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BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

STATE OF IDAHO

W. ALLEN FREEMAN,)	
Petitioner,)	Docket No. 0101-11-04
)	
vs.)	RECOMMENDED ORDER
)	GRANTING SUMMARY
IDAHO DEPARTMENT OF ENVIRONMENTAL)	JUDGMENT FOR RESPONDENT,
QUALITY,)	IDAHO DEPARTMENT OF
<u>Respondent.</u>)	ENVIRONMENTAL QUALITY

The Respondent, Idaho Department of Environmental Quality, having moved for Summary Judgment in the above-captioned matter, and the Hearing was held August 9, 2011. Both Parties were present and both presented oral argument at said Hearing.

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 Petitioner, Mr. W. Allen Freeman, is that the Board (of Environmental Quality) enter an Order exempting Petitioner from the emission testing requirement of his vehicle, as required by I.C. 39-116B and IDAPA 58.01.01.517 - 526, on the ground that "DEQ used 1999 data in Legislative

testimony to get I.C. 39-116B passed and did not comply with the required rule making provisions of I.C. 39-107D paragraphs 1,2,2a, and 2b, making IDAPA 58.01.01. 517-526 invalid, illegal, null and void.”

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 Petitioner does not identify a specific exemption for his vehicle from emission testing requirements, Petitioner argues that the rationale and justification for passage of I.C. 39-116B was based upon scientifically flawed and obsolete data, that the Department of Environmental Quality (DEQ) and the Idaho Legislature relied upon such inaccurate data in the passage of this statute, that as a result the DEQ failed to comply with the required rule making provisions of I.C. 39-107D (1), (2), (2)(a), and (2)(b), and thus rendering IDAPA 58.01.01.517 – 526 null and void and thereby relieving Petitioner of the obligation to have his vehicle emission tested.

Pursuant to Legislative action, the Department of Environmental Quality, (DEQ), has been granted, and is charged with the duty to administer and require vehicle emission testing in Ada County, Idaho, and now Canyon County, Idaho.

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

Recommended Order P. 3

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.

3. In this case the Petitioner is disputing the integrity of information, which information

was relied upon in the Legislative process which ultimately resulted in the passage of a state statute, Idaho Code 39-116B, and that as a result this statute should be declared null and void. Such a claim requires Judicial analysis and review of I.C. 39-116B.

Upon the Judicial review and Judicial interpretation of a statute of the laws of Idaho, according to I.C. 73-102, "The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice." Regarding the Judicial interpretation of a statute of the laws of Idaho, the Idaho Supreme Court has held, "it is incumbent upon the Supreme Court to give a statute interpretation that will not in effect nullify it, and it is not to be presumed that legislature performed idle act of enacting superfluous statute," Walker v. Nationwide Financial Corp. of Idaho, 102 Idaho 266 (1981).

Guided by such principles, the Presiding Officer determines as a matter of law that the Idaho State Legislature and the DEQ, in the drafting and passage of I.C. 39-116B has fully complied with I.C. 39-107D and all subsections thereof, that such statute was lawfully and appropriately passed and sufficiently states its' meaning, and that passage of IDAPA 58.01.01.517 -526 is an appropriate exercise of the authority delegated to the DEQ.

4. Pursuant to I.R.C.P 56(c), and 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."

Recommended Order P. 5

Additionally, concerning a Summary Judgment and in either Affidavits filed in support thereof or in opposition thereto, such shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.....”

The motion for Summary Judgment filed by the Respondent, DEQ, in this matter is supported by an affidavit, the affidavit of Rick Hardy, which complies with the requirements of I.R.C.P 56(e). The documents filed by Petitioner in response to Respondent’s motion for Summary Judgment fails to comply with the requirements of I.R.C.P 56(e) due to the fact that such documents do not contain Affidavits based on personal knowledge, nor do such documents, when analyzed independently, set forth such facts as would be admissible in evidence, as required by I.R.C.P 56(e).

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 the Respondent, DEQ, is granted, and the Petition of Mr. W. Allen Freeman filed in this matter is hereby dismissed.

5. The exemptions from vehicle emission testing are set forth in IDAPA 58.01.01.517 and I.C 39-116B(7), in its Petition, Petitioner 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 Mr. W. Allen Freeman filed in this matter fails to state a claim upon which relief can be granted and the Petition is therefore dismissed.

Recommended Order P. 6

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 to be held in February, 2012. The date of the February, 2012 board meeting has not been set.

DATED this 29 day of September, 2011.



Trent Marcus, Hearing Officer

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STATE OF IDAHO

W. ALLEN FREEMAN,
Petitioner,
v.

IDAHO DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Respondent.

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) Docket No. 0101-11-04
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) CERTIFICATE OF SERVICE
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)
)

I hereby certify that on this 3rd day of October, 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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