UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the matter of

Texaco Inc.,

Respondent

Docket No. I UNG-418C

Initial Decision

This is a civil penalty proceeding under Sec. 211(d) of the Clean Air Act (42 U.S.C. 7545) and implementing regulations (40 CFR Part 80). The proceeding was initiated by complaints, dated September 28, 1978, charging Texaco Inc. as refiner, Cray Oil Co., Bellows Falls, Vermont as reseller and Ralph E. Bruns, d/b/a Buzzy's Variety, Gorham, New Hampshire, as retailer, with the sale or offering for sale of gasoline, represented to be unleaded, having a lead content in excess of that permitted by the regulation (40 CFR 80.2(g)). Respondents filed answers and requested hearings.

Counsel for Complainant has represented that the complaint against Respondent Cray Oil Co. will be resolved by a consent agreement and that the complaint against Respondent Ralph E. Bruns, d/b/a Buzzy's Variety will be withdrawn. Complainant and Texaco Inc. have agreed to submit the matter for decision upon a stipulation of facts and upon the proposed findings, conclusions and briefs of the parties.

Based upon the entire record, including the stipulation executed by Complainant on April 30 and by Texaco Inc. on May 4, 1979, and the

proposed findings, conclusions and briefs of the parties, I find that the following facts are established:

1. At all times pertinent hereto, Texaco Inc. was a refiner of gasoline as defined in 40 CFR 80.2(i), Cray Oil Co. was a reseller of gasoline as defined in 40 CFR 80.2(n) and Ralph E. Bruns, d/b/a Buzzy's Variety, Gorham, New Hampshire, was a retailer of gasoline as defined in 40 CFR 80.2(j) and (k).

2. On July 26, 1978, certain gasoline was offered for sale at Buzzy's Variety through a pump bearing Serial No. FS9248, a label stating "Unleaded Gasoline," and Texaco's corporate, trade, or brand name.

3. On July 26, 1978, an EPA fuels inspector drew a sample of gasoline from the pump at Buzzy's Variety described in finding 2.

4. The sample of gasoline mentioned in finding 3 was analyzed by EPA using atomic absorption spectrometry in accordance with Appendix B of 40 CFR Part 80. The lead content of the sample was 0.340 gram.per gallon.

5. Gasoline referred to in finding 2, from which the sample mentioned in findings 2 and 3 was taken, was purchased by Buzzy's Variety from Cray Oil Co.

6. Texaco Inc. sells gasoline and other petroleum products to Cray Oil Co. pursuant to a Distributor Agreement, dated April 22, 1976 (Texaco Exh. 1). Clause 9 of that agreement is entitled "Unleaded Gasoline" and provides as follows:

> 9. Unleaded Gasoline--Purchaser warrants and agrees that Purchaser will not (1) mix or allow Lead-Free Texaco Gasoline to be mixed with any gasoline containing lead anti-knock agents and then sell it as Texaco Gasoline; and (2) will not store,

transport or deliver Lead-Free Texaco Gasoline in or through any container, tank, pump, pipe or other element of its gasoline storage or distribution system unless such facilities comply with all Federal, State and local government requirements for dispensing unleaded gasoline.

Purchaser further warrants and agrees that Purchaser, its employes or agents, will not introduce, cause or allow the introduction of leaded gasoline into any motor vehicle which is labeled "UNLEADED GASOLINE ONLY" or which is equipped with a gasoline tank filler inlet which is designed for the introduction of unleaded gasoline only.

Purchaser represents that it has received and read a copy of Texaco's "Guidelines for the Handling of Lead-Free Texaco Gasoline--Wholesaler and Consignees," which has been provided for Purchaser's information in order to make Purchaser aware of the proper handling procedures which would assist it in complying with the warranties of the preceding paragraphs and the relevant Federal Environmental Protection Agency Regulations pertaining to unleaded gasoline.

Purchaser will allow Seller, its employes or agents, to enter Purchaser's place or places of business at any time to obtain such samples or conduct such tests as may, in Seller's judgment, be reasonably required to confirm that Purchaser is complying with the aforesaid obligations, and Purchaser will cooperate with Texaco in any investigation of any alleged violations of such obligations.

Purchaser agrees that it will defend, indemnify and hold Seller harmless from and against all present and future claims, demands, suits, actions, proceedings and litigation arising out of any alleged liability for Purchaser's storage, transportation or delivery of Lead-Free Texaco Gasoline in or through any container, tank, pump, pipe or other element of its gasoline storage or distribution system or the introduction of leaded gasoline into any motor vehicle which is labeled "UNLEADED GASOLINE ONLY." Purchaser further agrees that it will, on Seller's demand, promptly pay all losses, costs, damages, obligations, judgments, fines, penalties, expenses and fees suffered or incurred by Texaco by reason of any such claims, demands, suits, actions, proceedings, or litigation, except those which are caused by the sole negligence of Seller or its employes.

Seller warrants that Lead-Free Texaco Gasoline purchased by Purchaser from Seller shall conform to Seller's specifications for same at the time of delivery. Purchaser shall notify Seller immediately of any claim for variance in quality, and Seller shall

have an opportunity to inspect and investigate at any time thereafter. Failure of Purchaser to so notify Seller or cooperate in any investigation shall operate as a waiver of any and all claims by the Purchaser hereunder.

In the event that Purchaser sells Lead-Free Texaco Gasoline to any other person, firm or company for resale under Seller's corporate, trade or brand name, Purchaser shall obtain from every such buyer for Seller's benefit in writing the warranty and agreements stated in this Clause 9 and shall hold Seller harmless and indemnify Seller from any penalty, cost, judgment, loss, fine or expense, including, but not limited to, attorneys' fees and court costs, which Texaco may incur as the result of the breach, actual or alleged, of the obligations of the Purchaser or any person, firm or company buying Seller's gasoline for resale from Purchaser.

7. The Guidelines For the Handling of Unleaded Texaco Gasoline--Wholesalers and Consignees referred to in Clause 9 of the Distributor Agreement (quoted in the preceding finding) provide for the cleaning of terminal/bulk plant tankage previously containing leaded product prior to use for lead-free gasoline, for the removal of all leaded product from service station tanks, lines and dispensers, for flushing the tank three times with approximately 25 to 50 gallons of lead free product depending on size of tank, for thorough flushing of lines and dispensers (normally twice the volume of line), for adding the minimal amount that can be dispensed to tank and for testing of product. If the product fails the lead-free test, additional flushing is required. Separate and dedicated systems for the receipt of lead-free product are recommended and in shipments by tank truck care is to be exercised to properly identify product to be received and to see that proper hose connections are made to prevent commingling. Although dedicated

compartments in tank trucks are stated to be unnecessary, each compartment should have separate unloading lines with no manifolding and strong control is necessary to assure that all residual product is drained from a compartment prior to loading of unleaded gasoline. Split loads of unleaded gasoline with kerosine, diesel fuel, furnace oil or other gasolines should not be permitted on tank trucks which do not have separate outlets. If a meter is utilized on the truck, the meter should be flushed with unleaded gasoline prior to unloading or dedicated compartments or trucks should be utilized. In making deliveries to a service station or consumer, tank identification by product is most important and extreme care is to be taken to be certain that all products are dropped into the appropriate tank.

8. Texaco owns and operates a terminal in South Portland, Maine. Texaco lead-free gasoline, the brand name for Texaco's unleaded gasoline, is transported to this terminal only by barge and by tanker ship.

9. Texaco's procedures, i.e., gauging (measuring) and testing unleaded gasoline prior to off-loading from ships and barges, testing samples of gasoline from the tank into which the unleaded gasoline is to be placed both prior and subsequent to off-loading and use of a dedicated piping system for unleaded product, are such that if lead-free gasoline containing lead in excess of that permitted by the regulation (0.05 gram per gallon) was delivered to or

present in the tank (No. 7551) for unleaded gasoline, its presence would be detected. All measurements and test results are recorded and Texaco has no record or knowledge of lead-free gasoline in tank No. 7551 failing to conform to the regulatory standard.

10. Unleaded gasoline is dispensed from tank No. 7551 through dedicated piping which leads to two dedicated loading rock arms, which are marked lead-free, color coded yellow and used exclusively for unleaded gasoline.

11. Cray Oil Co. picks up in its truck product identified as lead-free by Texaco from Texaco's South Portland terminal. The loading arm, which loads product designated as lead-free into Cray's truck is operated by Cray's employee. Texaco does not assert any control over Cray's employee during the loading operation.

12. After loading, Cray's employee receives from Texaco, a truck bill of lading and manifest form which transfers title to the gasoline to Cray. Texaco has no knowledge of Cray's subsequent handling of the lead-free product.

13. The precise cause of the violation is not shown by the record.

14. Texaco's sales are in excess of $5,000,000 annually.

Conclusions

1. Gasoline, represented to be unleaded, with a lead content in excess of 0.05 gram per gallon having been offered for sale at Buzzy's Variety, Gorham, New Hampshire on July 26, 1978, and Texaco's

corporate, trade or brand name appearing on the pump stand, Texaco Inc. as refiner is prima facie liable for a civil penalty for the violation of 40 CFR 80.22(a) in accordance with 40 CFR 80.23(a)(1).

2. Texaco Inc. can rebut the prima facie showing of liability of demonstrating that the violation was not caused by it, its agent or employee and 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 and despite reasonable efforts by Texaco to assure compliance with the reseller's contractual obligation (40 CFR 80.23(b)(2)(i) and (iii)).

3. Texaco Inc. has not shown reasonable efforts to assure compliance by Cray Oil Co., the reseller, with its contractual obligation to prevent violations of 40 CFR 80.22(a) and Texaco Inc. is, accordingly, liable for a civil penalty (40 CFR 80.5).

Discussion

The regulation (40 CFR 80.23(b)) under which this proceeding is being prosecuted provides in pertinent part:

> "(b)(1) In any case in which a retailer or wholesale purchaser-consumer and any 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) In any case in which a retailer or wholsesale 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, or

* * * *

"(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." 1/

The gasoline having been shown to be in compliance when it left Texaco's control, Texaco has satisfactorily established that the violation was not caused by Texaco, its employees or agents within the meaning of 80.23(b)(2)(i). Evidence that the gasoline was in compliance when it left Texaco's possession and control has been held to constitute a reasonably specific showing that the violation was

---

1/ This subparagraph was included in the regulation as a result of a stipulation in "Amoco II," Amoco Oil Company, et al. v. EPA, 543 F.2d 270, 9 ERC 1097 (D.C. Cir., 1976). See 42 Federal Register 45306, September 9, 1977.

caused or must have been caused by another within the meaning of 80.23(b)(2)(iii) and (viii), quoted supra.[2/]

The next question is whether Texaco Inc. has shown a contractual undertaking designed to prevent violations such as occurred in this instance within the meaning of 80.23(b)(2)(iii). In Texaco Inc., Docket No. I UNG-228C (note 2, supra), it was concluded that a clause identical to clause 9 herein was not such an undertaking. This was because of the emphasis on warranties and indemnification[3/] and because the clause did not require the purchaser (reseller) to comply with the guidelines for handling Texaco's lead-free product, but only to acknowledge that it has received and read a copy of the guidelines. The clause herein (finding 6) is, of course, open to the same objections. Nevertheless, the first two paragraphs of clause 9 contain the purchaser's (Cray Oil Co.'s) agreement that it will not mix or allow lead-free Texaco Gasoline to be mixed with any gasoline containing lead anti-knock agents and then be sold as Texaco Gasoline, that it will not deliver lead-free Texaco Gasoline through any pipe, container or distribution system not complying with all Federal, State and local requirements for dispensing unleaded gasoline and that the purchaser, its employees

---

2/ See Texaco Inc. et al., Docket No. I UNG-228C (Initial Decision, dated November 4, 1977). It is understood that this decision has been appealed, but that no decision has been rendered thereon.

3/ The explanatory note to the regulation (39 F.R. No. 235 at 42360, Dec. 5, 1974) makes it clear that the contractual undertaking contemplated by the regulation would include specific quality assurance measures and that a mere indemnification agreement would not be sufficient.

or agents will not introduce, cause or allow the introduction of leaded gasoline into any motor vehicle labeled or designed for unleaded gasoline. The mentioned agreements plus the agreement in the final paragraph of the clause that if the purchaser sells lead-free Texaco Gasoline for resale under Texaco's trade or brand name, purchaser shall obtain from every such buyer for Texaco's benefit in writing the warranty and agreements in clause 9, make it appear that there are only slight differences between clause 9 and clauses used by other refiners which have been held to constitute contractual undertakings contemplated by 80.23(b)(2)(iii).[4/] It therefore appears that clause 9 herein may be considered a contractual undertaking designed to prevent violations of 80.22(a). However, because Texaco has not demonstrated reasonable efforts to assure compliance with that undertaking it is unnecessary to finally decide that question.

4/ See, e.g., the contract provision in Shell Oil Company, Docket No. I UNG-263C (Initial Decision, dated January 23, 1978), which required the buyer (reseller) to arrange for taking of samples of unleaded gasoline from not less than 10% of the retail outlets serviced by him each month and for the establishment and enforcement of a positive program of compliance to assure that the retailer, its employees or agents, or third parties will not cause, allow or permit contamination of the unleaded gasoline at the retail outlet by any other gasoline or foreign substance at any time after delivery by or for buyer to such retail outlet and prior to introduction by the retailer into any motor vehicle, such program to include (in addition to the sampling and testing specified above), if and as necessary the securing of manhole covers, fill line caps and dispensers to avoid unauthorized entry or use, and the supervision and instruction of buyer's and the retailer's employees and others having access to the unleaded gasoline system regarding proper procedures to prevent accidental or willful contamination of unleaded gasoline or the introduction of leaded gasoline into vehicles designed only for unleaded gasoline. This provision more clearly constitutes compliance with the specific quality assurance measures contemplated by the regulation (note 3, supra).

The regulation here concerned (40 CFR 80.23(b)(2)(iii)) cites periodic sampling as an example of reasonable efforts by the refiner to assure compliance with the contractual undertaking to prevent violations of 80.22(a). This obviously contemplates periodic sampling and testing of unleaded gasoline from retail outlets and there is simply no evidence of such sampling and testing in this record.[5/] Sampling is, of course, merely illustrative and it is possible that there are other equally acceptable methods (admittedly, none come readily to mind) by which Texaco could discharge its obligation to take reasonable efforts to assure compliance with the regulation by resellers and retailers handling its branded product. 8e that as it may, for all that appears Texaco contented itself with furnishing a copy of its guidelines for handling unleaded gasoline to the reseller (Cray Oil Co.) and made no effort to ascertain or assure that the guidelines were followed. This has been held insufficient in prior decisions (Texaco Inc., Docket No. I UNG-228C, note 2, supra and Texaco Inc., Docket Nos. I UNG-335C and 356C (Initial Decision, dated February 13, 1979)) and is insufficient here.

Texaco argues (Brief at 4) that in considering the reasonableness of the refiner's efforts to assure compliance the question of the refiner's control over the person responsible for the violation must be considered.

5/ The prehearing statement of Ralph E. Bruns d/b/a 8uzzy's Variety, dated April 7, 1979, indicates that his tanks were sampled from time to time by Cray Oil Co. However, this unsupported statement is not part of the record herein and there is no evidence of the dates, frequency or results of any such sampling, if conducted.

Texaco asserts that this position is mandated by "Amoco II," Amoco Oil Co. v. EPA, 9 ERC 1097, 543 F.2d 270 (D.C. Cir., 1976). This position is perilously close to an attack on the regulations which were promulgated on the assumption that refiners were in the best position to prevent violations of the unleaded gasoline regulations because they have control or the ability to control their distribution networks. Indeed, this assumption was not disputed by the petitioners in "Amoco I" (Amoco Oil Co. v. EPA, 6 ERC 1481, 501 F.2d 722 (D.C. Cir., 1974)), who attacked provisions in the regulations providing for strict liability on the part of refiners for violations anywhere in the distribution system. 6 ERC at 1498, 501 F.2d at 748. Although in the cited decisions the regulations were invalidated insofar as providing for liability of refiners without fault and insofar as they precluded a refiner from escaping liability for violations caused by a retailer supplied directly by the refiner and whose outlet was leased from the refiner, the essential validity of the regulations, including the assumption of refiner control or ability to control the distribution of their product, was upheld. Accordingly, it is at least doubtful that the decision in "Amoco II," supra, can properly be read as making the degree of actual refiner control over the facility where the violation occurred determinative in each instance where vicarious liability is sought to be imposed upon the refiner.[6/]

6/ It is recognized that where the refiner is not shown to be in or to have control of the retail outlet where the violation occurred, a liberal interpretation of the regulation imposing liability on the refiner in favor of the refiner may be warranted. See Amoco Oil Company v. U.S., 11 ERC 1693, 450 F. Supp. 185 (D.C. Mo., 1978).

Assuming, arguendo, that the matter of the control the refiner could reasonably have exercised is an open question, Texaco has not shown any reason why the assumption of refiner control is not appropriate in this instance. For all that appears the violation could have been caused by the reseller, Cray Oil Co., and Texaco will not be heard to contend that it lacked sufficient control and could not have done more to assure Cray's compliance than furnishing a copy of the guidelines for handling unleaded gasoline. Clause 9 of the Distributor Agreement (finding 6) specifically allows Texaco, its employees or agents, to enter at any time the reseller's (Cray Oil Co.'s) place or places of business to obtain such samples as may, in Texaco's judgment, be reasonably required to confirm that Cray is complying with its obligations concerning the handling of unleaded gasoline. Moreover, it is noted that the clause entitled "Product Quality Maintenance" of the Provisions Of Agreement of the Distributor Agreement entered into by Texaco and Cray Oil Co. provides. in pertent part: "Purchaser [Cray] hereby authorizes Seller [Texaco] to inspect and sample at Purchaser's facilities or equipment or service stations and outlets he operates or serves, the product at any time and conduct such tests of the product as Seller may deem necessary." If Texaco can contract for retail outlet inspection, sampling and testing for the purpose of assuring the quality of its branded products, no reason is apparent or has been offered as to why it could not contract for or otherwise accomplish such inspection,sampling and testing for the purpose of assuring compliance with unleaded gasoline regulations.

It is concluded that Texaco has not shown reasonable efforts to assure that Cray Oil Co. complied with its contractual obligation to avoid violations of the unleaded gasoline regulations, has not rebutted the prima facie showing of liability and is liable for a civil penalty.

Penalty

In considering the amount of the proposed penalty, I am required to consider the gravity of the violation, the size of Respondent's business, Respondent's history of compliance with the Act, action taken by Respondent to remedy the specific violation and the effect of the proposed penalty on Respondent's ability to continue in business (40 CFR 80.327(b) and 330(b)(1)). I may but am not required to consult or rely on the Guidelines for the Assessment of Civil Penalties Under Section 211(d) of the Clean Air Act (40 FR No. 169 at 39973 et seq., August 9, 1975).

The lead content of the gasoline, 0.34 gram per gallon, was 0.01 gram less than seven times that permitted by the regulation and the gravity of the violation in that regard requires no elaboration. Texaco's responsibility for that violation is, of course, based solely on its failure to take reasonable efforts to assure compliance by the reseller of its contractual obligation to prevent the sale or offering for sale of gasoline containing lead in excess of 0.05 gram per gallon. Concerning its history of compliance with the Act, Texaco has repeatedly been held in violation of the regulation for the same reason it is held

liable here, i.e., failure to exercise reasonable contractual oversight as required by 40 CFR 80.23(b)(2)(iii).[7] While it is understood that these decisions have been or will be appealed and that no final decisions or orders have been entered, no reason is apparent why Texaco's history of compliance should be treated as if it were being written on a clean slate.[8] In any event, this course seems appropriate for the limited purpose of determining whether there are any reasons for reducing the penalty proposed by Complainant ($7,000), which appears to be based on the Guidelines (Category IV firm, no previous violations, lead content substantially in excess of standard).

Neither the time Texaco was notified of the violation nor its response thereto is shown by this record and I am unable to consider the action taken, if any, to remedy the specific violation. Texaco has not contested the amount of the proposed penalty, shown or alleged any mitigating factors, or contended that assessment of the penalty proposed would have any effect on its ability to remain in business.

7/ In addition to the decisions cited elsewhere in this opinion, see Texaco Inc., Docket No. I UNG-421C (Initial Decision, dated May 23, 1979).

8/ Analgously, court judgments or decrees are frequently executed or given effect notwithstanding the judgment or decree may be appealed. Cf. George Hyman Const. Co. v. OS&HRC, 582 F.2d 834 (4th Cir., 1978) (only single prior infraction need be proven in order to invoke repeated violation sanction authorized by provision of Occupational Safety and Health Act (29 U.S. 666(a)).

Under all the circumstances, a penalty of $7,000 is considered appropriate and is hereby proposed.

Final Order[9/]

The violation of 40 CFR 80.22(a) asserted in the complaint against Texaco Inc. having been established, Texaco Inc. is liable for a civil penalty in the amount of $7,000 and is hereby ordered to pay the same by forwarding to the Regional Hearing Clerk a certified or cashier's check payable to the United States of America within 60 days after receipt of this order.

Dated this 8th day of June 1979.

Spencer T. Nissen
Administrative Law Judge

9/ This initial decision shall become the final order of the Regional Administrator unless appealed to or reviewed by him sua sponte in accordance with 40 CFR 80.327(c).