UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of:	)	
	)	
Amoco Oil Company	)	Docket No. I UNG - 208C
	)	
	)	

INITIAL DECISION

This is a proceeding under Section 211 of the Clean Air Act (42 U.S.C. 1857f-6c), and implementing regulations, 40 CFR Part 80. The proceeding was instituted by complaints, dated December 22, 1976, against respondents, Amoco Oil Company as refiner, Eugene A. Whitney as reseller and Houlton Gas Company as retailer of certain gasoline represented to be unleaded. The complaints alleged in substance that on July 29, 1976, certain gasoline represented to be unleaded was offered for sale at Houlton Gas Company, Houlton, Maine, that a sample of said gasoline was collected and analyzed by an EPA fuels inspector for the presence of lead and that the gasoline contained lead in excess of 0.05 gram per gallon in violation of 40 CFR 80.22(a).[1/] Penalties of $6,500 were proposed to be assessed against Amoco, $750 against Eugene A. Whitney and $500 against Houlton Gas Company. By a complaint, dated February 11, 1977, a penalty of $1,200 was proposed to be assessed against respondent, Pelkey Transportation, Inc., as carrier of the

1/ The complaints referred to 40 CFR 80.2(g). However 80.2(g) merely sets the standard for unleaded gasoline and 80.22(a) prohibits the sale or offering for sale of gasoline, represented to be unleaded, containing lead in excess of the standard.

gasoline offered for sale at the premises of Houlton Gas Company on July 29, 1976.

All respondents with the exception of the retailer, Houlton Gas Company, filed answers denying liability and requesting a hearing. A hearing on this matter was held in Boston, Massachusetts on August 9, 1977.

Counsel for Complainant represented that a settlement had been reached with the retailer, Houlton Gas Company, and that the complaints against respondents, Eugene A. Whitney and Pelkey Transportation, Inc. had been withdrawn. Withdrawal of the complaints with respect to Whitney and Pelkey Transportation, Inc. was apparently based on the determination that the facts referred to in a stipulation mentioned below established that the violation was not caused by them, their employees or agents.

A stipulation, signed by counsel for Amoco and counsel for the Complainant, was received in evidence. The stipulation provides that gasoline represented to be unleaded was offered for sale at Houlton Gas Company, Houlton, Maine on July 29, 1976, that this gasoline contained more than 0.05 gram of lead per gallon, that the corporate name of Amoco appeared on the pump stand and was displayed at Houlton Gas Company, a gasoline retail outlet, that the gasoline contained less than 0.05 gram of lead per gallon when it left the Amoco bulk plant in Brewer, Maine and that the immediate cause of the gasoline containing greater than 0.05 gram of lead per gallon was the failure of the retailer, Houlton Gas Company, to properly flush the lines of its gasoline transport truck in [prior to] transporting the unleaded gasoline to its storage tanks.

The stipulation having established a violation for which respondent, Amoco, was prima facie liable in accordance with 40 CFR 80.23(a), the hearing proceeded limited to the question of whether Amoco could establish a defense under 40 CFR 80.23(b)(2), quoted infra.

Amoco argues that it has established all the elements necessary for a defense under the cited section, while counsel for Complainant asserts that none of these elements have been proven.

FINDINGS OF FACT

Based upon the entire record including the stipulation mentioned above and the proposed findings and conclusions submitted by the parties, I find the following facts are established:

1. Respondent Amoco was a refiner of gasoline as defined in 40 CFR 80.2 on and prior to July 29, 1976.
2. Pursuant to a jobber contract, dated June 3, 1976 (Amoco Ex. C), Amoco supplied unleaded gasoline to respondent, Eugene A. Whitney of Lincoln, Maine who in turn sold gasoline to respondent Houlton Gas Company, a retail outlet.
3. The unleaded gasoline referred to in finding 2 was supplied from Amoco's bulk plant in Brewer, Maine.
4. On July 29, 1976 gasoline represented to be unleaded, which had been supplied by Amoco to Whitney and sold by Whitney to Houlton Gas Company, was offered for sale at Houlton Gas Company, Houlton, Maine.

5. The corporate name of Amoco Oil Company appeared on the pump stand and was displayed at Houlton Gas Company, a retail outlet, on July 29, 1976.

6. The gasoline offered for sale at Houlton Gas Company on July 29, 1976 contained lead in excess of 0.05 gram per gallon in violation of 40 CFR 80.22(a).

7. When the gasoline mentioned above left Amoco's bulk plant in Brewer, Maine, it contained less than 0.05 gram of lead per gallon.

8. The immediate cause of the gasoline offered for sale on July 29, 1976, as referred to above, containing greater than 0.05 gram of lead per gallon was the failure of the retailer, Houlton Gas Company, to properly flush the lines of its gasoline transport truck in [prior to] transporting the unleaded gasoline to its storage tanks. The record does not reveal whether this failure was deliberate, was due to carelessness or simply ignorance upon the part of the truck operator as to the effect of failing to flush the lines.

9. There is no contractual relationship between Amoco and the retailer, Houlton Gas Company.

10. The contract referred to in finding 2 includes the following provisions:

"VII. * * * *
BUYER shall not mix, blend, substitute other brands or dilute products purchased under this contract and, in any such events, SELLER may forthwith cancel this contract. SELLER may at all times examine samples of product purchased under this contract in BUYER'S possession to determine if quality of goods is being maintained.

* * * *

"XII. LEAD-FREE PRODUCTS: BUYER shall comply at all times with SELLER'S established procedures for controlling the quality of SELLER'S branded lead-free products. BUYER shall indemnify SELLER against any penalty, loss or liability of any nature whatsoever resulting from failure of BUYER or those to whom BUYER resells to maintain lead-free specifications of SELLER'S lead-free products.

* * * *

"XXIII. PUBLIC AUTHORITIES: BUYER shall comply with all rules and regulations of public authorities covering storage, handling and sale of products hereunder."

11. Amoco's established procedures for controlling the quality of lead-free products, referred to in finding 10, are contained in a letter, dated December 29, 1975, and a manual entitled "AVOID LEAD IN UNLEADED GASOLINE." Eugene A. Whitney acknowledged receipt of these documents on February 5, 1976 (Amoco Ex. D).

12. The first page inside the cover sheet of the manual mentioned in finding 11 is entitled "AMOCO OIL COMPANY Procedures For Proper Handling of Unleaded Gasoline Products" and provides in part "The following instructions for handling of these products, when properly followed, will preclude their contamination and assure compliance with current governmental regulations." Included in the manual are five sections, Section II entitled "DELIVERY BY TRUCK TRANSPORT OR TANK WAGON," Section III entitled "SERVICE STATION OR CUSTOMER FACILITIES" and Section V entitled "SAMPLE REQUIREMENTS."

Also included is an unnumbered section providing procedures in the event notice of contamination is received which, inter alia, provide for the dealer stopping the sale and locking the pump.

13. Paragraph A "Equipment" under Section II "Delivery By Truck Transport or Tank Wagon" of the manual provides in part:

"2. Where only one meter is available on a truck, then the driver must always flush the meter--downgrading unleaded product to leaded storage before hooking his hose to the unleaded storage tank. As a general rule, it will require 20 gallons of product to adequately flush the system. See Fig. 3. If you have a single pumping system on a tank wagon, you have the same flushing procedure to follow. One hundred feet of 1-1/2" hose plus meter and line content will be about 15 gallons."

Paragraph B "Driver Procedures and Instructions" of the manual provides in part:

"1. Where a full load of leaded product is hauled prior to loading or hauling unleaded products, the truck must be completely drained and meters flushed before delivery of unleaded product into unleaded storage. * * * *"

Section V "Sample Requirements" of the manual provides in pertinent part:

"In order that the effectiveness of Amoco's operating procedures be evaluated, it is necessary that each Jobber and Area Marketer adhere to the following schedule in providing product sampling for evaluation by the supply terminal:

"1. Plant Storage tanks--Once a month or upon each barge or pipeline receipt.

"2. Service Station tanks--A minimum of 20% of the stations must be sampled each month. Where eight (8) accounts or less are served, it is necessary to sample two (2) stations per month.

"3. Samples should be obtained on a rotational basis such that each station is sampled a minimum of two (2) times per year.

* * * *."

14. The letter of December 29, 1975, referred to in finding 11, among other things, listed violations of the Clean Air Act for which penalties could be assessed, contained assurances that Amoco would deliver a qualified product at its point of delivery, recommended that procedures in its Unleaded Gasoline Manual, copy attached, (this is the manual referred to in findings 11 through 13) be followed and included the following:

"It is recommended that each jobber secure his own test kit and conduct his own testing program. * * * * It is recommended that you test samples from each bulk tank or service station once every three months.

"Amoco Oil Company will periodically pick up and test samples at random from jobber outlets, and EPA representatives may take samples (or check for other violations previously listed) at anytime.

* * * *

"To assure us that you have received and understand this information, I would appreciate your signature on the attached note and return to me."

15. Procedures in Amoco's Unleaded Gasoline Manual, if consistently followed by all persons involved in handling and sale of Amoco's unleaded product, would preclude the sale or offering for sale of unleaded gasoline containing more than 0.05 gram of lead per gallon.

16. The sole witness at the hearing was Mr. Carl Tocker, Coordinator of Environmental Control for the Distribution

Department of Amoco's Baltimore Marketing Region. The Baltimore Marketing Region contains approximately 5,600 stations (retail outlets) displaying Amoco signs and includes Houlton, Maine.

17. Mr. Tocker's unrebutted testimony established the following additional facts. Amoco has been producing and handling unleaded gasoline for 50 to 60 years which is longer than any other company in the industry. As part of Amoco's established procedures for handling unleaded gasoline, at the time Amoco signs a jobber contract with a distributor or reseller, the jobber is given a copy of Amoco's Unleaded Gasoline Manual and required to sign a receipt for it, which indicates that he has read and understands those procedures. It is understood that the jobber will pass the manual onto retail outlets supplied by the jobber and any explanations requested by and furnished to the jobber by Amoco representatives would include advice that not only the jobber but also the retailer is to comply with the guidelines in the Unleaded Gasoline Manual. Based on conversations with Mr. Whitney (apparently after notice of the violation had been received), the application of the manual was explained at a date not established by the record to Mr. Grant, operator of the retail outlet, Houlton Gas Company, and Mr. Grant had at least seen a copy of the Unleaded Gasoline Manual. Since 1969 Amoco has had an established sampling and testing program whereby Amoco's marketing representatives take samples of unleaded gasoline from retail outlets displaying Amoco's signs

and jobbers take samples from their customers which are sent into terminals for testing. In addition, Amoco operates a van in the Baltimore Marketing Region which takes samples for testing from direct dealer and jobber outlets on a random basis. During the period July 1 through December 31, 1976, a total of 5,735 samples were drawn and tested from direct dealer (Amoco owned or controlled) and jobber stations (Amoco Ex. B). Of these samples, 626 were taken in July 1976 of which 120 were from jobber stations. These samples are tested at Amoco terminals and during July of 1976, 11 samples were tested from jobber stations by Amoco's Portland, Maine terminal. The record does not show whether any of these samples were from stations serviced by Mr. Whitney. Houlton Gas Company was sampled, apparently after notice of the violation in the instant case was received.

18. There is no express contractual provision requiring Whitney to impose Amoco's procedures for handling unleaded gasoline on those to whom Whitney resells Amoco's unleaded products. Although the Unleaded Gasoline Manual contains provisions obviously applicable to retailers, which if followed by Houlton Gas Company would have precluded the instant violation, the absence of such an express provision makes it at least questionable whether Amoco has shown a contractual undertaking within the meaning of 40 CFR 80.23(b)2(iii) designed to prevent violations such as occurred in the instant case by retailers such as Houlton Gas Company.

19. Even if the provision requiring Whitney to comply with Amoco's established procedures for handling unleaded product constitutes a contractual undertaking within the meaning of subparagraph (b)(2)(iii), Amoco's efforts shown by this record to insure compliance by Whitney with that undertaking consists of mailing its Unleaded Gasoline Manual and the letter of December 29, 1975 to Whitney.

CONCLUSIONS OF LAW

1. Amoco was a refiner of gasoline as defined in 40 CFR 80.2 on and prior to July 29, 1976.
2. Gasoline, represented to be unleaded, offered for sale at Houlton Gas Company, Houlton, Maine, a retail outlet bearing the Amoco corporate name on the pump stand and displaying Amoco signs, on July 29, 1976, contained lead in excess of 0.05 gram per gallon in violation of 40 CFR 80.22(a).
3. The cause of the violation was the failure of the retailer, Houlton Gas Company, to properly flush the lines of its transport truck in [prior to] transporting the unleaded gasoline to its storage tanks.
4. There is no contractual relationship between Houlton Gas Company and Amoco and the violation was not caused by Amoco, its employees or agents.
5. Amoco has a contract with Eugene A. Whitney, a reseller as defined in 40 CFR 80.2(n), which imposes a contractual obligation on Whitney to follow Amoco's established procedures for handling gasoline. The contract does not expressly require Whitney to

impose those procedures on persons to whom he resells unleaded gasoline. Amoco's procedures for handling unleaded gasoline are contained in its Unleaded Gasoline Manual and the Manual has provisions obviously applicable to retailers, which if consistently followed, would have precluded the instant violation.

6. Assuming arguendo, that the contractual obligation imposed upon Whitney constitutes a contractual undertaking within the meaning of 40 CFR 80.23(b)(2)(iii) designed to prevent the violation that occurred in the instant case, Amoco's efforts shown by this record do not include sampling of any retail outlets serviced by Whitney and are insufficient to constitute reasonable efforts within the meaning of the cited subparagraph.

7. Amoco having failed to establish a defense under 40 CFR 80.23(b)(2)(iii) is liable for a civil penalty.

DISCUSSION

In order to establish a defense under 40 CFR 80.23(b)(2)(i) and (iii) cited above, the record must show that the violation was not caused by Amoco, its employees or agents, 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 Amoco on such reseller designed to prevent such action and despite reasonable efforts by Amoco, such as periodic sampling, to insure compliance with such contractual obligation. Although it has been concluded that Amoco has not successfully

established a defense under the latter of the cited subparagraphs, it is considered appropriate to discuss arguments advanced by the parties in order that the basis for the decision is clearly set forth.

Complainant argues that even though the immediate cause of the violation was the failure of the retailer, Houlton Gas Company, to properly flush the lines of its transport truck in hauling the unleaded gasoline involved in the instant case, Amoco's asserted failure to exert reasonable efforts to insure compliance was, nevertheless, the proximate cause of the violation and thus Amoco has not shown that the violation was not caused by it, its agents or employees. In support of this contention, Complainant cites Performance Stop, Thompson Oil Company, and Phillip's Petroleum Company, Docket No. 059317 (Initial Decision of ALJ, Region VII, January 12, 1977).[2/] The cited decision is based in part on the conclusion that the meaning of the word "caused" in subparagraph 80.23(b)(2)(i) of the regulation here involved is not identical with its meaning in subsequent subparagraphs of the regulation. Determination of the validity of this conclusion requires detailed analysis of the regulation, which is set forth below:

> "(b)(1) In any case in which a retailer or wholesale purchaser-consumer and gasoline refiner or distributor would be in violation under paragraphs (a)(1) or (2) of this section, the retailer or wholesale purchaser-consumer shall not be liable if he can demonstrate that the violation was not caused by him or his employee or agent.

2/ It is understood that this decision has been appealed to the Regional Administrator, but that no final decision and order has been entered.

"(2) In any case in which a retailer or wholesaler 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

(ii) That the violation was caused by an action in violation of law (other than the Act or this part), or an act of sabotage, vandalism, or deliberate commingling of leaded and unleaded gasoline, whether or not such acts are violations of law in the jurisdiction where the violation of the requirements of this part occurred, or

(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, or

(iv) That the violation was caused by the action of a retailer who is supplied directly by the refiner (and not by a reseller), and whose assets or facilities are not substantially owned, leased, or controlled by the refiner, in violation of a contractual undertaking imposed by the refiner on such retailer designed to prevent such action, and despite reasonable efforts by the refiner (such as periodic sampling) to insure compliance with such contractual obligation, or

* * * *

(vii) That the violation occurred at a wholesale purchaser-consumer facility: Provided, however, that if such wholesale purchaser-consumer was supplied by a reseller, the refiner must demonstrate that the violation could not have been prevented by such reseller's compliance with a contractual undertaking imposed by the refiner on such reseller as provided in paragraph (b)(2)(iii) of this section."

It is immediately apparent that the conjunctive "and" between subparagraphs (b)(2)(i) and (b)(2)(ii) is appropriate because "an act in violation of law * *, or an act of sabotage, vandalism, or deliberate commingling of leaded and unleaded gasoline * * *" could have been acts of and thus caused by, the refiner, its agents or employees. Difficulty arises with the conjunctive "and" between subparagraph (b)(2)(i) and (b)(2)(iii) because it would seem, prima facie, that a showing that the violation was caused by the "action of a reseller or a retailer supplied by such reseller" would constitute a showing that the violation was not caused by the refiner, its agents or employees. Under this reasoning, what appears to be two requirements in order for the refiner to avoid liability is in reality only one and following the rule that all words of a statute, regulation or contract must be given meaning if possible, the word "caused" in subparagraph (b)(2)(i) must mean something more than the identical word in subparagraph (b)(2)(iii).

The foregoing reasoning, while plausible, is not accepted for the reason that subparagraph (b)(2)(ii) is designed to cover deliberate acts of vandalism, sabotage, commingling, etc., including acts of strangers to the refining, distribution or retail chain, while subparagraph (b)(2)(iii) et seq. is intended to cover negligent or inadvertent violations by resellers, retailers or distributors over whom it is reasonable to expect that the refiner can exercise sufficient control, contractual or otherwise, so as to minimize, if not preclude, violations. Viewed thusly,

the requirement that the violation was caused by the action of a "reseller or a retailer supplied by such reseller" is merely the trigger removing the violation from subparagraph (b)(2)(ii) and invoking the additional requirements of (b)(2)(iii), i.e., that the violation was caused by an act in violation of a contractual undertaking and despite reasonable efforts to insure compliance with such contractual obligation. Under this reading, no reason is apparent for regarding "caused" in subparagraph (b)(2)(i) as having any different or additional meaning than the identical word in subsequent subparagraphs of paragraph (b)(2). It should also be noted that it is at least conceivable that a violation could be caused by the action of an employee or agent of a reseller or of an employee or agent of a retailer supplied by such reseller, who was also an employee or agent of the refiner. The refiner should not be permitted to escape liability in this situation and the requirement that the violation was not caused by the refiner, its agent or employee is immanently reasonable and not redundant. Moreover, reading the "reasonable efforts" or contractual oversight requirement into the word "caused" in subparagraph (b)(2)(i) appears to make the contractual oversight provision in subparagraph (b)(2)(iii) and following subparagraphs superfluous. This, of course, is a result to be avoided.

Performance Stop, supra, does not appear to have considered "Amoco II", Amoco Oil Company v EPA. 543 F.2d 270,9 ERC 1097 (D.C. Cir., 1976), which resulted, inter alia, in a stipulation

that a new subparagraph would be added to Section 80.23(b)(2) as follows:

> "(viii) In subparagraphs (ii) through (vi) hereof, the term "was caused" means that the refiner must demonstrate by reasonably specific showings by direct or circumstantial evidence that the violation was caused or must have been caused by another."3/

This stipulation was in response to the plaintiff's arguments as to the burden of proof and was apparently designed to cover the situation, not present here, where evidence is lacking or is unclear as to the precise cause of the violation. The question is, of course, whether the quoted stipulation renders invalid the conclusion, supra, that "caused" in subparagraph (b)(2)(i) means no more and no less than the identical word in subsequent subparagraphs of the regulation. Argument for an affirmative answer to this question centers on the supposed fact that a refiner who has shown that the violation was not caused by it, its agents or employees would have eliminated any need for a showing that the "violation was caused or must have been caused by another." This contention fails to fully consider the fact that showing the violation was not caused by the refiner, its agents or employees

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3/ The regulation has been amended to reflect the decision in "Amoco II," 42 Federal Register 45306, September 9, 1977.

is always a condition precedent to the refiner's freedom from liability and the further fact that, absent the stipulation, in a situation where the gasoline was shown to be in compliance when it left the refiner's control, but evidence of the precise cause of the violation was lacking, the refiner could still be liable for failing to demonstrate, e.g., that the violation was caused by a reseller or a retailer. Because the stipulation was designed to cover at least the situation described, it neither requires nor supports a holding that "caused" in subparagraph (b)(2)(i) is to be read differently than the identical word in subsequent subparagraphs of the regulation.

It is concluded that the stipulation to the effect that the violation was caused by the failure of Houlton Gas Company to properly flush the lines of its transport truck and the evidence that there is no contractual relationship between Amoco and Houlton Gas Company satisfies Amoco's burden of showing that the violation was not caused by Amoco, its agents or employees.

The next question is whether there was a contractual undertaking imposed by Amoco on Whitney designed to prevent the violation. It would seem that any doubts in this regard could have been eliminated by a provision expressly requiring Whitney to impose the unleaded gasoline handling procedures on those to whom he resold Amoco's unleaded product. 4/

4/ While Amoco's reasons for desiring to remain free of contractual relationships with independent retailers are understandable, its reasons for failing to expressly require Whitney to impose the unleaded gasoline handling procedures on those to whom he resells are unclear.

Be that as it may, Amoco asserts (Brief, p.5) that Whitney's contractual obligations to Amoco apply to all service stations serviced by him. To the extent that gasoline is delivered to such stations or handled by Whitney, his employees or agents, this assertion is accurate. However, in this instance the gasoline was delivered to the premises of the retailer, Houlton Gas Company, in equipment owned or operated by Houlton Gas Company and it is not readily apparent that Whitney's obligations extend to such a situation.

Complainant argues in effect for strict liability asserting that the fact the violation was caused by the retailer, Houlton Gas Company, and the absence of a contractual relationship between Amoco and Houlton Gas Company precludes a successful defense by Amoco under 80.23(b)(2)(iii). This contention fails to consider the decision in "Amoco II," supra, which forced the deletion from 40 CFR 80.23(b)(2)(iv), quoted above, of the phrase "and whose assets are not substantially owned, leased, or controlled by the refiner"[5/] upon the ground that the regulation was arbitrary in imposing liability upon refiners without proof of fault. If this is the result where the assets of the retailer are owned, leased or controlled by the refiner and when there is a direct contractual relationship between the refiner and the retailer, then a fortiori, is that result required in the instance of an independent retailer having no contractual relationship with the refiner. This is not to say that subparagraph (b)(2)(iii) is invalid,

5/ The benefit to refiners of this deletion is not clear because under 40 CFR 80.2(k) any person who owns, leases, operates, controls or supervises a retail outlet is a retailer.

the precise point not being in issue in "Amoco II," but only to suggest that a reading other than a literal one would be reasonable. It would seem that Amoco in order to bring itself within the reach of subparagraph (b)(2)(iii) need not show a contractual relationship with the retailer, but only that the contractual undertaking imposed upon the reseller included procedures which, if followed, would have prevented the violation.[6/] The Unleaded Gasoline Manual has provisions obviously applicable to retailers and the instant violation would not have occurred had these procedures been followed.

Complainant also argues that it is precisely because Whitney appears to have complied with his contract that Amoco is unable to establish an essential element of its defense under (b)(2)(iii), namely, that violation of the regulation was in violation of a contractual undertaking. It would seem anomalous that the refiner should be in a more favorable position if the reseller has breached his contract which the refiner is obligated to make reasonable efforts to prevent, than if the reseller has faithfully performed. However, Complainant's argument is based on a narrow reading of Whitney's obligations and it is clear that if a contractual undertaking exists which was designed to prevent violations by not only the reseller but also by the retailer, then that undertaking was violated.

6/ It is recognized that the wording of 40 CFR 80.23(b)(2)(vii) quoted supra, providing in part "* * * if such wholesale purchaser-consumer was supplied by a reseller, the refiner must demonstrate that the violation could not have been prevented by such reseller's compliance with a contractual undertaking imposed by the refiner on the reseller * * *" tends to negate the foregoing interpretation of subparagraph (b)(2)(iii). Nevertheless, the above interpretation of (b)(2)(iii) appears to be in accord with "Amoco II."

The preceding discussion indicates that the reasons for finding a contractual undertaking designed to prevent violations within the meaning of 40 CFR 80.23(b)(2)(iii) are persuasive. Because it is concluded that Amoco has failed to demonstrate reasonable efforts to insure that Whitney complied with his contractual undertaking, it is unnecessary to finally decide this question. In this connection, Mr. Tocker's testimony left the distinct impression that it was only if the jobber (reseller) asked for an explanation that the jobber was informed that not only jobbers but also retailers were to comply with the unleaded gasoline procedures. His exact testimony was as follows:

> "Q. Mr. Tocker, when a jobber asks for an explanation and you explain it to him, do you also explain to him that not only they but also their retailers are supposed to comply with the guidelines set out in the unleaded gasoline handbook?
>
> "A. Yes. I would say that is an important function." (Tr. 13)

The quoted testimony plus the fact that Amoco's program for informing those handling its branded unleaded gasoline of the proper procedures for doing so apparently does not extend beyond jobbers or resellers casts doubt on the reasonableness of Amoco's efforts to insure compliance with unleaded gasoline procedures by those with whom it contracts.[7/] Moreover, while it is recognized that the reference

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7/ It is clear that reseller-served retailers must be included in a program to insure compliance with contractual undertakings. See 39 F.R. 42359, December 5, 1974, Cf. Continental Oil Company, Docket No. 032640 (Initial Decision of ALJ, Region VII, September 24, 1976) (pamphlets or brochures detailing procedures for handling unleaded gasoline mailed to retailers as well as jobbers).

to periodic sampling in subparagraph (b)(2)(iii) is illustrative, that sampling may not be required at any particular time or retail facility,[8/] that Whitney was obligated to sample at least 20% of the retail outlets serviced by him every month, and that the fact Houlton appears to have been sampled only after notice of the violation was received is not conclusive, the record fails to show that any retail outlets serviced by Whitney were ever sampled. It is the contract with the reseller, Whitney, that Amoco must demonstrate it made reasonable efforts to insure was complied with and on this record such a finding may not be made.

Amoco has failed to demonstrate reasonable contractual efforts within the meaning of 40 CFR 80.23(b)(2)(iii) and is liable for a civil penalty.

Amoco's substantial and continuing sampling and testing program has not been overlooked. However, Amoco has not demonstrated on this record that concerted and continuing efforts to assure that retailers, such as Houlton Gas Company, know, understand and follow proper procedures for handling unleaded gasoline required for a finding of reasonable contractual oversight within the meaning of subparagraph (b)(2)(iii) of Section 80.23.

PROPOSED CIVIL PENALTY

In determining an appropriate civil penalty, I have considered the factors in 40 CFR 80.330(b) to the extent practicable. Among these factors is gravity of the violation. The violation in this instance, failure of the retailer to properly flush the lines of its

8/ 39 F.R. 42359, December 5, 1974.

transport truck prior to delivering the unleaded gasoline, is of a type that, considering the factor of human error or simple carelessness, probably cannot be eliminated entirely. The procedures in Amoco's Unleaded Gasoline Manual, if consistently followed by all involved in handling its unleaded product, would have prevented the instant violation. Amoco has an established program for contractually imposing these procedures on resellers and bringing the provisions of the manual to the reseller's attention. In addition, Amoco has a substantial and continuing sampling and testing program which serves as a check of its unleaded gasoline procedures. Amoco has failed to establish a defense under 40 CFR 80.23(b)(2)(iii) only in failing to demonstrate reasonable efforts to assure that those procedures are known, understood and followed by retailers serviced by the reseller, Whitney.

Under the circumstances, the gravity of the misconduct is considered not to warrant the penalty sought by Complainant. The degree of contamination is not shown by the record, and no finding as to gravity of harm is made. It does appear that when notified of the violation, Amoco made prompt efforts to ascertain and remedy the cause of the contamination.

I find that a civil penalty of $2,500 is appropriate and an assessment in that amount against Amoco is hereby proposed .

FINAL ORDER 9/

It having been found that Amoco Oil Company violated 40 CFR 80.22(a) as alleged in the complaint, a civil penalty is hereby assessed against Amoco Oil Company in the amount of $2,500 and Amoco is ordered to pay the same by cashier's or certified check, payable to the United States of America, within 60 days of receipt of this final order.

Dated this 3rd day of October 1977.

Spencer T. Nissen
Administrative Law Judge

9/ This Initial Decision and proposed final order assessing a civil penalty shall become the final order of the Regional Administrator unless appealed to or reviewed by the Regional Administrator in accordance with 40 CFR 80.327(c).