UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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IN THE MATTER OF:

MOBIL OIL CORPORATION
EUGENE A. WILLIS
Respondents

Docket No. IX-UG-233C

Marvin E. Jones
Administrative Law Judge
1735 Baltimore
Kansas City, Missouri

INITIAL DECISION

On March 25, 1977, the Complaints herein were filed against Respondents Mobil Oil Corporation (Mobil) and Eugene A. Willis (Willis) charging them with violation of 40 CFR 80.22(f)(1), which regulation requires "retailers" [as defined by 40 CFR 80.2(k)] to equip each gasoline pump dispensing leaded gasoline with a nozzle spout having a terminal end with an outside diameter of not less than 0.930 inches (15/16 inch), in that a leaded gasoline pump, Serial Number 23327-01, located at 1024 Santa Rita Road in Pleasonton, California, when inspected by a representative of Complainant on December 13, 1976, was equipped with an unleaded gasoline nozzle spout the terminal end of which was less than 0.930 inches. Said Complaint proposed that a civil penalty of $6,000 be assessed against Mobil.

An Adjudicatory Hearing was convened on August 23, 1977 at 100 California Street, San Francisco, California. Prior to same it was announced that the Complaint against Willis had been settled; therefore, this decision deals only with the charge against Mobil.

40 CFR 80.22(f)(1) provides, in pertinent part, as follows:

> "(f) After July 1, 1974, every retailer shall equip all gasoline pumps, ...as follows:
>
> "(1) Each pump from which leaded gasoline is introduced into motor vehicles shall be equipped with a nozzle spout having a terminal end with an outside diameter of not less than 0.930 inch (2.363 centimeters)."

40 CFR 80.2(k) and (j), respectively, defines "retailer" and "retail outlet" thus:

> "(k) 'Retailer' means any person who owns, leases, operates, controls or supervises a retail outlet. (emphasis supplied)
>
> "(j) 'Retail outlet' means any establishment at which gasoline is sold or offered for sale for use in motor vehicles."

Mobil's Motion to dismiss--denied by Order entered June 6, 1977--was renewed at the Hearing on the grounds that Mobil is not a "retailer" under its interpretation of 40 CFR 80.2(k) and that to hold Mobil liable for the violation charged "in effect imposes a vicarious liability upon Mobil which disregards...(decided cases)". Said Motion was then and is now again denied for the reasons that Mobil's interpretation of 40 CFR 80.2(k) is rejected and the second ground is, in effect, an attack on the regulations and is not a proper matter for consideration in this Hearing.

At said Hearing Mobil filed its further Motion praying that the instant decision be held in abeyance until a case filed July 20, 1977 by Amoco Oil Company (referred to as Amoco III) has been decided by the Western District of Missouri. Said Motion was taken under advisement pending consideration of Mobil's Brief (filed 8/23/77) and the receipt of Complainant's reply Brief which was filed ten days following the Hearing. Said Motion was denied by Order rendered on October 13, 1977, for the reasons that no showing was made that it is in the public interest to grant same or that it would prejudice Mobil if said Motion is denied. Further, there was no showing , and question remains, whether this forum possesses authority to grant the relief prayed.

Complainant presented its case by a showing, first, that Mobil is the lessor of the subject retail outlet property to the operator,

Willis, and second, that on December 13, 1976, an inspection of said retail outlet by an EPA Inspector revealed that a pump dispensing leaded gasoline--Serial Number 23327 01--was equipped with a nozzle manufactured for use on unleaded gasoline pumps which had an outside diameter at its terminal end of 0.840 inches or smaller.

FINDINGS OF FACT

1. On December 13, 1976, Eugene A. Willis, lessee from Mobil under a Service Station Lease dated November 19, 1974, (Mobil Exhibit 2A) was the operator of a retail outlet situated at 1024 Santa Rita Road, Pleasonton, California, at which location Mobil gasoline was offered for sale and the Mobil emblem was displayed.

2. Mobil leased subject land and improvements from Barton C. Yates and Bonnie R. Yates, successors in interest to Charles J. Ritenour and Ruth Y. Ritenour, and subleased subject property to Willis.

3. Said Service Station Lease (Mobil Exhibit 2A) is a form lease used by Mobil for leases given to operators such as Willis which embodies a sales agreement and which sets forth responsibilities for both the operator (or dealer) and Mobil.

4. Under said lease and agreement to him, Willis has the responsibility of supplying the (nozzle spouts) and the spouts here considered were purchased from Mobil, though under said agreement he was free to purchase them elsewhere if he desired.

5. Mobil issued a brochure (Mobil Exhibit 3) which was given to lessees required to sell unleaded gasoline, including Willis, explaining what they were required to do to comply with (pertinent regulations) including the explanations that new 1975 model cars will only accept an unleaded nozzle with an outside diameter no greater than 0.840 inches.

6. Mobil paid the initial costs incurred in equipping Willis' gasoline pumps with proper nozzles.

7. Willis is considered by Mobil to be an independent business man.

8. With respect to the violation here charged, Willis explained to Mobil's Acting District Administrative Control Manager, following receipt of the instant complaint, that the day prior to the subject EPA inspection, a customer had driven away from his pump island with the "leaded" spout in the car, and that the (unleaded) nozzle found on said leaded gasoline pump by the EPA Inspector on December 13, 1976 had been temporarily placed on said pump to keep it in business while the proper (leaded) spout was being repaired, and that the repaired "leaded" nozzle replaced the temporary "unleaded" nozzle approximately two days after the said EPA inspection.

9. Troy Cinnamon, an EPA Inspector, on December 13, 1976, identified himself and presented his credentials to the person in charge before making an inspection of all gasoline pumps, at the subject location, dispensing gasoline to customer vehicles.

10. The subject nozzles were checked with a gauge (EPA Exhibit 3) furnished to the Inspector by EPA for the purpose of measuring the outside diameters of the terminal ends of nozzle spouts.

11. The gauge used by the Inspector in the course of the instant inspection and other numerous inspections was identified as EPA Exhibit 3 (Tr. 13).

12. The said gauge is described by the Inspector as a "go and a no-go gauge". A leaded nozzle will not go into it unless the nozzle is worn or the wrong size (i.e., its terminal end has an outside diameter of less than 0.930 inches).

13. A nozzle whose terminal end will pass all the way through the gauge and which goes past the third ledge thereof and into the third chamber is an "unleaded" nozzle. Because the nozzle on the subject pump "went through" subject gauge, the inspector determined a violation existed--that a leaded gasoline pump was equipped with an unleaded nozzle (Tr. 17).

14. Inspector Cinnamon wrote and signed the inspection report (Complainant Exhibit 1) at the time of the inspection on December 13, 1977. on said report he checked box 22 which states in print:

"LEADED pump nozzle is less than 0.930 inch", after which is written "23327-01". In block 5 (comments) is written "Code 22 - unleaded nozzle on premium pump, serial No. 23327-01. ...". A copy of said inspection report was then left with Willis.

15. After the record was closed by the Administrative Law Judge, Complainant asked and was given leave to present evidence of the dimensions of the nozzle gauge (Complainant Exhibit 3) for the purpose of withdrawing the gauge as an exhibit to facilitate its immediate use by said EPA inspector. The "large end" of the gauge measured 23.4 millimeters and the small end measured 21.3 millimeters, using a micrometer caliper (which measures to a tenth of a millimeter). Counsel for Mobil witnessed the measurements and stated that he believed the measurements were "conscientiously made" and that he had no objection to Complainant's Exhibit 3 (the said gauge) being withdrawn.

CONCLUSIONS OF LAW

1. Mobil is a "retailer" within the meaning of 40 CFR 80.22(f) and as defined in 40 CFR 80.2(k), where the record shows that Mobil leases subject retail outlet from its owner and sub-leases same to Willis.

2. On this record, gasoline pump Serial Number 23327-01, which was used to dispense leaded gasoline was equipped with a nozzle with an outside diameter at its terminal end which was less than 0.930 inches, to-wit: 0.840 inches.

3. Mobil, at all times pertinent herein, had a positive and affirmative duty under said regulations to equip, or cause to be equipped, all leaded gasoline pumps at subject retail outlet with nozzle spouts having an outside diameter of no less than 0.930 inches.

4. Mobil's failure to properly equip subject leaded gasoline pump is a violation of said applicable regulations and an appropriate civil penalty should be assessed.

5. Mobil was not prejudiced by the re-opening of the record (immediately following the closing thereof) for the purpose of taking measurements of the nozzle gauge used in the subject inspection (Complainant's Exhibit 3) so that said Exhibit could be withdrawn from evidence to facilitate its continued use by the EPA inspector who appeared as a witness and sponsored such exhibit, when all Counsel were present and witnessed the measurements taken of the gauge and for the further reasons that:

a. The record otherwise establishes that the subject leaded gasoline pump was, at the time of said inspection on December 13, 1976, equipped with a nozzle of the dimensions used on pumps dispensing unleaded gasoline, and

b. The function and measurements of said gauge are so well known within the agency and within the industry here involved as to warrant administrative notice to have been taken of same. 31 CJS Evidence, Sec. 10, p. 832, N. 92.50 et seq.; Davis, Adm. Law Treatise, Vol 2, Sec. 15.06, p. 382.

My comments with respect to my conclusions reached are contained in Attachment "A", entitled "MEMORANDUM COMMENTS", attached hereto and made a part hereof.

PROPOSED CIVIL PENALTY

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

The subject inspection resulted in a finding that an unleaded nozzle was in use on a pump dispensing leaded gasoline. Under these facts the introduction of leaded gasoline into an automobile tank equipped to receive only unleaded gasoline is so easily facilitated that serious and extensive harm could have resulted in that numerous emission control devices installed on automobiles sold in 1975 and thereafter could have become inoperable. The evidence presented by Mobil as justification for the fact that the unleaded nozzle was present was that a customer drove off with the leaded nozzle still in the gas tank filler pipe requiring the leaded nozzle to be repaired. This suggests that the pump here considered was a self-service pump, which enhances to some degree the possibility of illegal introductions of leaded gasoline. However, the testimony is uncontradicted that such damage occurred on December 12 (the day before the subject inspection) and that the leaded nozzle was again installed on December 15. In the interim Willis used the improper nozzle on the leaded pump to enable him to render service to customers requiring leaded gasoline. The cause of the emergency and the attendant action and concern on the part of both Respondents should and will be considered as mitigating factors. On consideration of all facts in this record,it is my recommendation that a civil penalty in the amount of $2,000.00 be assessed against Mobil.

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 Mobil Oil Corporation has violated Section 80.22(f)(1) as alleged in the Complaint issued herein, a civil penalty is hereby assessed against it in the sum of $2,000.00 and Respondent is ordered to pay the sum by Cashier's or Certified Check, payable to the United States Treasury, within sixty (60) days of receipt of this Order.

This Initial Decision is signed and filed this 3rd day of November 1977.

Marvin E. Jones

ALJ

MEMORANDUM COMMENTS

Respondents in this, and similar cases, contend, as a defense, that "there is no evidence...which in any way disputes the fact that (the retail operator) was in full control of the operations on the premises on the date of the subject violation, and at all other times" and that he "owned all nozzles" at all times pertinent. In this manner a foundation is laid for the further argument that US EPA regulations subject it to "vicarious" liability where control is not sufficiently present, and no employee or agency relationship exists.

This same argument was proferred, in substance by Amoco Oil Company (February 1, 1977, US EPA Region VII, Docket No. 059239). We there stated:

> "It can be seen we are not here considering vicarious liability...but liability placed...on every retailer for failure to comply with a duty directly imposed by 40 CFR 80.22(f)(1)."

Respondent here, as Amoco, is defined as a retailer by virtue of the word "leases" in Section 80.2(k), supra. Other descriptive words such as "operates" or "controls" subjunctively present in said definition are excluded by application of the verb "leases".

As we have previously pointed out, if it is Respondent's contention that the applicable regulations impose an unfair burden upon it, the obvious answer is that this is not the forum for attacking these regulations. However, rather than appear to ignore the various, though inappropriate contentions made, the following observations will be included herein.

In the Amoco Oil Case, supra, we stated:

> "But there exists good and valid reasons for the regulations here pertinent. The controls, promulgated as 40 CFR Part 80, applicable to all aspects of the purchase and sale of gasoline, are regulatory in character and establish a program which must lend assurance that the public health or welfare will not be

> endangered by emissions from fuels or fuel additives; important to this concern is the assurance, as well, that the emission products will not impair the performance of any emission control device in, or expected to be in, general use by the public. On the advent, in 1975, of catalytic converters, which can be impaired by certain fuel additives, particularly lead, provisions which regulate leaded gasoline became an essential part of such fuel regulation. [See Clean Air Act, Section 211, 400 U.S.C. Sections 1857f-6c (1970, ELR 41220.)]
>
> "It is clear that, if the 'essentials of the intention of Congress' are to be achieved, such regulatory program must succeed. It is not sufficient that a nozzle such as the one here in question may have at one time been in compliance with applicable regulations. It is thus apparent that a policy is both reasonable and essential which places a positive and continuing obligation on all 'retailers' to equip or cause to be equipped the 'leaded' pumps at retail outlets with nozzle spouts conforming to said Section 80.22(f)(1). Strict adherence to such policy is essential if such regulation is to succeed in meeting its important objective."

Section 211(c)(1)(B) authorizes the Administrator, by regulation, to control the manufacture and sale of any fuel or fuel additive for use in a motor vehicle "if emission products of such fuel and fuel additive will impair to a significant degree the performance of any emission control device...".

By granting such authority "to regulate", Congress recognized that the manufacture and sale of such product was a business "affecting the public interest".[1/] Pursuant to such authority, the Administrator formulated the regulations here applied (40 CFR Part 80) and afforded refiners the opportunity for comments and suggestions.

Respondent seizes upon language of a former US EPA Administrator, in the January 10, 1973 Federal Register, that the term "retailer" was borrowed from Section 111(a)(5) of Title I of the Clean Air Act and argues that said section construed in conjunction with Section 111(e) thereof evidences Congress' intent that only those operating a retail

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1/ Thus, the rights and duties of Respondent will likely be viewed as those existing in the cases of a Public Utility. (See 73 C.J.S., "Public Utilities", p. 995, et seq, Sec. 4, et seq.) E.g., a public utility cannot by contract relieve itself of liability for negligence in the performance of its duty to the public or the measure of care it owes to its patrons under the law. (Id., p. 996, Sec 5, n. 93).

outlets can be held to have violated any regulations. It will be noted that the term "to operate" is not defined but that said Section 111(a)(5) indicates that the words "owner" and "operator" are to be used interchangeably and bear the same definition. For this reason and for further reasons hereinbelow cited, I do not interpret Administrator Ruckelshaus' statement in the context urged. Respondent further argues that Amoco I (Amoco Oil Co v. EPA, 501 F 2d 722 (D.C.Cir. 1974)), which applied to liability for offering for sale as unleaded gasoline product containing lead in excess of .05 grams per gallon, should be here applicable. The obvious answer is contained in Amoco Oil Company, Region VII, Docket Numbers 033204 and 033219, Final Decision of the Acting Regional Administrator (April 1, 1977), on review of the Initial Decision of John H. Morse, Presiding Officer, assessing civil penalties for nozzle violations, where it is stated, l.c. 5:

> "The conclusions and the rationale in Amoco I and II do not appear to be controlling on the issues here involved. There, the problem was essentially the extent to which the negligence of a retail operator resulting in the commission of a prohibited act could be imputed to a brand name refiner regardless of its legal relationship to or control over the retail outlet. The reason for promulgating Section 80.23 with special reference to brand name refiners was that it was deemed appropriate to impose upon such a refiner [which would not be within the express terms of 80.22(a) unless it was also a retailer] some responsibility to guard against contamination of unleaded gasoline, not only in the refining process but in the distribution to and delivery by the retail outlet. Here we are concerned with a duty to equip pumps with specified nozzles which is imposed upon every retailer, that is upon every person who owns, leases, operates, controls or supervises a retail outlet. Since the owner has the same responsibility as the lessee-operator, it is not a question of imposing on the former vicarious liability for the wrong doing of the latter."

Continuing, said Final Decision also states:

> "Respondent quotes from the preamble to the regulations as promulgated January 10, 1973 (38 FR 1254,1255), the statement that the industry had sought clarification of the term "owner or operator" of a retail outlet as

used in paragraphs (c), (d), and (g), Section 80.22 and that those paragraphs had been modified to adopt as a definition any person who "owns, leases, operates, controls or supervises" a regulated facility; and since this definition is derived from the definition of owner and operator in Section 111(a)(5) of Title I of the Clean Air Act, respondent seeks to draw an inference that the Administrator intended that a retailer, to be liable for a violation, must actually operate the facility in violation of the standards. The explanation of the change in the preamble related, of course, to the fact that in the regulations as originally proposed (37 FR 3882, et seq. February 23, 1972) some parts of Section 80.22 (including the provision for nozzles, then in subparatraph (g)) referred to "owner and Operator of a retail outlet" while other portions referred to "retailer" which was originally defined as "a person selling, or offering for sale, gasoline to the public". From this clear and quite significant change in the designation of persons responsible under Section 80.22, the logical inference is that the Administrator intended that the owner of a retail outlet, as well as the operator thereof, should have a duty and responsibility to equip the pumps with the required nozzles.

"Respondent further argues that to hold the owner-lessor responsible for a failure to have proper nozzles would somehow violate historical principles of property and tort law with reference to the obligations of the parties under leases of real property or business facilities. We are not concerned, however, with the problem of imputation of liability upon one for the tort of another; nor indeed are we concerned with a tort at all. We are concerned with the duty of the owner of a retail outlet to provide certain equipment to protect the public, that is, to guard against accidental introduction of leaded gasoline into a car equipped with a catalytic converter; just as a state or municipal authority might require, for the protection of the public, that the owner or operator of a gasoline service station have on hand prescribed fire extinguishers. If respondent has imposed upon its lessee some contractual responsibility, this proceeding will not affect their respective rights and obligations as between themselves; and if respondent has some contractual recourse against its lessee, that is another matter entirely and is not the concern of the public or this agency."

Respondent correctly notes that 40 CFR Part 80 was amended on December 12, 1974 (39 FR 42350). The clarification there mentioned contains at page 42358, second column, language corroborating the construction here given to the definition in said Section 80.2(k), because of the presence of the word "lessee", as follows:

> "it is not the intention of the regulations to impose the same liability upon the branded refiners where the retailers are operator-owners instead of lessees...".

Respondent fails and refuses to recognize the import of the terms "regulation" and "in the public interest", the first always being existent for the protection of the latter. The great volume of cases where a defendant has been held subject to criminal sanctions for a violation of a statute or regulation promulgated for the protection of the interests of the public, furnish ample precedence for the duty placed on branded refiners and the consequent liability where such duty is violated. United States v. Parfait Power Puff Co., 163 (F 2^d) 1008 (1974); United States v Shapiro, 491 (F 2^d) 335 (1974); United States v Dotterweich, 320 U.S. 277, 64 S.C. 134 (1943); and United States v Balint, 258 U.S. 250, 42 S.C. 301.

In the above cases, and the many others cited therein, the defendants were faced with sizeable criminal penalties and incarceration. Said laws were enacted by a Congress determined to obtain compliance with measures necessary for the protection of the public interest. The civil penalties proposed to be assessed by the regulations governing this case are analogous to the statutory penalty provided in the cases cited. Their primary purpose is to obtain compliance so that the public will be protected. Unless they accomplish that purpose, they are neither adequate nor effective.

In Parfait, supra, l.c. 1009 (1, 2) the Seventh Circuit Court of Appeals stated:

> "In this situation, it is defendant's position that the violation was not that of itself...But we are not concerned with any distinction between independent contractors and agents in the ordinary sense of these words. It is clear that defendant was engaged in procuring the manufacture and distribution of the article... It saw fit to create out of...activities

> in its behalf an instrumentality and to avail itself of the acts of that instrumentality, which effected (a violation). This we think it could not do without incurring the criminal penalty imposed... The liability was not incurred because defendant consciously participated in the wrongful act, but because the instrumentality which it employed, acting within the powers which the party had mutually agreed should be lodged in it, violated the law. The act of the instrumentality is controlled in the interest of public policy by imputing the act to its creator and imposing penalties upon the latter.

Balint and Dodderweich both held that Congress concluded that it was preferable, in "balancing relative hardships", to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers..., rather than to throw the hazard on the innocent public who are wholly helpless".

Parfait continues, l.c. 1010(3):

> "... In other words, one who owes a certain duty to the public and entrusts its performance to another, whether it be an independent contractor or agent, becomes responsible criminally for the failure of the person to whom he has delegated the obligation to comply with the law, if the non-performance of such duty is a crime...". (citing cases).

As criminal sanctions so imposed were approved by the Court as justified for the purpose of obtaining compliance with rules governing the manufacture and handling of product and essential for the protection of the public, a fortiori, the imposition of civil penalties is here justified.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the City and County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action; I am Regional Hearing Clerk, Environmental Protection Agency, Region IX; my business address is 100 California Street, San Francisco, California; and on November 9, 1977, I served a copy of the hereunto annexed Initial Decision In the Matter of Mobil Oil Corporation, Eugene A. Willis, Docket No. IX-UG-233C on the following parties by placing a true copy thereof, certified mail, return receipt requested, postage prepaid, in a United States Postal mail box, or hand delivering, at San Francisco, California, addressed as follows:

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I certify under penalty of perjury that the foregoing is true and correct.

Executed on November 9, 1977, at San Francisco, California.

Lorraine Pearson
Lorraine Pearson