BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

STATE OF IDAHO

DOCKET NO.

CANYON COUNTY, Petitioner,	)	**Docket No. 0101-11-02**
vs.	)	
IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent.	)	**RECOMMENDED ORDER GRANTING SUMMARY JUDGMENT FOR RESPONDENT, IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY**

Both parties having moved for Summary Judgment in the above-captioned matter, the Hearing was held June 24, 2011. At the Hearing, both parties argued there were no genuine issues of material fact (Idaho Department of Environmental Quality (DEQ) – Tr. P. 7, L 12, 13; Canyon County (County) Tr. P. 24, L 22-25).

In this matter it has been previously Ordered that Idaho Rule of Civil Procedure 56 et. seq. will apply to motions for summary judgment.

The Presiding Officer has reviewed and considered the pleadings, documents, Affidavits, briefs, motions and arguments filed and made herein, and Orders as follows:

1. IDAPA 58.01.23.211(c) requires that a Petition filed before the Board of Environmental Quality, state the relief sought. In its Petition, the relief requested by the County is that the Board "enter an Order that exempts the vehicles listed on attached Exhibit A from emission testing requirements." The County also requests that the Board "voluntarily enter.....a

separate order addressing three (3) matters, which may be characterized as:

(1) a request to suspend vehicle emission testing in Canyon County, Idaho;

(2) Directing a refund of funds paid by Canyon County residents under threat of revocation of vehicle registration, and; (3) Granting such other relief as the Presiding Officer deems warranted."

The Petition was filed pursuant to Idaho Code 39-107(5), 39-116B(4), 67-5201 and IDAPA 58.01.23 et. seq., Rules of Administrative Procedure before the Board of Environmental Quality.

2. While the County does not identify a specific exemption for the vehicles on Exhibit A from emission testing requirements, the County argues that the procedures followed in adopting and implementing rules was unconstitutional and if that claim is upheld, then the vehicles would not have to be tested until the unconstitutional activity is rectified. The basis for the County's argument is: (1) The County argues that the State's rule making process was done in such a manner that the County has been denied Constitutionally guaranteed procedural due process (Tr. P. 20, L 1 – 7); (2) The County argues that the State (DEQ) through its interpretation and application of I.C. 39-116B has rendered this statute a local or special law in violation of the State Constitution (Tr. P. 20, L 8 – 12); (3) The County argues that the law has been applied retroactively in violation of I.C. 73-101 without an express declaration in the statute that it is to be applied retroactively; and, (4) The State (DEQ) has acted beyond the scope of its authority in violation of Idaho law.

3. IDAPA 58.01.23.415 provides "a Presiding Officer (Hearing Officer) in a contested case

has no authority to declare a statute unconstitutional." This matter is a contested case. At said Hearing, Counsel for the County stated, "we think that the statute is constitutional, we think that its application is not." (Tr. P. 24, L 11 – 13). Whether the Presiding Office has jurisdiction to declare the application by the State (DEQ) of a statute unconstitutional becomes a fundamental issue in this matter. In effect the issue becomes whether the Board had the constitutional authority to adopt its rules implementing the statute. The County's contention that the manner in which the State (DEQ) applied the statutes is unconstitutional is tantamount to a claim that the Board did not have the legal authority to adopt the rules pursuant to which the statute has been applied.

4. In this case the County alleges the rules adopted by the Board are unconstitutional in which case they could not be within the Board's rule making authority, and the County argues that the State's (DEQ's) rules have not been promulgated according to proper procedure. Pursuant to IDAPA 58.01.23.415 the Presiding Officer has no Jurisdiction over the issues of whether the County was denied procedural due process or whether the State through its interpretation and application of I.C. 39-116B has rendered that statute a local or special law in violation of the State Constitution, or whether the agency (Department of Environmental Quality) is improperly exercising legislative authority and is thus allegedly in violation of Article III Section 1 of the Idaho Constitution. To the extent that the County's argument that the State has applied the statute retroactively rests upon any claimed Constitutional violation, the Presiding Officer has no Jurisdiction.

To the extent the retroactive claim does not involve allegations of Constitutional violations, the Presiding Officer concludes that I.C 39-116B is prospective in application, meaning, from the date the agency's rulemaking regarding vehicle emission testing was complete, the penalty provisions of I.C. 39-116B would occur *from that date forward*, that the statue has no provision meant to punish or penalize alleged transgressions occurring prior to the completion of rulemaking; as a result there is no retroactive application rendering I.C. 39-116B an "ex post facto law" or in violation of I.C. 73-101, et. seq.,; such interpretation is consistent with the principle that "a Court, in construing a statute should aim to give it sensible construction, such as will effectuate legislative intent, and, if possible avoid absurd conclusion," c.f. Hartman v. Meier, 39 Idaho 261 (1924).

The Presiding Officer further determines as a matter of law that the Idaho State Legislature, in drafting the statute, did intend for it to apply to vehicle registrations existing when DEQ's rulemaking regarding vehicle emission testing in Canyon County was complete.

5. In its Petition, Canyon County also alleges "the Agency has acted without a reasonable basis in law by enforcing compliance (of vehicle emission testing) in Canyon County with statements that the Agency did not promulgate as rules under the Idaho Administrative Procedures Act's rulemaking provisions, in contravention of I.C. 39-116B, 67-5220 through 67-5225 and 67-5227 and other applicable law."

Pursuant to I.C. 39-102A the Department of Environmental Quality (DEQ) was created on January 1, 2000 by the Legislature of the state of Idaho; the Legislature declaring, "the

creation and establishment of the department of environmental quality to protect human health and the environment as its sole mission is in the public's interest..."

Granted this authority, concerning the matter of vehicle emission testing, the DEQ has administered vehicle emission testing in Ada County, Idaho (with the exception of the city of Kuna, Idaho), since its creation. Note: Vehicle emission testing has been mandatory in Ada County (except Kuna) since 1984. Realizing the need to address air quality concerns in the most populous region of the state of Idaho, known as the Treasure Valley, in 2005 the Idaho Legislature passed the Treasure Valley and Regional Air Quality Council Act. This entity was charged with developing a plan to address deteriorating air quality in this region; vehicle emission testing in Canyon County, Idaho was recommended as a part of this plan. Subsequently, in April, 2008 the Idaho Legislature enacted I.C. 39-116B, which was signed into law by the Governor of Idaho. Idaho Code 39-116B is entitled "Vehicle inspection and maintenance program and provides in part: (1) The Board {of environmental quality} shall initiate rulemaking to provide for the implementation of a motor vehicle inspection and maintenance program to regulate and ensure control of the air pollutants and emissions from registered motor vehicles in an attainment or unclassified area as designated by the United States environmental protection agency, not otherwise exempted in subsection (7) of this section, if the director determines the following conditions are met:

(a) An airshed, as defined by the department, within a metropolitan statistical area, as defined by the United States office of management and budget, has ambient concentration design

values equal to or above eighty-five percent (85%) of a national ambient air quality standard, as defined by the United States environmental protection agency, for three (3) consecutive years starting with the 2005 design value; and

(b) The department determines air pollutants from motor vehicles constitute one (1) of the top two (2) emission sources contributing to the design value of eighty-five percent (85%).

(2) In the event both of the conditions in subsection one (1) of this section are met, the board shall establish by rule minimum standards for an inspection and maintenance program for registered motor vehicles....."

The record of this matter includes the affidavit of Rick Hardy, who is an Engineer and is employed by the DEQ. This affidavit indicated, among other things: a) That air quality monitoring data showed ozone design value concentrations in the Treasure Valley to be: .077, .078, and .075 ppm for the years 2006, 2007, and 2008, or above 85% of the national ambient air quality standards, and; b) That vehicle emissions constitute one of the top two emission sources contributing to ozone concentrations in the Treasure Valley. This affidavit therefore identified the occurrence of the two events which triggered the rule making authority and duty of the Board of the DEQ to "provide for the implementation of a motor vehicle inspection and maintenance program to regulate and ensure control of the air pollutants and emissions from registered motor vehicles," under I.C. 39-116B. The record of this matter does not contain any credible evidence which negates, refutes, contests, or disputes the findings and data contained in said affidavit.

The notice sent to Canyon County by the DEQ regarding vehicle emission testing were sent *after* the date I.C. 39-116B became law and *after* the occurrence of the events which triggered the rulemaking process by the Board pursuant to I.C. 39-116B, and well in advance of the effective date of the rules set forth in IDAPA 58.01.01.517 – 526. The notice sent to Canyon County was to inform Canyon County of the status and existence of I.C. 39-116, and the effect such statute would have on Canyon County and the requirement for vehicle emission testing. Idaho Code 39-116B provides the legal basis for the DEQ to adopt and pass those provisions of the IDAPA which mandate vehicle emission testing in the geographical areas identified therein, to-wit: Ada and Canyon Counties, i.e. IDAPA 58.01.01.517 – 526.

Therefore, the Hearing Officer concludes that as a matter of law, the Idaho Legislature has delegated and granted to the Idaho Department of Environmental Quality (DEQ) the authority to create, administer, manage, monitor and mandate vehicle emission testing those areas identified in the Treasure Valley airshed, which includes Canyon County, and that passage of IDAPA 58.01.01.517 – 526 is an appropriate exercise of the authority so delegated to the DEQ.

6. In its Petition, Canyon County also alleges, "the agency's internal procedures regarding notice are subject to critical failure." The Presiding Officer concludes that the record of the above-captioned matter indicates that the State (DEQ) has fully complied with all notice provisions as required by I.C. 39-116B and that in this matter, Petitioner was duly provided with all notice as required by law.

7. The exemptions from vehicle emission testing are set forth in IDAPA 58.01.01.517 and I.C 39-116B(7), in its Petition Canyon County has not identified or articulated a recognized basis for exemption under either of these sources, from the requirement of vehicle emission testing; as a result the Petition of Canyon County filed in this matter fails to state a claim upon which relief can be granted and the Petition is therefore dismissed.

8. To the extent the Petition seeks voluntary Orders from the Board, it is Dismissed as the claim upon which this form of relief was predicated is likewise Dismissed. IDAPA 58.01.23. 211(c) requires that the Petitioner (County) state the relief sought and IDAPA 58.01.23.102 requires the County to prove by a preponderance of the evidence the allegations justifying the relief sought. As a matter of law, Petitioner is not entitled to an Order directing the Board to take voluntary action in the manner requested.

9. Pursuant to I.R.C.P 56(c), and ample case law interpreting the same, summary judgment shall be entered "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

For the foregoing reasons the Presiding Officer concludes that in this case the pleadings, and admissions on file, together with the affidavits show that there is not genuine issue as to any material fact and that the moving party (DEQ) is entitled to a judgment as a mater of law. Therefore, the motion for summary judgment by Petitioner, Canyon County is denied; the motion for summary judgment by the Respondent, DEQ, is granted, and the Petition of Canyon County filed in this matter is hereby dismissed.

PROCEDURAL RIGHTS

a. This is a recommended order of the presiding officer. It will not become final without action of the Board.

b. The Board shall allow all parties an opportunity to file briefs in support or taking exceptions to the recommended order and may schedule oral argument in the manner before issuing a final order. The hearing coordinator shall issue a notice setting out the briefing schedule and date and time for oral argument. The Board will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived or extended by the parties or for good cause shown. The Board may hold additional hearings or may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

c. This recommended order will be reviewed by the Board during the board meeting scheduled for November 9 and 10, 2011.

DATED this 19 day of August, 2011.

Trent Marcus

Trent Marcus, Hearing Officer

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CANYON COUNTY, Petitioner, v. IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent.	)	Docket No. 0101-11-02 CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2011, a true and correct copy of the **Recommended Order Granting Summary Judgment for Respondent, Idaho Department of Environmental Quality** was served on the following:

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