Attachment D

FEBRUARY 15, 1994 LETTER FROM ARB SENIOR STAFF COUNSEL W. THOMAS JENNINGS TO MICHAEL D. GAYDA, ASSISTANT GENERAL COUNSEL OF TOSCO REFINING COMPANY

STATE OF CALIFORNIA PETE WILSON, Governor

AIR RESOURCES BOARD
2020 L STREET
P.O. BOX 2815
SACRAMENTO, CA 95812

February 15, 1994

Michael D. Gayda
Assistant General Counsel
Tosco Refining Company
2300 Clayton Road
Suite 1100
Concord, CA 94520-2100

Re: Confidentiality Determination on Your Public Records Act Request for Documents Pertaining to Certification of Texaco Alternative Diesel Fuel Formulations

Dear Mr. Gayda:

I am writing to confirm that the Air Resources Board (ARB/Board) is upholding the claims of confidentiality made by Texaco Refining & Marketing, Inc. (Texaco) in response to your request under the California Public Records Act (Government Code sections 6250 et seq.) for records pertaining to Texaco's alternative diesel fuel formulations. I believe that some time ago I orally advised you that we were taking this action.

Background. In a letter dated March 19, 1993, you requested copies of records pertaining to the fuel properties of diesel fuel formulations for which Texaco Refining & Marketing, Inc. (Texaco) sought certification, or for which a certification order was issued, pursuant to Title 13, California Code of Regulations, section 2282(g). Section 2282 establishes a 10 percent limit on the aromatic hydrocarbon content of motor vehicle diesel fuel. Diesel fuel producers or importers are permitted to seek certification of an alternative diesel fuel formulation under section 2282(g), based on an engine test demonstration that the alternative formulation will result in the same emission benefits as typical diesel fuel meeting the 10 percent aromatic hydrocarbon standard. Once an alternative formulation is certified by the ARB, a producer or importer may comply with the regulation by selling diesel fuel that exceeds the otherwise applicable aromatic hydrocarbon limit, as long as the fuel meets the designated specifications for the alternative fuel formulation.

On March 24, 1993, I sent you a letter indicating that the ARB had issued two Executive Orders certifying two separate diesel fuel formulations submitted by Texaco. I advised you that, at the time of submittal, Texaco claimed that all materials associated with the applications for certification were confidential. The letter to you noted that the ARB had recently received another Public Records Act request for the specifications

identified in an Executive Order certifying a Texaco alternative diesel fuel formulation. I forwarded you a copy of the March 8, 1993 letter and accompanying declarations that Texaco had submitted in response to the other Public Records Act request, claiming confidentiality for the fuel properties of the certified diesel fuel formulation. I also transmitted to you copies of the two Executive Orders certifying Texaco's alternative diesel fuel formulations, without the page (labeled Attachment 1) identifying the fuel properties that Texaco claimed to be confidential.

On March 24, 1993, I also sent a letter to Charles Walz, Western Region Regional Manager for Texaco. A copy of your Public Records Act request was enclosed. I indicated that your request covered not only the Executive Orders certifying the two Texaco alternative diesel fuel formulations, but also any other documents in the ARB's possession containing the fuel properties of the formulations. In the letter, I offered Mr. Walz the opportunity to submit documentation to support Texaco's claim of confidentiality, and noted that Title 17, California Code of Regulations, section 91022(c) describes the information that should be included to support a claim of confidentiality.

Mr. Walz responded in a letter dated April 8, 1993, to which he appended three declarations and an Appendix A containing roughly 500 pages of documents submitted by Texaco in connection with its applications for certification of the two diesel fuel formulations. Deleted from these materials were redacted portions containing information in the following categories: specific percentages of aromatics in the candidate fuels, references to quantities of components and characteristics of candidate fuels, references to special components of candidate fuels, description of reference fuels characteristics, references to and descriptions of proprietary analytical methods developed by Texaco to evaluate Texaco additives claimed to be proprietary, and the identity of special Texaco fuel additives. Mr. Walz asserted that Texaco's two certified diesel fuel formulations, and the redacted portions of Appendix A, qualify as trade secrets and accordingly are exempt from disclosure.

By letter to you dated April 12, 1993, I transmitted the entire contents of Mr. Walz's April 8 submittal. This included all of the documents in Mr. Walz's Appendix A. I asked you to advise me whether you wished to provide a response to Texaco's trade secret justification. In subsequent telephone conversations, you indicated you planned to provide such a reply. The reply was contained in your letter of June 15. I subsequently provided a copy of that letter to Mark Asplund, an attorney with Texaco, and he provided a response in his letter of July 7, 1993. I enclose a copy.

Applicable Public Records Act Requirements. In responding to your records request, the ARB is subject to the California Public Records Act and our regulations regarding the disclosure of public records, Title 17, California Code of Regulations, sections 91000 to 91022. An agency may justify withholding a record from disclosure only by demonstrating that the record is exempt under express provisions of the Public Records Act, or that

on the facts of the particular case, the public interest served by not making the the record public clearly outweighs the public interest served by disclosure of the record. (Gov. Code § 6255.) Title 17, California Code of Regulations, section 91022(c) identifies the information that should be included in the documentation submitted by a party seeking confidential treatment of records sought by a member of the public pursuant to the Act. Mr. Walz's April 8 letter contained all of the information identified in section 91022(c).

Texaco claims that Attachment 1 to the two Executive Orders and the redacted portions of Appendix A to Mr. Walz's April 8, 1993 letter (hereafter "the information claimed to be confidential") are statutorily protected from disclosure as "trade secrets" pursuant to Government Code section 6254.7(d). This statute provides as follows:

> (d) Except as otherwise provided in subdivision (e) and Chapter 3 (commencing with Section 99150) of Part 65 of the Education Code, trade secrets are not public records under this section. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

Section 6254.7(e) provides,

> (e) Notwithstanding any other provision of law, all air pollution emission data, including those emission data which constitute trade secrets as defined in subdivision (d), are public records. Data used to calculate emission data are not emission data for the purposes of this subdivision and data which constitute trade secrets and which are used to calculate emission data are not public records.

Texaco has shown that the information claimed to be confidential describes a formula to produce vehicular diesel fuels in compliance with 13 Cal. Code Regs. section 2282, and that the resulting diesel fuels will be articles of trade not subject to patents. The declarations of Mr. Ketcham and Mr. Hancock show that access to the information claimed to be confidential has been closely controlled and disseminated only to specific companies within Texaco. The declarations state that care has been taken to shield the information from non-Texaco entities; the only disclosures have been to the ARB, and under confidence to the Southwest Research Institute and the Detroit Diesel Corporation. The declarations also show that disclosure of the information claimed to be confidential would harm Texaco's competitive position. Texaco has invested over $2 million in the development of certifiable diesel fuels, and this investment has helped give

Texaco a competitive advantage in being able to produce complying diesel fuels by the October 1, 1993 compliance date. This advantage would be lessened by disclosure of the requested information. In light of these factors, I conclude that the information claimed to be confidential does qualify as trade secrets. Furthermore, the data do not constitute emission data.

In your June 15, 1993 letter, you make several arguments in support of disclosure of the requested information. First, you note that some of the records containing the information claimed to be confidential are portions (actually attachments) to Executive Orders of the Board. You urge that under no circumstances can such portions of an ARB order be withheld from the public, since a governmental agency cannot keep its decisions secret and deprive the public of the ability to review, analyze and understand the basis for the decisions.

It is not unprecedented for material claimed as trade secret to be referenced by an ARB Executive Order and withheld for disclosure. Title 13, California Code of Regulations, section 2257 establishes a mechanism for certifying gasoline formulations that meet specified performance standards regarding deposit control; these standards are met by the use of a deposit control additive. Section 2257(a) generally prohibits the sale of California gasoline unless the producer, importer or distributor has been issued a certification and the gasoline contains the minimum concentration of additives identified in the final application for certification. Refiners and distributors typically claim the properties of the gasoline and additive, and the method for determining the presence and concentration of the additive, confidential. The ARB Executive Orders certifying the blends have accordingly referenced an attachment containing this information and identified as confidential. In fact, Executive Order G-696-071, issued to Tosco, contained just such a confidential attachment. Although we are mindful of the potential shortcomings of confidential treatment of an attachment to an ARB Executive Order, we see no basis for automatically disclosing the data claimed to be confidential upon a public request for the data.

Second, you indicate that all of the relevant statements made by Board members and staff pertaining to the certification of alternative diesel fuel formulations made clear that the Board's intention was to have certification information available to the public. I agree that the expectation was that any producer or importer would be able to comply with the diesel aromatic hydrocarbons regulation by meeting any certified alternative diesel fuel formulation. However, once Texaco submitted a qualifying certification application and claimed the formulation to be a trade secret, it was the ARB's responsibility to determine whether the formulation satisfied the criteria for trade secret protection. Nothing in the regulation prohibits a claim that the formulation is a trade secret and accordingly exempt from disclosure. If in the future the Board wishes to assure that alternative formulations will be made public, it can provide in the regulation that certification will be conditioned on the applicant's consent to disclosure of the formulation.

Third, you question whether Texaco has treated the claimed trade secret information confidentially. You state that there is an indication in the material provided to you that at least some of the claimed trade secret information has been provided to third parties. In various listings submitted by Texaco identifying reference and candidate fuel characteristics, Unocal is identified next to the aromatic hydrocarbon content. You conclude these references indicate that the fuels had been provided to Unocal for testing, and you state there is no indication Texaco took steps to preserve any asserted trade secret status.

Mr. Asplund's July 7 letter states that Texaco provided approximately fifteen coded distillate samples to Unocal, which was acting as a commercially-contracted analytical laboratory. He indicates that the number and diversity of the fuels provided made it impossible for Unocal to discern which, if any, of the fuels were ultimately certified. I conclude that this is an adequate showing that the material claimed to be trade secret did not lose its confidential status through disclosure to Unocal.

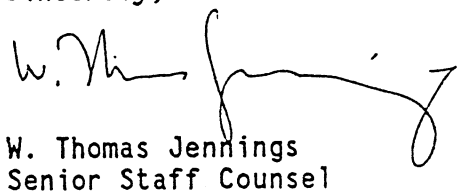
Finally, you state that to justify the withholding of a record, the ARB is required by Government Code section 6255 to balance the public interest served by not making the record public against the public interest served by making the record public. I do not share your interpretation. Section 6255 provides,

> The agency shall justify withholding any record by demonstrating that the record in question is exempt under the express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

The statute is clearly written in the disjunctive. An agency is required to engage in the balancing of interests only in those situations where the material is not exempt from disclosure under an express provision of the Public Records Act. In this case, the Texaco materials constitute trade secrets that are expressly exempt under Government Code section 6254.7.

Please call me at (916) 323-9608 if you have any questions on this matter.

Sincerely,



W. Thomas Jennings
Senior Staff Counsel

Attachment

cc: Mark Asplund
Jocelyn Thompson