UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of Texaco Inc., Respondent.	)	Docket No. I UNG-422C

79 JUN 12 P1:18

INITIAL DECISION

This is a proceeding for the assessment of a civil penalty for violation of the Clean Air Act, Section 211, 42 U.S.C.A. 7545 (1978 Supp), and the regulations issued thereunder, 40 CFR Part 80. The civil penalty is assessed pursuant to Section 211(d) of the Act. The proceeding was instituted on a complaint issued by the United States Environmental Protection Agency ("EPA") against Texaco Inc. ("Texaco"), charging that unleaded gasoline containing lead in excess of 0.05 gram per gallon had been offered for sale at a Texaco-branded service station in violation of 40 CFR 80.22(a) of the regulations, and that Texaco was liable for violation under 40 CFR 80.23 of the regulations. A penalty of $6,000 is requested.[1/]

This case has been submitted on a stipulation of facts and the parties have agreed to dispense with an oral hearing. Briefs and proposed findings and conclusions have been filed by both sides. The stipulation of facts between Texaco and the EPA and the exhibits submitted with it marked Texaco Exhibits 1 and 2 are admitted into evidence. On consideration of the stipulation of facts and the briefs of the parties, it is found that Texaco is liable for the violation found herein. All proposed findings of fact not specifically adopted are rejected.

1/A complaint was also issued against Fleming Oil Company, Inc., the owner and operator of the Texaco-branded service station. That proceeding was settled by entry of a consent agreement and order assessing a civil penalty of $600 against Fleming Oil Company, Inc.

Findings of Fact

1. Respondent Texaco is a refiner of gasoline within the meaning of 40 CFR 80.2(i), whose gross income exceeds $5 million annually.
2. Fleming Oil Company, Inc. ("Fleming") owns and operates the Fleming Service Station located at 1-3 Putney Road, Brattleboro, Vermont, which is a "retail outlet" within the meaning of 40 CFR 80.2(j).
3. On August 22, 1978, an EPA fuels inspector collected a sample of gasoline offered for sale at Fleming Service Station through a pump bearing the label stating "Unleaded Gasoline", and Texaco's corporate, trade, or brand name.
4. When tested for lead content by the EPA in accordance with the procedure set out in Appendix B to 40 CFR Part 80, the unleaded gasoline was found to contain 0.086 gram of lead per gallon. This lead content is in excess of the defined requirement in 40 CFR 80.2(g), that unleaded gasoline contain not more than 0.05 gram of lead per gallon. The offering for sale of such gasoline by Fleming Service Station was a violation of 40 CFR 80.22(a).
5. The "unleaded" gasoline from which the sample was taken was purchased by Fleming directly from Texaco pursuant to a contract termed a "Distributor Agreement", dated April 13, 1976.
6. The Distributor Agreement contains the following provisions dealing with gasoline sold by Texaco as unleaded gasoline:

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 employees 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 employees 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 employees.

Seller warrants that Lead-Free Texaco Gasoline purchased 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 Lead-Free Texaco Gasoline referred to in the contract provide in pertinent part as follows:

Terminal/Bulk Plant Tankage

Terminal/Bulk Plant tankage previously containing leaded product should be cleaned prior to use for Lead-free Texaco gasoline.

Service Station Tankage - (Previously containing leaded product)

All leaded product should be removed from the tank, lines and dispensers. The tank should then be flushed three times with approximately 25-50 gallons of Lead-free product, depending on size of tanks. It has been found that repeated flushing with small quantities of unleaded product is satisfactory. Upon completion of flushing, add minimal amount of product to a tank that can be dispensed. Then flush lines and dispenser thoroughly, normally twice the volume of line.

The product should then be tested for lead content to determine product is on test. If not, additional flushing of tank is required, repeating the above sequence. Experience has been that three flushings are generally satisfactory. Experience may indicate two flushings will give satisfactory results.

* * *

Tank Truck

Dedicated compartments are not necessary, however, each compartment should have separate unloading lines with no manifolding. Strong control is necessary to be sure that all residual product, if any, is drained from the compartment prior to the loading of unleaded Texaco gasoline.

Split loads of unleaded Texaco gasoline with kerosene, Diesel fuel, furnace oil or other gasolines should not be permitted in units which do not have separate outlets from the compartments and products are separated by double walls or an empty compartment.

If a meter is utilized on the truck, then the meter should be flushed with unleaded Texaco or in these instances, dedication of compartment or trucks may be warranted depending on local conditions.

Tank cars are to be inspected to ascertain that tank car is free from any previous product and condition of car is acceptable for loading.

Delivery of Unleaded Texaco Products to the Service Station or Consumer

Extreme care is to be taken to be sure that all products are dropped to the appropriate tank. Tank identification by product is most important.

Where delivery is made through metered lines, then flushing is required.

8. Under Texaco's procedures, which procedures were followed at the time the violation occurred, Texaco delivers gasoline identified by Texaco as "Lead Free" (Texaco's name for unleaded gasoline) from its terminal in East Hartford, Connecticut to Fleming's bulk plant in Brattleboro, Vermont. Deliveries are made either in trucks owned and operated by Texaco or by common carrier.
9. Under Texaco's procedures, which procedures were followed at the time the violation occurred, Texaco maintains sufficient quality control at its East Hartford terminal to insure that unleaded gasoline does not contain lead in excess of 0.05 gram per gallon when gasoline is loaded on a Texaco truck or on a common carrier for delivery to Fleming.
10. Under Texaco's procedures, which procedures were followed at the time the violation occurred, Texaco makes no effort to insure that Fleming handles the unleaded gasoline in a manner which complies either with Fleming's contractual obligations, or with Texaco's guidelines, which were furnished at the time the Distributor Agreement was signed.

Discussion, Conclusions and Penalty

The stipulated facts establish that a retail gasoline service station offered for sale Texaco-branded gasoline which was represented to be unleaded gasoline but which contained lead substantially in excess

of the defined requirement for unleaded gasoline in 40 CFR 80.2(g). The sale of gasoline represented to be unleaded which exceeds the defined requirements of unleaded gasoline is prohibited by 40 CFR 80.22(a).

Pursuant to 40 CFR 80.23(a)(1), Texaco is made presumptively liable for sales of contaminated unleaded gasoline by retail outlets bearing the refiner's brand, trade or corporate name. The presumption is rebuttable and the defenses are set out in 40 CFR 80.23(b). Fleming, the purchaser of the gasoline from Texaco, owns and operates the retail outlet at which the contaminated gasoline was offered for sale (Stipulation of facts, para. 2), and is, therefore, a "retailer" within the meaning of 40 CFR 80.2(b). The pertinent provisions, accordingly, are as follows:

> (2) In any case in which a retailer or wholesale purchaser-consumer, a reseller (if any), and any gasoline refiner would be in violation under paragraph (a)(1) of this section, the refiner shall not be deemed in violation if he can demonstrate:
>
> (i) That the violation was not caused by him or his employee or agent, and
>
> * * *
>
> (iv) That the violation was caused by the action of a retailer who is supplied directly by the refiner (and not by a reseller), 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....

(viii) In paragraphs (b)(2)(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.2/

The stipulated facts show that Texaco maintained sufficient quality control in its own handling of its unleaded gasoline at its East Hartford Terminal to insure that the gasoline did not exceed the defined requirements at the time it was loaded into a tank truck for delivery to Fleming (Stip. of facts, paras. 7-13). The contamination consequently, must have been caused by negligent handling of the gasoline thereafter. While the stipulation of facts is silent on this

---

2/ Texaco's liability could also be judged perhaps on the ground that Fleming is a "distributor" within the meaning of 40 CFR 80.2(k). That would depend presumably on whether Fleming redistributed the gasoline from its "bulk plant" where it takes delivery from Texaco (See Stip. of Facts, para. 15) to Fleming Service Station, a fact on which the stipulation is silent. Texaco in its brief refers to Fleming as a "reseller" of gasoline (p. 1, passim). A reseller is defined as one who purchases branded gasoline from the refiner and resells or transfers it to retailers or wholesale purchaser-consumers. 40 CFR 80.2(n). There is nothing in the stipulated facts to show that Fleming, itself a retailer, sold to other retailers or to wholesale purchaser-consumers. The precise description of Fleming's relation to Texaco is not significant, however. The same showing to escape liability is required whichever relationship applies; namely, Texaco must show that the contamination was in violation of a contractual undertaking imposed by Texaco on Fleming designed to prevent such action, and despite reasonable efforts by Texaco (such as periodic sampling) to insure compliance with such contractual obligation. See 40 CFR 80.23(b)(2)(iii) and (v).

point, the parties have assumed that the contamination was caused by Fleming's negligent handling after the gasoline was delivered to Fleming and Texaco's liability will be determined on this assumption.[3/]

The issue, then, centers on the sufficiency both of the contractual undertaking which Texaco imposed on Fleming, and of Texaco's efforts to insure compliance with that contractual undertaking.

The contractual undertaking imposed by Texaco upon Fleming obligates Fleming to not mix Texaco-branded unleaded gasoline with leaded gasoline and oil, and to comply with Federal, State and local unleaded gas requirements in handling Texaco-branded unleaded gasoline. The contract further contains a representation by Fleming that it has received and read a copy of Texaco's Guidelines for the handling of branded-Texaco unleaded gasoline but, for reasons not disclosed by the stipulated facts, Fleming is not required to follow the procedures in the Guidelines.[4/] It is questionable whether Texaco's contract

---

3/ Official notice may also be taken of the fact that Fleming signed a consent agreement and order in which it admitted that as a retailer of the gasoline it is liable for the violation under 40 CFR 80.23(a)(1). The actual cause of the contamination is not disclosed in the stipulated facts.

4/ It is to be noted that contracts of other refiners have required resellers purchasing branded gasolines to follow specific procedures. See e.g., Amoco Oil Co., Docket No. I UNG-208C (EPA, Oct. 3, 1977) (Initial Decision). The contract in that case between the refiner and reseller required the reseller to follow the refiner's established procedures. Id.at 5-7.

satisfies the regulation's requirement of a contractual undertaking "designed to prevent [violations.]"[5/] A decision on this question is not necessary, however, since the regulation also requires that Texaco make reasonable efforts to ensure that Fleming will comply with the contractual undertakings that Texaco has imposed, and it is found that Texaco has not done so.

5/ See Texaco, Inc., Docket No. I UNG-228C 20 (EPA Nov. 4, 1977) (Initial Decision) appeal pending, in which a similar contractual agreement by Texaco was held not to comply with the regulations. As the EPA stated in its explanation of what would be considered a satisfactory contractual obligation in order for the refiner to escape liability, 39 Fed. Reg. 42360 (Dec. 5, 1974):

> It should be emphasized, however, that a boiler-plate provision reciting that a reseller or distributor will comply with the requirements of this Part [80] adds nothing to existing legal obligations and would also fail to accomplish EPA's objectives in assuring the availability of unleaded gasoline meeting the standards. Similarly, a provision requiring a reseller or other party to indemnify a refiner if a violation is caused by such party would not be considered a contractual undertaking designed to prevent violations if the indemnity clause is unaccompanied by specific quality assurance measures to be observed by the contracting party.

Texaco furnishes Fleming with a copy of its Guidelines at the time its Distribution Agreement is signed, but as already noted, the procedures therein are not made mandatory by the contract. The Guidelines may assist those who are conscientious about their compliance, but they do not by themselves reduce the risk of violations by retailers or other purchasers who are careless or unwilling to take the trouble to follow the necessary procedures for keeping the unleaded gasoline from being contaminated. As the EPA stated in its explanation of the regulations, the "reasonable efforts" required from refiners by the regulations are that "they exercise oversight responsibility so that the [contract] obligations are not taken lightly." 39 Fed. Reg. 45359 (Dec. 5, 1974). Texaco exercises no oversight responsibility whatever to insure that Fleming abides by its contractual obligations to maintain the lead-free quality of Texaco's branded unleaded gasoline.6/

Texaco argues that it is reasonable to assume that another is acting in accordance with its contractual obligations until there is some evidence of a violation. That is a convenient assumption for Texaco to make in order to lighten its burden of overseeing compliance by others, but it is without record support and is in conflict with the regulations.

6/ Texaco's failure to make an effort to insure that Fleming complies with its contractual obligations or even with Texaco's guidelines is established by Texaco's admission in the stipulated facts that it has no knowledge of Fleming's handling of Texaco's lead-free gasoline after the gasoline is delivered to Fleming (Stip. of facts, para. 15). Nowhere in Texaco's brief or proposed findings does Texaco claim to have exercised any oversight of Fleming's compliance with its contractual obligations.

Texaco also argues that it has done all that can reasonably be required of it to satisfy its obligation to oversee compliance with Fleming's contractual obligations, asserting that it lacked sufficient control over Fleming to be subject to vicarious liability for Fleming's debts. To hold it liable, therefore, Texaco claims, would be tantamount to imposing strict vicarious liability on it, contrary to the decisions in Amoco Oil v. EPA, 501 F. 2d 722 (D.C. Cir. 1974) ("Amoco I"), and Amoco Oil Co. v. EPA, 543 F. 2d 270 (D.C. Cir. 1976) ("Amoco II"). This argument is unpersuasive.

Texaco's assertion of lack of control over Fleming ignores the extent to which Texaco not only may, but has in fact, exercised control through the terms and conditions under which it sells its gasoline and permits the use of its brand name.[7/] The contract provides that Texaco shall have the right to enter Fleming's places of business to obtain samples or conduct such tests as may in Texaco's judgment be reasonably required to confirm that Fleming is complying with its obligations (Texaco Ex. 1, Para. 9). The contract further provides (Texaco Ex. 1, Para. 11) that Texaco may terminate it if Fleming breaches any of the terms, covenants, warranties, agreements and conditions of the contract.

7/ This was the premise for the refiner's liability in drafting the regulation. See 39 Fed. Reg. 13176 (Apr. 11, 1974). See also Amoco Oil Co. v. EPA, 501 F. 2d 722, 748 (D.C. Cir. 1974); "Petitioners (oil refiners) acknowledged that...refineries can exert considerable control over other facilities through contractual agreements providing for regular inspections and for stiff damages upon contamination of the branded product."

Evidence of Texaco's control by contract over Fleming is also shown by the following provision in a supplement to the main body of the agreement (Texaco Ex. 1, p. 6):

> Product Quality Maintenance.- Purchaser will not allow or permit any Texaco branded products to be sold as Texaco branded products by purchaser or the service stations and outlets selling Texaco products which he operates or serves which are mislabeled, misbranded, or contaminated and without limiting the generality of the foregoing, specifically Purchaser will not sell or allow to be sold Sky Chief Gasoline as Sky Chief Gasoline which has been commingled with other grades of Texaco branded gasoline or any non-Texaco gasoline; nor will Purchaser allow or permit the commingling of leaded with unleaded gasoline; nor will Purchaser allow or permit the sale, under a Texaco label or designation, of gasoline or any other product which is in fact a non-Texaco product or is a grade of Texaco product other than described by the label or designation. Purchaser hereby authorizes Seller 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. (Emphasis supplied) 8/

8/ Paragraph 15 of the contract makes this provision part of the agreement unless by its terms it is inapplicable. There is nothing on the face of this paragraph which indicates it is not applicable to Fleming. It is not clear whether the provision applies to the right to inspect and take samples to ascertain whether unleaded Texaco-branded gasoline contains excessive amounts of lead. The construction of this provision is not the issue, however, but what efforts may resonably be required of Texaco in order to fulfill its duty of contractual oversight under the regulation. That duty was imposed to carry out the national policy against air pollution expressed in the Clean Air Act, and it is reasonable, therefore, to require from Texaco, at a minimum, the same quality controls to prevent contamination of unleaded gas, which Texaco imposes to protect the integrity of its branded products.

It cannot be presumed that these contractual provisions are meaningless. They clearly show that Texaco does have the power to control those who distribute its branded unleaded gasoline, and to oversee their actions. The presumption of liability which is placed on Texaco by the regulation, accordingly, is not rebutted by Texaco's avoiding any effort at contractual oversight, which is what Texaco has done here.

Texaco's reliance upon Amoco I, supra, 501 F. 2d 722, and Amoco II, supra, 543 F. 2d 270, is based upon a misreading of those cases, and also on a misunderstanding of the regulations. Those cases were concerned with whether the EPA can impose vicarious liability on a refiner even where the refiner has taken all possible steps to prevent the violation. See Amoco I, supra, 501 F. 2d at 748-49; Amoco II, supra, 543 F. 2d at 274. The regulation, however, does not impose that kind of liability on Texaco. Texaco can escape liability for Fleming's violations if it can show (1) that Texaco contracted with Fleming for Fleming to exercise proper quality controls so that Texaco-branded unleaded gasoline would not be contaminated, and (2) that Texaco made reasonable efforts to insure that these quality controls were being followed. Establishing such requirements as a condition for the refiner escaping liability was never questioned in Amoco I or Amoco II. To the contrary, what the court questioned was the omission of such defenses to refiners when the violations were caused by retailers selling unleaded gasoline under a refiner's brand, trade or corporate name. See Amoco I, supra, 501 at 748; Amoco II, supra, 543 F. 2d at 274, 279.

In conclusion, Texaco has not sustained its burden of showing that it made reasonable efforts to prevent violations by Fleming. It may be true, as Texaco argues, that the control which Texaco has over the person responsible for the violation must be considered in determining what constitutes reasonable efforts. The stipulated facts, however, and the inferences which can reasonably be drawn from them show that Texaco had considerable control over the negligent party with respect to the handling of Texaco-branded unleaded gasoline. Hence, it cannot be assumed that any oversight effort by Texaco to insure compliance with the unleaded gas regulations would have been futile. What the facts do disclose is that Texaco simply did not exercise any control. Texaco, however, cannot rely on its own failure or refusal to act to exculpate it. The regulation places on Texaco the positive duty to insure compliance through active oversight of those who handle its branded unleaded gasoline.[9/]

9/As the EPA explained in issuing its regulation, 39 Fed. Reg. 42360 (Dec. 5, 1974):

> The formulation of a defense based on contractual obligations is intended to require, at a minimum, that refiners contract for specific quality assurance measures for branded unleaded gasoline suitable to the stage of distribution covered by the contract and that they exercise oversight responsibility so that these obligations are not taken lightly.

It is concluded accordingly, that Texaco Inc. has violated Section 211 of the Clean Air Act, as amended, 42 U.S.C.A. 7545, and the regulations issued thereunder, 40 CFR Part 80, as alleged in the complaint issued against Texaco Inc. on November 2, 1978, in Docket No. I UNG-422C.

The Penalty

In evaluating the appropriate penalty, I am to consider the gravity of the violation, the size of Texaco's business, Texaco's history of compliance with the Act, the action taken by Texaco to remedy the specific violation, and the effect of the proposed penalty on Texaco's ability to continue in business. 40 CFR 80.327(b). 80.330(b). I may also consult and rely on the Guidelines for the Assessment of Civil Penalties under the Clean Air Act, Section 211(d). 42 U.S.C.A. 7545 (1978 Supp.), which Guidelines are published in 40 Fed. Reg. 39974 (Aug. 29, 1975), but am not required to follow them. The Guidelines reflect the EPA's judgment of what are suitable penalties for effectively enforcing the Act, and their purpose is to ensure uniformity of penalties for similar violations. They will, accordingly, be followed here.

The civil penalty assessment schedule fixes a tentative penalty based on the gravity of the violation, the size of Texaco's business and Texaco's history of compliance with the Act. Accepting the EPA's statement (brief at 7), that there are no prior violations by Texaco, the penalty proposed for the violation found herein for a

company of Texaco's size is between $6,000 and $7,000. 40 Fed. Reg. at 39976 (Schedule No. 2 with no previous violations). The exact amount depends on how much the lead content exceeds the defined standard of 0.05 gram of lead per gallon. 40 Fed. Reg. at 39975 (Para. 3, Gravity of Violation). The proposal that the lead content found here of 0.086 gram per gallon was not excessive enough to warrant a larger penalty than $6,000 seems reasonable.

This tentative penalty may be reduced if a respondent shows that it promptly acted to remedy the violation and the conditions which gave rise to it, or that payment of such amount will adversely affect respondent's ability to continue in business, or that there are special circumstances which justify a reduction in penalty. 40 Fed. Reg. at 39975.

Texaco has come forward with no mitigating facts which justify reducing the penalty. It does not contend that the penalty will cause any disruption of its business, and there is no evidence that Texaco has investigated the violation and has taken measures to keep it from occurring again. Finally, Texaco has not shown any special mitigating circumstances present which should be considered.

I conclude, accordingly, that $6,000 is an appropriate penalty for the violation found.

FINAL ORDER[10/]

1. Pursuant to Section 211(d) of the Clean Air Act, as amended, 42 U.S.C.A. 7545 (1978 Supp), and the regulations issued thereunder, 40 CFR 80.201, et seq., a civil penalty of $6,000 is assessed against Texaco Inc. for the violation of said Act found herein.

2. Payment of the full amount of the penalty assessed shall be made within 60 days of service upon Texaco Inc., by forwarding to the Regional Hearing Clerk, a cashier's check or certified check in the amount of the penalty payable to the United States of America.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

June 12, 1979

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