UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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IN THE MATTER OF:	)	DOCKET NOs. X76-211-8 and X77-211-1
V-1 Oil Company	)	---
Respondent	)	Marvin E. Jones Administrative Law Judge 1735 Baltimore Kansas City, Missouri 64108

INITIAL DECISION

Complaints were filed in the above-styled cases on September 28, 1976 and January 5, 1977, respectively charging Respondent V-1 Oil Company (hereinafter V-1) with violations of 40 CFR 80.22(b) of the Fuels and Fuel Additives regulations, each said violation being also a violation of Section 211(c) of the Clean Air Act [42 U.S.C. Section 1857f-6c(c)]. Said cases were, on agreement of the parties (Tr. 3-4) consolidated for hearing.

The first said Complaint alleges that:

> "On or about September 15, 1976, Respondent, as an owner and/or party in control of the retail outlet at 3166 Pole Line Road, Pocatello, Idaho, which sold in excess of 200,000 gallons of gasoline in at least one calendar year beginning with 1971, did cause, suffer, or permit said retail outlet to fail to offer unleaded gasoline."

The second said Complaint alleges, in two counts, like violations at retail outlets located respectively at 824 Avon, Caldwell, Idaho (on December 10, 1976) and at 1800 block of west Holmes Avenue, Idaho Falls, Idaho (December 14, 1976.

Said Complaints propose, and Complainant now urges and at the hearing urged, the assessment of a civil penalty of

$3,000 for each violation, or a total of $9,000, assuming that V-1 had gross income for the prior fiscal year of an amount exceeding $5 million and, on consideration of the Guidelines set forth at 40 FR 39973 and the fact that V-1 does not have a history of violations prior to the subject Complaint. The Complaints suggest that downward adjustment of the proposed penalties will be made on submission of proof by V-1 that its gross income is less than that assumed.

On May 17, 1977, V-1 filed amended answers in both of said causes. Said answers generally deny the allegations of the Complaints, and in addition, seven "Affirmative Defenses" were alleged along with a Demand for Jury Trial. The first Affirmative Defense alleges that the Complaint fails to state a claim upon which affirmative relief may be granted. My prior action in overruling said contention is here reaffirmed. Likewise, as stated in my Orders of July 29, 1977 (letter form) and August 26, 1977 (a formal order) those portions of said answers raising constitutional questions (Affirmative Defenses Second, Third, Fourth, Fifth, and Seventh) have been stricken for the reason that this forum is without jurisdiction to consider said issues. As was there pointed out constitutional questions are properly addressed in the Court of Appeals. Likewise, a jury trial cannot be granted in an Administrative Law Case and V-1's allegation that its constitutional rights are thereby violated cannot and will not be considered here. Respondent's Sixth Affirmative Defense states that "respondent affirmatively alleges its willingness to install additional gasoline dispensing equipment requested or required by the EPA upon receipt of sufficient moneys, credits or other incentives

from said agency to accomplish the same without excessive financial burden or strain to respondent". (emphasis supplied.) I am unable to discern that Section 211(c) of the Act or the applicable regulations provide that any conditions need to be satisfied in order to make respondent answerable for any violations thereof. Therefore, said paragraph is inappropriate. In conformity with V-1's requests, an Administrative Law Judge was designated to preside in these cases and the venue was moved from Seattle to Idaho Falls, Idaho, where said Adjudicatory Hearing was held on September 14, 1977, in District Court room No. 2 of the Bonneville County Court House.

In each of said cases, V-1 served Complainant, on or about January 18, 1977, with 23 Interrogatories, and contends in its brief and arguments, in support of its proposed Findings and Conclusions, that said Interrogatories were ignored.

It is not necessary to here observe or discuss whether said inquiries were and are germaine to legitimate issues here presented, for the reason that 40 CFR 80.319(f) provides that no discovery shall be undertaken except upon order of the Presiding Officer or upon agreement of the parties. Said section was cited by Complainant in its November 15, 1976 reply to V-1's request for venue and interrogatories.

In conformity with said Section 80.319(b) and (e), the undersigned, as presiding officer, sought to obtain illumination of the facts in issue by its letter of July 20, 1977. Answers from both parties were requested to questions as follows:

Question 1 inquired as to the ownership of the three retail outlets. (Respondent's first proposed Finding on page

one of its proposed Findings, Conclusions, Brief and Argumer dated November 11, 1977, admits that it is the "owner...of each of the gasoline outlets referred to in the Complaint".)

Question 2 directed compliance with the provisions o subsection (b) -- Exchange of Witness List and Documents.

Question 3 inquired as to the amount of gross sales and the total gallonage sold at the subject retail outlets i the 12-month period next preceding the violations charged.

Question 4 requested suggestions as to what penalty should be assessed under the facts and circumstances, as viewed by the respective parties.

Both parties, with copies to opposing counsel, responded to said July 20 letter containing the above questions. V-1, by letter on August 15, 1977 furnished the names of the witnesses it expected to testify at the hearing, but otherwise omitted responding to, or even making mention of questions 2, 3, and 4. The response of Complainant, dated August 19, 1977, stated, on page 2:

> "Gallonage and Income Information. Company sales and income records, as well as gallonage sales records for each of the outlets, would normally be in the possession of, and could easily be produced by, the respondent. (sic) Complainant is deferring any request for discovery [pursuant to 80.319(f)] in light of the requirement by the Presiding Officer that such information be supplied in this exchange."

In addition, Complainant's response to question 4 was that no mitigation of the penalty proposed would be appropriat because of two year continuous violation cited on the part of V-1.

At the Adjudicatory Hearing (Tr. 4) Complainant made a demand that Respondent furnish information respecting or admitting to the following:

1. Ownership of the three subject retail outlets;

2. The gallonage sales at each of the respective outlets for calendar years beginning with 1971 (i.e. that said outlets sold over 200,000 gallons of gasoline in a calendar year);

3. The size of Respondent's business as a whole (i.e., that Respondent's gross income for the 12-month period immediately preceding the date of the alleged violations exceeded $5 million);

4. That none of the three subject outlets offered unleaded gasoline for sale as alleged in the Complaint.

Complainant pointed out that Respondent did not plead specifically [Section 80.316(b)] to the facts so alleged in the Complaint, but denied said allegations generally; and further that the prehearing exchange addressed each of the fact issues explicitly and the response from Respondent was silent as to each (Tr. 5).

Section 80.304, in pertinent part, is as follows:

> "80.304(c) Presiding Officer. It shall be the duty of the Presiding Officer to conduct a fair and impartial hearing, assure that the facts are fully elicited, adjudicate all issues, and avoid delay (emphasis supplied). The presiding officer shall have authority to:
>
> x x x

"(4) ...as set out in 80.319(f), upon motion or sua sponte, order the production of persons, documents, or other nonprivileged evidence; (emphasis supplied.)

x x x

"(7) Do all other acts and take all measures necessary for the maintenance of order and for the the efficient, fair and impartial adjudication of issues of fact and law arising in proceedings in section 211(d) of the Act."

Said Section 80.319(e) provides:

"Unavailablity of a prehearing conference. Where circumstances render a prehearing conference unnecessary or impracticable, the Presiding Officer, on motion or sua sponte, may request the parties to correspond with him for the purpose of accomplishing any of the objectives set forth in this section. The Presiding Officer shall include such correspondence for the record ..."

Section 80.319(f), in pertinent part:

"(i) That such discovery will not in any way unreasonably delay the proceeding;

"(ii) That the information to be obtained is not otherwise obtainable;...

x x x

"(4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order pursuant to this paragraph may lead to an inference that the information to be discovered would be adverse to the person or party from whom the information was sought."

Though Section 80.319(e) uses the term "requests", the furnishing of certain factual information requested is mandator Consider the following regulations (emphasis supplied):

Section 80.7 Requests for Information.

"(a) When the Administrator, the Regional Administrator, or their delegates have reason to believe a violation of Section 211(c) of

> the Act and the regulations thereunder has occurred, they may require any refiner, distributor, or retailer to report the following information regarding receipt, transfer, delivery or sale of gasoline represented to be unleaded gasoline... .
>
> "(b) Upon request by the Administrator, the Regional Administrator, or their delegates, any retailer shall provide documentation of his annual total sales volume in gallons of gasoline for each retail outlet for each calendar year beginning with 1971."
>
> [Subsection (c) requires the provision of such "...other information" maintained in the normal course of business which (delegates) may reasonably require to determine whether (such respondent) has complied with the Act and regulations thereunder.]

With reference to Section 80.7(a) the Presiding Officer is a delegate and (see section 80.304 -- Powers of Presiding Officer) vested with authority to require production of information under subsection (a) and the Respondent was and is required under subsection (b) to provide documentation of his annual total volume in gallons of gasoline for each subject retail outlet when requested. Under Section 80.317(a) Respondent's failure to respond to the prehearing request in my letter of July 20, in order to accomplish the objectives of a prehearing conference is a default which constitutes "an admission of all facts alleged in the Complaint". At the Hearing, Respondent was given the opportunity to present evidence which might vary the allegations of the Complaint; however the choice of Respondent was to insist that Complainant had not borne its burden of proof.

Throughout these proceedings, from the time of the filing of the Complaint herein, and until the conclusion of the evidentiary hearing, Respondent has followed a pattern of

resisting and refusing to comply with the requirements of the regulations as to the furnishing of non-privileged evidence peculiarly within its possession. It has consistently withheld such evidence which is pertinent to this hearing -- namely, the annual gallonage sales at subject outlets and the gross income of respondent -- though requests for same were made by the Administrative Law Judge prior to the hearing and by Complainant during the course of the Hearing (Tr. 6).

The above clearly and rationally demonstrates that Respondent's failure and refusal was contumacious and that Respondent is subject to the inference that the evidence in his possession sought by Complainant was adverse to the Respondent. (see further the preamble to promulgation of Rules applicable here, 40 F.R. 39961 and 39962, August 29, 1975, for the Administrator's construction of Section 304 provisions.)

On the basis of the pleadings, the evidence in the record, and the reasonable inferences to be drawn from the pleadings and the evidence, and the proposed findings of facts, conclusions of law, briefs and arguments submitted by the parties, I do make the following

FINDINGS OF FACTS

1. On September 15, 1976, December 10, 1976 and December 14, 1976, and at all times pertinent hereto, Respondent V-1 Oil Company owned, operated and controlled each of the three subject retail gasoline outlets as hereinabove and in the Complaint more fully described.

2. The annual gallonage sales at each of said retail gasoline outlets exceeded 200,000 gallons in one or more of the calendar years beginning with the year 1971.

3. Respondent's gross income exceeded $5 million for the 12-month period immediately preceding the dates of the alleged violations.

4. The Respondent V-1 Oil Company is the owner of and controls and operates subject retail outlets for the sale of gasoline at the following subject locations:

3166 Pole Line Road, Pocatello, ID, (hereinafter Pocatello);

824 Avon, Caldwell, ID, (hereinafter Caldwell);

1800 block of West Holmes Ave, Idaho Falls, ID (hereinafter Idaho Falls).

5. On September 15, 1976, Nathaniel Davis, Sr. (Davis a fuels inspector for US EPA Region X, Seattle, WA, inspected Pocatello, and on advising the attendant in charge he wished t purchase unleaded gasoline for sampling, was told then and there by said attendant that the owner of said retail outlet was V-1 Oil Company and Sam Bennion of Idaho Falls, Idaho and that no unleaded gasoline was there offered for sale (Tr. 27). Said attendant further stated that at the particular time he sold 40,000 gallons of gasoline per month.

6. On December 10, 1976, Davis inspected Caldwell and, on inquiring about unleaded gasoline being offered for sale at said location, was told by the man who said he was the manager that they didn't have any underground storage or an unleaded gasoline pump, but that they had unleaded gasoline

for sale in a five-gallon can. Davis purchased gasoline (for sampling) from the manager's five-gallon can, which the manager obtained from some point inside the service station building (Tr. 32, 33). Davis stated he did not see any signs posted that said unleaded gasoline was offered for sale. He did see V-1 Oil Company signs. The station manager at Caldwell stated that his station was a pretty big operation and, from his observation, over 200,000 gallons of gasoline per year was sold there.

7. On December 14, 1976, Davis inspected Idaho Falls after he was first directed to the V-1 Oil Company office where he met Mr. Bennion, who identified himself as President of V-1 and who requested that he accompany Davis on his inspection. Bennion advised (Tr. 36) "we don't have a (unleaded gasoline) pump in the ground, but we have it (unleaded gasoline in a five-gallon container". (Bennion) told the station operator to get the container and sell Davis what (amount of unleaded gasoline) he wanted. Davis purchased and was receipted for two cents worth of unleaded gasoline for sampling which was tested in an EPA fuels van, while Bennion observed.

CONCLUSIONS OF LAW

1. Respondent V-1 Oil Company had a duty under the facts found hereinabove to offer for sale at least one grade of unleaded gasoline from and after July 1, 1974.

2. On the basis of the facts presented on this record, Respondent V-1 Oil Company was in violation of 40 CFR 80.22(b) on the dates of each of the subject inspections in that V-1

did not offer for sale unleaded gasoline as provided by applicable regulations.

DISCUSSION

It is clear from a reading of said Section 80.22, subsections (b), (c), (d), (e), and (f) that "offering for sale unleaded gasoline" contemplates (b)(3)(ii) the use of a nozzle spout as described in 80.22(f)(2) for dispensing, and (iii) preparing "existing tanks to dispense unleaded gasoline' (extensions of time of up to two months for such procurements are provided on proper application). Subsection (d) provides that notices shall be displayed "in the immediate area of each pump stand". Subsection (e) provides for the proper labeling of each gasoline pump stating whether the product dispensed therefrom is unleaded gasoline or leaded which "contains lead anti-knock compounds". Subsection (f) prescribes the size nozzle which are required to be utilized in dispensing both leaded and unleaded gasoline.

V-1 argues that the fact that a five-gallon can which contained an undisclosed amount of unleaded gasoline satisfies the requirement that it there "offered for sale unleaded gasoline". We disagree. It is apparent that the protection provided for consumers and the general public in the regulatior above referred to would be nullified if this argument were accepted. Congress, by passage of the subject Act, [Section 211(d)], intended that unleaded gasoline must be generally available to serve the cars and light-duty trucks produced during the 1975 model year and thereafter since said vehicles were and are equipped with lead-sensitive catalytic converters

which are deactivated by the presence of lead in gasoline. It is imperative, if the regulatory program is to succeed, that retail gasoline outlets must be required to "offer for sale" unleaded gasoline in a manner and to the extent dictated by the public need. It is essential that V-1's stations, and all retail outlets performing a comparable function, must provide this service to the public and provide it adequately. The instant violations' serious effect is recognized when we visualize the serious negative effect on the entire regulatory program which can and will result from a multiplicity of such violations. [See Wickard v Filburn, 317 U.S. 111 (1942.] The fallacy of its argument is demonstrated by V-1's witness, Darrell Lester. He stated that he had three five-gallon cans of unleaded gasoline "in a hole in back of the station" -- that he has been on his job since September 1974, and he sold unleaded gasoline "just once" (Tr. 99) from a can. He also stated (Tr. 104) "if they pull in and you have a five-gallon can in back -- they are going to assume you don't have it in the pump -- and drive off".

Further perspective is furnished by the Administrator's explicit expressions relative to marketing requirements for unleaded gasoline, 39 FR 16123, at page 16124, May 7, 1974.

CIVIL PENALTY

In proposing a civil penalty properly to be assessed on the basis of the entire record, I have given consideration to the factors set forth in 40 CFR 80.330(b)(1), viz.,

(1) the gravity of the violation, (2) the size of respondent's business, (3) respondent's history of compliance

with the Act, (4) the action taken by respondent to remedy the specific violation, and (5) the effect of such proposed penalty on respondent's ability to continue in business.

Gravity of the violation is usually determined from the standpoints of gravity of harm and gravity of misconduct. From a study of the facts here presented I do not find any mitigating circumstances. Respondent's failure for approximately two years to comply with a mandatory regulation is serious when considered from either standpoint. I do not find that the penalty proposed will have an adverse effect on Respondent's ability to continue in business.

By reason of the foregoing I find that a civil penalty in the total amount of $9,000.00 is appropriate for the violation found in the two Complaints consolidated herein and an assessment against V-1 Oil Company in such amount is hereby proposed.

PROPOSED FINAL ORDER

This Initial Decision and the following proposed Final Order assessing penalty shall become the Final Order of the Regional Administrator unless appealed to or reviewed by the Regional Administrator, as provided in 40 CFR 80.327(c):

"FINAL ORDER

It being hereby determined that Respondent V-1 Oil Company has in three instances violated 40 CFR 80.22(b), as alleged in the subject Complaints consolidated herein, a civil

penalty is hereby assessed against Respondent in the sum of $9,000.00 and Respondent is ordered to pay the same by Cashier's or Certified Check, payable to the United States Treasury, within sixty (60) days of the receipt of this Order."

This Initial Decision is signed and filed this 19th day of December 1977, at Kansas City, Missouri.

Marvin E. Jones

ALJ