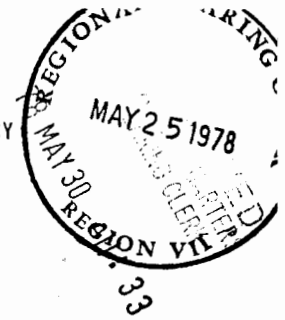

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
1735 BALTIMORE
KANSAS CITY, MISSOURI 64108

IN THE MATTER OF:	)	
	)	
HUDSON OIL COMPANY	)	DOCKET NO. 033715
	)	
Respondent	)	

INITIAL DECISION

This proceeding was initiated by the issuance of a complaint to respondent Hudson Oil Company, dated August 30, 1977, alleging a violation of 40 CFR 80.22(a) (promulgated pursuant to Section 211(c) of the Clean Air Act, 42 U.S.C. 1857f-6c) in that on or about August 26, 1977, at respondent's retail outlet at 7620 Metcalf, Overland Park, Kansas, respondent, its "employee or agent introduced leaded gasoline into a motor vehicle which was labeled 'unleaded gasoline only'; said vehicle being a 1976 Chevrolet Monte Carlo."

Respondent filed an answer to the complaint and requested a hearing. The matter was heard on February 23, 1978, in Kansas City, Missouri, before John H. Morse, Presiding Officer designated by the Regional Administrator of the Environmental Protection Agency, Region VII.

Having considered the evidence introduced by both parties at the hearing, and the briefs and proposed findings of fact, conclusions of law, submitted by the respective parties, the Presiding Officer makes the following findings of fact and conclusions of law:

Findings of Fact

1. Hudson Oil Company, Number 14, 7620 Metcalf, Overland Park, Kansas, is and at all times pertinent to this matter has been, a "retail outlet" as defined in 40 CFR 80.2(j).

2. Hudson Oil Company, 4720 Rainbow Boulevard, Westwood, Kansas, owns the retail outlet, Number 14 above.

3. Hudson Oil Company, 4720 Rainbow Boulevard, Westwood, Kansas, is, and at all times pertinent to this matter has been, a "retailer" as defined in 40 CFR 80.2(k).

4. Hudson Oil Company retail outlet Number 14 sells leaded and unleaded gasoline.

5. Anthony L. Smith is, and at all times pertinent to this matter, has been an employee of Hudson Oil Company at retail outlet Number 14.

6. On or about August 26, 1977, Anthony L. Smith was on the premises of Hudson Oil Company retail outlet Number 14, working as an attendant.

7. On or about August 26, 1977, a 1976 Chevrolet Monte Carlo, license number Kansas J J 16711 was driven into Hudson Oil Company retail outlet Number 14, and stopped adjacent to two of the gasoline pumps at the retail outlet.

8. The driver of the automobile requested five dollars worth of regular gasoline.

9. There was no label on the exterior of said automobile reading "unleaded gasoline only" or any words to that effect.

10. Respondent's employee Smith, pursuant to the request of the automobile driver, took the nozzle and hose from a pump dispensing regular leaded gasoline and inserted the nozzle into the filler inlet of the automobile; and encountered no difficulty in inserting the nozzle into the filler inlet. He then introduced leaded gasoline into the automobile.

11. On the gasoline gauge located in the upper left quadrant of the dashboard on the interior of said automobile, there was a label reading "unleaded gasoline only" in letters 1/4-inch to 3/8-inch high; but this label was not observed by respondent's employee. There was nothing observed by or readily observable to respondent's employee Smith about the exterior of the automobile, including the gasoline cap or the fuel tank filler inlet, in the ordinary course of his servicing of such automobile, to indicate any removal of an "unleaded gasoline only" label or any tampering with the fuel tank filler inlet.

12. Respondent regularly admonishes its supervisors and its retail outlet managers, both by instruction letters and by weekly telephone talks to their supervisors, with regard to the necessity of complying with EPA motor fuels regulations, including the prohibition against introducing leaded gasoline into automobiles labeled or equipped for unleaded gasoline only.

13. Respondent's employee Smith had been similarly instructed by his supervisor and although it was not uncommon for operators of late model automobiles to request leaded gasoline, he had made it a firm practice, pursuant to his

instructions, to refuse such requests if the automobile was identifiable as one designed for unleaded gasoline only, or if he saw evidence of removal of the "unleaded gasoline only" label or alteration of the gasoline tank filler inlet as indicated either by the damaged appearance of the inlet or by the use of a cap of the style commonly found on tanks with the filler inlet designed to receive unleaded gasoline only. He had not made a practice, however, of noticing whether or not there was an "unleaded gasoline only" label on the dashboard of a customer's automobile.

Conclusions of Law

1. The regulation in question (40 CFR 80.22(a)) is not intended to impose an absolute liability for introduction of leaded gasoline into a motor vehicle labeled "unleaded gasoline only" or equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline; the introduction of leaded gasoline into such a vehicle is a culpable violation only if done knowingly or as a consequence of negligence involving disregard of facts or circumstances observable or ascertainable by the retailer, his employee or agent in the exercise of due care, and sufficient in themselves to indicate to the retailer or his employee or agent that the vehicle was one of the prescribed types, or to impose upon him the responsibility for such further inquiry or investigation as could reasonably be expected to disclose the pertinent facts concerning the vehicle type.

2. The phrase in 40 CFR 80.22(a) "any motor vehicle which is labeled 'unleaded gasoline only'" must be related to the labelling specifications and requirements contained in 40 CFR 80.24, that the manufacturer of a motor vehicle equipped with an emission control device which would be impaired by the use of leaded gasoline, shall affix two or more "unleaded gasoline only" labels to such vehicle, one (1) to be "located on the instrument panel so as to be readily visible to the operator of the vehicle", and the other to be located immediately adjacent to the gasoline filler tank inlet, "located so as to be readily visible to any person introducing gasoline to such filler inlet;" and consequently the existence of the label on the dashboard of the vehicle is not in itself sufficient to constitute the required labelling within the meaning and intent of Section 80.22(unless actually observed by the retailer or his employee or agent prior to or durin the introduction of leaded gasoline into the vehicle. (Emphasis added.)

3. The record fails to establish, by a preponderence of the evidence, the facts constituting the violation alleged in the complaint.

Discussion

Aside from the testimony concerning the label on the dashboard gasoline gauge, the only evidence that the vehicle in question was labeled "unleaded gasoline only" or equipped with a gasoline tank filler inlet designed for the introduction of unleaded gasoline, was the testimony of complainant's witness Mr. Henry Rompage that at an unspecified time and place other than the time and place of the alleged violation he inspected the vehicle, which he had traced by the license number, and observed that it had a gasoline tank cap on which were embossed the words "unleaded gasoline only", and that the tank filler inlet appeared to have been altered by removing the filler inlet restrictor, possibly by chiselling it off. Although Mr. Rompage and another EPA employee had observed the automobile in respondent's service station, and immediately after the introduction of leaded gasoline, and at that time observed the label on the dashboard gauge, there was no indication in the record that they observed the gasoline tank cap or filler inlet at that time and place. Respondent's employee Smith, on the other hand, testified specifically that the gasoline tank cap which he removed while servicing the vehicle was of the older standard, plain type used prior to the unleaded gasoline requirements, and not of the type presently used on automobiles equipped for unleaded gasoline having a threaded plastic extension and the unleaded gasoline label embossed into the metal of the cap. He was not alerted to any apparent tampering with the filler inlet because when he lifted the rear license plate to gain access to the tank cap, removed the cap, and inserted the pump nozzle into the inlet it met no resistance and gave no indication of any restriction or any former restriction in the tank inlet. The license plate, raised to permit access to the tank inlet, shielded the inlet from the view of the attendant inserting the pump nozzle. It is entirely reasonable to assume the vehicle owner, having removed the exterior label from the automobile and having eliminated the filler inlet restrictor, would further the disguise of his automobile by temporarily using a plain gasoline cap when endeavoring to deceive a service station attendant. I am unable to find from a

preponderence of the evidence that at the time of the alleged violation the labeled gasoline tank cap was in place or that evidence of tampering of the filler inlet should have been observed by the attendant. It should be noted, moreover, that the complaint does not charge respondent with having introduced leaded gasoline into a vehicle equipped with a tank filler inlet designed for the introduction of unleaded gasoline; it alleges only that such vehicle was labeled "unleaded gasoline only." The fact that the same regulation covers both prohibited acts does not enlarge the allegations of the complaint.

Since the regulation which specifies the manner of labelling vehicles requiring unleaded gasoline clearly implies that the label on the instrument panel is intended to inform the vehicle operator, and that the label on the vehicle exterior adjacent to the gasoline filler inlet is the one intended as a warning to a person introducing gasoline to such inlet, there appears to be no duty on the part of a retailer or his employees to look for the label on the instrument panel, at least, in the absence of any other evidence suggesting the probability that the vehicle is one equipped to receive unleaded gasoline only. Respondent's employee testified that from the appearance and style of the automobile he assumed and believed that it was an earlier year model not requiring unleaded gasoline; and there was no evidence that Chevrolet Monte Carlos of 1976 or other years requiring unleaded gasoline had unique appearance characteristics or style readily distinguishing them from earlier Monte Carlo models using regular gasoline.

In Mr. Smith's testimony concerning a conversation with the EPA employees after the alleged violation he recalled saying that "there wasn't a sticker on the car" and "it was punched out or drilled out, whatever." Complainant argues that these are admissions indicating knowledge on the part of the respondent's employee: but from the context of this statement and the other testimony of Mr. Smith it is apparent that those statements were spoken from hindsight after Mr. Smith was made aware of the alleged violation.

The conclusions reached in this case should not be regarded as countenancing or encouraging any lack of diligence on the part of retailers and their employees in resisting and countering the efforts of motorists who wish to obtain regular gasoline for automobiles designed for unleaded gasoline, the extent of which efforts is rather dramatically emphasized in the testimony in this case. Indeed, retailers and their employees have a responsibility to use care and diligence in observing and acting upon evidence of deception and tampering. While in this

case there may have been evidence which could have been discovered by respondent's employee on closer scrutiny, the preponderance of the evidence indicates that respondent and its employees did meet the required standard of care.

Accordingly, the following final order is proposed:

ORDER

Respondent is not in violation of 40 CFR 80.22(a) as alleged in the complaint, and the proposed assessment of the civil penalty against respondent is withdrawn.

May 25, 1978
Date

John H. Morse
John H. Morse
Presiding Officer