UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR
Washington, D.C.

In re	)	
	)	
BP OIL, INC.	)	DOCKET NO. CAA(211)-113
	)	
Respondent	)	

Respondent found to be liable for violation of the governing statute and regulation as alleged in the complaint. A somewhat lesser penalty than that proposed found proper. Order entered assessing such penalty.

APPEARANCES:

William J. Webb for Respondent

George E. Lawrence, Jr. and Joseph Vasapoli, Jr. for Complainant

INITIAL DECISION BY JAIR S. KAPLAN,
ADMINISTRATIVE LAW JUDGE (Ret.)

I. Introduction

This matter arises from a Complaint issued by the United States Environmental Protection Agency, Office of Enforcement (EPA) on May 16, 1980. The Complaint alleges that Respondent BP Oil, Inc. (BP) is liable for the violation of the EPA's Regulation of Fuel and Fuel Additives (40 CFR Part 80), its branded fuel, represented as unleaded, but in fact containing in excess of .05 grams of lead per gallon, having been offered for sale for use in motor vehicles, in violation of 40 CFR §80.22 (a), thereby also violating Section 211 of the Clean Air Act (42 U.S.C. §7545). Separate complaints involving the same facts were filed against Joseph G. Perry, d/b/a Perry's Service Center (Perry), a retailer, and Milton M. Freedman and Alfred E. Freedman, d/b/a Jermyn Mill and Grain Company (Jermyn), a reseller. The three proceedings were consolidated for joint hearing. Prior to hearing, the Complaint against Jermyn was settled and the Complaint against Perry was withdrawn. Hearing in the remaining BP proceeding was held on December 16, 1980, in Wilkes-Barre, Pennsylvania. Both EPA and BP have timely filed initial and reply briefs.

II. Stipulation

At the hearing, the parties agreed to the following stipulation:

1. On February 21, 1980, inspectors of the U.S. Environmental Protection Agency conducted an inspection of the gasoline dispensing facility at 315 E. Drinker Street, Dunmore, Pennsylvania, owned and/or operated by Joseph G. Perry.

2. On that date, gasoline represented to be unleaded was offered for sale for use in motor vehicles at the facility described in Paragraph 1, above.

3. The gasoline described in Paragraph 2, above, had a lead content in excess of 0.05 grams of lead per gallon.

4. BP Oil, Inc. owns, leases, operates, controls or supervises a refinery.

5. The corporate trade or brand name of BP Oil, Inc. is displayed at Perry's Service Station.

6. The excess lead level described in Paragraph 3, above, was not caused by BP Oil, Inc., its employees or agents.

III. The Basic Facts

BP is a refiner of petroleum products. Jermyn is a gasoline reseller ("jobber" in trade parlance), purchasing gasoline identified by BP's brand name from BP under a current contract dated February 1, 1980, entitled "Branded Jobber Agreement" (hereinafter "the Agreement"). All purchases are for the purpose of resale by Jermyn to retail gasoline stations. Because Jermyn serves relatively more small stations than other jobbers, the tank vehicles used are also smaller and less sophisticated. Perry operates a retail gasoline station in Dunmore, Pennsylvania, supplied by Jermyn and bearing and displaying BP brand. On February 21, 1980, EPA inspectors conducted an inspection at Perry's and determined that gasoline offered for sale as unleaded had, in fact, a lead content in excess of .05 grams of lead per gallon, in violation of 40 CFR §80.22(a). The immediate cause of the excess lead level was the failure by a Jermyn driver to remove the residual leaded gasoline remaining in the hose of his truck

from a previous delivery. Following the contamination, all of the contaminated gasoline was promptly recovered and each month thereafter BP retested Perry's unleaded gasoline to determine whether its lead content remained within acceptable levels.

Incorporated as part of the Agreement is a six-page "Unleaded Gasoline Handling Procedure" (hereinafter "the Handling Procedure") intended to prevent contamination of unleaded gasoline while such gasoline is in the jobber's possession. The Handling Procedure, inter alia, requires that jobber trucks delivering unleaded gasoline to retail outlets be "drained before loading" and prohibits delivery of unleaded gasoline "through a common meter and/or a common manifold".

The trucks operated by Jermyn are not equipped with separate manifolds and meters and, as a practical matter, they, or more particularly their delivery hose, cannot be completely drained before loading. Under these circumstances, the only feasible method of removing residual fuel (about 20 gallons) is to place new fluid in the tank of the vehicle and pump all residual leaded fuel out of the hose of the truck before delivery of the unleaded gasoline. Although such a procedure was not followed prior to the delivery of the involved gasoline in the instant case, Jermyn did customarily take such steps to avoid contamination.

The Agreement also requires that Jermyn itself sample the unleaded gasoline in its storage tank, following each receipt of the product; and that Jermyn conduct or maintain an internal sampling program of retail stations it supplies. The results of such sampling were to be reported monthly to BP. Jermyn had not complied with the reporting obligation for at least 18 months prior to the subject violation; and it sampled its unleaded gasoline tank only once each month, although it had been generally receiving fuel from BP twice a month. BP knew of these departues from the Agreement, but did not attempt to secure Jermyn's compliance with these requirements.

BP has, periodically and randomly, taken its own samples from jobber supplied outlets. In addition to the violation here, BP found, in the conduct of this sampling program, three previous instances of contamination at Jermyn supplied stations. In each instance, BP instructed Jermyn not to sell any of the gasoline as unleaded, discussed the matter with Jermyn, and secured the latter's promise that corrective action would be taken. In one of the instances, BP monitored the lead level of the outlet's unleaded gasoline tank until it returned to an acceptable range.

BP's oversight of unleaded gasoline distribution includes issuance of written guidelines and procedures to the jobber and twice monthly discussions between the jobber and the assigned BP sales representative. In recognition of the fact that Jermyn supplies an unusally large number of small stations, BP samples such stations three times as frequently as other outlets.

IV. Position and Contentions of the Parties

The principal issue presented here is whether BP has established an affirmative defense under 40 CFR §80.23(b)(2) which provides, in pertinent parts, as follows:

> In any case in which a retailer or wholesale purchaser-consumer, a reseller (if any), and any gasoline refiner would be in violation under paragraph (a)(1) of this section, the refiner shall not be deemed in violation if he can demonstrate:
>
> (i) That the violation was not caused by him or his employee or agent, and
>
> * * *
>
> (iii) That the violation was caused by the action of a reseller or a retailer supplied by such reseller, in violation of a contractual undertaking imposed by the refiner on such reseller designed to prevent such action, and despite reasonable efforts by the refiner (such as periodic sampling) to insure compliance with such contractual obligation.

EPA alleges that BP has not established that the contamination was caused by Jermyn's violation of the Agreement. Specifically, EPA argues that, because Jermyn was not explicitly required to flush its delivery trucks prior to deliveries of unleaded gasoline, the Agreement itself failed to mandate action by Jermyn that would have prevented contamination; and that the undertaking specified in the Agreement (i.e., separate meter/manifold system) would not have prevented contamination. BP responds that had separate meters and manifolds been used, no contamination would have occurred. BP also contends that the flushing procedure, although not specifically mentioned in the Agreement, substantially complies with its intent and underlying purpose of preventing contamination of unleaded gasoline and is a workable substitute method for draining.

Alternatively, EPA argues that even if the Agreement imposed an obligation on Jermyn to prevent contamination, BP's defense must fail because it did not take reasonable steps to secure Jermyn's compliance, as required by the regulation. While acknowledging that BP conducts a sampling program, EPA maintains that BP has not responded aggressively enough to violations discovered through sampling. EPS is particularly critical of the two instances, one in June 1978 and another in November 1978, where BP relied on Jermyn's voluntary efforts and assurances that lead levels had been returned to acceptable ranges, but BP failed to conduct its own resampling to insure that contamination had actually ceased.

EPA also charges that BP's failure to enforce the requirements in the Agreement that Jermyn sample both its own unleaded gasoline storage tanks and those of the stations it supplies and report the results monthly to BP, indicates lack of reasonable oversight. Finally, EPA notes that the statistical measure of contamination at Jermyn's outlets (3 instances out of 23 samples taken since December 1977, or about 13%) compares very unfavorably with BP's systemwide contamination rate (approximately 10 incidents out of 665 unleaded samples during the first eleven months of 1980, or a ratio of 1.5%, the latter being similar to the national annual average), indicates a continuing pattern of violations by Jermyn, and betrays a lack of resolve by BP to enforce its unleaded gasoline compliance program with regard to jobber. BP responds that each of the three incidents of contamination had a different cause, i.e., suspected deliberate contamination by a retailer, mechanical failure, and human error. BP asserts that these incidents did not constitute a pattern of violations by Jermyn or demonstrate a lack of resolve by BP to abide by the regulations; and that, following each incident, BP secured a promise of voluntary corrective action by Jermyn and satisfied itself that none of the contaminated fuel would be sold as unleaded gasoline.

BP emphasizes that its more recent record indicates improvements in its compliance program. Its present representative in the involved area now routinely resamples previously contaminated tanks for two or three months in a row to insure that all infractions have been eliminated. In fact, he has conducted such resamplings at Perry, following the contamination which is the subject of this proceeding, as well as in the most recent of the three unrelated incidents of contaminations. Respondent particularly objects to EPA's percentage calculations of BP's violations, asserting that they are not based on a wide enough sample to be accurate.

Finally, EPA criticizes BP for relying too much upon informal discussions to obtain full compliance with the fuel regulation, and not enough upon concrete measures, such as letters of admonitions, sanctions, and strict insistence on following the provisions of the Agreement. BP defends its approach as an appropriate one to treat a competent jobber such as Jermyn which, it emphasizes, is an independent business entity over which BP has no direct control. BP believes that it will have greater success and better results by relying on personal contact and persuasion in dealing with such a customer than in the manner suggested by EPA.

V. Discussion

As noted, the principal dispositive issue here is whether BP has established a defense absolving it from liability for the violation of the regulations, as provided in §80.23(b)(2). The parties agree that BP did not cause the violation. BP must, therefore, establish the two remaining separate elements set forth in that section: (a) that Jermyn was subject to a contractual undertaking imposed by BP designed to prevent the action that resulted in the contamination and (b) that BP's program of enforcing the terms of the contract constituted "reasonable efforts by the refiner (such as periodic sampling) to insure compliance with such contractual obligation".

A. Did the Agreement Impose a Duty Designed to Prevent the Action that Caused the Violation?

The Agreement incorporates a Handling Procedure for maintaining the integrity of unleaded gasoline. The provision governing delivery of unleaded gasoline to retailer provides the following:

> Trucks provided by Buyer for delivery of unleaded gasoline to Buyer's retail outlets must have all compartments and associated piping to be used for such product thoroughly drained before loading. Under no circumstances are deliveries of unleaded gasoline to be made through a common meter and/or common manifold.

Because Jermyn's truck could not, as a practical matter, be drained before each loading, nor was it equipped with separate manifolds and meters, Jermyn customarily cleared residual leaded fuel in the truck's hose by flushing the hose prior to delivery of unleaded fuel. EPA argues that the Agreement's failure to explicitly require flushing renders the contract inadequate under §80.23(b)(2)(iii).

EPA's interpretation of the contract must be rejected as unduly stringent. First, BP correctly notes that the Handling Procedure includes the following general statement:

> Federal regulations require that any persons who own, lease, operate, control or supervise certain retail outlets for sale of gasoline must offer for sale at such outlets at least one grade of "unleaded gasoline", which is defined in the regulations to mean gasoline containing not more than 0.05 grams of lead per gallon and not more than .005 grams of phosphorus per gallon.
>
> The primary problem in maintaining the integrity of unleaded gasoline is to avoid contamination with leaded regular and premium grades. It is important to note that only 10 gallons of leaded gasoline (containing 2 gm/gal. lead) will raise the lead level of 1000 gallons of unleaded by .02 gm/gal. In order to comply with EPA regulations the following handling procedures are specified by BP Oil, Inc.

The Agreement itself, moreover, declares and reiterates in explicit terms that the purpose of the Handling Procedure is the prevention of contamination of unleaded gasoline. Finally, the Agreement contains the following indemnity provision which underlines for Jermyn that the purpose of the Handling Procedure is to maintain the integrity of unleaded gasoline:

> Buyer agrees that it will indemnify BP and hold it harmless against any liability, penalty or loss which may result from a violation of the regulations relating to the sale and distribution of unleaded gasoline which arise as a result of purchases made under this contract and which are not attributable to the acts or omissions of BP, its agents or employees. This indemnity in no way limits and is intended to be included within the scope of the general indemnity set forth in Paragraph 10 hereof.

In short, Jermyn was aware, or should have been aware, that it had a major responsibility under the Agreement for compliance with the regulations.

Nor can the practical considerations governing Jermyn's performance of the Agreement be ignored. The flushing procedure, if properly done, fully achieves the underlying purpose of the Agreement -- i.e., preventing contamination -- whereas draining before loading has been shown to be completely impracticable and unworkable for Jermyn's trucks. The fact that Jermyn routinely used the flushing procedure and that BP acquiesced in such practice constitutes a mutual recognition of the economic reality of Jermyn's situation. Contract law holds that where a promisee does not perform strictly as contemplated in an agreement, particularly where, as here, full performance is practicably impossible, substantial performance through a suitable alternative method discharges the promisee's duty. Williston, Contracts, §805. Accordingly, it is found that the Agreement imposed a binding contractual undertaking on Jermyn to guard against contamination, using any practicable means available while BP unleaded gasoline was in its possession; and that flushing prior to delivery constituted substantial performance of this undertaking under the Agreement.

Again, the foregoing finding is consistant with the general thrust of contract law that contract conditions should be construed with reasonable regard to commercial reality and economic feasibility. Id., §806. The test of the Agreement here need not necessarily be whether it is perfect in all respects from a regulatory point of view. Nevertheless, Respondent may well wish to consider including in future agreements with Jermyn and other jobbers similarly situated the express imposition of flushing, as an alternative method of avoiding contamination. This would be consistent with the statement made at the time the regulations were initially proposed that contract provisions may need to be changed in light of actual experience with the distribution of unleaded gasoline.

B. Did BP Make Reasonable Efforts to Insure that Jermyn Complied with its Contractual Obligations?

The reasonableness of BP's efforts to secure Jermyn's compliance with the Agreement's provisions is somewhat troubling. At the outset, however, EPA's statistical argument that Jermyn's contamination rate of 13% (based on 3 contamination of 23 samples) is in and of itself an indication of insufficient policing by BP of Jermyn's compliance with the Agreement, based on a comparison with BP's company-wide rate of contamination, must be rejected. While such data might reliably be developed, it is noted that the period covered was more than two years and

that 23 instances are too few to permit valid statistical comparisons or inferences. In addition, EPA has made no threshold showing that conditions with respect to Jermyn supplied stations are substantially similar, if not identical, to those prevailing at all other BP stations.

EPA is correct in arguing, and indeed one of BP's own witnesses agrees, that each of Jermyn's supplied stations where contamination is detected should be resampled until the problem is remedied. As noted, the pertinent provision of the regulation requires reasonable efforts by the refiner (such as periodic sampling) to insure compliance with the contractual obligations. This language clearly implies both preventive sampling, to determine whether a violation exists, and continuing sampling, to insure that contamination is eliminated. BP's past failure in two instances to conduct follow-up sampling would indicate a laxness in this respect. No matter what the value of a voluntary prevention program may be, once violations of the Agreement are detected, BP is on notice of, and presumptively liable for, the resulting contamination. At that point BP has an obligation under the regulations to act affirmatively to see to it that the contamination violation ceases. While BP's instructions to Jermyn to stop unleaded sales to such outlets until the contamination is corrected are commendable, such instructions are only a necessary, but not a sufficient, step in discharging BP's duty of securing Jermyn's compliance with the Agreement.

As noted, however, BP's current Jermyn sales representative customarily now conducts follow-up testing when a violation is found. He did, in fact, conduct such testing at Perry's station and also subsequent to the most recent unrelated instance of contamination. Accordingly, it is apparent that BP has already corrected its deficiency in this regard and that such action partially mitigates BP's past failures to resample.

EPA is also correct in pointing out that BP's failure to insist that Jermyn test its own unleaded tank and report to BP the results of its internal station testing program betrays a lack of reasonable compliance oversight. Both the testing and reporting are required by the Handling Procedure and are integral parts of the Agreement's pronounced company-wide goal of maintaining the integrity of unleaded gasoline "at any stage in the chain of distribution". BP's response, that Jermyn is an independent business entity capable of keeping its own house in order, is not an adequate answer to this charge or any other infraction. The very purpose of the agreement is to impose upon

Jermyn mandatory sampling and reporting obligations which apparently BP has previously decided could not be left to voluntary and unsupervised action. It is precisely because jobbers are generally not subject to the direct control of the refiner that a formal agreement is required under §80.23(b)(2). That agreement must be enforced, if its purpose of avoiding contamination is to be achieved, otherwise the refiner should suffer the consequences.

EPA contends that BP's response, in the face of Jermyn's three previous violations, should have included sanctions (presumably unbranding) or a warning letter. Although such action might be necessary in some appropriate circumstances, there is no showing here that the provisions in the contract itself, if fully enforced -- together with immediate cessation of sales from contaminated tanks, resampling at stations where contamination has occurred, and systematic preventive sampling of Jermyn's outlets -- would not have been sufficient to discharge BP's general regulatory obligations with regard to Jermyn. Each of Jermyn's three previous incidents of contamination, though unfortunate, apparently stemmed from a different cause. Such a record does not indicate that Jermyn is an incorrigible violator of the Agreement requiring the severe sanction of unbranding.

BP did attempt to communicate its concern about the contaminations in the meetings held by its representative with Jermyn. But something more than mere discussions appear to have been required here. BP should have taken some additional specific action to ensure that flushing was used prior to each retail delivery by Jermyn. Although flushing, as a matter of contract law, may be sufficient to discharge Jermyn's obligations under the Agreement, BP knew full well that such a procedure was a departure from the Agreement's explicit terms and allowed for a greater possibility of human error than separate manifolds and meters. Thus, BP's relying solely on Jermyn's verbal assurances that flushing was routinely used, particularly after two contaminations had occurred because of a failure to flush, was not sufficient to fully discharge BP's oversight obligations under the regulations. The Agreement itself expressly provides for amendment or modification by "written memorandum signed by both parties". At a minimum, and to emphasize the seriousness and importance of the matter, BP should have demanded and received a written assurance from Jermyn that it would flush its truck hoses prior to retail deliveries, whether or not such written undertakings were also to be incorporated into the Agreement as previously suggested.

All in all, the Presiding Officer finds that BP has failed to meet fully the requirement that it make reasonable efforts

to insure compliance by Jermyn with its contractual obligations.

C. Amount of Penalty

The maximum statutory penalty for the violation is $10,000. However, EPA proposes the assessment of a $6,000 penalty against BP. The five factors to be considered in determining the size of a penalty are found in §22.34(e) of the Consolidated Rules of Practice (40 CFR §22.34(e)). They are: (1) the gravity of the violation, (2) the size of the Respondent's business, (3) the Respondent's history of compliance with the Act, (4) the action taken by Respondent to remedy the specific violation, and (5) the effect of the proposed penalty on Respondent's ability to continue in business.

EPA argues that $6,000 is an appropriate penalty because, according to EPA guidelines governing assessment of penalties, BP is a category IV business (having had over $5 million gross revenues for the previous fiscal year), the largest classification; contamination of unleaded fuel is among the more serious of the Clean Air Act violations; the gravity of the violation is determined not by how much of the contaminated fuel has actually been sold, but by the "potential for harm". EPA states that BP has had no prior violations and that assessment of the proposed penalty will not jeopardize BP's ability to remain in business. Although conceding that BP moved quickly to insure that none of the contaminated fuel was sold as unleaded gasoline, EPA alleges that BP did not remedy the conditions that caused the contamination (i.e., failure to flush) and that no mitigation of the proposed penalty should be permitted in such circumstances. On the other hand, BP assets that EPA has not demonstrated the extent to which the lead content of the gasoline at Perry's exceeded the allowed maximum of .05 grams per gallon and that the foregoing indicates either that no violation occurred (because of a possible margin of error in testing) or, in the alternative, that the gravity of the violation was slight. BP also argues that because none of the contaminated product was sold, no harm to the public occurred. Finally, BP emphasizes that it has no prior history of violations.

It is true that the extent to which the contamination exceeded .05 grams per gallon is pertinent to determining the gravity of the violation and, in turn, the amount of penalty. However, BP cannot here properly assert that the theoretical possibility, that the lead content of the fuel, because of the margin of error in testing, might not have exceeded .05 grams, requires a finding of no violation. The stipulation precludes, and BP has thus waived, any claim that no violation actually

occurred. As pointed out by EPA, and an examination of the schedules shows, the proposed $6,000 is at the lowest point of the range of penalties specified by the governing guidelines for this type of violation for a refiner of the size of BP which has had no prior violations.

The second and fifth elements are the size of Respondent's business and the effect of the penalty on its ability to continue to do business. Here, there appears to be no dispute that BP's size, measured by its gross revenues, puts it in the category for exposure to the maximum schedule of penalties and that payment of the proposed penalty would have no effect upon BP's ability to remain in business. Similarly, the parties agree that BP has no prior violations.

The last element to be considered is Respondent's action remedying the specific violation. The expeditious and effective steps taken to ensure that none of the contaminated gasoline was sold to the public is a relevant factor militating in BP's favor. Although Respondent has been deficient in exerting sufficient efforts to insure that contamination would be avoided by Jermyn through flushing, its more recent and present practice of follow-up tests or resampling should also be given weight in mitigating the proposed penalty. Accordingly, it is found that the proposed penalty should be reduced to $5,000, which penalty appears to be appropriate under the circumstances presented herein.

ULTIMATE CONCLUSIONS AND ORDER

Upon consideration of the entire record, including briefs filed, and based upon a preponderance of the evidence and the foregoing discussion and findings, it is concluded that:

(1) Respondent BP Oil, Inc., as the involved refiner, is liable, pursuant to 40 CFR §80.23(a)(1), for violation of 40 CFR §80.22(a) and, as a result, for violation of Section 211 of the Clean Air Act.

(2) Respondent BP Oil, Inc., has failed to establish an adequate defense under 40 CFR §80.23(b)(2) to be absolved from liability for the indicated violation.

(3) Respondent BP Oil, Inc. should, accordingly, be assessed a civic penalty in the amount of $5,000, and that such penalty is just, reasonable, and warranted in the circumstances presented herein.

WHEREFORE, IT IS ORDERED, subject to review by the Administrator on appeal, or sua sponte, as provided by Section 22.30 of the Consolidated Rules of Practice (40 CFR §22.30), that:

(A) A civil penalty in the amount of Five Thousand Dollars ($5,000) be, and it is hereby, assessed against Respondent BP Oil, Inc.

(B) Payment of the above-specified amount shall be made in full within sixty (60) days after service of this order by forwarding to the Hearing Clerk a cashier's check or certified check payable to the United States of America.

Jair S. Kaplan

By the Presiding Officer
April 13, 1981

Jair S. Kaplan
Administrative Law Judge (Ret.)

CERTIFICATE OF SERVICE

I do hereby certify that the original of the foregoing document was mailed by certified mail to Respondents, and by regular mail to Complainant to the addressees that follow:

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DATED: APRIL 14, 1981