

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

In re)
)
BP OIL, INC.) Docket No. CAA(211)-138
)
Respondent)

NOV 12 1971 P 2: 41

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

APPEARANCES:

William J. Webb and David L. Bell for Respondent

George E. Lawrence, Jr., and Reynold Meni 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 June 3, 1980. The complaint alleges that Respondent, BP Oil, Inc. (BP), is liable for a violation of the EPA Regulations of Fuel and Fuel Additives (40 CFR Part 80). More specifically, EPA alleges that BP branded gasoline, represented and offered for sale or sold as unleaded, for use in motor vehicles, in fact contained in excess of 0.05 grams of lead per gallon, in violation of 40 CFR §80.22(a), thereby also violating Section 211 of the Clean Air Act (42 USC §7545). Separate but related complaint proceedings were also instituted against William C. Bruner, d/b/a Bruner's Service Center, (Bruner), the retailer, and Ann Schriver, d/b/a The Schriver Company, Inc., (Schriver), the reseller, of the subject gasoline, based on the same provisions of the regulations. On March 27, 1981, the complaint against Bruner was withdrawn; and on March 31, 1981, the Schriver proceeding was settled. The hearing herein was held on June 23, 1981, in Cumberland, Maryland. Both EPA and BP have filed initial and reply briefs.

II. Stipulations

At the hearing the parties agreed to the following stipulations:

1. On April 16, 1980, an inspector of the Maryland Gasoline Tax Division conducted an inspection of Bruner's Service Center, a gasoline dispensing facility located on Route 495, Grantsville, Maryland, owned and operated by William C. Bruner.
2. On that date, gasoline represented to be unleaded was sold, dispensed or offered for sale at Bruner's Service Center.

3. The gasoline described in paragraph 2 above had a lead content of 0.530 grams of lead per gallon.
4. The corporate, trade or brand name of BP Oil, Inc., was displayed at Bruner's Service Center.
5. BP Oil, Inc., owns, leases, operates, controls or supervises a refinery.
6. The excess lead level described in paragraph 3 above was not caused by BP Oil, Inc., its agents or its employees.

III. The Facts

The Schriver Oil Company has been a jobber or reseller of BP products for over six years. Prior thereto it was a jobber for other brands of gasoline for a number of years. Mr. Joseph Schriver ran the business until his death in 1978 and his widow, Mrs. Ann Schriver, continued to operate the business thereafter. The retail outlet where the contamination was detected is a country grocery store owned and operated by Bruner in Grantsville, Maryland. He sells gasoline from pumps displaying the BP brand. He purchases gasoline at wholesale from Schriver. Bruner's unleaded gasoline storage tank holds only 550 gallons, whereas his leaded gasoline storage tank holds 2,000 gallons. On April 16, 1980, an inspector for the State of Maryland conducted an inspection at Bruner's Service Center which revealed that gasoline offered for sale as unleaded actually contained in excess of 0.05 grams of lead per gallon, in violation of the regulations. This was the first citation for violation of the regulations by either Bruner or Schriver. On the same day of the inspection, immediately after

notification, the contaminated product was removed by Schriver and replaced with uncontaminated unleaded gasoline. Follow-up testing was also performed by BP to insure that no recurrence of the contamination took place.

Schrivers normal and required procedure for the delivery of gasoline to its customers was to unload the unleaded gasoline first and then the leaded gasoline, when leaded and unleaded gasoline was being transported by the same truck. The amount of each type of product delivered was documented on a separately and sequentially numbered meter ticket. The ticket was inserted into the delivery truck's metering device which would then stamp the meter reading prior to and after the unloading of the particular product, as well as the number of gallons which passed through the meter during the unloading operation. On each ticket, the type and amount of the product delivered would be specified.

Bruner also kept a record of the deliveries of gasoline to his station. His method of measuring the quantity of gasoline in each of his two storage tanks was to use a measuring stick to determine the level of the product in the tank and then refer to a chart which showed the corresponding volume in gallons. Measured volumes were recorded in a notebook, along with the amount of each type of gasoline delivered according to the truck driver's meter ticket. Stick measurements may be in error by 30 to 40 gallons, depending upon how level or tilted the storage

tanks are in the ground. Bruner's unleaded gasoline tank is not completely level in the ground.

Schriver's trucks were commonly used to carry and deliver both leaded and unleaded gasoline in the same vehicle. The trucks were equipped with common meters and common manifolds, a fact of which BP was aware. In contrast to unloading, Schriver did not load leaded and unleaded gasoline into its trucks according to any routine pattern. It neither recorded the type of product being carried in the several truck compartments, nor did it tag the compartments to indicate what particular type of gasoline was contained in each. Schriver's drivers relied on their memory as to which compartment contained which type of product. The use of dedicated equipment -- trucks carrying exclusively one type of product -- would have been economically prohibitive for an operation of Schriver's size.

The gasoline delivery to Bruner, immediately preceding the inspection, was made on April 11, 1980. Prior to that delivery, Bruner's 2,000-gallon leaded gasoline tank contained 308 gallons and his 550-gallon unleaded gasoline tank contained 179 gallons. Schriver's delivery tickets indicated the following: (1) on the first ticket, No. 15135, the driver wrote that 1,700 gallons of regular (leaded) gasoline were delivered, though the stamped meter reading indicated that 2,013.9 gallons flowed through the meter, but the latter meter stamp was crossed out by the driver;

and (2) on the second ticket, No. 15136, the driver wrote that 300 gallons of unleaded gasoline were delivered, and no meter readings were stamped on that ticket. While one of Schriver's drivers testified as to his general practice of handling gasoline transported by truck from the jobber to retail outlets, he was not the one who made the delivery on April 11, 1980.

Following the delivery, Mr. Bruner measured his leaded gasoline storage tank and determined that 1,944 gallons were in that tank; he, however, did not measure his unleaded gasoline storage tank. On the average, Bruner sold 300 gallons of unleaded gasoline every 10 days, or 30 gallons per day. Daily sales of this product varied from none to 80 gallons, depending upon the day of the week and weather conditions. Bruner's place of business was generally closed on Sundays. Based upon the specific daily average, about 90 gallons of the contaminated gasoline would have been sold during the intervening three weekdays. However, Bruner estimated that only about 30 gallons of the contaminated gasoline were actually sold.

BP and Schriver had in effect a contract, called the "Branded Jobber Agreement" (the Agreement), which incorporated by reference a document entitled "Unleaded Gasoline Handling Procedure" (the Handling Procedure). Schriver agreed to become familiar with such procedure and to comply strictly with its terms.

Under the Handling Procedure, Schriver (Buyer) was prohibited from using trucks with common meters and/or manifolds to deliver

leaded and unleaded gasoline as follows:

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 and any leaded gasoline to be made through a common meter and/or common manifold. (Handling Procedure, p. 4.)

The Handling Procedure also required Schriver to:

Paint or have painted the manhole covers and fill line caps as recommended to BP to identify storage tank(s) dedicated to unleaded gasoline. (Handling Procedure, p.4)

In addition, Schriver was to conduct a program of monthly testing of unleaded gasoline at BP branded retail outlets supplied by it, as follows:

Buyer shall arrange for the taking of samples from the unleaded gasoline dispenser(s) at not less than 10% of Buyer's retail outlets each month and the prompt testing of such samples by any lead test kit approved by BP or by any method approved by the Regulations, so that each such retail outlets will be sampled and tested at least once during any ten-month period. (Handling Procedure, p.5.)

Shriver was also required to test its own unleaded gasoline at its bulk storage tank following each receipt of that product, as follows:

All plant storage of unleaded gasoline must be sampled and tested for lead content following each receipt of unleaded gasoline and the lead content of unleaded gasoline in storage must be known to Buyer and be within permissible limits prior to any delivery truck loading. (Handling Procedure, p.4.)

The results of all sampling and testing were required to be reported to BP monthly pursuant to the following provisions:

Buyer shall make a written record of each sampling and testing of unleaded gasoline product conducted by or for its pursuant to articles above, and shall furnish to BP District Office (at the above or other address provided to Buyer from time to time) by the tenth day of each month a consolidated report setting forth a listing of, and the results of lead tests made of all samples of unleaded gasoline product taken from, Buyer's plant storage Buyer's retail outlets in operation during the preceeding month pursuant to this Agreement. Buyer shall retain its supporting records of all sampling and testing conducted by or for it of unleaded gasoline product for a period of at least 12 months and BP shall have the right at all reasonable times to inspect such records of Buyer, as well as Buyer's other records showing deliveries and receipts of gasoline at Buyer's plant and sales and deliveries from Buyer's plant of gasoline to Buyer's retail outlets. (Handling Procedure, p.6.)

The Handling Procedure also called for BP to sample or test monthly 2.5 percent of the retail outlets served by Schriver. Thus, for Schriver's seven outlets selling unleaded gasoline, two samples per year would satisfy BP's obligations to conduct periodic sampling, while eight samples per year would meet Schriver's obligation.

Although Schriver performed some testing, the overall compliance was substantially less than mandated by the Agreement, which, as noted, required Schriver to sample unleaded gasoline at its retail outlets and at its bulk storage facility, and to provide BP monthly reports of the results. The only confirmed instances of sampling by Schriver occurred in 1978, when both Schriver and BP jointly tested the retail outlets which carried unleaded gasoline. Schriver

kept no written records of its sampling program for the retail outlets it served; nor was there any indication that it ever sampled its own unleaded gasoline storage tank. Schriver did, however, ask BP for test sampling kits on a number of occasions. Admittedly, BP was aware of these deficiencies in the testing program as early as 1976, and in 1978 it specifically criticized the program as inadequate. Although BP suggested to Schriver that its program be brought into compliance with the Agreement, no action was ever taken by the jobber to remedy the deficiencies. On the contrary, Schriver emphasized that it would run its business the way it saw fit. Respondent never took or threatened any sanctions against Schriver.

BP, for its part, sampled the Schriver served stations roughly once a year. BP held informal discussions with Schriver to review the requirements concerning unleaded gasoline, particularly when that product had first been introduced, and later when the Agreement was renewed. BP was generally satisfied with the sincerity with which Schriver and its employees regarded the unleaded gasoline requirements.

IV. Contentions of the Parties

As noted, the parties have stipulated that contamination, in violation of the regulations, occurred here; but that BP, its agents or employees were not the cause of the contamination. The

ultimate question for resolution, therefore, is whether BP has established an affirmative defense to liability under the provisions of 40 CFR §80.23(b)(2) which as pertinent read 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.

Thus, three principal issues arise here: (a) whether Schriver caused the contamination; (b) whether there was a contractual obligation imposed by BP on Schriver to prevent the action which caused the contamination; and (c) whether BP undertook reasonable efforts to ensure compliance with such an obligation.

A. Actual Cause of Contamination

Although there was no direct testimony on this point, EPA contends that the circumstantial evidence showed that the contamination here was caused by Schriver's truck driver who apparently mistakenly introduced leaded gasoline into Bruner's unleaded gasoline storage

tank. EPA notes that the delivery of gasoline, prior to the April 16, 1980, inspection, took place on April 11, 1980. EPA states that the record shows that Bruner's 2,000-gallon leaded gasoline storage tank contained 308 gallons prior to delivery and 1,944 gallons after delivery, indicating the addition of 1,636 gallons, and that a total of 1,700 gallons of unleaded gasoline were actually unloaded that day, raising the inference that at least 64 gallons of leaded gasoline were placed into the unleaded storage tank, thus accounting for the excess lead level of the tested unleaded gasoline on April 16, 1980. EPA asserts that such a conclusion is reinforced by the fact that the delivery tickets show that the driver departed from normal procedures of unloading unleaded before leaded gasoline, as evidenced by the ticket sequence, and specifying the quantities of the products delivered by handwritten notations, instead of by meter stamps. EPA suggests that the explanation behind this scenario is that Schriver's driver not only commenced to unload leaded gasoline first, contrary to the usual practice, but also and mistakenly introduced that gasoline into the unleaded gasoline tank. EPA surmises further that, realizing his error of commingling unleaded and leaded gasoline, the driver then completed the two delivery tickets by hand, in an attempt to obscure the fact that a contamination had occurred and that he had left the first ticket in the truck meter during the unloading of both the leaded and unleaded products. BP does not dispute BP's hypothesis. It admits that the actual cause of contamination was

either driver error or deliberate commingling by Schriver or Bruner. However, no evidence has been presented to support the latter bare allegation of deliberate commingling.

B. The Contractual Obligation

As to the existence of a contractual obligation designed to prevent the violation, BP alleges that the Agreement and the Handling Procedure incorporated therein impose such an obligation. BP points to various clauses having that purpose, such as requiring Schriver not to adulterate BP's products or commingle them with other products, and to identify externally manhole covers and fill lines that are dedicated to unleaded gasoline. The most emphasized provision, however, is the following:

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

BP contends that compliance with the foregoing provision would have prevented the contamination here. It further argues that, because of the high cost of literal conformity with the provision, BP had been insisting that delivery trucks be flushed prior to the loading of unleaded gasoline. Although no testimony was presented to show that Schriver had actually flushed its trucks, the flushing procedure was alleged to be in substantial compliance with the Agreement. In effect, BP claims that the quoted provision and the flushing requirement, considered together, amount to a contractual

obligation designed to ensure the integrity of unleaded gasoline and is in conformance with §80.23(b)(2) of the regulation.

EPA responds that BP's interpretation of the Agreement is too broad. Though admitting that the Agreement contains language designed to prevent contamination resulting from various practices, EPA argues that the Agreement fails to adequately guard against contamination due to driver error, which apparently was here the cause of the violation. For this reason, EPA contends that BP's discussion of flushing as suitable means of complying with the provision prohibiting a common meter and/or a common manifold is beside the point, since failure to flush the truck was not the actual cause of the contamination here. The critical deficiency of the contract, according to EPA, is the omission of any provisions requiring Schriver to assist drivers to remember where exactly unleaded gasoline has been placed. EPA has suggested the need for this purpose of such provisions as: (a) requiring the use of dedicated trucks to carry unleaded gasoline only; or (b) mandating the use of dedicated compartments, for leaded and unleaded gasoline, thus requiring the driver only to remember which compartment is dedicated to which product; or (c) providing for a system by which compartments are clearly marked or tagged to show which type of product is carried therein. EPA maintains that complete reliance on the truck driver's memory alone was inadequate

to guard against contamination and that the provisions of the Agreement did not constitute a sufficient contractual obligation to prevent contamination under the regulations.

C. Reasonable Efforts

In asserting that it took reasonable measures to ensure Shriver's compliance with the contractual obligation, BP preliminarily contends that Schriver's general attitude toward compliance must be considered as a background matter. BP points, on the one hand, to various indications of Schriver's serious intention to comply with the Agreement and, on the other hand, to its expressed independence and distinct dislike of any meddling by BP in its business affairs as jobber. These factors are said to both explain and justify BP's relatively hands-off approach to Schriver's shortcomings. As for its actual oversight of Schriver, BP maintains that both it and Schriver regularly sampled retail outlets for contamination. The fact that BP did more sampling, and Schriver did less sampling, than required under the contract is said by Respondent to be irrelevant, since the total number of samples was approximately at the rate required in the Agreement. BP emphasizes that no outlet sampled by it and/or Schriver had ever sold contaminated gasoline prior to the instant incident and that, given this history, BP's oversight efforts need not be as stringent here as with a jobber who had a previous record of contaminations.

BP also notes its favorable general experience with, and impression of, Schriver. Respondent states that the pertinent provisions of the Agreement were often discussed by BP personnel with Schriver; that Schriver personnel, both drivers and administrative staff, seemed competent and concerned about compliance with the regulations; and that Schriver's handling procedures were in substantial compliance with the agreement. BP submits that in the circumstances it has undertaken reasonable precautions to avoid contamination.

V. Discussion

A. Cause of the Contamination

As noted, EPA has advanced a detailed explanation postulating that the contamination here occurred through driver error. In the absence of direct testimony, the circumstantial evidence indicates that the Schriver driver who delivered the gasoline on August 11, 1980, apparently either through careless inattention or lapse of memory, mistakenly introduced 64 gallons of leaded gasoline into Bruner's unleaded gasoline storage tank. BP has not challenged this explanation, but contends that an alternative possible cause of the contamination might have been deliberate commingling. However, the latter supposition lacks any direct or indirect evidentiary support on this record; and, in addition, it seems to be contrary to common sense. While a dishonest seller could conceivably profit from the substitution of leaded for the higher priced unleaded

gasoline, there is no similar motivation to deliberately contaminate unleaded gasoline. EPA's explanation is quite plausible and persuasive. It logically places the cause of the violation at the delivery immediately preceding the inspection, the most likely time that the contamination would have occurred. It is also fortified, and substantiated by the irregularities in the unloading process and the meter ticketing of the delivered products, and by the records and testimony of Bruner. Accordingly, the Presiding Officer agrees with EPA that the contamination here was the result of the erroneous action of Schriver's driver, and he so finds based on the preponderance of the evidence.

B. The Contractual Obligation

The question of whether an obligation was imposed on Schriver by BP to prevent the action which resulted in contamination is largely a dispute over how specifically the obligation should have been spelled out in the contract. EPA maintains that BP should have required the establishment of a particular scheme by which the driver's memory would be jogged into recalling the type of gasoline carried in each truck compartment. BP, on the other hand, contends that the language in the contract was sufficiently specific to insure that only unleaded gasoline would be unloaded into unleaded gasoline storage tanks; and that the absence of a particularly prescribed regimen was not fatal.

The Presiding Officer agrees with BP that the contract imposes an obligation on Schriver to prevent contamination by driver error, but not quite for the reasons advanced by Respondent. The driver error committed here should be distinguished from the problems arising in the connection with the delivery of gasoline in trucks equipped with common meters and manifolds where prior flushing is required to avoid contamination. In that latter situation, the potential problem is so obvious that the necessity for the particular routine of flushing is almost self-evident. Cf., BP Oil, Inc., Docket No. CAA(211)-113, Initial Decision dated April 18, 1981. Here, however, the mistake causing the contamination was more basic and elementary, involving plain carelessness or negligence, not related to any technical or mechanical unloading devices. The mere performance of the required flushing by Schriver would have not prevented the contamination.

As for actual provisions imposing an obligation, the Handling Procedure includes the following general statement as its principal purpose:

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 also included representations that Schriver understood the significance of, and would comply with, the EPA unleaded gasoline regulations. The Handling Procedure stated:

11. Product Handling Regulations. Buyer agrees to observe all valid laws, ordinances and regulations pertaining to the handling, storage and dispensing of petroleum products purchased hereunder, including all regulations pertaining to leaded and unleaded gasolines.

12. Unleaded Gasoline - Compliance and Indemnity. Buyer acknowledges that it is familiar with the regulations of the United States Environmental Protection Agency relating to fuels and fuel additives as set forth in Volume 40 Code of Federal Regulations, Chapter 1, Part 80. These regulations are subject to amendment from time to time and Buyer agrees to keep current with the effective version of the regulations.

As seen, the Handling Procedure also required the external identification of manhole covers and fill lines dedicated to unleaded gasoline. In short, the Agreement and the Handling Procedure contained provisions adequately alerting Schriver of its obligation not to allow its drivers carelessly or inattentively to unload gasoline which would result in contamination.

This is not to say, of course, that the Agreement is ideal. EPA correctly observes that the Agreement could have been improved by prescribing a more particularized loading and unloading procedure

and, thus, more forcibly impressing Schriver with the necessity of avoiding the potential dangers of driver error in the unloading process. The question here, however, is not whether the contract was perfect, but rather whether it imposed a binding obligation on Schriver to insure that its drivers do not improperly unload gasoline. It is reasonable to conclude here that Schriver's general undertaking to guard against any contamination of unleaded gasoline necessarily included also the obligation to insure that its drivers acted responsibly and carefully in delivering BP products to retail outlets, and it is so found.

C. Reasonable Efforts

BP's efforts to monitor Schriver's compliance with its contractual obligation to prevent driver error during unloading were, however, not wholly or altogether reasonable. As noted, BP's efforts were basically limited to sampling and informal conferences with Schriver. Respondent permitted Schriver to dispense with many, if not most, of its obligations to sample its own storage tanks and those of its customers and to report the results monthly to BP. To its credit, BP attempted to close this gap by performing additional sampling of its own, beyond what was normally required of Respondent. The sampling and reporting requirements, however, have two purposes. First, to detect any contamination that has already occurred. And second, a prospective and preventive purpose - to provide Schriver with a concrete impetus to continually reexamine its practices and to make sure that they conform to the requirements of the Agreement and the

Handling Procedure and to EPA regulations. To the extent that BP's sampling took the place of Schriver's own duty to perform sampling, only the first purpose was served. BP's rather loose approach to Schriver's sampling and reporting obligations distinctly conveyed an attitude that strict compliance with the provisions of the Agreement, Handling Procedure, and regulations was not very important or critical. Obviously, such a state of affairs cannot pass muster.

Also significant is BP's failure to affirmatively and specifically inquire more carefully and closely into Schriver's unleaded gasoline handling practices, either during their occasional informal contacts, or generally as part of their ongoing business relationship. The regulations place a major responsibility on the refiner to prevent contamination by jobbers or resellers. To the extent that the refiner abdicates this responsibility or shifts it to the very party whose activities it is to oversee, a finding that reasonable efforts have been undertaken is precluded. This does not mean that the refiner must intrude into or control the details of a jobber's daily business practices. It does mean, however, that the refiner must independently exert reasonable efforts to make sure that the jobber has been taking sufficient precautions to prevent contamination. Such efforts should include inquiries into such matters as the appropriate use of equipment and tank trucks, driver selection and training programs, and proper identification of storage tank covers and fill line caps. BP made here

no showing whatever that such efforts were ever undertaken. On the contrary, Respondent maintains that Schriver's previous record justified a light-handed approach to inspection or oversight. While, it may be true that a jobber's past history of contamination should trigger closer supervision by the refiner, it is nevertheless equally clear that oversight efforts must be undertaken on a continuous basis and targeted, with some specificity, at all potential and reasonably foreseeable causes of contamination, with the aim of preventing any prospective violations, regardless of the seller's previous behavior.

Nor can BP be excused by the fact that Schriver tended to shun outside interference in its affairs by Respondent. The very purpose of the Agreement and the Handling Procedure was to impose obligations upon Schriver which BP decided could not properly be left to voluntary or discretionary action on the part of the jobber. It is precisely because a jobber, such as Schriver, is an independent entrepreneur and is not subject to the direct control of the refiner that a formal agreement is required under 40 CFR §80.23(b)(2). Such an agreement must be enforced with reasonable strictness to ensure that its objective of avoiding contamination is achieved, otherwise the refiner must suffer the consequences. Under the facts and circumstances presented here, it is found that BP has failed to show here that it exerted sufficiently reasonable efforts to insure that Schriver complied with its contractual obligation to prevent contamination. Accordingly, Respondent must be found liable for the violation

pursuant to the provisions of 40 CFR §80.23(a)(1).

VI. Amount of Penalty

The maximum statutory penalty for violation of the regulations is \$10,000. EPA here proposes the assessment of an \$8,000 penalty against BP. The five factors to be considered in determining the size of a penalty are found in 40 CFR §22.34(e). They are:

- (1) the gravity of a violation;
- (2) the size of Respondent's business;
- (3) the Respondent's history of compliance with the Act;
- (4) the action taken by the Respondent to remedy the specific violation; and
- (5) the effect of the proposed penalty on the Respondent's ability to continue in business.

EPA argues that \$7,000 to \$8,000 is the appropriate penalty range, based on the guidelines governing the assessment of penalties. Under these criteria, BP is a category IV business (having had \$5 million or more in gross annual revenues), the largest such classification; contamination of unleaded fuel is among the more serious of the Clean Air Act violations; and 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 notes in this latter connection that the lead contamination level here, 0.530 grams per gallon, is ten times the maximum allowed. Although conceding that BP had no prior violations at that time the contamination occurred, EPA notes that BP was subsequently found liable for a violation of 40 CFR §80.22(a) in BP Oil, Inc., Docket No. CAA(211)-113, Initial Decision, dated April 18, 1981. EPA also contends that BP

is not qualified for any reduction of the proposed penalty under the criteria (4) and (5) listed above, since no action has been taken by BP to remedy the conduct which caused the contamination, and the payment of the penalty will not affect the ability of Respondent to continue in business.

BP maintains that the \$8,000 penalty proposed is inappropriately large. It asserts that the amount of contaminated gasoline actually sold was small, perhaps as little as 20 or 30 gallons, indicating that the gravity of harm was insignificant. It also points to the fact that as soon as the contamination was detected, all of the contaminated gasoline was pumped out and replaced while the inspector was still on Bruner's premises; and that follow-up testing was performed by BP. As to the prior proceeding, BP argues that the decision therein is being appealed and, therefore, should not be considered here as a previous violation for the purpose of assessing a penalty.

There appears to be no dispute here concerning the category in which BP falls and that payment of the proposed penalty would have no effect on BP's ability to remain in business. As to BP's history of compliance with the Act, BP's violation of the regulations as determined in the previous Initial Decision, simply cannot be ignored. Although it is true that the Initial Decision is subject to appeal, it still constitutes a presumptive finding of liability. In any event, if the Initial Decision in CAA(211)-113 is reversed by the Administrator, Respondent may request that the instant proceeding be reopened for reconsideration for the purpose of re-

ducing the assessed penalty on the basis that BP had no prior violation in the region.

More perplexing is the criterion of the gravity of the violation. EPA is certainly correct that gravity of the violation is affected by the degree to which the contaminated gasoline exceeded prescribed limits and the potential harm. However, the nature of the conduct which gave rise to the violation must also be considered. A deliberate act of contamination, for example, would constitute a more serious offense than contamination resulting from negligence. It appears here that BP is liable because of its failure or laxity to hold Schriver to sufficiently strict standards of scrutiny and accountability, generally with respect to maintaining the integrity of unleaded gasoline and more particularly in connection with driver unloading practices. While such failure may not be disregarded and should be corrected, BP's conduct was not of such nature as to warrant the imposition of the upper limit of the established range of penalties. Also militating in BP's favor is the fact that it conducted follow-up testing to ensure that there was no recurrence of contamination. Under all of the circumstances, it is found that the proposed penalty should be reduced by \$1,000 to \$7,000.

One final observation on BP's liability is in order. At the hearing, there was indication in the record that if BP were found liable for a contamination in this proceeding, it would seek indemnification from Schriver under paragraph 12 of the Agreement.

While the agency obviously cannot control BP's actions, it is noted that such conduct by BP would be an attempt to circumvent the policy concerning assessment of liability for contamination of unleaded gasoline set forth in the Clear Air Act and 40 C.F.R. Part 80. The regulations clearly mandate the circumstances where liability attaches to the refiner and where liability attaches to jobbers such as Schriver. To the extent that paragraph 12 of the Agreement attempts to reorder these priorities, it may be void as against public policy and of dubious enforceability.

V. 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 civil penalty in the amount of \$7,000, 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 Seven Thousand Dollars (\$7,000) 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.



By the Presiding Officer
November 12, 1981

Jair S. Kaplan
Administrative Law Judge (Ret.)

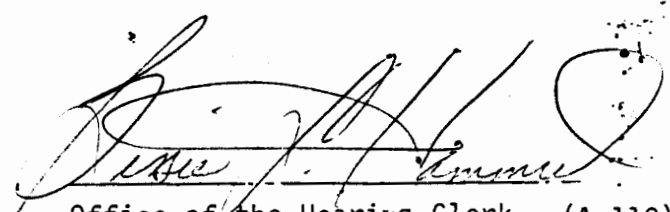
CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing document was filed and mailed by certified mail this day, to the Respondent and Complainant to the addresses that follow:

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DATED: November 12, 1981