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BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

STATE OF IDAHO

CANYON COUNTY, Petitioner, v. IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent.	Docket No. 0101-11-02 FINAL ORDER ON REVIEW OF RECOMMENDED ORDER

I. INTRODUCTION

On March 24, 2011, Canyon County ("the County"), filed a *Petition Initiating Contested Case* ("Petition"), seeking review of the Idaho Department of Environmental Quality's ("DEQ") decision that, because the County's vehicles failed to comply with the emissions testing requirements established by Idaho Code § 39-116B, the vehicle registrations may be revoked by the Idaho Transportation Department. Following contested case proceedings, the hearing officer issued a *Recommended Order Granting Summary Judgment* ("Recommended Order") for DEQ. Pursuant to Idaho Code § 67-5244, the County timely filed *Petitioner's Brief Taking Exception To The Recommended Order.* DEQ filed *Respondent's Brief In Support Of The Recommended Order.* On November 9, 2011, after fully considering the record and the oral and

written arguments of the parties, the Idaho Board of Environmental Quality ("Board") unanimously voted to affirm the Recommended Order.

II. STANDARD OF REVIEW

When reviewing a Recommended Order, the Board has the authority to "exercise all of the decision-making power that [the Board] would have had if [the Board] had presided over the hearing." Idaho Code § 67-5245(7). In reviewing the Recommended Order, the Board may review all of the evidence *de novo* and does so here.

III. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

In 2005, the Idaho Legislature, finding that the threatened deterioration of "the air quality in certain regions of the state . . . may endanger the breathability, economic potential, public health, natural beauty, recreational use and livability in various regions of the state[,]" enacted the Treasure Valley and Regional Air Quality Council Act ("Act"). Idaho Code § 39-6701 *et seq.* The Act created and required the Treasure Valley Air Quality Council ("Council") to develop a plan to "protect, preserve and, where necessary, improve the quality of air in a specified geographical area while accommodating private, public and commercial activities." Idaho Code § 39-6701(2). The Act defines the "Treasure Valley" as the geographic boundaries encompassed by Ada and Canyon counties. Idaho Code § 39-6705(8). The Act directed the Council to develop a plan that requires "a working partnership of state and local agencies of government as well as the private sector." Idaho Code § 39-6701(2).

The Treasure Valley Air Quality Plan ("Plan") was submitted to the 2007 Legislature and included a recommendation that a vehicle emissions testing program be established in Ada[1] and Canyon counties. In April 2008, the Idaho Legislature enacted, and the Governor signed into

[1] Ada County has administered a vehicle emissions testing program for over a decade. *See* 1999 Motor Vehicle Emissions Control Ordinance, title 6, chapters 1-3 of the Ada County Motor Vehicle Code.

law, Idaho Code § 39-116B, entitled Vehicle Inspection and Maintenance Program ("Vehicle I/M Program" or "Program"), which required DEQ to enter into rulemaking to establish the minimum standards for emissions testing if DEQ determined the following conditions were 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%).

Idaho Code § 39-116B(1)(a) and (b). In the event both conditions are met, Idaho Code § 39-116B(2) states that the Board "must establish by rule minimum standards for an inspection and maintenance program for registered motor vehicles, not otherwise exempted . . . which shall provide for: (a) Counties and cities within the airshed that will be subject to the motor vehicle inspection and maintenance program." In addition, the statute imposes the following duties on DEQ:

> [T]he director shall attempt to enter into a joint exercise of powers agreement under sections 67-2326 through 67-2333, Idaho Code, with the board of county commissioners of each county within the airshed in which a motor vehicle inspection and maintenance program is required under this section, and the councils of incorporated cities within those counties, to develop a standardized inspection and maintenance program. If the board of county commissioners or the councils of incorporated cities within those counties choose not to enter into a joint exercise of powers agreement with the director, then within one hundred twenty (120) days of the director's written request to enter into such an agreement, the board of county commissioners or the councils of incorporated cities may notify the department that it will implement an alternative motor vehicle emission control strategy that will result in emissions reductions equivalent to that of a vehicle emission inspection program. If the department determines the emissions reductions of the alternative motor vehicle emission control strategy are not equivalent, or no equivalent reductions are proposed, the department or its designee shall implement the motor vehicle inspection and maintenance program required pursuant to the provisions of this section.

(4) The Idaho transportation department shall revoke the registration of any motor vehicle identified by the department or its designee, or any city or county administering a program established under the provisions of this section as having failed to comply with such motor vehicle inspection and maintenance program, except that no vehicle shall be identified to the Idaho transportation department unless:

(a) The department or its designee, or the city or county certifies to the Idaho transportation department that the owner of the motor vehicle has been given notice and had the opportunity for a hearing concerning the program and has exhausted all remedies and appeals from any determination made at such hearing; and

(b) The department or its designee, or the city or county reimburses the Idaho transportation department for all direct costs associated with the registration revocation procedure. Any vehicle registration that has been revoked pursuant to the provisions of this section that is found to be in compliance with current emissions standards shall have the registration reinstated without charge.

Idaho Code § 39-116B(3) and (4)(a) and (b).

The "airshed, as defined by the department" pursuant to Idaho Code § 39-116B, includes the most populous counties, Ada and Canyon with portions of other, less populated counties surrounding them. At the end of summer 2008, the airshed met the criteria specified in the law for implementation of a vehicle inspection program. Air quality monitoring data showed ozone design value concentrations were 0.077, 0.078, and 0.075 parts per million (ppm) for 2006, 2007, and 2008 respectively, above 85% of the National Ambient Air Quality Standards. 40 C.F.R. 50.10 (2008). The data showed, and continue to show, that vehicle emissions constitute one of the top two emission sources contributing to ozone concentrations in the Treasure Valley airshed.

Because the photochemical modeling takes many months, the analysis of county contributions had to be prepared in advance of the required rulemaking so that the rulemaking participants would have a basis for their decision making. By letter dated November 7, 2008, DEQ informed the County of this finding:

House Bill 586, which was passed by the Idaho Legislature in 2008, requires airsheds within a metropolitan statistical area where vehicle emissions are one of the top two emission sources of pollutants, and where the airshed exceeds 85% of the National Ambient Air Quality Standards, to enact vehicle emissions testing or an alternative vehicle emissions control program. The Treasure Valley airshed, which includes all or part of Ada, Canyon, Payette, Gem, Boise, Elmore, and Owyhee counties is subject to HB 586.

Section 2(a) of HB 586 requires that the [DEQ] determine "counties and cities within the airshed that will be subject to the motor vehicle inspection and maintenance program." To fulfill this requirement DEQ conducted airshed modeling of the vehicle fleets in the counties that make up the airshed to determine the relative contributions of the fleets to the overall air quality program in the valley.

Based on the results of the modeling, the vehicle fleets of Canyon County and Ada County have been determined to significantly contribute to the overall concentration of ozone in the Treasure Valley airshed, and as such will be required to comply with the provisions of HB 586. Further evaluation showed that vehicle fleets from Payette, Gem, Boise, Elmore and Owyhee counties have minimal impact on overall ozone concentrations. Therefore, vehicle emissions testing or an alternative is not required at this time for these counties. However, please note that if the Treasure Valley airshed is officially designated as a federal nonattainment area the control area determinations (e.g. areas subject to controls such as emissions testing) could be subject to change.

Pursuant to HB 586, DEQ must establish by rule the minimum standards for an inspection and maintenance program. DEQ will begin negotiated rulemaking to fulfill this requirement as soon as possible. A notice of proposed rulemaking will be published in the January Bulletin. The rulemaking process will be open to all interested parties, and you or your designated representative(s) will be invited to participate in the development of these minimum standards through the negotiated rulemaking process.

Once the rulemaking process is completed, the Director of DEQ will send a written notice to all the effected parties asking for the parties to enter into a Joint Powers Agreement to implement the Vehicle Inspection and Maintenance Program, or to present an acceptable alternative Vehicle Emissions Control Program that achieves comparable vehicle emissions reductions. If neither of these options is taken by the affected parties, within one-hundred and twenty days (120) of the written notice, DEQ will be required to implement vehicle inspection and maintenance pursuant to the provisions of HB 586.

No action is needed from you at this time. DEQ will be in contact with you or your designated representative in the near future to invite you to participate in

negotiated rulemaking. If you have any questions on this matter, please feel free to contact Leonard Herr, Boise Regional Air Program Manager, at 373-0457.

On December 18, 2008, DEQ sent the County advanced information about the upcoming negotiated rulemaking, which included a copy of the formal notice that would appear in the January 2009 Idaho Administrative Bulletin, and invited the County to participate in the first rulemaking meeting scheduled for February 3, 2009. Formal Notice of Negotiated Rulemaking was published in the Idaho Administrative Bulletin on January 7, 2009. The Notice advised that the text of the rule would be drafted by DEQ in conjunction with interested participants and specifically stated that cities, counties, and all citizens in areas required to implement vehicle emissions testing might be interested in participating in the rulemaking.

On January 29, 2009, DEQ sent additional documents to the County for review prior to the February meeting. During the first rulemaking meeting, DEQ advised the participants that the emission inventory and modeling analyses showed that Canyon County's motor vehicle fleet was the only significant contributor (outside Ada county) to the high ozone levels and the participants were invited to review and discuss the findings with DEQ technical staff. On February 4, 2009, DEQ notified the County that a second meeting had been scheduled for March 17, 2009, and that DEQ intended to distribute a preliminary rule (based upon discussions that took place during the February 2009 meeting) for review prior to the March meeting.

On February 7, 2009, DEQ made available for public review a preliminary draft negotiated rule. On March 13, 2009, DEQ forwarded to the County a summary of the February 3, 2009 meeting. On March 18, 2009, DEQ forwarded a revised draft based on the March 17, 2009 discussions and requested comments by March 31, 2009. The County also received a revised copy of the rulemaking schedule. On March 26, 2009, DEQ forwarded to the County a summary of the March 17, 2009 meeting.

On April 3, 2009, DEQ distributed the written comments and a revised draft for review and comment by April 13, 2009. The April 3, 2009 email advised of DEQ's intent to send a letter to the counties of Ada and Canyon, and their respective cities, requesting that they enter into a Joint Exercise of Powers Agreement[2] to implement a Vehicle I/M Program.

On April 15, 2009, DEQ informed the County by separate letter that the participants to the negotiated rulemaking process had come to a consensus on the text of a proposed rule. The County was advised again of DEQ's intent to request that Ada and Canyon counties, and their respective cities, enter into a Joint Exercise of Powers Agreement to implement the Program. By letter dated April 22, 2009, DEQ asked the County the following:

> In accordance with the Idaho Code Section 39-116B(3), with this letter I am requesting that Canyon County notify DEQ whether it intends to enter into a joint exercise of powers agreement with DEQ to implement a vehicle inspection and maintenance program, or whether Canyon County desires instead to implement an alternative motor vehicle emission control strategy that will result in emission reductions equivalent to that of a vehicle inspection program. If Canyon County chooses neither to enter into a joint powers agreement nor to implement an equivalent emission control strategy, or DEQ determines that the proposed alternative motor vehicle emissions control strategy is not equivalent, then DEQ is required, in Idaho Code 39-116B(3), to implement the vehicle inspection and maintenance program for Canyon County.

The letter also provided the County with the electronic link to the proposed rule, a copy of the current Ada County Automotive and Readjustment Program Joint Powers Agreement to view as an example, and an offer to assist in the development of an equivalent alternative motor vehicle emissions control strategy.

On May 8, 2009, DEQ provided the County with a copy of the proposed rule that was subsequently published in the June 3, 2009 Idaho Administrative Bulletin. On May 27, 2009, legislative research analyst, Katharine Gerrity, submitted a memorandum to the Rules Review

[2] Idaho Code §§ 67-2326 - 2333 authorize the state and public agencies to enter into agreements for joint or cooperative action.

Subcommittee of the Senate Health and Welfare Committee, the Senate Resources and Environment Committee, and the House Environment, Energy, and Technology Committee documenting the submission of the proposed rule and advising the committees that the rule appeared to be authorized by Idaho Code §§ 39-105, 39-107, and 39-116B. A June 16, 2009 letter authored by Ms. Gerrity advised DEQ that the House and Senate Subcommittees had reviewed the proposed rule and that no objections would be filed.

On August 24, 2009, the County responded to DEQ's April 22, 2009 letter and proposed an alternate vehicle emissions control strategy implementing a one-year voluntary program from which, it stated, "we will have an accurate idea of what percentage of vehicles registered in Canyon County do not meet emission standards, and will use this quantifiable data as we revisit the issue and determine whether a permanent vehicle emissions testing program would be beneficial." Although the letter described the many air quality initiatives that had already been implemented in Canyon County, it did not contain the information required under Idaho Code § 39-116B.

On September 21, 2009, DEQ informed the County that the proposed rule would come before the Board at the October 7, 2009 meeting and provided copies of the Rulemaking and Public Comment Summary, Revisions to the Proposed Rule, and Board meeting agenda.

By letter dated September 24, 2009, DEQ notified the County of the agency's determination that the proposed alternative emission reduction control strategy was not consistent with the requirements of Idaho Code § 39-116B. DEQ explained:

> Your letter did not quantify the emissions reductions from motor vehicles that you predict would result under your proposal. Therefore, DEQ conducted an evaluation to estimate emission reductions that would occur from your proposal including (1) the implementation of an anti-idling policy, (2) the encouragement of car pooling, (3) the institution of four day work weeks, and (4) replacement of two County vehicles with hybrid vehicles. Using generous assumptions for a

> reduced work-week, a no-idling policy, alternative transportation participation by county employees, and two hybrid replacements, we estimate that less than 2 tons/year each of volatile organic compounds (VOCs) and nitrogen oxides (NOx) reductions would result. These reductions are significantly less that the projected reductions from a Vehicle I/M Program. With regard to the ticketing of "obviously emitting" vehicles, these vehicles do produce excess particulate matter (also a concern) but not necessarily excess VOCs or NOx (the two constituents of concern in producing ozone). Therefore, there is no way to evaluate the expected emission reductions for this specific portion of your proposal. Finally, you indicate that the county will implement a one-year voluntary pilot program to obtain information to determine whether a permanent vehicle emissions testing program would be beneficial. The law does not provide DEQ with the authority to wait and see what emissions reductions may occur after a one-year voluntary pilot study.

Accordingly, DEQ advised the County that, as required by Idaho Code § 39-116B(3), the agency intended to move forward by issuing a Request for Proposal ("RFP") to solicit, evaluate and select a vendor to implement a Vehicle I/M Program in Canyon County. In so doing, DEQ advised that the agency's goal was to implement a Program that will provide measurable reductions in air pollution while also being cost-effective, efficient, and convenient for citizens.

On October 7, 2009, the Board adopted the pending rule, and notice of its adoption and submission to the Legislature was published on October 13, 2009. The County did not participate in the rulemaking meetings, provide comments on rule drafts, or voice any objections to the Board regarding the content or application of the proposed rule.[3] On November 16, 2009, DEQ provided the County with a copy of the Notice of Adoption of Pending Rule as it would appear in the Idaho Administrative Bulletin on December 2, 2009. With the passage of Senate Concurrent Resolution 125, the Motor Vehicle and Inspection rules ("Rules") became effective in March 2010. They are located in the Rules for the Control of Air Pollution in Idaho at IDAPA 58.01.01.517-526.

[3] Representatives from the two largest population centers within Canyon County, Nampa and Caldwell, as well as the smaller cities of Wilder and Greenleaf, participated in the rulemaking process.

Prior to March 2010 and after the Board had adopted the Rules, the County corresponded with DEQ numerous times asserting, among other things, that there was no scientific basis for applying the Vehicle I/M in Canyon County and that the County had been left out of the process in which it was determined that the County would be subject to the Program. The Director met with Canyon County Commissioners to discuss the County's opposition to the Program.

In a May 14, 2010 letter to Governor Otter, the County asked for the postponement of the Program "until the need for such testing has been scientifically proven." The letter reiterated the County's view that DEQ had been unresponsive to the County's concerns and advised that the County would comply with the Program only if "DEQ is able to provide us with science and CURRENT data to back up their contention . . . ." (Emphasis in original.) The Governor responded by letter on June 1, 2010, stating in pertinent part:

> I am writing in response to your letter dated May 14, 2010, in which you requested that I postpone vehicle emissions testing scheduled to start June 1, 2010, in Canyon County.
>
> As you know, the requirement for emissions testing is a result of a law passed by the 2008 Legislature and is part of the Treasure Valley Air Quality Council's plan to proactively address air quality issues in the Treasure Valley. The law does not include provisions for a governor to delay or change the implementation of the emissions testing program.
>
> You may recall that the Legislature did not change the 2008 law during the 2010 legislative session. The Legislature had an opportunity to amend the law and did not do so, thus reaffirming its commitment to the Treasure Valley Air Quality Council's plan to protect air quality and to proactively address non-attainment.
>
> However, in response to your statements that you have not been presented the science regarding this program and that your questions continue to go unanswered, I contacted Director Hardesty and asked her to address your claims. She assured me that in correspondence and communication over the past year and again in the three-hour meeting held at the Department of Environmental Quality (DEQ) on April 12, 2010, DEQ provided the science, described how ozone is formed, explained which emission sources are responsible for ozone, explained how the air shed is defined, detailed Canyon County's and Ada County's contribution to the ozone issue, and showed predicted results of a vehicle emissions testing program in Canyon County.

Director Hardesty also assured me that DEQ reviewed the results of the alternative plan that Canyon County submitted. The County did not quantify the emission reductions that you predicted from your alternative plan, so DEQ provided an analysis of the reductions from your plan and its comparison to the reductions of a vehicle emissions testing program. Even with generous assumptions, DEQ's scientists determined the proposed alternative plan did not result in emission reductions equivalent to that of a motor vehicle inspection and maintenance program.

If you would like to review the information again, most of the data presented to Canyon County is available on the DEQ website: http://www.deq.idaho.gov/air/prog_issues/emissions_testing/treaure_valley_program.cfm, and information on the specifics of the testing program can be found at the Vehicle Emission Testing website http://www.idahovip.org/. In addition, Director Hardesty assures me that she continues to be willing to answer any questions that you have and her offer to meet with you again still stands.

As you know, the legislation was drafted and passed to allow counties and cities to take control of this program on the local level. Since you elected not to sign a joint powers agreement and not to exercise local control of this program, the statute required DEQ to implement the program. The preferred alternative was for Canyon County to establish an acceptable alternative plan or a locally controlled emissions testing program that met the legislative requirements. This did not happen. Therefore, DEQ was required to implement the program, and the agency has worked hard to design and implement a program that is both cost-effective and convenient for the citizens of Canyon County.

The summer of 2010 will be a critical time for determining compliance with air quality standards in the Treasure Valley. It is my belief that with your leadership both Canyon and Ada counties can work together on air quality for all the people of the Treasure Valley.

Because the County's alternate proposal did not meet statutory criteria and because the County declined to enter into a Joint Exercise of Powers Agreement, DEQ entered into a contract with SysTech International to implement a Vehicle I/M Program in Canyon County and the City of Kuna. Testing began on June 1, 2010. Under the Program, vehicles are tested based on model year, with odd model year vehicles testing in odd calendar years, and even model years testing in even years. Vehicles are then randomly placed into a testing group for each month. Since the Program started on June 1st, all even year vehicles were placed into the remaining months available for testing in 2010.

Based on vehicle registration information, DEQ determined the County owned approximately thirty-six (36) vehicles subject to vehicle emissions testing requirements. Upon request by the County, DEQ determined fifteen (15) of these vehicles did not need to be tested because the vehicle (1) had been transferred to another jurisdiction, (2) had been sold, or (3) constituted a public service vehicle operating less than 1000 miles per year. *See* IDAPA 58.01.01.526.02.

Testing the remaining vehicles was put on hold to allow for further discussions with the County about the implementation of the Program. Ultimately, the County's remaining vehicles were given a testing deadline of December 31, 2010. However, the initial notices for this group of vehicles were not mailed until December 14, 2010, the last possible date for an even numbered model year vehicle. To give the County the same thirty (30) day testing deadline that all other vehicles received, a revised deadline of January 15, 2011 was manually placed on the initial notice.[4]

Idaho Code § 39-116B(4)(a) requires that owners of motor vehicles subject to revocation be given notice and an opportunity for a hearing. The final notice sent to the County on February 17, 2011 included the following language:

> **Department of Environmental Quality** records indicate this vehicle has not complied with the emissions testing requirements established by Idaho Code § 39-116B in Canyon County and the City of Kuna. If you disagree that you have failed to comply with the emissions testing requirements, you may file a petition for a contested case in accordance with the Rules of Administrative Procedure before the Board of Environmental Quality, IDAPA 58.01.23, within 35 days of the date of this notice. Your vehicle registration will be revoked by the Idaho Department of Transportation without further notice unless: (a) you comply with the emissions testing requirements within 35 days of the date of this notice as listed above or (b) you file a petition for a contested case form is available at

[4] The original deadline of December 31, 2010 remained in the database so that the vehicles would stay on the even model year testing schedule in the following years. The subsequent mailers (1st and final warning) noted the original testing deadline as indicated in the database.

www.deq.idaho.gov/air/vetpetitionform.pdf. The Rules of Administrative Procedure before the Board of Environmental Quality, IDAPA 58.01.23, are available at http://adm.idaho.gov/adminrules/rules/idapa58/0123.pdf."

The County filed its Petition on March 24, 2011. Pursuant to Idaho Code § 39-116B and the Rules, the County sought an exemption for its own motor vehicles. The County also requested that the hearing officer by separate order (1) suspend emission testing in Canyon County until such time as the deficiencies described in the Petition are remedied; (2) direct DEQ to refund the monies expended by Canyon County residents on the Program; and (3) award such other relief as the presiding officer believed warranted. The County asserted it was entitled to these remedies because (1) DEQ acted without a reasonable basis in law by enforcing compliance in Canyon County with statements that DEQ did not promulgate as rules under the Idaho Administrative Procedures Act's ("IAPA") rulemaking provisions, in contravention of Idaho Code § 39-116B, and other applicable law; (2) DEQ was impermissibly exercising legislative authority;[5] (3) by excluding the rural counties from the requirements of Idaho Code § 39-116B, DEQ had rendered the legislation "local" or "special" and therefore unconstitutional; (4) DEQ's implementation of Idaho Code § 39-116B is unlawfully retroactive in effect; and (5) DEQ's internal notification procedures are subject to "critical failure."[6]

In response, DEQ filed a *Motion to Dismiss or in the Alternative Motion for Summary Judgment* arguing that the County had provided no factual or legal basis for exempting its vehicles from the requirements of IDAPA 58.01.01.517.5 and Idaho Code § 39-116B. DEQ also asserted that the agency fulfilled it duties and obligations under Idaho Code § 39-116B, and was

[5] The Petition asserted that the Legislature had vested DEQ with unfettered discretion to define critical terms and provided no guidance as to the minimal contribution a vehicle emission must make to the design value or the minimally acceptable emissions reduction the vehicle inspection program, or any proposed alternative must achieve. In the County's *Objection to Motion to Dismiss and Cross-Motion for Summary Judgment*, the County conceded, for the purpose of summary judgment, that the enactment of Idaho Code § 39-116B appropriately delegated legislative authority to make findings of fact upon which the execution of the statute would depend. Thus, the legality of the statute is no longer at issue in this case.

[6] The County characterized this issue as a mere byproduct of the primary issues before the Board.

therefore entitled to summary judgment on the County's claims. The County then filed *Petitioner's Objection to Motion to Dismiss and Cross-Motion for Summary Judgment* seeking the relief requested in its Petition. In this and subsequent filings, and in oral argument before the hearing officer and the Board, the County appeared to add an "equal protection argument" in support of its Petition.

On August 19, 2011, the hearing officer entered a Recommended Order finding in favor of DEQ on the summary judgment motion and on DEQ's motion to dismiss.

IV. ISSUES ON REVIEW

(1) Whether the County has failed to state a claim under Idaho Code § 39-116B;

(2) Whether DEQ complied with rulemaking requirements;

(3) Whether DEQ's implementation of Idaho Code § 39-116B violates the constitutional prohibition against local and special laws;

(4) Whether the Rules violate the equal protection guarantees of the federal and state constitutions; and

(5) Whether DEQ has applied Idaho Code § 39-116B retroactively in violation of Idaho Code § 73-101.

There are no material facts in dispute in this case and the parties agree that the following standards apply to the Board's review:

In reviewing an I.R.C.P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief must be granted, the question is whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief. Orrock v. Appleton, 147 Idaho 613, 618, 213 P.3d 398, 403 (2009).

Summary judgment is proper "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." I.R.C.P. 56(c). A court must liberally construe the record in a light most favorable to the party opposing the motion, drawing

all reasonable inferences in favor of that party. DBSI/TRI v. Bender, 130 Idaho 796, 801, 948 P.2d 151,156 (1997). The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and a Court must evaluate each party's motion on its own merits. Borley v. Smith, 149 Idaho 171, 176, 233 P.3d 102, 107 (2010).

V. ANALYSIS

A. The County Has Failed To State A Claim Under Idaho Code § 39-116B(4).

Idaho Code § 39-116B(4) provides that prior to revocation of a vehicle registration due to a failure to comply with emission testing requirements, the owner of the vehicle must first be allowed notice and an opportunity for a hearing. Pursuant to this and other statutory and regulatory provisions, the County initiated this contested case requesting an order exempting the County's vehicles from vehicle emission testing requirements. DEQ is authorized to exempt motor vehicles from the testing requirements consistent with the criteria set forth in IDAPA 58.01.01.517.5 and Idaho Code § 39-116B(7). The County has 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 58.01.01.517.5 and Idaho Code § 39-116B(7), the County has failed to state a claim upon which relief can be granted.

B. DEQ Complied With The Rulemaking Requirements Set Forth In The Idaho Administrative Procedures Act And DEQ Rules Of Procedure.

The County acknowledges that Idaho Code § 39-116B specifically grants authority to DEQ to promulgate the Rules and implement a Vehicle I/M Program. The County, for purposes of this case, does not dispute that the criteria for initiating rulemaking set forth in Idaho Code § 39-116B(1) were met in the summer of 2008. The County instead advances the argument that DEQ's November 7, 2008 letter determined "by administrative fiat" which counties and cities would be subject to testing prior to rulemaking and as a result, the rulemaking process that

followed did not comply with the IAPA, Idaho Code § 67-5201 *et seq.*, or the Rules of Administrative Procedure Before the Board of Environmental Quality ("Procedural Rules"), IDAPA 58.01.23. In the County's view, DEQ was prohibited by statute from reaching any conclusions regarding the geographic scope of a Vehicle I/M Program prior to rulemaking and, therefore, the final Rules are ineffective and voidable.

The statutory procedures governing the promulgation of administrative rules are contained in sections 67-5220 through 67-5232 of the IAPA. Although not mandatory, the IAPA encourages negotiated rulemaking. Idaho Code § 67-5220 provides:

> (1) An agency may publish in the bulletin a notice of intent to promulgate a rule. The notice shall contain a brief, nontechnical statement of the subject matter to be addressed in the proposed rulemaking, and shall include the purpose of the rule, the statutory authority for the rulemaking, citation to a specific federal statute or regulation if that is the basis of authority or requirement for the rulemaking, and the principal issues involved. The notice shall identify an individual to whom comments on the proposal may be sent.
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> (2) The notice of intent to promulgate a rule is intended to facilitate negotiated rulemaking, a process in which all interested parties and the agency seek consensus on the content of a rule. Agencies are encouraged to proceed through such informal rulemaking whenever it is feasible to do so.

Idaho Code § 67-5220. DEQ's Procedural Rules also express a preference for negotiated rulemaking. *See* IDAPA 58.01.23.810.

The County does not allege, nor is there anything in the record to suggest, that DEQ did not comply with the IAPA and DEQ's Procedural Rules governing negotiated rulemaking. *See* IDAPA 58.01.23.810 through 813. To the contrary, the record shows that DEQ complied with the legal requirements to ensure that all affected parties, including the County, were involved in the rulemaking process. DEQ advised the County in advance about the upcoming notice of negotiated rulemaking and meeting dates and provided related materials. Formal notice was published in accordance with statute and rule and a preliminary negotiated rule was made

available for public review.

Because no rule may come into effect solely as a result of informal rulemaking, the agreement reached by those who did participate in the negotiated rulemaking was finalized in accordance with requirements of the IAPA which can be summarized as follows:

- Publication in the Idaho Administrative Bulletin of a notice containing the text and additional information on the proposed rule. Idaho Code § 67-5221.
- Opportunity for the public to comment on the proposal. Idaho Code § 67-5222.
- Concurrent notification of the legislature so that the germane subcommittees have an opportunity to consider the proposal. Idaho Code § 67-5223.
- Publication of the text of a pending rule and a notice of adoption of a pending rule along with a statement of the reasons for the rule. Idaho Code § 67-5224.

See IDAPA 58.01.23. 812 through 835.

Importantly, a pending rule cannot become a final rule until it has been submitted for review and approval by the Idaho legislature. Idaho Code § 67-5224(5); IDAPA 58.01.23.836. Final review allows the Legislature to ensure the rule is consistent with statutory intent. Pursuant to Idaho Code § 67-5224(5)(c), a pending rule imposing a fee or charge cannot become final and effective until it has been approved by concurrent resolution.

With respect to the formal rulemaking process, the County does not allege improper notice or failure to comply with all of the procedural requirements that must be followed in order for a rule to become legally enforceable. Instead, the County asserts the Rules are voidable because DEQ reached a conclusion about which counties and cities would be governed by the Vehicle I/M Program prior to rulemaking and advised the County of this conclusion in the November 7, 2008 letter. The November 7, 2008 letter, however, had no legal effect on the

County or its citizens. Idaho Code § 67-5201(19) provides in pertinent part:

> (19) "Rule" means the whole or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, or prescribes:
>
> (a) Law or policy; or
>
> (b) The procedure or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule, **but does not include**:
>
> (i) Statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or
>
> (ii) Declaratory rulings issued pursuant to section 67-5232, Idaho Code; or
>
> (iii) Intra-agency memoranda; or
>
> (iv) **Any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule.**

Idaho Code § 67-5201(19) (emphasis added).

The November 7, 2008 letter advised the County of DEQ's interpretation of the best available science as applied to elevated ozone levels in the airshed and the requirements of Idaho Code § 39-116B. It was DEQ's responsibility under Idaho Code § 39-116B(2)(a) to use its technical expertise to determine which counties and cities should be subject to the Vehicle I/M Program and bring those findings to the rulemaking process for further discussion and review. The County may be confusing the rulemaking process with the processes for a contested case adjudication. While it would be improper for a hearing officer to investigate the facts of a contested case before a hearing and come to a preconceived view of what the facts will be, rulemaking is entirely different. Agency rulemakers are prescribing rules to govern future conduct, and they should be aware of the facts on the ground, or at least have educated estimates of the facts on the ground, before beginning the rulemaking process.

DEQ's preliminary determination as to the application of the Rules was subject to change through rulemaking and by the Legislature, which has the authority to modify or reject a pending rule that is inconsistent with legislative intent, and therefore, a rule cannot be enforced until the rulemaking process is completed and approved by the Legislature. Thus, the November 7, 2008 letter simply advised the County of the agency's technical findings and of its intent to promulgate a rule consistent with those findings. Nothing has been presented showing that DEQ failed to comply with the IAPA rulemaking requirements or the statutory directives in Idaho Code § 39-116B.

C. Article III, Section 19 Of The Idaho Constitution Does Not Apply To Article V, Section 20 Executive Departments.

The County argues that DEQ's implementation of Idaho Code § 39-116B has rendered the statute special or local in violation of article III, section 19 of the Idaho Constitution. The most appropriate starting point in assessing the County's argument is the plain language of the provision itself, which states in relevant part, that "[t]he legislature shall not pass local or special laws in any of the following enumerated cases . . . ."

Article II, section 1 of the Idaho Constitution divides the departments of government "into three distinct departments, the legislative, executive, and judicial." The legislative power of the state is "vested in a senate and house of representatives." Idaho Const. art. III, § 1. Article IV, section 1 generally outlines the executive power, with article IV, section 5 authorizing the Governor to hold the supreme executive authority of the State. The constitution grants the Governor the ability to carry out this authority through the allocation of executive departments as outlined within article IV, section 20. The DEQ has expressly been created as an article IV, section 20 department by Idaho Code § 39-104(1), which states:

> There is created and established in the state government a department of environmental quality which shall for the purposes of section 20, article IV, of the constitution of the state of Idaho be an executive department of the state government.

The plain language of article III, section 19 is a limitation on the Legislature, not article IV, section 20 departments under the executive branch of government. The County, however, does not challenge the legislative enactment of Idaho Code § 39-116B or legislative approval of the Rules. Thus, because there is no similar constitutional limitation on the executive branch of government, article III, section 19 does not apply to DEQ's implementation of the Vehicle I/M Program.

D. Even Assuming The County As A Political Subdivision May Invoke Constitutional Protections Guaranteed To Individuals, The Rules Do Not Violate The Equal Protection Guarantees Of The Idaho And United States Constitutions.

According to the County, excluding those counties which do not significantly contribute to elevated ozone levels from the Program also violates the equal protection guarantees of the Idaho and United States Constitutions. Although not specifically cited in the County's briefs, the Board presumes the County is invoking the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution and article I, section 2 of the Idaho Constitution. The Fourteenth Amendment provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. Article I, section 2 of the Idaho Constitution provides:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature.

At the outset, we note the difficulty of addressing the County's argument, as the County did not provide citation to legal authority or provide legal analysis relating to its equal protection claim. Additionally, a review of case law addressing whether a political subdivision may invoke the protection of the federal constitution to claim violation of individual rights raises the question as to whether the County is a person with rights under the Fourteenth Amendment. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 361, 129 S.Ct. 1093, 1101 (2009), presented the issue of whether Idaho could regulate payroll systems of school districts and other local units of government to prohibit deductions for union political activities. Ysursa recognized the general rule that political subdivisions are not "persons" entitled to equal protection under the federal constitution, because "[a] political subdivision ... is a subordinate unit of government created by the State to carry out delegated government functions.... [B]ut a political subdivision, created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." Id. (Citations and internal punctuation omitted.)

Using a similar analysis, the Idaho Federal District Court granted the State's motion to dismiss federal constitutional claims after determining that an Idaho charter school, as a political subdivision of the state, could not invoke the first and fourteenth amendments of the federal constitution to challenge the Idaho Public Charter School Commission's policy prohibiting sectarian and denominational texts in public schools. Nampa Classical Academy v. Goesling, 714 F. Supp. 2d 1079, 1087 (2010); *aff'd* --- Fed. Appx.--- 2011 WL 3562954 (9th Cir. 2011) (unpublished).

Even assuming the County's equal protection claim is properly before the Board, the County cannot meet its burden to show a federal or state equal protection violation.[7] The County has not asserted discrimination based upon some unjustifiable or arbitrary classification, such as race, sex, or religion or a fundamental right which would require strict scrutiny. Tarbox v. Tax Comm'n, 107 Idaho 957, 960, 695 P.2d 342, 345 (1984). Nor does the classification distinguish between individuals or groups "either odiously or on some other basis calculated to excite animosity or ill will." McLean v. Maverik Country Stores, Inc., 142 Idaho 810, 814, 135 P.3d 756, 760 (2006). The classification was not made in an offensive or hateful manner, nor was it calculated to excite animosity or ill will against the County. The classification here is between counties subject to the Rules and counties exempted from the Rules' requirements. The rational basis test is therefore the applicable level of scrutiny. Maverik, 142 Idaho at 814, 135 P.3d at 760.

Under the rational basis test, the Legislature's action need only be rationally related to a legitimate government objective. Maverik , 142 Idaho at 814, 135 P.3d at 760; Leliefeld v. Johnson, 104 Idaho 357, 374, 659 P.2d 111, 128 (1983). Applying the Program to Ada and Canyon counties advances the underlying legislative purpose of reducing air pollution in the airshed. Under the rational basis test, a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it. Maverik, 142 Idaho at 814, 135 P.3d at 760. The County, for purposes of this case, does not contest DEQ's finding that Ada and Canyon counties are significant contributors to elevated ozone as compared to the minor contribution of the more rural counties. Because these facts support the classification, the Rules do not violate the equal protection guarantees of the Idaho or United States Constitutions.

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[7] Analysis of equal protection claims under the Idaho Constitution proceeds under three similar tests: strict scrutiny, means-focus, and rational basis. Meisner v. Potlatch Corp., 131 Idaho 258, 261, 954 P.2d 676, 679 (1998).

E. DEQ Did Not Apply Idaho Code § 39-116B Retroactively.

The County argues that under the plain language of Idaho Code § 39-116B, the Legislature intended to exempt from testing all motor vehicles registered as of the effective date of the statute. In the County's view, these vehicles should not be subject to testing until the next applicable renewal period. Thus, according to the County, applying the requirements of Idaho Code § 39-116B and the Rules to vehicles with existing registrations is an illegal retroactive application of law. *See* Idaho Code § 73-101. (No part of these compiled laws is retroactive, unless expressly so declared.) "A retrospective or retroactive law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." Wheeler v. Idaho Dept. of Health and Welfare 147 Idaho 257, 262-263, 207 P.3d 988, 993-994 (2009). Generally, a statute will not be applied retroactively in the absence of clear legislative intent. University of Utah Hosp. v. Pence, 104 Idaho 172, 174, 657 P.2d 469, 471 (1982).

In interpreting a statute, courts give effect to the plain meaning of the terms and provisions in question to reach a sensible construction that will give effect to legislative intent. Safe Air For Everyone v. Idaho State Dep't of Agric., 145 Idaho 164, 166, 177 P.3d 378, 380 (2008). Accordingly, we must determine the Legislature's intent from the statutory language and ordinary meaning of the terms and provisions in Idaho Code § 39-116B. *See* Ag Servs. of Am., Inc., v. Kechter, 137 Idaho 62, 64, 44 P.3d 1117, 1119 (2002); Mendenhall v. Aldous, 146 Idaho 434, 437, 196 P.3d 352, 355 (2008).

Idaho Code § 39-116B(2) requires DEQ to establish by rule a vehicle emissions program for "**registered**" motor vehicles. Idaho Code § 39-116B(4) states that the "Idaho Transportation Department shall **revoke the registration of any motor vehicles**" that fail to comply with the

vehicle inspection program. (Emphasis added.) Idaho Code 39-116B(4)(b) requires DEQ to reimburse the Idaho Transportation Department for costs associated with the "**registration revocation**" procedure and prohibits imposing a fee to have the registration "**reinstated**" when the vehicle is found to be in compliance with emission standards. Based upon the ordinary meaning of these terms, it is clear that the Legislature intended the Program to apply after its enactment (i.e., prospectively) to existing registrations.

The term "registered" is defined as "having the owner's name listed in a register." Webster's New College Dictionary 955 (3d ed. 2005). "Revoke" means "to nullify by withdrawing, recalling, or reversing." Id. at 973. "Reinstate" means (1) to bring back into use or existence restore to a former condition; (2) to restore to a former condition or position. Id. at 957. "Revocation of vehicle registration means the termination by formal action of the department or as otherwise provided in this title of a person's vehicle registration or, in the case of fleets of vehicles, all vehicle registrations in each fleet operated by a company. Upon revocation, the privileges of operating the vehicles on Idaho highways is terminated until the difficulty that caused the revocation is corrected and an application for new registration is presented and acted upon." Idaho Code § 49-119. In summary, one cannot revoke, terminate, or reinstate a registration if it does not already exist.

The plain language of the statute shows that existing registrations are subject to its terms and that DEQ's implementation of the statute is not retroactive in effect. No registration was cancelled by "back dating" the cancellation to a date before the statute was enacted. Applying the Program to vehicles with existing registrations does not improperly increase or impose liability for past conduct, but instead requires a change in existing practices. This is prospective application. Importantly, the penalty for noncompliance with the statute is a loss of the right to

drive that vehicle and does not affect a citizen's right to drive. Instead, it merely precludes an owner from driving a particular vehicle if that vehicle does not comply with emissions standards and if the owner refuses to repair it. And, as Governor Otter observed, the Legislature had an opportunity to amend the law in 2010, and did not do so, indicating that DEQ's interpretation of the statute is consistent with legislative intent.

Moreover, the general rule that courts favor prospective applications of statutes is founded upon the premise that fundamental fairness requires that citizens be given notice of a statute so they may conform their behavior to new or revised requirements. 2 Sutherland Statutory Construction § 41:2 (7th ed. 2007); *See also* Frisbie v. Sunshine Mining Co., 93 Idaho 169, 457 P.2d 408 (1969). The County does not contend that it was without notice or that there was no opportunity to conform its behavior to the new requirements. To the contrary, the County advised DEQ that it intended to perform a "small act of civil disobedience" by not submitting any of its vehicles for testing. In a February 18, 2010 letter to DEQ, the County stated:

> It may therefore be an opportune time for Canyon County to remind you that we, as an entity, own more than 200 registered vehicles used for public purposes. We do not intend to submit any of these vehicles for testing under your proposed program. Perhaps by this small act of civil disobedience we can accomplish that which our respectful adherence to the law has failed to secure: a voice in decisions which affect us.

As demonstrated by the County's statements, this is not a case of inadequate notice resulting from the retroactive effect of statutory or regulatory requirements. Requiring emissions testing for registered vehicles is simply a prospective exercise of the State's police power to further the legitimate state goal of reducing air pollution. *See* Landgraf v. U.S. Film Products, 511 U.S. 244, 269, 270 n.24 (1964) (distinguishing between the retroactive redefinition of rights and prospective exercise of the police power).

VI. CONCLUSIONS OF LAW

Based upon a review of the record and oral and written arguments of the Parties, the Board concludes that:

1. The County has failed to state a claim under Idaho Code § 39-116B(4).

2. DEQ complied with the rulemaking requirements set forth in the IAPA and DEQ Rules of Procedure.

3 Article III, section 19 of the Idaho Constitution is not a limitation on DEQ's implementation of Idaho Code § 39-116B.

4. Even assuming the County may invoke the protections guaranteed to individuals under the federal and state constitutions, the County has not met its burden to show a federal or state equal protection violation.

5. DEQ did not apply Idaho Code § 39-116B retroactively.

In consideration of the foregoing, it is hereby ordered that the County's motion for summary judgment is DENIED, the relief sought in the Petition is DENIED, and DEQ's motion to dismiss and motion for summary judgment are GRANTED.

This is a final order of the Board. Pursuant to Idaho Code §§ 67-5270 and 67-5272, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition 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.

An appeal must be filed within twenty-eight (28) days of the service date of this final order. *See* Idaho Code § 67-5273 and IDAPA 58.01.23.791. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED THIS 25th day of December 2011.

IDAHO BOARD OF ENVIRONMENTAL QUALITY

Nick Purdy

Carolyn S. Mascarenas

Dr. Joan Cloonan

Dr. J. Randy MacMillan

Kermit V. Kiebert

John C. McCreedy

Kevin C. Boling

DATED THIS 28th day of December 2011.

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BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

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

I hereby certify that on this 28th day of December, 2011, a true and correct copy of the **Final Order on Review of Recommended Order** was served on the following:

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