

UTAH AIR QUALITY BOARD MEETING
January 6, 2010 – 1:30 p.m.
168 North 1950 West, Room 101
Salt Lake City, Utah 84116

FINAL MINUTES

I. Call-to-Order

Ernie Wessman called the meeting to order at 1:33 p.m.

Board members present: Nan Bunker, Joel Elstein, Robert Paine, Kathy Van Dame, Steve Sands, Ernie Wessman, Craig Petersen, Kerry Kelly, Darrell Smith, Brent Bradford

Excused: Amanda Smith

Executive Secretary: Cheryl Heying

II. Date of the Next Air Quality Board Meeting: February 3, 2010, and March 3, 2010

The Board decides to have a telephone conference call of the Board on February 3, 2010, to draft a comment letter to the EPA on the proposed disapproval of redesignation requests and maintenance plans for Salt Lake County, Utah County, and Ogden City. The next regular meeting of the Board will be on March 3, 2010.

III. Approval of the Minutes for December 2, 2009, Board Meetings.

- Nan Bunker moved to approve the December 2, 2009, minutes. Kathy Van Dame seconded. The Board approved unanimously.

IV. Tax Certification Denial. Appeal by Jack M. McIntyre. Presented by Fred Nelson.

Fred Nelson, of the Attorney General's Office and counsel to the Board, stated that several weeks ago the Board received a recommended decision and findings from a hearing officer on this matter and today the Board would decide on that recommendation. Mr. Nelson reminded the Board that at the last Legislative session a bill passed which established a process for the Board to hear issues and that the Executive Director would appoint a hearing officer to hear the matter and prepare a recommendation.

It is Mr. Nelson's suggestion that both parties have 15 minutes to make comments to the Board with respect with the recommended decision. Afterwards the Board would then deliberate and make a decision on what is being recommended. The Board has three options: they can accept the recommendation; they can modify the recommendation; or find that the Board needs additional proceedings and information collected and refer it back to the Administrative Law Judge for further consideration and bring back to the Board additional information.

Richard Golden, representing Jack McIntyre, stated this is more than a tax deduction and they wish to clarify some of the Administrative Law Judge's conclusions. It is important that the Board have a full perspective of the difference between a vehicle operating on

compressed natural gas (CNG) and gasoline. Mr. Golden points out that the maximum concentrations numbers for hydrocarbons, carbon monoxide, and oxides of nitrogen in the recommendation with respect to Mr. McIntyre's vehicle are maximum points set by the manufacturer and not measured amounts. Mr. McIntyre has presented that there was significant reductions in all those regulated pollutants and this vehicle is a lot cleaner.

What seems to be the issue in this case is the interpretation of the statute. The statute lists three options, that a tax credit can be allowed if the CNG conversion kit is approved by the EPA, testing done under the Clean Air Act, or if a reduction in emissions of regulated pollutants is demonstrated by a test recognized by the Board. The hearing's officer found that a test recognized by the Board had to be one that the Board recognized for purposes of the tax credit, but the statute says a reduction in emissions is demonstrated by a test recognized by the Board. The hearing's officer came to the conclusion that Mr. McIntyre's position was that if there were any test or procedure that was recognized by the Board it would be used for this purpose, and Mr. McIntyre's position is that the tail pipe test is recognized by this Board for measuring regulated pollutants. It is their interpretation of the statute that if the tail pipe test, which he states is recognized by the Board, can show that a vehicle has a reduction in emissions then Mr. McIntyre should qualify for the tax credit. Also, the certification in the statute refers to the tax credit and not for EPA certification, which are two related but significantly different things.

Part of the confusion that arose from this case is that in 2007 the Board changed its rules. The applicable rules were modified to clean it up, clarify it, and make things more efficient. It is Mr. Golden and Mr. McIntyre's conclusion that prior to that change the Division had been accepting the tail pipe test obtained from an emissions station as proof that a vehicle had demonstrated a reduction in regulated pollutants, which is what the language of the statute required, to qualify for the tax credit. The Division has argued that DAQ did not accept inspection/maintenance (I/M) tests as showing reduction in emissions but as proof of purchase and that it has to be a rule that is specifically enacted by this Board for that purpose.

The Division's position has been that they have applied this law equally because in 2007 they were accepting this documentation but for the 2008 tax year they were not. And since the Division was treating everyone in 2008 equally they were treating everyone equally under the law. Mr. Golden takes issue with that because the tax law didn't change in this regard between 2007 and 2008. The Division can't make the claim that they were treating everyone equally under the law when the law didn't change. Their position has been that the Board has always interpreted the rule as supplying that type of documentation and that would qualify as demonstrating a reduction in emissions.

In conclusion Mr. Golden would ask the Board to continue what had been done in 2005, 2006, and 2007 which was to accept the tail pipe emissions standards for a tax credit, if the converted CNG vehicle could show a reduction in emissions in regulated pollutants.

Mr. Golden then answered questions by the Board and commented that the cost of the conversion was enough that if it were allowed would justify the tax credit that Mr. McIntyre seeks. Mr. McIntyre concedes that his conversion kit was not an EPA certified kit at the time of conversion, but even if an EPA certified was used there could still be safety issues if it was not installed properly. The Administrative Law Judge talked about the on-board diagnostic (OBD) test not showing a reduction in emissions and about there not being set points after 1995. That addresses I/M standards which Mr. Golden is not talking about, but he is referring to tests that are used in the I/M process that measure

regulated pollutants. The test reports submitted by Mr. McIntyre show a significant difference which he believes is an important fact the Board should be aware. The statute says a reduction, it does not say how big of a reduction is needed. It is Mr. McIntyre's understanding and through his research that the emissions test is a document that can be used to provide evidence of eligibility in showing a reduction in regulated pollutants to obtain a tax credit.

Christian Stephens, counsel for the Executive Secretary, stated the county emissions test doesn't provide any guidance on how a reduction in emissions is suppose to be measured. In this case an I/M test was done voluntarily by Mr. McIntyre, which means to pass the Salt Lake County emissions test a person would only have to do an OBD test which gives a pass or fail result. The test does not give any kind of quantitative readout where you could measure anything. Also the I/M test, whether an OBD or tail pipe test, is only required in a nonattainment area. Under the current rule if you are in an attainment area you only have to have an American Society of Engineers certified mechanic certify that the conversion on the vehicle is functional. So it calls into question whether the I/M test is the applicable test that can be used. The rule has no guidance on that.

When the rule was amended in mid-2007 there was a requirement that an I/M test be obtained, both in the previous and current versions. It was a uniform and independent requirement regardless of the certification requirements. Irrespective of what you do about the certification you would still have to have an I/M test done in order to qualify for the tax credit.

Finally, the Division believes the law did change. Tax Code Section 59-10-1009 has three options, but part of the law that governs this tax credit and the agency's rule was amended in 2007. Because it was amended in the middle of the tax year, the agency made the prudent determination that it would begin requesting proof of certification with a new calendar year. The previous version of the rule did not require the tax claimant to provide that certification information and the change in the rule laid that responsibility on the tax credit claimant. So there was a distinction between what the rule said before it was amended and what it said afterwards.

Mr. Stephens then answered questions by the Board and stated that he believes the DAQ's effort to ask the rule be amended was because the increase in the number of tax credit conversion requests received and not all the documentation had been requested in the past. Also, the question began to be raised as to whether all applicants were properly converting their vehicles.

The documents required to get a tax credit approval are listed in R307-121-4 and states that to demonstrate a conversion of a motor vehicle to be fueled by a clean fuel is eligible, proof of purchase shall be made by submitting certain documentation to the Executive Secretary as is listed in the rule. Proof of certification would be conversion equipment that is certified by EPA or having a federal test procedure done. The Division has no issue with the accuracy of the tail pipe emissions test showing a reduction in regulated pollutants, but the Division has said that test is not a test the Board has recognized for this purpose. Unless the Board undertakes rulemaking to recognize a third test or standard by rule, the Division believes there is no third option to obtain tax credit approval.

Mr. Stephens continued that up through the time that the rule changed in 2007 the agency had accepted the I/M test as part of the demonstration needed to obtain a tax credit and it

has been a requirement ever since. The dispute is whether that was being submitted for the purpose of showing reduction in emissions. It is the agency's position that the I/M test is not a test established by this Board under the statute as what can be used to show a reduction of emissions. It is one of a number of requirements a person needs to qualify for a tax credit.

After discussion with both parties and with the Board's counsel, Board members were then asked to make comment before a decision and motion was to be made. The common statement among the Board was that the statute and rule are confusing and need to be changed to clearly describe documentation and information needed to satisfy both the certification and proof of purchase requirements. And at the same time ensuring that actual emission reductions occur as a result of vehicles being retrofitted with this equipment.

- Brent Bradford moved to table this agenda item until the March Board meeting for further review of the rule. Craig Petersen seconded. The motion does not carry with a vote of five in favor (Bradford, Petersen, Smith, Elstein, and Sands) and five opposed (Kelly, Van Dame, Paine, Bunker, and Weissman).
- Kathy Van Dame moved to accept the Administrative Law Judge's recommendations. Nan Bunker seconded. The Board approves to accept the recommendations by a vote of seven in favor (Kelly, Elstein, Van Dame, Paine, Sands, Weissman, and Bunker) and three opposed (Bradford, Petersen, and Smith).

V. Propose for Public Comment: Repeal and Reenact R307-840. Lead-Based Paint Program Purpose, Applicability, and Definitions; New Rule R307-841. Residential Property and Child-Occupied Facility Renovation; and New Rule R307-842. Lead-Based Paint Activities. Presented by Robert Ford.

Robert Ford, Air Toxics Lead Asbestos Standards Section Manager at DAQ, stated that on October 22, 2008, the EPA promulgated the final lead based paint renovation repair and painting rule. This rule creates regulatory requirements for individuals and firms who perform renovation to implement the federal lead based paint renovation repair and painting rule in Utah. The first step in the process is to develop Utah administrative rules. DAQ staff recommends that the Board propose repealing the existing R307-840 rule and propose new R307-840, R307-841, and R307-842 rules for public comment.

- Craig Petersen moved to submit for public comment as proposed. Darrell Smith seconded. The Board approved unanimously.

VI. Informational Items.

A. Sevier Power Supreme Court Decisions. Presented by Fred Nelson.

Mr. Nelson reported to the Board on the Utah Supreme Court's issued decision on the appeal by the Sierra Club and James Kennon on the permit issued to Sevier Power Company.

The court found that the record was not adequate to the 18-month review that was done on the permit. While the court did find that the Board was correct in saying that there was no automatic expiration of the permit, the court said that it

should have documented more carefully that a review of the best achievable control technology (BACT) had been done at the time of the 18-month review.

The Board has not established rules on carbon dioxide (CO₂) and so the court upheld the Board's decision on CO₂.

With respect to the alternative issue on the integrated gasification combined cycle (IGCC) using a different process, the court did not agree with the Board that it was a redesign of the facility and that it should have been considered in the BACT analysis. The court did not say that it had to be accepted, but that it was needed to go through the analysis on IGCC and the BACT process.

The court had concerns that there did not appear to be evidence in the record to support that nitrogen oxides (NO_x) should not have a 30-day rolling average in addition to the 24-hour maximum. The court concluded that the evidence was not sufficient to support the NO_x number.

The court upheld the Board and the Executive Secretary on the analysis on prevention of significant deterioration (PSD), significant impact level analysis, and all other issues that were presented to the Board.

At this point, the permit has deficiencies as defined by the court. Sevier Power Company will have to decide whether or not they want to come back to the Executive Secretary with a BACT analysis to deal with the 18-month review, the IGCC, and the NO_x issues. At which point the Executive Secretary would need to look at the information and make a decision as to whether to go forward at this point.

Regg Olsen, Permitting Branch Manager at DAQ, responded to the Board's inquiry about DAQ's plans of the BACT process. The DAQ is preparing a notice to the source asking what their desires are as mention by Mr. Nelson. Internally, DAQ does not see a need to change the process. Although as a result of the court's decision, staff training is an issue that came up and DAQ will strive to make sure that staff understands what the BACT process needs to include. The DAQ has begun a better process of documenting the decisions that are made. In addition to the Board's suggestion to investigate more of what other states are doing in similar permitting issues, Mr. Olsen commented that DAQ has done that routinely through the years but it was not documented well by staff. At this point the DAQ documents everything, Chris Stephens is more involved in discussions with the source, and there is more stakeholder involvement.

- B. Air Toxics. Presented by Robert Ford.**
- C. Compliance. Presented by Jay Morris and Harold Burge.**
- D. Monitoring. Presented by Bo Call.**

Bo Call updated the Board on the monitoring graphs submitted to the Board.

Dr. Paine asked if DAQ could give more information at another meeting on the red alert calls made by DAQ and what the implication are of those notifications.

Ms. Heying explained that a letter was sent to EPA asking them to attend a Board meeting to discuss the PM10 disapproval, how we move forward with PM2.5, and also to request an extension of the public comment period. EPA responded by committing to visit the Board in the future, but at this time they could not because of issues regarding the open period for public comment. EPA did extend the comment period to March 1, 2010.

The DAQ submitted comments on December 30, 2009, saying that the DAQ does not agree with EPA's disapproval of the PM10 nonattainment areas to attainment, to approve some and disapprove other associated state implementation plan revisions, and request an extension of the comment period. The letter provided DAQ's initial comments and will follow with more detailed responses during the requested extension of the comment period.

The Board has asked that a February 3, 2010, meeting be held so that the Board can draft a letter to EPA to submit comment to the record with EPA. The DAQ will draft a letter, based on direction from the Board, prior to the February 3rd meeting so that Board members can review and discuss changes at the meeting. It was suggested that since DAQ's comments may have been more technical and specific to individual items that the Board may wish to comment more on procedural aspects.

Meeting was adjourned at 4:05 p.m.

Minutes approved: March 3, 2010