UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
1735 BALTIMORE
KANSAS CITY, MISSOURI 64108

REGIONAL HEARING CLERK
JUL 05 1977
REGION VII

IN THE MATTER OF	)	DOCKET NO. 030770
TEXACO, INC.,	)	
Respondent	)	

INITIAL DECISION OF PRESIDING OFFICER

This proceeding was initiated on October 8, 1976, by complaints issued by the Director, Enforcement Division, Environmental Protection Agency, Region VII (the Complainant), against Hiway Garage, retailer, Kugler Oil Company, distributor, and Texaco, Inc., refiner, alleging that, on or about September 24, 1976, Hiway Garage, Wauneta, Nebraska, a Texaco branded retail outlet, offered for sale unleaded gasoline containing in excess of .05 grams per gallon lead content, said gasoline having been supplied by Kugler Oil Company, and failed to equip leaded gasoline pump number 911764 with the proper size nozzle. A penalty of $6,000.00 was proposed against Texaco, the refiner which supplied the gasoline ultimately furnished to Hiway Garage by Kugler Oil Company. These actions were alleged to have violated 40 CFR 80.22(a), 80.23(a), and 80.22(f)(1) promulgated pursuant to Section 211(c) of the Clean Air Act.

On October 26, 1976, Texaco, Inc., (Texaco) filed an answer, and therein requested a hearing, contested the facts alleged in the complaint and stated that Texaco was not liable for the alleged acts of Hiway Garage and that Texaco had no knowledge of whether the gasoline offered for sale by Hiway Garage on or about September 24, 1976, contained in excess of .05 grams per gallon lead content or that leaded gasoline pump 911764 was not equipped with the proper size nozzle.

The complaint against Hiway Garage was resolved by a Consent Agreement and Final Order filed on November 9, 1976, wherein Hiway Garage acknowledged that it offered for sale unleaded gasoline containing in excess of .05 grams per gallon lead content, said gasoline having been supplied by Kugler Oil Company, and that it failed to equip leaded gasoline pump number 911764 with the proper size nozzle. By reason of those facts Hiway Garage

acknowledged that it had violated 40 CFR 80.22(a) and 80.22(f)(1), and consented to the issuance of an order requiring the payment of a civil penalty in the amount of $300.00.

The complaint against Kugler Oil Company was withdrawn by Complainant on November 17, 1976, on the basis of new information that no violation had been committed by Kugler Oil.

On November 17, 1976, Complainant withdrew that portion of the complaint against Texaco, Inc., which related to 40 CFR 80.22(f)(1) (the nozzle violation).

On January 3, 1977, the undersigned was appointed Presiding Officer for this matter by Charles V. Wright, Acting Regional Administrator. An order setting hearing was issued on January 3, 1977, advising the parties that hearing was set for February 10, 1977, and advising the parties that they were encouraged to reach settlement prior to the formal hearing.

On January 14, 1977, counsel for Complainant requested indefinite postponement of the hearing upon agreement with counsel for Texaco that certain stipulations could be reached which might obviate the need for hearing. On January 17, 1977, the hearing was postponed by order of the Presiding Officer until April 14, 1977, to give the parties ample time to complete their negotiations.

Several postponements were granted, and after a final extension until June 17, 1977, for the parties to submit all required documentation, the brief of Complainant was timely received, and the brief of Texaco, Inc., was received on June 28, 1977.

On May 26, 1977, a stipulation between the parties was filed, noting 26 separate items of agreement upon which the issues remaining might be submitted for decision. Among those agreements it issufficient to note at this point that it has been agreed between the parties that the unleaded gasoline delivered by Kugler Oil Company to Hiway Garage was purchased from Texaco, Inc., facilities at Williams Brothers Pipeline Terminal, Doniphan, Nebraska. It is further agreed that the gasoline purchased by Kugler from Texaco was in compliance with Environmental Protection Agency (EPA) restrictions pertaining to lead content, and the unleaded gasoline delivered by Kugler Oil Company to Hiway Garage on August 13, 1976, August 30, 1976,

and September 14, 1976, was in compliance with those regulations. The parties also acknowledged that the violation was caused by the insufficient cleansing of Hiway Garage's leaded gasoline underground tank in preparation for storage of unleaded gasoline, which resulted in commingling of some leaded gasoline with the complying unleaded gasoline delivered. The parties further acknowledged (1) the violation was not caused by Texaco, Inc., or its employee or agent, (2) the violation was not caused by the action of Kugler Oil Company or its employee or agent, and (3) the violation was caused by the action of Hiway Garage's owner and operator, Gordon A. Dininger. In addition, the parties also acknowledged the existence of contractual relationships between Texaco, Inc., and Kugler Oil Company, and the existence of certain instructions to Kugler Oil Company concerning the delivery and handling of unleaded gasoline product.

It appears from the stipulation and the arguments of the parties presented in their briefs that the sole issue remaining for determination in this proceeding is the question of whether Texaco, Inc., has established the affirmative defenses provided by 40 CFR 80.23. Of that section, the provisions of 80.23(b)(2)(i), (ii), and (iii) appear to be relevant. Those subsections are phrased 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:
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> (i) That the violation was not caused by him or his employee or agent; and
>
> (ii) That the violation was caused by an act 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
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> (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.

Upon consideration of the entire record, including the stipulation, the briefs and exhibits, and other associated documents submitted by the

parties, I have concluded that the violation alleged against Texaco, Inc., did occur, that Texaco, Inc., is legally responsible for the violation and should pay an appropriate civil penalty based upon the following findings of fact and conclusions of law:

Findings of Fact

1. Respondent, Texaco, Inc., is a refiner within the definition of 40 CFR 80.2(i).

2. Pursuant to a distributor agreement dated April 1, 1976, Texaco, Inc., supplied unleaded gasoline to Kugler Oil Company from the storage facilities at Williams Brothers Pipeline Terminal, Doniphan, Nebraska, from whence Kugler Oil Company subsequently delivered unleaded gasoline to Hiway Garage on the dates of August 13, 1976, August 30, 1976, and September 14, 1976. The unleaded gasoline delivered by Kugler Oil Company on those dates has been stipulated by the parties as in compliance with EPA regulations governing lead content.

3. Pursuant to stipulation, the parties have agreed that, on or about August 12, 1976, Hiway Garage converted an underground storage tank from leaded gasoline storage to unleaded gasoline storage upon the initiative of the owner and operator of Hiway Garage, Gordon A. Dininger, who made all of his own arrangements for this conversion and then requested Kugler Oil Company to furnish unleaded gasoline.

4. On August 12, 1976, Hiway Garage displayed the Texaco brand name, as that fact is relevant within Section 80.23(a)(1). Although this item was not stipulated by the parties, it was alleged in the complaint, and was not controverted by Texaco.

5. Texaco, Inc., had no notice or knowledge of the activities of Hiway Garage in its conversion of a storage tank to the sale of unleaded gasoline, prior to the EPA inspection of August 12, 1976.

6. Texaco, Inc., did not own, lease, operate, control, supervise, or directly sell gasoline to Hiway Garage at the times relevant to this proceeding.

7. The parties have stipulated that the violation was caused by the insufficient cleansing of Hiway Garage's leaded gasoline underground tank in preparation for storage of unleaded gasoline, which resulted in commingling of some leaded gasoline with the complying unleaded gasoline delivered.

8. Pursuant to the terms of the Distributor Agreement dated April 1, 1976, between Texaco, Inc., and Kugler Oil Company, Kugler Oil Company warranted that it would not mix or allow lead-free Texaco gasoline to be mixed with any gasoline containing lead anti-knock agents, nor would it store, transport or deliver lead-free Texaco gasoline unless the facilities to be served complied with all federal and state requirements for the dispensing of unleaded gasoline.

Kugler Oil Company further represented it had received and read a copy of Texaco's "Guidelines for the Handling of Lead-free Texaco Gasoline--Wholesaler and Consignees" and that it would allow Texaco, Inc., to enter its places of business to obtain samples or conduct such tests as might be required to confirm its compliance with the foregoing obligations.

In addition, Kugler Oil agreed that, in the event it would sell lead-free Texaco gasoline to any other entity, it would obtain from each such buyer for Texaco's benefit in writing the warranties and agreements to which Kugler Oil was subject pursuant to the distributor agreement, and hold Texaco harmless from any penalties which Texaco might incur as a result of a breach of the agreement.

9. At the time of the violation, Texaco, Inc., did have in effect a program for monitoring the compliance of those retail outlets bearing the Texaco brand name, which Texaco knew to be selling unleaded gasoline, by testing the unleaded product offered at such outlets at a frequency of once each two months. Texaco, Inc., did not receive actual notice of the fact that Hiway Garage offered for sale Texaco branded unleaded gasoline beginning on or about August 12, 1976, and, therefore, did not test or sample the unleaded gasoline offered for sale at that retail outlet.

10. Texaco had no notice or knowledge of the sale of unleaded gasoline until its investigation following its receipt of the complaint of October 12, 1976.

11. There is no indication in the record that Kugler Oil did obtain or attempt to obtain for Texaco, Inc.'s benefit the warranties and agreements contained in the distributor's agreement from Hiway Garage for the benefit of Texaco, Inc.

12. The obligations of Kugler Oil Company pursuant to the distributor's agreement do not require Kugler Oil Company to notify Texaco when it sells or distributes Texaco unleaded gasoline to a retail outlet for the first time.

13. There is no indication in the record of any communications or instructions of any nature by Texaco, Inc., to its retail outlets such as Hiway Garage concerning the procedures which must be followed when a retail outlet decides to offer unleaded gas for the first time, particularly with reference to the precautions which must be taken in the cleansing of tanks formerly used for the storage of leaded gasoline in preparation for the storage of unleaded gasoline.

14. There is no indication in the record of any contractual relationship between Texaco, Inc., and Hiway Garage which would have tended to prevent the violation which has occurred in this matter, or that Texaco undertook any efforts to make Hiway Garage aware of its responsibilities in the handling and sale of unleaded gasoline, should Hiway Garage elect to purchase and sell such product.

Conclusions of Law

1. Texaco, Inc., has not established that Hiway Garage was aware of the requirements of the regulations governing the offer for sale of unleaded gasoline; therefore it has not been established upon the record that the action of Hiway Garage in converting a storage tank from leaded gasoline to unleaded gasoline in such a fashion that the unleaded gasoline placed therein became contaminated, amounted to "deliberate commingling" as that term is used in 40 CFR 80.23(b)(2)(ii).

2. The immediate cause of the violation was the action of Kugler Oil Company in placing unleaded gasoline in an improperly cleaned storage tank which had previously held leaded gasoline and which contained a sufficient quantity of leaded gasoline to create a contamination, in violation of a contractual undertaking with Texaco, Inc.

3. Texaco, Inc., failed to exercise a program of reasonable efforts to insure compliance with the contractual obligations which may have operated to prevent the actions which led to the violation in this instance, and was the proximate cause of the violation.

Discussion

There are several significant issues in connection with Texaco's liability, as shown by the briefs of the parties. The first is concerned with the action of Hiway Garage in the preparation of its underground storage tanks for sale of unleaded gasoline. By stipulation, as noted above, Complainant and Texaco have agreed that the insufficient cleansing of Hiway Garage's unleaded gasoline underground tank which resulted in the commingling of leaded gasoline with unleaded gasoline is the cause of the violation. Texaco argues that the insufficient cleansing, with the fact that Hiway Garage made all its own arrangements for converting the leaded storage tank to unleaded gasoline and called a distributor to obtain unleaded gasoline, all without knowledge to Texaco, constitutes "deliberate commingling" as that term is used in Section 80.23(b)(2)(ii); and that Texaco must thereby be held not liable for the violation. Texaco points to the decision In the Matter of Continental Oil Company, Docket No. 032640, as indicative of the type of situation which satisfies the referenced regulation. However, upon a reading of the full decision in that matter, it can be seen that a significant distinction exists between the facts of that case and those in evidence in this case in that the tank truck operator who caused the violation in Continental was at least aware of the requirements for flushing his tank truck before hauling unleaded gasoline, which requirements existed in order to avoid a violation of the unleaded gas regulations. In this case there has been no showing that Hiway Garage was in any way aware of the requirement for flushing a storage tank previously used for leaded gasoline before converting to storage for unleaded gasoline, or in fact that it had any knowledge whatsoever of any program of precautionary measures regarding the sale of unleaded gasoline.

In the Continental case, it can be seen that there was cognizance on behalf of the responsible party of the actions necessary to avoid a violation, and a willful or deliberate disregard of the necessary conduct, while in this case there has been no such showing. As was observed in Capital Packing Company v. U.S., 350 Fed. 2d 67 (1965), willfulness may be found in an intentional misdeed or gross neglect of a known duty. In this case it is critical that there is a clear absence in the record of any showing that

Hiway Garage's employees and agents were made aware of the requirements of the unleaded gas program, and it must follow that the action by Hiway Garage could not have been deliberate commingling, as that term is used in Section 80.23(b)(2)(ii).

The second issue in contention centers on the affirmative defense provided by 40 CFR 80.23(b)(2)(iii). As noted above, that section allows a refiner to avoid liability for the unlawful offer for sale by a retail outlet bearing its corporate, trade or brand name, of unleaded gasoline with a lead content in excess of .05 grams per gallon if it can establish that it had in existence a contractual undertaking designed to prevent such action and exerted reasonable efforts (such as periodic sampling) to insure compliance with the contractual undertaking.

Texaco bases its demonstration of compliance with this excuse, in part, upon a characterization of the two-pronged test of Section 80.23(b)(2)(iii), (consisting of (1) the requirement of contractual undertakings designed to prevent the action which caused the violation and (2) reasonable efforts by the refiner to insure compliance with the contractual obligations) as an "artificial dichotomy" as it applies to the question of whether the contamination at issue could have been prevented by the refiner. Initially, it should be noted that any attempt to redefine such a regulation in a sense that does not seem to be consistent with its plain language, is, in essence, an attack upon the regulation which is not appropriate to a proceeding such as the present. At any rate, Texaco proceeds with the argument that, if a refiner has imposed on a reseller a contractual undertaking, that undertaking alone, if a reasonable program of contractual oversight, must be held to satisfy Section 80.23(b)(2)(iii), and, if the undertaking is supplemented by other activities, then "those activities must be deemed to be 'reasonable efforts ... to insure compliance' with the undertaking and such undertaking and supplemental activities must be held to satisfy Section 80.23(b)(2)(iii)." It is inherent to this argument, and the general nature of Section 80.23(b)(2)(iii) that the refiner must demonstrate that it has recognized and acted upon the necessity of a program of reasonable efforts to insure compliance with its contractual obligations designed to prevent actions which might violate Section 80.23(a)(i), and it is in this area that Texaco has failed to meet the standard of conduct

required. That a program of reasonable efforts to insure compliance with contractual obligations might exist through additional contractual obligations is obvious, but, for reasons discussed below, Texaco has not accomplished compliance through this means. As expressed in Amoco Oil Company, Docket No. 030085, the term "reasonable" as used in 80.23(b)(2)(iii) must mean "fit and appropriate to the end in view." It is in this test that Texaco's program of oversight has failed.

Before reaching a consideration of the merits of Texaco's program of reasonable efforts to insure compliance with its contractual obligations, it is interesting to note that Texaco contends that if it had in existence at the time of contamination a reasonable program of contractual oversight and that the action which caused the contamination could not have been prevented by the program, then it is not liable for the violation. The foundation in fact for this argument is based upon Texaco's assertion that the violation was caused by Mr. Dininger of Hiway Garage, and that Texaco could not have operated to prevent the violation since it did not have the contractual right of access to Hiway Garage's property whereupon it could have sampled the unleaded gasoline about to be offered for sale.

The obstacle which Texaco has thus presented to its ability to exercise contractual oversight does not seem realistic in light of the strong interest of Texaco in protecting the integrity of its unleaded gasoline product. Although there has been no contract offered for the record between Texaco and Hiway Garage, the fact that Hiway Garage was a Texaco branded retail outlet at the time of the violation is indicative of the high degree of responsibility of Texaco to maintain the quality of its products offered for sale at that location.

Returning to the merits of Texaco's efforts to insure compliance with its contractual obligations, it can be seen that the argument of Texaco on the above point as well as the general nature of its contract with Kugler Oil indicate strongly that Texaco considered its responsibilities concerning the protection of the unleaded product as largely at an end when the product was delivered to the distributor, and that it was the distributor's burden from that point to obtain additional contractual obligations with the retail outlets and to conduct the reasonable efforts necessary to insure compliance with those additional obligations. Indeed, Texaco has stipulated, and stresses in its arguments that the violation was caused through the

"actions" of Hiway Garage, and "was not caused by the action of Kugler Oil." It may be observed that the truth of these statements should be tempered by recognition that the violation was equally caused by Kugler Oil Company's inaction in its failure to observe the requirements of the Distributor Agreement and the guidelines referenced therein, whereby it agreed to protect the quality of Texaco unleaded gasoline, and to properly purge storage tanks before use. This failure on the part of Kugler and the characterization by Texaco of the violation as caused by Hiway Garage is a further indication that Texaco was undertaking virtually no action by way of reasonable efforts to assure that the contractual provisions it entered with Kugler Oil to avoid actions leading to a violation would be observed; and, it is equally important that even less effort was taken with regard to the obtaining of oversight of Hiway Garage's actions, either directly or through the contract with Kugler Oil.

As has been stated in similar proceedings, the responsibility of the refiner to assure the quality of the unleaded gasoline product does not end with the delivery of the product to the jobber or distributor, but continues until the unleaded product is delivered to the motorist's tank (Sam Spain dba Main Street Standard and Amoco, Docket No. 031555 and Amoco Oil Company, supra). The reasoning of those decisions seems sound and the concepts expressed above are adopted as applicable herein because of the strong requirements for the protection of public health through the assurance of the general availability to the public of uncontaminated unleaded gasoline.

It has been acknowledged that the regulations at issue in this case play an important role in the furtherance of public health protection by the assurance that the public will have available unleaded gasoline in compliance with the standards of the applicable regulations, in order that catalytic converters fitted on automobiles introduced in model year 1975 and thereafter equipped with catalytic converters can operate without the contamination of those converters, which are designed to prevent introduction of lead particulates into the atmosphere.

In this context, Texaco's argument that it could not have acted to prevent this violation because of its contractual undertaking with Kugler which required Kugler to obtain from the retail outlets which it supplied

with unleaded gasoline, agreements and warranties similar to the ones given Texaco by Kugler, and that Kugler would obtain for Texaco a right of entry to the retail outlets so that Texaco could thereafter test for compliance the unleaded gas offered for sale are seen as an indication that Texaco considered its contractual obligations ending with the distributor, and, indeed, that it considered itself barred from taking any efforts to insure compliance by retailers until the distributor obtained for Texaco a contractual right of entry. This concept was refuted in Sam Spain (supra) and it is here concluded that such a scheme seems repugnant to the conduct of a good faith effort by the refiner to comply with unleaded gsoline requirements.

It is an important concept that the execution of a program of reasonable efforts to insure compliance with contractual obligations must be demonstrated by the refiner before the affirmative defense of Section 80.23(b)(2)(iii) can be found to have been met.

The high degree of responsibility placed on the refiner can reasonably be construed to require the refiner to exercise a requirement of all its jobbers and dealers that it be notified of the first time offerings for sale of unleaded gasoline product by any of its retail outlets, so that its agents or employees might be given an opportunity to test the compliance of that product with unleaded gas requirements. Texaco has argued that such a requirement is implicit in its contractual obligations with Kugler Oil Company, but from the very fact that the requirement is termed "implicit," it cannot be accorded the weight of a contractual obligation, and the construction of such a requirement is not supported by any indication in the record that Kugler Oil Company or any other Texaco distributor operated upon such an "implicit" requirement to provide notices to Texaco of any such first time offerings of unleaded gas.

It is also reasonable to expect that a refiner, in the pursuit of a program of reasonable efforts to insure compliance with contractual obligations to prevent actions which may lead to a violation, might undertake to periodically investigate the compliance of its jobbers, distributors, and dealers with requirements pertaining to notification of "changeover" operations, in addition to a periodic sampling program directed at routine handling and distribution practices. No such showing has been made on this record.

Upon consideration of the foregoing, it is concluded that Texaco, Inc., did not exercise reasonable efforts to insure compliance with contractual obligations of its distributors, and Texaco must be held responsible for the violation in this instance.

Proposed Civil Penalty

In evaluating a civil penalty, I have considered the factors of 40 CFR 80.330(b) and those of the guidelines published August 29, 1975, at 40 FR 39973. The gravity of the violation may be considered from the standpoint of the nature of the misconduct, and from the extent of the harm which might result. The fact that Texaco's liability in this situation lies in its failure to recognize and act upon its responsibilities which exist even after the unleaded gasoline product is delivered to a distributor rather than from a deliberate action in derogation of the applicable regulations, indicates that Texaco did not act in bad faith in creating the circumstances which led to the violation. The existence of a contract with the distributor which, if implemented through more aggressive and specifically oriented procedures to apply to retailers, may in future situations prevent violations such as the ones in this instance, indicates that Texaco has taken initial steps toward the implementation of an effective program of contractual oversight.

In regard to the extent of harm which might result from the violation, there is no indication in the record except through contentions by Complainant of the extent which the unleaded gasoline offered by Hiway Garage exceeded the .05 grams per gallon lead content standard established by EPA. However, as this contention has not been controverted by Texaco, and it has had ample opportunity since receipt of Complainant's brief to raise such a contention, it is accepted that the unleaded gasoline offered for sale by Hiway Garage on October 12, 1976, contained lead nearly three times the amount allowed under EPA regulations. Whether Texaco acted promptly upon receipt of the notice of violation to insure that the non-complying product was taken off the market is not clear in the record.

Based upon the foregoing considerations and a review of the entire record, I find that a civil penalty in the amount of $4,000.00 is an appropriate assessment against Texaco and such amount is hereby proposed.

Proposed Final Order

This Initial Decision and the following Proposed Final Order assessing a civil penalty shall become the Final Order of the Regional Administrator unless appealed or reviewed by the Regional Administrator as provided in 40 CFR 80.327(c).

Final Order

It is hereby determined that Respondent Texaco, Inc., has violated 40 CFR 80.22(a), as alleged in the complaint herein, and a civil penalty is hereby assessed against Texaco in the sum of $4,000.00, and Texaco, Inc., is ordered to pay the amount by cashier's or certified check payable to the United States Treasury within 60 days of the receipt of this order.

This Initial Decision ~~is~~ signed and issued this 1st day of July, 1977, at Kansas City, Missouri.

David R. Tripp

David R. Tripp
Presiding Officer