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BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

W. ALLEN FREEMAN

Petitioner,

vs.

IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY
Respondent.

Docket No.: 0101-12-05

PRELIMINARY ORDER

Respondent, the Idaho Department of Environmental Quality ("DEQ"), moved for dismissal, or in the alternative, summary judgment in the above-entitled action. The motions were fully briefed by the parties and submitted for review and a ruling on the pleadings.

I. BACKGROUND

A. Petition I

On May 13, 2011, W. Allen Freeman ("Mr. Freeman") filed his initial *Petition Initiating Contested Case*, Docket No. 0101-11-04 (Petition I), wherein he sought review of Idaho Department of Environmental Quality's ("DEQ") decision, holding that the registration for his 2003 Toyota vehicle, license number 2C EE845, may be revoked because Mr. Freeman failed to

comply with the emissions testing set forth in Idaho Code § 39-116B. On September 29, 2011, the appointed hearing officer issued a *Recommended Order Granting Summary Judgment for Respondent, Idaho Department of Environmental Quality*, effectively dismissing the case. Mr. Freeman filed a timely *Exception to Recommended Order Granting Summary Judgment for Respondent, Idaho Department of Environmental Quality*, to which DEQ filed its response in support of the hearing officer's recommended order.

Mr. Freeman's issues presented in Petition I alleged that "'DEQ used outdated information in legislative testimony to get 39-116NB passed' and did not comply with the required rulemaking provisions of Idaho Code § 39-107D."[1]

Oral arguments were heard by the Idaho Board of Environmental Quality ("Board"). On February 16, 2012, after fully considering the record and the oral and written arguments of both parties, the Board affirmed the hearing officer's Recommended Order. No subsequent appeal was filed by Mr. Freeman.

B. Petition II

After receiving two written notices to obtain emissions testing of his vehicle, identified as a 2006 Mazda MPV, license number 2C EJ983, on November 19, 2012, Mr. Freeman filed a new *Petition Initiating a Contested Case* ('Petition II"), Docket No. 0101-12-05, which is the petition currently pending. In Petition II, Mr. Freeman sought review of the DEQ's decision that the registration of the vehicle identified as a 2006 Mazda MPV, license number 2C EJ983, may be revoked because Mr. Freeman failed to comply with the emissions testing requirements established by Idaho Code § 39-116B. In response to Mr. Freeman's hearing request, DEQ filed *Respondent's, Department of Environmental Quality, Motion to Dismiss or in the Alternative Motion for Summary Judgment* on December 12, 2012.

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[1] *Final Order on Review of Recommended Order (Final Order)*, p. 6.

On December 19, 2012, a prehearing telephone conference was held; Mr. Freeman appeared on his own behalf, and Lisa Carlson, Deputy Attorney General, appeared on behalf of DEQ. It was ordered that Mr. Freeman's response to DEQ's motion was due on January 18, 2013, and DEQ's reply was due on January 25, 2013. Both parties timely submitted their pleadings as ordered.

i. Position of DEQ

DEQ argues that a motion to dismiss for failure to state a claim upon which relief may be granted, or in the alternative, a motion for summary judgment is appropriate regarding Petition II. While certain exemptions apply to the admissions testing requirements, Mr. Freeman did not allege any of the exemptions apply to his 2006 Mazda MPV, license number 2C EJ983, and DEQ argues none of the exemptions are applicable in this matter.[2] DEQ further argues that no legal or factual basis exists to exempt Mr. Freeman's vehicle, and the Board had already decided the issues presented in Petition II, in its decision and order in Petition I.

DEQ further alleges Mr. Freeman's argument that DEQ failed to comply with Idaho Code § 39-107D when it determined motor vehicle emissions constitute one of the top two sources contributing to elevated ozone design value is without merit, because DEQ's determination was not subject to rule making requirements.

ii. Position of Mr. Freeman

In his *Motion to Deny Respondent's, Department of Environmental Quality, Motion to Dismiss or in the Alternative, Motion for Summary Judgment*, Mr. Freeman argues that DEQ's

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[2] The exemptions from the Vehicle I/MN Program are: a. Electric or hybrid motor vehicles; b. Motor vehicles with a model year less than five (5) years old; c. Motor vehicles with a model year older than 1981; d. Classic automobiles as defined by Section 49-406A, Idaho Code; e. Motor vehicles with a maximum vehicle gross weight of less than fifteen hundred (1500) pounds; f. Motor vehicles registered as motor homes as defined by Section 49-114, Idaho Code; g. Motorized farm equipment; and h. Registered motor vehicles engaged solely in the business of agriculture. IDAPA 58.01.01.517.5; Idaho Code § 39-116B(7). *See* Final Order, p. 10, footnote 7.

motion must be denied, and identified two specific questions he believes must be answered:

> "The first question that must be asked and answered is what was the best science available and where did it come from on which the legislature based its determination that a vehicle emissions program was an appropriate strategy for addressing **elevated** ozone values?"[3] [Emphasis original].
>
> "The second question that must be asked is whether the projected reductions are the result of the **VET program or new cars?**"[4] [Emphasis original].

With regard to the first question, Mr. Freeman opines that the best science available was not utilized. In answer to the second question, Mr. Freeman indicates that the reduction in emissions is due to new cars, not the emissions program.

II. LEGAL ANALYSIS

In 2005, the Idaho Legislature enacted the Treasure Valley and Regional Air Quality Council Act, Idaho Code § 39-6701 *et seq.*, as a means by which to address the problem of deteriorating air quality in the Treasure Valley and other regions of Idaho.

In 2008, the Idaho Legislature passed the Vehicle Inspection and Maintenance Program ("Vehicle I/M Program" or "emissions program"), Idaho Code § 39-116B, which required DEQ to implement rules establishing minimum requirements for the emissions program. DEQ began the rule-making process in response to Idaho Code § 39-116B; public input was received in early 2009, which Mr. Freeman participated in, and DEQ promulgated IDAPA 58.01.01.517 through 526, effective March, 2010.

Since 2010, there have not been any substantive changes to the statutes or regulations implementing DEQ's responsibilities pertaining to the vehicle emissions program identified by either party or relevant to Petition II.

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[3] Petitioner's Motion, p. 4.
[4] Petitioner's Motion, p. 5.

A. Board's Ruling in Petition I

In its *Final Order on Review of Recommended Order* (Final Order), pertaining to Petition I, the Board reviewed two specific issues:

1. Whether Freeman has stated a claim that his vehicle should be exempted from the Vehicle I/M Program under Idaho Code § 39-116B(4).

2. Whether DEQ complied with Idaho Code § 39-107D in promulgating the Rules.[5]

Before addressing the first issue, the Board, in its Final Order in Petition I, provided an overview of the legislative action that occurred due to the threatened deterioration of air quality in particular regions of Idaho, including the enactment of Idaho Code § 39-116B, entitled Vehicle Inspection and Maintenance Program ("Vehicle I/M Program"). The Vehicle I/M Program required DEQ to enter into rulemaking to establish minimum standards for vehicle emissions testing, if certain air quality standards were found to have been met. Additionally, Idaho Code § 39-116B(4) requires the Idaho Transportation Department revoke the registration of any motor vehicle which failed to comply with the Vehicle I/M Program.

The 1999 Emissions Inventory determined that vehicle emissions constituted one of the top two emission sources contributing to ozone concentration in the Treasure Valley. The same results were found in testing that occurred in 2008. The Board found that the air quality monitoring data met the criteria specified in the law for implementation of a vehicle inspection program at the end of summer, 2008.

DEQ began the rulemaking process in 2009 in order to establish the required minimum standards for the Vehicle I/M Program, as required by Idaho Code § 39-116B. The rules for the Vehicle I/M Program became effective in March 2010. The hearing officer, in his Recommended Order to Petition I determined, "as a matter of law that the Idaho State Legislature and the DEQ,

[5] Final Order, p. 9.

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 that the rules established by DEQ constituted "an appropriate exercise of the authority delegated to the DEQ."[6] Mr. Freeman did not appeal the hearing officer's finding to the Board on this issue. The hearing officer's decision on this issue is a final decision on the merits.

Each of Mr. Freeman's allegations in Petition I is discussed below.

1. **Whether Freeman has stated a claim that his vehicle should be exempted from the Vehicle I/M Program under Idaho Code § 39-116B(4).**

In addressing the first issue, the Board found that Mr. Freeman had "not identified or articulated a recognized basis for an exemption pursuant to rule or statute. Thus the hearing officer was correct in concluding that, under IDAPA 58.01.01.5175 and Idaho Code § 39-116B(7), Freeman has failed to state a claim upon which relief can be granted."[7]

2. **Whether DEQ complied with Idaho Code § 39-107D in promulgating the Rules.**

With regard to the second issue, the Board upheld the hearing officer's finding that Mr. Freeman failed to file an affidavit authenticating the documents attached to his pleadings, and he failed to file an affidavit establishing that he had the knowledge, skill, experience, training or education to offer admissible expert testimony, as required by Rule 56(e) of the Rules of Civil Procedure.

Although the Board recognized the deficiencies with the supporting documentation to Mr. Freeman's motion in Petition I, it nevertheless also ruled on the substantive issues, and determined that Mr. Freeman's allegations that DEQ did not provide the Legislature and the public information pertaining to the best science available regarding whether a vehicle emissions testing program was a necessary and effective air quality control strategy was without merit.

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[6] Final Order, p. 7.
[7] Final Order, p. 9-10.

> . . .Freeman challenges the Rules on the ground that DEQ did not provide the Legislature and the public the best science available regarding whether a vehicle emissions testing program is a necessary and effective air quality control strategy. However, the Idaho Legislature already decided this issue prior to the challenged rulemaking. In enacting Idaho Code § 39-116B, the legislature determined that vehicle emissions testing is an appropriate strategy for addressing elevated ozone values. Idaho Code § 39-116B does not require DEQ to revisit this issue, but instead to implement a Vehicle I/M Program when the statutory criteria established by the legislature are met. Accordingly, the Rules outline the minimum requirements of the Program, not whether the Program should be adopted.[8] [Emphasis original].
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> * * *
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> In sum, Freeman's legal arguments and supporting documents go to whether there is any scientific justification for a vehicle emissions testing program in Idaho. This question has been answered in the affirmative by the Idaho Legislature and was not at issue in the rulemaking proceedings. Thus, Freeman's challenge to the Rules under Idaho Code § 39-107D must fail.[9]

Based on its findings, the Board denied the relief sought by Mr. Freeman, and granted DEQ's motion to dismiss and motion for summary judgment. Although the Board's Order in Petition I also sets forth the appeal rights of any party aggrieved by its final order, no evidence has been received that Mr. Freeman appealed the Board's Final Order in Petition I.

B. The Doctrines of Collateral Estoppel and Res Judicata

The doctrine of collateral estoppel, also known as issue preclusion, is a common law estoppel doctrine that prevents a person from relitigating an issue in another action. In other words, "once a court has decided an issue of fact or law necessary to its judgment, that decision…preclude[s] relitigating of the issue in a suit on a different cause of action involving a party to the first case."[10]

Res judicata, also known as claim preclusion, applies when "the earlier suit ... (1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the

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[8] Final Order, p. 13.
[9] Final Order, p. 14.
[10] *San Remo Hotel v. San Francisco*, 545 U.S. 323 (2005), fn. 16.

merits, and (3) involved identical parties or privies."[11] Res judicata is conclusive on all matters which were litigated, as well as all matters which could have been litigated in the prior suit.

The Board's Final Order constituted an administrative decision issued in the Board's judicial capacity. Mr. Freeman did not appeal the decision.[12] The doctrines of collateral estoppel and res judicata are also applicable to administrative decisions that have attained finality, as determined by the U.S. Supreme Court:

> We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and *res judicata* (as to claims) to those determinations of administrative bodies that have attained finality. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." (Citation omitted.) Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise, would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. (Citation omitted.) The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal (citations omitted) which acts in a judicial capacity.[13]

The two doctrines are based on public policy aimed at achieving finality in disputes and preventing parties from re-litigating the same issues or claims in the interest of judicial economy.

Once the 28-day appeal time ran, the Board's order in Petition I attained finality. Even if Mr. Freeman believes the Board's Final Order in Petition I was in error, since it was not appealed, it became a final order. The adjudicatory nature of the Final Order in Petition I is

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[11] *Sidhu v. Flecto Co.*, 279 F.3d 896, 900 (9th Cir.2002).
[12] A Petition for judicial review must be filed within twenty-eight (28) days of the service date of the final order. I.C. § 67-5273; IDAPA 58.01.23.740.02(c).
[13] *Astoria Federal Savings and Loan Assoc. v. Solimino*, 111 S. Ct. 2166, 2169 (1991).

binding on both Mr. Freeman and DEQ, thereby precluding a subsequent proceeding between the same parties regarding the same or similar issues adjudicated in the Final Order in Petition I.

The issues set forth by Mr. Freeman in Petition I and Petition II are the same or similar; the only substantive different between Mr. Freeman's arguments in Petition I and Petition II, is the vehicle identified for emissions testing. In Petition I, the vehicle was a 2003 Toyota, license number 2C EE845. In Petition II, the vehicle is a 2006 Mazda MPV, license number 2C EJ983. In the briefing submitted, neither party to this matter identified any changes to the legal requirements pertaining to vehicle emission testing subsequent to the Board's Final Order dated April 11, 2012 issued in Petition I.

As discussed above, the Board, in its Final Order in Petition I, ruled that Mr. Freeman's challenges to the Vehicle I/M Program failed. Based on its findings, the Board denied the relief sought by Mr. Freeman, and granted DEQ's motion to dismiss and motion for summary judgment. Although the Board's Order also sets forth the appeal rights of any party aggrieved by its final order, no evidence has been received that Mr. Freeman appealed the Board's Final Order in Petition I.

Collateral estoppel precludes Mr. Freeman from relitigating the same or similar issues identified in Petition I. The policies that support the doctrine of claim preclusion support its application in this case. The United States Supreme Court explained that precluding "parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."[14]

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[14] *Montana v. United States,* 440 U.S. 147, 153-54, 99 S.Ct. 970, 973-74, 59 L.Ed.2d 210, 217 (1979).

Mr. Freeman has not identified any exception under which the 2006 Mazda would be exempt from emissions testing, and failed to raise any new issues that apply specifically to the 2006 Mazda MPV, license number 2C EJ983, that were not already decided in Petition I.

III. CONCLUSIONS OF LAW

Based upon a review of the pleadings and supporting documentation filed in this matter, a review of the Final Order in Petition I issued by the Board on April 11, 2012, and for the reasons set forth above, it is hereby ordered that the relief sought by DEQ is GRANTED, and the relief sought by Mr. Freeman is hereby DENIED.

IV. PROCEDURAL RIGHTS

This is a preliminary order of the presiding officer. It can and will become final without further action of the Board, unless any party appeals to the Board by filing with the hearing coordinator a petition for review of the preliminary order;

Within fourteen (14) days of the service date of this preliminary order, any party may take exceptions to any part of this preliminary order by filing with the hearing coordinator a petition for review of the preliminary order. Otherwise, this preliminary order will become a final order of the Board. The basis for review must be stated in the petition. The Board may review the preliminary order on its own motion.

If any party files a petition for review of the preliminary order, the Board shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter 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.

Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which:

i. A hearing was held,

ii. The final agency action was taken,

iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or

iv. The real property or personal property that was the subject of the agency action is located.

The petition for judicial review must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of a petition for judicial review in district court does not itself stay the effectiveness or enforcement of the order under review.

Motions for reconsideration of any preliminary order shall not be considered.

DATED this 25th day of February, 2013.

EBERHARTER-MAKI & TAPPEN, PA

By Elaine Eberharter-Maki
Elaine Eberharter-Maki, Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2013, a true and correct copy of the PRELIMINARY ORDER was served on the following:

W. Allen Freeman
1127 W. Edwards Avenue
Nampa, Idaho 83686
U.S. MAIL, postage prepaid

Lisa J. Carlson
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Department of Environmental Quality
1410 N. Hilton, 2nd Floor
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Respondent.

Docket No.: 0101-12-05

NOTICE OF SERVICE

NOTICE IS HEREBY GIVEN that on this 25th day of February, 2013, I caused a true and correct copy of the **PRELIMINARY ORDER**, as well as a copy of this **NOTICE OF SERVICE** to be served on the parties as indicated below.

DATED this 25th day of February, 2013.

EBERHARTER-MAKI & TAPPEN, PA

By Elaine Eberharter-Maki
Elaine Eberharter-Maki, Hearing Officer

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