79.17(b)(1) and (c).] As a private corporation, New Power Muffler also falls within the definition of "person" at 6 NYCRR 200.1(bi).

Each inspector is also liable for the violations attributable to his own non-compliant inspections. This liability is due to the connection between the official inspection station, which is licensed under VTL 303, and the

inspectors who work at the station, who are certified under VTL 304-a. Pursuant to 15 NYCRR 79.8(b)(2), the specific duties of the inspection station include employing at all times, at least one full-time employee who is a certified motor vehicle inspector to perform the services required under DMV's regulations. In this sense, the inspection station operates through the services that its inspectors provide.

In summary, each inspector should share liability with the inspection station for the OBD inspections he performed using a device to simulate the vehicle that had been presented. However, there is no basis for holding the inspectors liable for each other's non-compliant inspections.

Also, there is no basis for holding Mr. Marte personally liable for all of New Power Muffler's non-compliant inspections. In paragraph 4 of its complaint (Exhibit No. 1), DEC Staff says that at the times of the alleged violations, Mr. Marte was president, vice president, secretary and treasurer of New Power Muffler, an allegation that the respondents admitted in their answer. However, Staff's own evidence (Exhibit No. 8, New Power Muffler's original inspection station application) indicates that New Power Muffler, as a corporate entity, sought and held the inspection station license; therefore, New Power Muffler, as licensee, was the station operator, as Staff also acknowledges. [See paragraph 3 of the complaint.] Mr. Marte may be held personally liable for the 1,311 non-compliant inspections that he personally performed, but not for the remainder, which were performed by the other inspectors.

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

In paragraph 19 of its complaint, DEC Staff alleges that the respondents violated 6 NYCRR 217-1.4 by issuing emission certificates of inspections 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 New Power Muffler was an official inspection station "as defined by 15 NYCRR 79.1(g)" (i.e., an official safety inspection station), the second cause of action must be dismissed, consistent with the dismissal of similar causes of action in matters involving other stations where simulators were used. (See, for instance, Matter of Geo Auto Repairs, Order of the Commissioner, March 14, 2012, at 3 and 4.)

Civil Penalties

In its complaint, DEC Staff proposed that the Commissioner assess a civil penalty of \$1,261,500 in this matter. Staff has not apportioned the penalty between the two causes of action, or among the respondents. According to DEC Staff, it is meant to

apply to the respondents as a whole, meaning they would be jointly and severally liable for it.

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

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

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

DEC Staff is actually seeking \$500 per simulated inspection (T: 126), using the civil penalty policy framework and formulating what it believes to be a consistent, fair and reasonable approach to calculating civil penalties in this and the other 43 similar enforcement cases it is pursuing.

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

- Economic Benefit

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

- Gravity

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

The violations committed here are quite serious to the degree that they frustrate the goal of OBD emissions testing, which is to protect air quality. In fact, OBD testing is required as part of NYVIP, which has been implemented due to ozone pollution in downstate New York. (Clyne, T: 70 - 71.) Also referred to as smog, ozone is created on warm days between hydrocarbons and oxides of nitrogen, and has significant public health and environmental impacts, due to its corrosive nature, as Mr. Clyne testified. Not only does it damage crops, buildings and bridges, it damages nasal, throat and bronchial airways, especially in people who are afflicted with asthma and other respiratory problems. (Clyne, T: 71.)

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 testing is not actually performed, as this removes an opportunity to identify vehicles with malfunctioning emission control systems and ensure those systems are repaired. Using a simulator to bypass the required emissions testing undermines the regulatory scheme that DEC and DMV have developed, the Commissioner has emphasized. (See Matter of Gurabo Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, at 6 and 7.)

- Culpability

According to the policy, the penalty derived from the gravity component may be adjusted in relation to factors including 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. Levine explained, individuals seeking to become motor vehicle inspectors must attend a clinic addressing the inspection process, the regulations that govern that process, and the procedure by which information is entered into the test equipment. (T: 32 - 34.) Then they must pass two tests - one at the end of the clinic and a second on their station's test equipment - before they can do an actual inspection. (Levine, T: 34 - 35.) Due to the training they would have received, the respondents would certainly have known that the use of a simulator is not compliant with the procedures for a properly conducted OBD inspection.

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

- Special Penalty Considerations for Reynaldo A. Medina

At the hearing, respondents' counsel proposed that, for Mr. Medina, consideration be taken of his plea to a class "E" felony, for issuing a false certificate, in violation of Penal Law Section 175.40. The plea was taken in satisfaction of criminal charges that Mr. Medina, on 381 separate occasions, falsely issued inspection certificates as the result of a "clean scanning" operation at A.R. Tire Center & Services located at 2895 Jerome Avenue in the Bronx. According to the felony

complaint (which was furnished, with my permission, after the hearing), clean scanning involves the use of surrogate vehicles to fraudulently obtain passing emissions certificates for vehicles that cannot pass the NYVIP emissions test, or are not even present for testing. Upon taking the plea, Mr. Medina received a \$5,000 fine and a sentence of five years' probation, according to respondents' counsel, who represented Mr. Medina in the criminal matter. (T: 115.)

Department Staff argues that the plea and sentence in the criminal matter are not relevant to its charges; however, it did not object to their introduction for the purpose of possible penalty mitigation. (T: 117.) I find no relevance at all to the plea and sentence. As DEC Staff notes, the charges in the criminal matter do not arise from the same conduct charged by DEC. Clean scanning differs from the use of a simulator. Also, the clean scanning is alleged to have occurred at a station other than New Power Muffler, during a time period (April 26, 2011, to June 29, 2011) that postdates the time frame of the auto simulations (April 9, 2009, to February 28, 2010). Mr. Medina's felony conviction and monetary penalty in a separate matter do not warrant a downward adjustment of the penalty that would otherwise be assessed by DEC.

In an e-mail submitted after the hearing, respondents' counsel argued that "the plea wipes out everything," presumably as to DEC's charges. There is no basis for such a conclusion. DEC's charges of violations of its regulations, prosecuted administratively in this matter, are wholly separate from the criminal charges, prosecuted criminally by the New York State Attorney General's office. Furthermore, nothing has been offered showing that the resolution of the criminal charges was meant to dispose of DEC's administrative action as well.

- Penalty Recommendation

My recommendation is that, for 2,523 separate violations of 6 NYCRR 217-4.2, New Power Muffler should be assessed a civil penalty of \$224,300. Given the culpability of the four inspectors, but recognizing the unequal number of violations they committed, I recommend a civil penalty of \$116,600 for Mr.

Marte, \$44,500 for Mr. Ortega, \$37,100 for Mr. Medina, and \$26,100 for Mr. Gonzalez. On a per violation basis, these penalties are consistent with those assessed in prior matters involving similar sets of facts. Even combined, they are considerably less than the \$1,261,500 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 by the Commissioner in other matters where it has been offered for violations identical to these.

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

CONCLUSIONS

1. Between April 9, 2009, and February 18, 2010, respondent New Power Muffler, an official emissions inspection station, used a simulator to perform OBD II inspections on 2,523 separate occasions. These simulated inspections were performed by respondents Miguel Marte, Jovanny F. Ortega, Reynaldo A. Medina and Johann Gonzalez.

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

RECOMMENDATIONS

1. For the first cause of action, involving alleged violations of 6 NYCRR 217-4.2, respondent New Power Muffler should be assessed a civil penalty of \$224,300, respondent Miguel Marte should be assessed a civil penalty of 116,600,

respondent Jovanny F. Ortega should be assessed a civil penalty of \$44,500, respondent Reynaldo A. Medina should be assessed a civil penalty of \$37,100, and respondent Johann Gonzalez should be assessed a civil penalty of \$26,100.

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

ENFORCEMENT HEARING EXHIBIT LIST

**NEW POWER MUFFLER INC., MIGUEL MARTE, JOHANN GONZALEZ, REYNALDO
A. MEDINA and JOVANNY F. ORTEGA**

1. DEC Notice of Hearing and Complaint (8/18/10)
2. Respondents' Answer (10/18/10)
3. DEC Staff's Statement of Readiness (12/30/10)
4. DEC Chief ALJ's assignment letter (2/4/11)
5. DEC Staff's Supplemental Statement of Readiness (12/22/11)
6. ALJ's hearing notice to parties' counsel (4/11/12)
7. ALJ's hearing notice to respondents Ortega and Gonzalez (4/24/12)
8. DMV repair shop and inspection station application for New Power Muffler Inc. (2/2/09)
9. DMV certified inspector application for Reynaldo A. Medina (1/15/07)
10. DMV certified inspector application for Johann Gonzalez (4/10/06)
11. DMV certified inspector application for Miguel Marte (1/16/07)
12. DMV certified inspector application for Jovanny F. Ortega (7/2/08)
13. Abstract of New Power Muffler's OBD II inspection data for the period between 4/8/09 and 9/9/09, certified by DMV records access officer Brad Hanscom (1/20/10)
14. Abstract of New Power Muffler's OBD II inspection data for the period between 9/10/09 and 3/4/10, certified by DMV records access officer Brad Hanscom (9/1/10)
15. Data from Exhibit No. 13, with orange highlighting of simulated inspections
16. Data from Exhibit No. 14, with orange highlighting of simulated inspections
17. Memorandum from Chris Ayers to regional DMV staff, re: "Defense Use of Regulatory Impact Statement (RIS) at hearing" (2/29/12)