December 8, 2009

BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Jack M. McIntyre Re: Tax Credit Certification 1996 Chevrolet Tahoe	Administrative Law Judge Denise Chancellor

RECOMMENDED MEMORANDUM DECISION AND ORDER

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Mr. McIntyre, the Petitioner, converted his 1996 Chevrolet Tahoe to operate on both gasoline and compressed natural gas and applied to the Division of Air Quality for a tax credit. The Executive Secretary, the Respondent, denied Mr. McIntyre's tax credit application on the ground that he had not met the statutory certification requirement. While the sole issue in this proceeding is whether the Executive Secretary unlawfully denied Mr. McIntyre's tax credit application, the outcome here could set a precedent for numerous other tax credit applicants who are similarly situated.[1]

The parties stipulated to a set of facts and each filed motions for summary judgment. This matter, therefore, is being decided on the memoranda filed in support of and in opposition to the two motions, on oral argument presented to the administrative law judge (ALJ), and without an evidentiary hearing.

As this is one of the first matters to be decided under the newly enacted administrative law judge proceedings (Utah Code Ann. § 19-1-301), this recommendation first describes the procedural requirements applicable to the ALJ and the Board. It then presents the stipulated undisputed facts; the legal standards applicable to summary judgment; an overview of the statute and rules applicable to the clean fuels tax credit; a summary of the parties' positions and an analysis of their arguments; and findings of facts, conclusions of law and a recommended order.

[1]As represented to the Board in 2007, the number of tax credit applications increased dramatically from 2002 (73) until early 2007 (663). *See* Record CNGConv. at 164.

I. PROCEDURAL REQUIREMENTS

On May 27, 2009, the Acting Executive Director of the Department of Environmental Quality appointed Denise Chancellor as the ALJ for this proceeding pursuant to Utah Code Ann. § 19-1-202(1)(f). Now, instead of the Board conducting an adjudicatory proceeding, it is conducted before an ALJ who shall submit a proposed dispositive action to the Board, including:

(A) written findings of fact;
(B) written conclusions of law; and
(C) a recommended order.

Utah Code Ann. § 19-1-301(6)(a)(iii). Upon receipt of the ALJ's submittal, the Board may:

(i) approve, approve with modification, or disapprove [the ALJ's] proposed dispositive action . . .; or
(ii) return the proposed dispositive action to the administrative law judge for further action as directed.

Id. § 19-1-301(6)(b). A "dispositive action" is "a final agency action that: (a) a board takes following an adjudicative proceeding on a request for agency action; and (b) is subject to judicial review under Section 63G-4-403." Id. § 19-1-301(1). Thus, the ALJ's recommendation to the Board is a proposed dispositive action and the Board's ultimate decision is a dispositive action.

The following actions occurred prior to appointment of an ALJ for this proceeding:

January 14, 2009:	The Executive Secretary denied Mr. McIntyre's application for a clean fuels tax credit of $2,492.50.
January 27, 2009:	Mr. McIntyre submitted a Request for Agency Action.
April 2, 2009:	The Executive Secretary responded to Mr. McIntyre's Request for Agency Action.
March 4, 2009:	The Board issued a Notice of Further Proceedings.
May 12, 2009:	Effective date of Utah Code Ann. § 19-1-301, *Adjudicative proceedings.*

II. RELEVANT DOCUMENTS

An agency record has been created consisting of the documents the Executive Secretary and the Division of Air Quality (DAQ) relied upon in this case. A CD containing an electronic copy of the agency record is enclosed. In addition, an adjudicative record has been created consisting of pleadings filed by the parties and orders issued by the ALJ. The substantive documents filed in the adjudicative proceeding and a transcript of oral argument are also included on the enclosed CD. For ease of reference, a hard copy of the following documents from the record are included as attachments (Att.) hereto:

Att. 1 Chevy Tahoe Inspection and Maintenance (I/M) test results before and after conversion to alternate fuels.

Att. 2 Applicable excerpts from the Utah State Implementation Plan (SIP) and Salt Lake Valley Health Department Regulations (SL Health Reg.) relating to I/M testing.

Att. 3 Utah Code Ann. § 59-10-1009 (2008) (in effect until January 1, 2009).

Att. 4 Utah Admin. Code R307-121 (effective as of July 14, 2007).

Att. 5 *Utah State Bulletin*, May 1, 2007, notice of proposed rule, R307-121.

III. STIPULATED UNDISPUTED FACTS

The parties have stipulated to the following statement of undisputed facts with respect to the conversion of Mr. McIntyre's 1996 Chevrolet Tahoe, VIN No. 1GNEK13R9TJ426727:

1. Prior to its conversion, the above referenced Vehicle ("the Vehicle") operated on gasoline.

2. The Vehicle was converted to operate on compressed natural gas ("CNG") and gasoline sometime after June 13, 2008 and before August 21, 2008.

3. CNG is a clean fuel within the meaning of Utah Code Ann. § 59-10-1009.

4. The conversion equipment that was installed on the Vehicle was not certified by the Environmental Protection Agency.

5. The Vehicle did not undergo the Federal Testing Procedure before and after installation of the conversion equipment, in accordance with 40 C.F.R. Part 86, using all fuels the Vehicle is capable of using.

6. The conversion equipment that was installed on the Vehicle was installed in accordance with the conversion equipment manufacturer's instructions.

7. The Vehicle is registered in Salt Lake County.

8. On June 13, 2008, the Vehicle passed the Salt Lake County emissions test. *Exhibit A* (attached hereto as Att. 1-A).

9. The emissions tests referenced in Exhibit A are of type recognized by the Air Quality Board and required under the Utah State Implementation Plan.

10. The emissions tests performed on the Vehicle are of a type that is recognized by board rule for the measuring and reducing air pollution levels. Utah Admin. Code R307-110-33; Salt Lake County Health Department Regulation 22a § 1.1; *see also* Utah State Implementation Plan.

11. After conversion to CNG, on August 21, 2008 the Vehicle again passed the Salt Lake County emissions test for both CNG and gasoline. *Exhibit B* (attached hereto as Att. 1-B).

12. Based on a declaration of the testing facility technician, Respondent does not dispute the accuracy of the test results. *Exhibit* C (attached hereto as Att. 1-C).

13. Upon the DAQ's recommendation, in its April 2007 meeting the Board proposed

for public comment an amendment to Utah Admin. Code R307-121 to include a provision that proof of purchase requirements for CNG converted vehicles shall include "proof of certification required in 59-10-1009(l)(b) or 59-7-605(1)(b)." Utah Admin. Code R307-121-5(6).

14. No public comments were received, and the Air Quality Board adopted the amendments as proposed by the DAQ.

15. The amendments to Utah Admin. Code R307-121 became effective on July 13, 2007.

16. Prior to the July 13, 2007 rule change, DAQ had not been requesting the submission of proof of either EPA certification or compliance with the 40 C.F.R. Part 86 Federal Testing Procedure before approving tax credit applications for vehicles converted to run on CNG.

17. After the July 13, 2007 amendment, and beginning with the tax credit applications for the 2008 tax year, DAQ began requesting such proof, except for one tax credit application for tax year 2008 that was inadvertently approved without having been requested to show such proof.

18. Petitioner McIntyre submitted an application for the Clean Fuel Tax Credit on August 28, 2008.

19. On September 18, 2008, DAQ staff requested that Petitioner provide additional information regarding his application, including proof that the Vehicle's conversion equipment was either EPA certified or that the converted Vehicle had successfully passed the testing procedures of 40 C.F.R. Part 86.

20. On October 6, 2008, Petitioner provided additional information to DAQ, but did not provide any proof that the Vehicle's conversion equipment was either EPA certified or that the converted Vehicle had successfully passed the testing procedures of 40 C.F.R. Part 86.

21. In a letter dated January 14, 2009, the Executive Secretary denied Petitioner's application for the Clean Fuel Tax Credit for tax year 2008, for the stated reason that the Vehicle did not "meet the requirements under U.C.A. § 59-10-1009(1)(b)(i)(C)."

IV. SUMMARY JUDGMENT LEGAL STANDARD

Both parties moved for summary judgment. During an adjudicative proceeding the presiding officer may grant a timely motion for summary judgment if the requirements of Utah R. Civ. P. 56 are met by the moving party. Utah Code Ann. § 63G-4-102(4)(b). If the adjudicative record shows "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" then summary judgment shall be granted. Utah R. Civ. P. 56(c). Here, the parties have stipulated to the undisputed facts (referred to herein as "Stip. Facts") and the issue before this tribunal is basically a question of law.

V. TAX CREDIT REQUIREMENTS

A. Statutory Requirement

There is a long-standing statutory provision that, under certain specified conditions, allows a Utah taxpayer ("claimant") who operates a vehicle on cleaner burning fuels to obtain a one-time tax credit against taxes due.[2] A claimant may be eligible for a tax credit of up to "50% of the cost of the equipment for conversion, **if certified by the [Utah Air Quality] board** . . . up to a maximum tax credit of $2,500 per vehicle, if the motor vehicle . . . is to be fueled by propane, natural gas or electricity." Utah Code Ann. § 59-10-1009(2)(a)(ii) (West 2008) (*emphasis added*). The claimant must also provide "proof of the purchase of an item for which tax credit is

[2]In 2006, the statute was renumbered from Section 59-10-129 to Section 59-10-1009 and amended again in 2008 (effective January 1, 2009). The 2006 and 2008 amendments did not place any new substantive requirements on the tax credit at issues in this proceeding.

allowed . . . by providing proof to the board in the form the board requires by rule." Id. § 59-10-1009(3)(a).

Critical to the issue here is the definition of "certified by the board," which means that:

> (i) a motor vehicle on which conversion equipment has been installed meets the following criteria:
>
> (A) before the installation of conversion equipment, the vehicle does not exceed the emission cut points for a transient test driving cycle, as specified in 40 C.F.R. Part 51, Appendix E to Subpart S, or an equivalent test for the make, model, and year of the vehicle;
>
> (B) the motor vehicle's emissions of regulated pollutants, when operating on . . . [certain fuels including natural gas], is less than the emissions were before the installation of conversion equipment; and
>
> (C) a reduction in emissions under Subsection (1)[(a)[3]](i)(B) is demonstrated by:
>
> (I) certification of the conversion equipment by the federal Environmental Protection Agency or by a state whose certification standards are recognized by the board;
>
> (II) testing the motor vehicle, before and after installation of the conversion equipment, in accordance with 40 C.F.R. Part 86, Control Emissions from New and In-use Highway Vehicles and Engines, using all fuels the motor vehicle is capable of using; or
>
> (III) any other test or standard recognized by board rule.

Id. § 59-10-1009(1)(b) (West 2008).[4]

The parties stipulated that Mr. McIntyre did not use an EPA certified conversion kit (or kit certified by a State whose standards are recognized by the Board) and that he did not test his vehicle in accordance with 40 C.F.R. Part 86 Federal Test Procedures. Stip. Facts ¶¶ 4-5. The issue comes down to whether the Executive Secretary should have found that McIntyre's converted vehicle met the "any other test or standard recognized by board rule" (sometimes

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[3]The statute mistakenly cites to Subsection (1)(b)(i)(B).

[4]A statutory amendment in 2008 caused Section 59-10-1009(1)**(b)** to be renumbered to (1)**(c)**. The reference herein will be to Section 59-10-1009(1)(b) because that was the statute in effect at the time of McIntyre's tax credit application and its review in 2008.

referred to herein as "the third method") as demonstrating a reduction in emissions in accordance with Section 59-10-1009(1)(b)(i)(C) and, thus, be eligible for a tax credit.[5]

B. Utah Air Quality Board Authority and Rules

The cleaner burning fuels tax credit statute for converted vehicles has two separate requirements relating to the Board's responsibility: (1) certification requirement to demonstrate a reduction of emissions under Section 59-10-1009(1)(b)(i); and (2) proof of purchase procedures under Section 59-10-1009 (3)(a). To this end, the Legislature provided the Board with the following authority. Under the Utah Air Conservation Act, the Board may,

> establish certification procedures and requirements for certification of the conversion of a motor vehicle to a clean-fuel vehicle, certifying the vehicle is eligible for the tax credit granted in Section 59-7-605 or 59-10-1009.

Utah Code Ann. § 19-2-104(3)(u). Under the tax credit statute, the Board may make rules specifying the form the Board requires a claimant provide as proof of purchase of an item eligible for a tax credit. Id. § 59-10-1009(3)(a). The Board promulgated R307-121 (general requirements to determine eligibility for an income tax credit pursuant to Utah Code Ann. §§ 59-7-605 and 59-10-1009), as the rules specific to its responsibilities relating to tax credit eligibility for vehicles that use cleaner burning fuels.

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[5]Both parties agree that the only issue here is the application of Section 59-10-1009(1)(b)(i)(C)(III) to the McIntyre tax credit application. McI. Mot. at 6 ("[T]he only real question is whether inspection and tests by a state emissions inspection station is a test or standard that has been recognized by board rule."); and Ex. Sec. Mot. at 2 ("The threshold issue is whether DAQ erred as a matter of law in denying McIntyre's application on the basis that Salt Lake County emission testing is not a 'test or standard recognized by board rule'. . . ."). Thus, the structure of Section 59-10-1009(1)(b)(A) and (B), which is somewhat confusing, is not at issue here.

The following amended rule, Utah Admin. Code R307-121-4, effective July 14, 2007, is applicable to Mr. McIntyre's tax credit application (*see* Att. 4):[6]

R307-121-4. *Procedures for Vehicles Converted to Clean Fuels*

To demonstrate that a conversion of a motor vehicle to be fueled by clean fuel is eligible,[7] proof of purchase shall be made by submitting the following documentation to the executive secretary:

(1) VIN;
(2) fuel type before conversion;
(3) fuel type after conversion;
(4) (a) if within a county with an I/M program, a copy of the motor vehicle inspection report from an approved station showing that the converted alternate fuel vehicle meets all county emissions requirements for all installed fuel systems, or
(b) a signed statement by an ASE certified technician that includes the VIN and states that the conversion is functional;
(5) each of the following:
(a) conversion system manufacturer,
(b) conversion system model number,
(c) date of the conversion, and
(d) name, address, and phone number of the person that converted the motor vehicle;
(6) proof of certification required in 59-10-1009(1)(b) or 59-7-605(1)(b); and
(7) a copy of the current vehicle registration.

The rulemaking in 2007 renumbered the former proof of purchase rule R307-121-5 to R307-121-4 and added to it subsections (6) and (7). The 2007 rulemaking also deleted various portions of R307-121. *See* Att. 5.

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[6]Mr McIntyre applied for a tax credit in 2008. Therefore, the rules applicable to the McIntyre tax credit application, and as cited herein, are those that were in effect in 2008. Further amendments to R307-121 in 2009, including renumbering R307-21-4 to R307-21-5, are not relevant to the case at hand.

[7]"Eligible" means, in relevant part, "a vehicle . . . on which conversion equipment has been installed that meets the definition of 'Certified by the Board' that is found in . . . 59-10-1009." Utah Admin. Code R307-121-2.

VI. EACH PARTY'S POSITION[8]

A. Petitioner McIntyre's Position

1. I/M Testing

Mr. McIntyre argues that because the Board adopted the I/M Program as part of the State Implementation Plan (SIP), and the I/M portion of the SIP is incorporated into R307-110-33, I/M testing may be used to satisfy method three to demonstration a reduction in emissions. Mr McIntyre posits, first, that county inspection and maintenance (I/M) tests performed on his vehicle before and after conversion show a dramatic reduction in regulated air pollutants. Second, the county I/M testing program is designed to measure and achieve reductions in vehicle emissions. Third, the I/M program is incorporated into the SIP, which was enacted to comply with the federal Clean Air Act, including conversion of vehicles to cleaner burning fuels. Fourth, as the Board has incorporated the SIP into Utah rules, I/M tests may be used to satisfy the third method under Section 59-10-1009(1)(b) as a test or standard recognized by Board rule. *See* McI. Mot. at 6-7 and McI. Opp. at 2-4. To find otherwise, says McIntyre, would fail to give effect to the third method in the statute. McI. Opp. at 5 (*citing* Archer v. Board of State Lands, 907 P.2d, 1142, 1145 (Utah 1995)).

Mr. McIntyre also argues that his vehicle meets the most stringent testing standards because a provision in the I/M portion of the SIP says "vehicles that are switched to a type for

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[8]The memoranda filed in support of and in opposition to summary judgment will be shorted cited as following:

McI. Mot. or Ex. Sec. Mot . – initial summary judgment motions (Sept. 3, 2009).
McI. Opp. or Ex. Sec. Opp. – opposition to each party's motion (Sept. 18 and 17, 2009).
McI. Reply or Ex. Sec. Reply – parties' reply to opposition filings (Sept. 25, 2009).

which there is no certified configuration are tested according to the most stringent emissions standards for that vehicle year and model type." McI. Mot. at 9 (*citing* SIP § X Part C at 6). Looking at the plain meaning of the statute, McIntyre also says that accepting I/M tests for a tax credit "is good public policy because it helps reduce pollution" and not accepting I/M tests "would require the board to exceed its authority and pretend the Legislature did not create that third option . . . or require the board to read language into its rules that simply is not there strictly for the purpose of a tax credit." McI. Mot. at 7.

2. Improper Rulemaking

Mr. McIntyre argues when R307-21 was amended in 2007, there was ineffective notice in the *Utah State Bulletin* of any administrative change from past practice of accepting I/M tests as proof of eligibility for a tax credit. The Division of Air Quality (DAQ), in its statement of the fiscal impact of the 2007 rule change to the State budget or other persons and on the compliance costs to affected persons and business, stated under those four categories: "these revisions would simply codify current administrative practices." *Utah State Bulletin,* Vol. 2007, No. 9 at 14 (May 1, 2007) (*see* Att. 5). As DAQ's past practice did not require an EPA certified kit or a 40 C.F.R. Part 86 test (methods 1 and 2) to receive a tax credit, McIntyre argues I/M tests should still satisfy a demonstration in the reduction of emissions for purposes of obtaining a tax credit. McI. Opp. at 6-8.

Mr. McIntyre argues in his Reply that the Executive Secretary and DAQ should be equitably estopped from enforcing certification that requires use of EPA certified kits to be eligible for a tax credit. This would prevent manifest injustice to himself and others who relied to their detriment on the written representations in the *Bulletin* when not submitting comments to the

proposed 2007 rule change or when contemplating what equipment to install (such as a non-certified EPA conversion kit) that would qualify for a tax credit. McI. Reply at 4-5 (*citing* Celebrity Club v. Utah Liquor Control Comm'n, 602 P.2d 698 (Utah 1979)). Mr. McIntyre also argues the Board acted beyond its statutory authority by, in essence, making EPA certification the minimum standard for purposes of tax credit eligibility. Id. at 6.

3. The 2007 Rule Allows I/M Testing to Satisfy Method Three

McIntyre says the language in amended R307-121-4, by merely referring back to the statute, is circular. First, the third method in Section 59-10-1009(1)(b)(i)(C) says "any other test or standard recognized by board rule. Then R307-121-4(6) says a tax claimant must provide "proof of certification required in 59-10-1009(1)(b)." R307-121-4(6) thus leads the tax claimant right back to the statute, including the third method for showing a reduction in emissions. Accordingly, Mr. McIntyre says his first argument still applies even if the 2007 rulemaking procedure is not deemed to be flawed. McI. Opp. at 10.

B. Respondent Executive Secretary's Position

1. I/M Testing Rules Were Never Adopted to Satisfy the Tax Credit Statute

The Executive Secretary argues that the Board must promulgate a rule specific to a reduction of emissions for purposes of method three in the tax credit statute and the Board has never promulgated such a rule recognizing the I/M test for tax credit purposes. Further, the I/M program in the SIP is a general air pollution prevention measure and the I/M test does not double as Board recognition of another test or standard for purposes of tax credit eligibility. Ex. Sec. Mot. at 3-4, 7-8. The tests or standards to demonstrate a reduction in emission are those specified in the statute, *i.e.*, EPA (or other state) certification and the Federal Test Procedure. Ex. Sec.

Mot. at 4-5, Reply at 1-2.

2. The Amendment to R307-121 in 2007 Constituted Valid Rulemaking

The Executive Secretary says the 2007 rule change merely clarified what had to be submitted to show compliance with the statutory certification requirements. Ex. Sec. Opp. at 4. Consistent with past practice, DAQ continues to accept I/M tests as part of the proof of purchase requirements but it has never accepted I/M tests to demonstrate a reduction of emissions. Ex. Sec. Reply at 4.

The Executive Secretary says a stated reason for amending R307-121 in 2007 was to remove sections of the former rule, including former R307-121-7 and R307-121-8, because they "are not currently required"[9] Ex. Sec. Mot. at 5-6. The Executive Secretary notes that prior to the 2007 rule change, "former R307-121-7 specifically addressed the reduction in emissions and that it could be satisfied [] either by 40 C.F.R. Part 86's Federal Testing Procedure, or by EPA certification of the conversion system." Ex. Sec. Mot. at 6. The only substantive change in 2007, argues the Executive Secretary, is that "Federal Testing Procedure 'reduction in emissions' data no longer need be submitted by the 'system manufacturer,' but instead that certification documentation be provided by the applicant." Ex. Sec. Opp. at 5. Moreover, continues the Executive Secretary, if the Board had intended I/M test results to satisfy reduction in emissions as certified by the Board, it would have been contained in former R307-121-7. Ex. Sec. Mot. at 7. Furthermore, if R307-121-4(4) addressed "certified by the Board" it would mean that I/M testing would satisfy that requirement in non-attainment areas under paragraph (4)(a) and in other areas

[9]Att. 5 and Record CNGConv. at 145 (Notice of Proposed Rule, R 307-122, *Utah State Bulletin,* Vol 2007, No. 9 (May 9, 2007)).

of the State (*i.e.*, attainment areas), the certification requirement would be satisfied by a signed statement by an ASE-certified technician that the conversion is functional. Such a reading, says the Executive Secretary, is unreasonable, inoperable or confusing. Ex. Sec. Opp. at 5 (*citing* Archer, 907 P.2d at 1145).

The Executive Secretary also argues that Mr. McIntyre did not comment on the 2007 rule change, did not challenge rulemaking in his Request for Agency Action and any challenge to the 2007 rulemaking is barred by a two year statute of limitations. Ex. Sec. Reply at 4 *citing* Utah Code Ann. § 63G-3-603.

3. The 2007 Rule Change Has Been Applied Even-Handedly

The Executive Secretary argues the 2007 rule amendment applied equally to all 2008 tax claimants (with one inadvertent exception), even though in the past DAQ had not been requesting documentation of EPA certified kits or compliance with 40 C.F.R. Part 86 Federal Testing Procedures (methods 1 and 2) before approving eligibility for tax credit rebates. Ex. Sec. Mot. at 8, 13; Stip. Facts ¶¶ 15-17. The Executive Secretary says the agency's decision to implement the new rule in 2008, rather than on the effective date, is reasonable because tax claimants such as Mr. McIntyre "cannot be considered for a tax credit for his CNG conversion any year other than 2008 [the year in which the expense was incurred]." Ex. Sec. Mot. at 3, 18.

In any event, the Executive Secretary argues DAQ's past practice is irrelevant. The issue here is the taxpayer's adherence to the statute and not, as Mr. McIntyre asserts in his memorandum to DAQ in support of his tax credit application, "to establish that under existing law it is legal to convert a vehicle to natural gas using a conversion kit that has not been EPA certified and receive a tax credit . . for doing so." Ex. Sec. Mot. at 9 (*citing* Record CNGConv. at 2).

The Executive Secretary points out that if a tax claimant is dissatisfied that current rules thwart the policy objectives of the statute, the appropriate avenue is to file a petition for rulemaking. Ex. Sec. Opp. at 5-6 (*citing* Utah Code Ann. § 63G-3-601). Finally, the Executive Secretary argues that tax credit statutes are to be strictly construed against the taxpayer. Ex. Sec. Opp. at 6 (*citing* MacFarlane v. Utah State Tax Comm'n, 134 P.3d 116, 1120 (Utah 2006)).

VII. ANALYSIS

The crux of Mr. McIntyre's claim is that I/M testing satisfies method three in the statute as a way to demonstrate a reduction in emissions. The issue here is not whether the particular I/M tests performed on McIntyre's vehicle show a reduction in emissions. The issue is whether I/M testing is a rule of general applicability that any claimant applying for a tax credit under Section 59-10-1009(1)(b) may use to show eligibility for a tax credit. *See* Utah Code Ann. § 63G-3-102(16)(a) (to be considered a "rule" the agency's written statement must "apply to a class of persons."). And if I/M testing satisfies the general applicability requirement, there must be quantifable standards for what constitutes a reduction of emission from I/M testing to ensure the agency treats all tax claimants equally.

Whether or not I/M testing satisfies the third method to show a reduction in emissions, the other major issue is the legality of the agency's rulemaking and implementation of its statutory responsibilities. This will be addressed after an analysis of I/M testing.

A. I/M Tests and the SIP

Under federal law, areas in a state that do not meet national ambient air quality standards for certain pollutants are required to prepare a State Implementation Plan (SIP) to show how those non-attainment areas will reach and maintain attainment with those standards. To help achieve

and maintain attainment, the SIP relies, in part, on I/M programs developed by counties out of attainment with national ambient air quality standards. I/M programs were initially implemented by Davis and Salt Lake Counties in 1984, and then by Utah County in 1986 and by Weber County in 1992. Utah SIP, § X Part A at 1. Other areas of the State do not have I/M programs. At one time the I/M programs were standardized and reciprocal among the I/M non-attainment counties but since 1995 "each I/M county is free to develop an I/M program that best meets the respective county's needs." Id. at 2.

1. The Salt Lake County I/M Inspection Program

Mr. McIntyre relies on the SIP, Section X, Part C, which addresses the vehicle inspection and maintenance program for Salt Lake County, to support his position and so it is this I/M program that will be reviewed to determine its applicability to "any other test or standard" under the third method in Section 59-10-1009(1)(b)(i)(C). McI. Mot. at 8-9; McI. Opp. at 2-4 and Exhibit A.

The Salt Lake County I/M program employs "ASM2 tailpipe inspections . . . for light duty gasoline vehicles older than 1996 . . . [while] On-Board Diagnostic (OBD) compliant 1996 and newer model year vehicles undergo an applicable OBD inspection." SIP § X, Part C at 2. The emissions standards under the ASM2 test are that vehicle emissions "shall not exceed the maximum concentrations for carbon monoxide (CO), oxides of nitrogen (NO_x) and Hydrocarbons (HC) . . . ." Att. 2, SL Health Reg. #22A at 4.1.3(i). The Director of the Salt Lake Valley Health Department sets the maximum concentration cutpoints based on the factors enumerated in SL Health Reg. 4.1.3(ii). Those emission standards "allow for quick adjustment of the standards in case actual failure rates fall below the level specified in the State Implementation Plan." SIP § X

Part C at 5.

Newer vehicles equipped with on board diagnostic equipment generally do not undergo an ASM2 tailpipe test. OBD or OBD II compliant vehicles are equipped with "an electronic monitoring and fault detection system . . . to self-diagnose and control the vehicle's emission controls and engine/transmission operation." Att. 2, SL Health Reg. #22A at 2.45. Emissions tests on these vehicles are pass/fail rather than meeting a numeric maximum concentration limit. Vehicles operated on alternative fuels, such as propane or natural gas, "are tested twice, once on each fuel." SIP § X Part C at 3. The Salt Lake County I/M program has a provision for vehicles that operate on alternative fuels and those vehicles "are tested according to the most stringent emission standards for that vehicle model year and vehicle type." Id. at 6.

In sum, the requirements for I/M testing depend upon the age of the vehicle: an ASM2 test measures tailpipe emissions on vehicles older than 1996; and a pass/fail OBD II test is conducted on 1996 or newer vehicles.

2. I/M Tests Conducted on McIntyre's 1996 Chevy Tahoe

The following I/M test were conducted on the 1996 Chevy Tahoe:

- Prior to conversion to operate on compressed natural gas (CNG): 2 ASM tests and 2 OBD II tests while operating on gasoline. *See* Att. 1-A.
- After conversion to operate on CNG: 2 ASM tests and 2 OBD II tests while operating on gasoline; and 2 ASM tests and 2 OBD II tests while operating on CNG. *See* Att. 1-B.

All OBD II tests show that the vehicle passed but those tests do not enumerate whether there has been a reduction of emission after the vehicle was converted to operate on CNG.

ASM tests are conducted at 15 mph and 25 mph. According to the I/M test results

conducted on McIntyre's vehicle pre conversion operating on gasoline and post conversion operating on gasoline and CNG, the maximum concentrations[10] were as follows:

Test	HC (PPM)	CO (%)	NO (PPM)
15 mph	91	0.55/0.56*	1093
25 mph	81	0.49	1043

*The CO maximum concentration at 15 mph for the pre-conversion gasoline ASM test was 0.55, while the post conversion gasoline and CNG ASM tests was 0.56. *Cf* Att.1-A with Att. 1-B.

Mr. McIntyre argues that because his vehicle operates on alternate fuels it was tested according to the most stringent standard and "the post-conversion vehicle has passed all six of the most stringent emissions standards for the year and model type." McI. Mot. at 9 (referring to "fuel switching" in the SIP, § X, Part C at 6). It is unnecessary to decide the purpose of the SIP fuel switching provision because whether pre or post conversion, whether operating on gasoline or CNG, all I/M test results for McIntyre's Chevy Tahoe show those tests were conducted using the same numeric concentration limits applicable to each of the three pollutants.[11]

3. Quantification and Objective Application of the I/M Testing Program to the Tax Credit Statute

It is obvious that because the OBDII test does not quantify emissions it cannot suffice to satisfy certification by the Board to demonstrate a reduction in emission under the third method. On the other hand, there are numeric values under the ASM test for hydrocarbons, carbon monoxide and nitric oxide. Consequently, the only portion of the I/M program that could conceivably be used to show a reduction in emissions is the ASM test, applicable to model year

[10]The I/M tests measured percentage of CO_2 and O_2 but a numeric standard was not listed on the I/M test results for those two pollutants. *See* Att. 1.

[11]Any difference in the CO maximum concentration limit is irrelevant because all post conversion ASM tests (whether operating on gasoline or on CNG) had to meet the 0.56 limit.

1995 and older vehicles for vehicles owners who reside in non-attainment areas. However, even under the ASM test, the I/M program does not require a reduction in emissions to pass the test. It merely requires the vehicle not exceed the maximum concentrations for HC, CO and NO.

Ignoring, for the moment that to pass the I/M test does not require a reduction in emissions, how would the agency determine, objectively for each tax claimant under the current rule, what constitutes a "reduction in emissions." If the measured emissions achieved a one percent reduction in emissions post conversion over pre conversion would that suffice? Must there by a reduction in all three measured pollutants or would a reduction in one or two pollutants suffice?[12] Could a vehicle owner in an attainment area choose an I/M program in a county that has higher concentration limits than other county I/M programs? Or for that matter, for purpose of the tax credit statute, must the vehicle owner, say in the Salt Lake Country non-attainment area, be permitted to use only an I/M testing station in Salt Lake County?

R307-110-33 incorporates a portion of the SIP, the I/M Program for Salt Lake County, into the rules. R307-110-33 is part of the generalized plan for how the State will attain and maintain compliance with nation ambient air quality standards. It contains no standards or guidance against which the agency may objectively evaluate eligibility for the tax credit statute.

4. Test or Standard Adopted by Board Rule

One theory underlying McIntyre's claim is that if the Board has adopted a rule for any purpose, he should be free to use that rule to show a reduction in emissions. Whether the Board

[12]In one instance the measured HC on McIntyre's vehicle was greater when operating on CNG than it was when measured operating on gasoline. *See* Att. 1-B (The August 21, 2008 post conversion I/M test run at 19:39 on gasoline measured 9pp HC at 15 mph and 14ppm at 25 mph, whereas the test run at 19:04 on CNG showed HC levels of 12 ppm and 18 ppm, respectively.).

adopted the I/M program for purposes of complying with the federal Clean Air Act, and not the tax credit statute, is irrelevant, according to Mr. McIntyre.

In 1996, when "Certified by the Board" was added to the cleaner burning fuel tax credit statute, Section 19-2-104(3)(u) was added at the same time giving the Board new authority to "establish certification procedures and requirements for certification of the conversion of a motor vehicle to a clean-fuel vehicle certifying the vehicle is eligible for the tax credit granted in Section 59-7-605 or 59-10-127 [now renumbered to 59-10-1007]." *See* 1996 Utah Laws Ch. 257 (S.B. 218). This combined piece of legislation suggests the Legislature anticipated the Board would use its new authority to develop rules for tax credit eligibility. Accordingly, it is reasonable to conclude that the third method of showing a reduction in emissions is only available if and when the Board decides to promulgate a rule specific to a reduction of emissions for purposes of the tax credit statute. To date, the Board has not exercised that authority as to individual tax claimants seeking a tax credit for converted vehicles.

5. Summary

The I/M testing program incorporated into R307-110-33 does not require a reduction in emission to pass the test. In addition, the only portion of the I/M test that actually quantifies emissions is an ASM test for vehicle model years 1995 or older, and that is only applicable in non-attainment areas of the State (*i.e.*, Salt Lake, Utah, Weber and Davis Counties). Also, the agency could not objectively use the I/M testing program as it is currently constituted to evaluate tax credit eligibility. Based on all the factors described in VII.A above, R307-110-33 cannot reasonably be considered a rule the Board has recognized for purposes of a tax credit under Section 59-10-1009(1)(b)(ii)(C)(III), that any and all Utah taxpayers may use to be eligible for a

tax credit for conversion of a Utah registered vehicle to operate on cleaner burning fuels.

B. Agency Rulemaking and Implementation of Board Procedures and Requirements for Tax Credit Eligibility

1. Statutory Provisions Required to be Implemented by the Agency

The cleaner burning fuels statute has two separate provisions the agency is required to implement. First, the Board must establish procedures for the tax claimant to provide proof of the purchase of an item for which tax credit is allowed. Utah Code Ann. § 59-10-1009(3)(a). Second, the Board must establish procedures and requirements to certify that a converted vehicle is eligible for a tax credit. Id. §§ 19-2-104(2)(u) and 59-10-1009(2)(a)(ii). Until the 2007 rule change, former R307-121-5 was a stand alone rule containing proof of purchase requirements and former R307-121-7 and R307-121-8 may have addressed Board certification requirements.

Mr. McIntyre asserts that to the extent the agency's 2007 rule varies from the statute, the rules are suspect and the agency has rewritten the rules to illegally remove the third method allowed by the statute. McI. Opp. at 5 (*citing* Williams v. Mountain States Tel. & Tel., 763 P.2d 796, 799 (Utah 1988). At issue in Williams was whether the agency ignored statutory factors (the statute stated, "the commission shall consider all *relevant* factors *including*, but not limited to: [factors (a) through (k)]." 763 P.2d at 799. The court held: "The intent of the legislature is clear; factors (a) through (k) are the minimum factors the commission shall consider." Id.

Williams is not controlling here. Section 59-10-1009 gives the Board discretion to recognize "any other test or standard" as the way in which a claimant demonstrates a reduction in emissions. In Section 59-10-1009, the Legislature mandated that the Board recognize EPA or other State certified conversion kits or testing in accordance with 10 C.F.R. Part 86 as the way in which a claimant demonstrates a reduction in emissions. But the Legislature did not mandate that

the Board recognize any other test or standard. Section 59-10-1009 merely gives the Board discretion to promulgate another test or standard through rulemaking.

2. The Rules in Effect Before the 2007 Rule Change

In this proceeding the agency takes the position that the definition of "Certification by the Board" is basically self-executing – at least, after DAQ started implementing the 2007 rule change in January 2008. On the other hand, Mr. McIntyre claims the agency did not afford proper notice of a change in agency practice when it conducted a major re-write of R307-121in 2007. It is, therefore, instructive to review the rules in effect before the 2007 rule change.

One rule in effect until July 2007, read as follows:

R307-121-5, *Proof of Purchase Vehicles Converted to Alternate Fuels*

> To obtain certification from the board that a conversion of a motor vehicle to be fueled by clean fuel is eligible,[13] proof of purchase shall be made by submitting the following documentation to the executive secretary:
> (1) VIN;
> (2) fuel type before conversion;
> (3) fuel type after conversion
> (4) either:
> (a) if within a county with an I/M program, a copy of the motor vehicle inspection report from an approved station showing that the converted alternate fuel vehicle meets county emission requirements for all installed fuel systems; or
> (b) a signed statement by an ASE certified technician that includes the VIN and states that the conversion is functional;
> . . . .
> (5) if the vehicle is newly converted within one year of the tax year in which the credit is to be claimed:
> (a) conversion system manufacturer;
> (b) conversion system model number;
> (c) date of the conversion;
> (d) name, address, and phone number of the person that converted the vehicle.

[13] "Eligible" was defined, in relevant part, to mean the vehicle is fueled by natural gas. R307-121-2 (effective until July 13, 2009).

The introductory sentence of former R307-121-5 refers to "certification from the board," but the latter part of the sentence suggests the rule only addressed proof of purchase procedures. Former R307-121-5 was repealed and re-enacted as R307-121-4(1) to (5) (effective July 13, 2007).

Two rules, in effect before the 2007 rule change,[14] appear to have addressed certification procedures. However, they were directed to "the system manufacturer," a term that is not defined, but presumably means the manufacturer of an alternative fuels conversion kit. Even before the 2007 amendment, there was no specific rule that addressed what an individual tax claimant must submit in order to satisfy certification by the Board pursuant to Section 59-10-1009(1)(b). Former R307-121-7 and 8 were repealed in 2007 and not re-enacted because "they are not currently required." Record CNGConv at 143.

Prior to the 2007 rule change "DAQ had not been requesting the submission of proof of either EPA certification or compliance with the 40 C.F.R. Part 86 Federal Testing Procedures before approving tax credit applications." Stip. Facts ¶ 16. Given the rules and practices that were in effect prior to the 2007 rule change, the issue is whether the Executive Secretary gave adequate notice of the rule change.

3. Adequacy of Notice for the 2007 Rule Change

The 2007 rule change was a major re-write of R307-121 which addressed not only a tax credit for converted vehicles, but also rules relating to original equipment manufactured vehicles and special mobile equipment. The notice in the *Utah State Bulletin* summarized the 2007 rule changes as follows:

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[14]Former R307-121-7 *Procedures for Obtaining Certification by the Board for Fuel Conversion Systems* and former R307-121-8 *Revocation of Certification*. *See* Att 5, May 1, 2007 *Bulletin* (struck out language to be repealed).

> 1) the Board is proposing to update the references to statute throughout R307-121; 2) the Board is proposing to reference statute to define terms that are already defined in the statutes; 3) the Board is proposing to require applicants to submit a copy of the current vehicle registration for each OEM or converted vehicle for which a tax credit is sought; 4) the Board is proposing to require proof of the certification for converted vehicles and special mobile equipment; and 5) the Board is proposing to remove Sections R307-121-3, R307-121-7, R307-121-8, and R307-121-9 because they are not currently required.

Utah State Bulletin, May 1, 2007, Vol 2007, No. 9 at 14. The notice summarizing the rule change relating to converted vehicles states the Board is requiring proof of certification. The text of the published rule says "proof of certification required in 59-10-1009(1)(b)" is part of the documentation a tax claimant is required to submit to the Executive Secretary. Id. at 17.

Mr. McIntyre zeros in on the summary of the general fiscal effect and compliance costs of changing R307-121. It is here that the agency says there is no change in costs "because the new requirement detailed in these revisions would simply codify current administrative practices relating to the tax credit." Id. at 14. This overview of the costs associated with the rule change relates to the entirety of the rule change. Even if the statements in the summary of the rule could be considered ambiguous, the rule is not. It requires the tax claimant to comply with Section 59-10-1009(1)(b) – even though the rule gives no guidance on how that is to be done. The agency met the Utah Administrative Rulemaking Act by publishing in the *Utah State Bulletin* the deletions and additions to the rule, and generally describing the proposed changes and their effect. *See* Utah Code Ann. §§ 63G-3-201, -301 and -303.

As addressed more fully below, the agency's reference in the rule to Section 59-10-1009 (1)(b), without more, did not violate the Rulemaking Act. Unlike the case of Williams v. Public Serv. Comm'n, 720 P.2d 773 (Utah 1986), the agency did not make a "change in clear law" by "reversing its long-settled position regarding the scope of its jurisdiction and announcing a

fundamental policy change," which, if it did, may have constituted inadequate rulemaking. *See* Ellis v. Utah State Ret. Bd., 757 P.2d 882, 887 (Utah App. 1988) (*citing* Williams, 720 P.2d at 776). Mr. McIntyre's complaint is that the agency's application of the 2007 rule change to his tax credit application is a change that the 2007 rulemaking does not satisfy. The agency's failure in the past had been in not applying Section 59-10-1009(1)(b) to tax credit applications. Now, the agency's application of the statutory language to the facts (*i.e.*, to tax credit applications) follows the policy decision of the Legislature in its enactment of the tax credit statute. *See* Ellis, 757 P.2d at 887 ("the Board was merely applying the explicit statutory language of the Disability Act to the facts of Ellis's case" (*emphasis omitted*)). In this case, the notice of the rule change in the *Utah State Bulletin* is adequate.

4. Equitable Estoppel

The analysis now turns to whether the agency should be equitably estopped from applying the amended rule to Mr. McIntyre (and other like tax claimants), after which the analysis addresses whether the agency has adequately implemented the statute and rules to determine tax credit eligibility for conversion of a vehicle to cleaner burning fuels.

As described by the Utah Court of Appeals, "Utah courts define equitable estoppel as 'conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct.'" Youngblood v. Auto-Owners Ins. Co., 2005UT App 154, ¶ 12, 111 P.3d 829 (*quoting* United Am. Life Ins. Co. v. Zions First Nat'l Bank, 641 P.2d 158, 161 (Utah 1982)).

The elements necessary to invoke equitable estoppel are:

> (1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on

> the basis of the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Holland v. Career Service Review Board, 856 P.2d 678, 682 (Utah App. 1993) (*citations omitted*). Equitable estoppel may only be asserted "against the State or its institutions in unusual situations in which it is plainly apparent that failing to apply the rule would result in manifest injustice." Id. The few cases in which courts have allowed estoppel against the government, "have involved **very specific written** representations by authorized government entities" and where the court found "the injustice to be suffered is of sufficient gravity, to invoke the exception. Id. (*emphasis in original; citations omitted*).

As we are dealing with motions for summary judgment, for the purpose of analyzing equitable estoppel, it will be assumed that Mr. McIntyre (a) relied on the written notice in the *State Bulletin* summarizing the fiscal effect and impact of the rule that the agency was not changing its past practice when it went through rulemaking in 2007; and as such (2) he purchased a non-EPA and non-State certified kit believing he would be entitled to a tax credit of up to $2,500 for the conversion of his Chevy Tahoe to operate on gasoline and compressed natural gas.[15] In such circumstances should the agency be estopped from treating Mr. McIntyre any differently in 2008 than it treated tax claimants in 2007.

In determining whether Mr. McIntyre is entitled to equitable estoppel, it is instructive to review the types of injustices and government representations the Utah courts have found to meet

[15]Mr. McIntyre asserts that if DAQ disputes the fact that he relied on the notice in the *Bulletin* in not submitting comments on the 2007 rule change, and in taking the tax credit into account when deciding on what equipment to install, he will need discovery and a hearing to establish reliance on the notice. McI. Reply at 5 and n. 1. Assuming Mr. McIntyre's asserted facts to be true, obviates any need for discovery or a hearing.

the unusual exception of applying estoppel against the government. In Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689 (Utah 1979), a liquor license applicant sought guidance from the Liquor Control Commission about an apparent ambiguity in the statutory distance a club could be located from a school. After making suggested changes, the applicant received a letter from the Commission stating the survey plot for the club complied with the statutory distance. In reliance on the Commission's letter, the applicant expended over $200,000 to complete the club and made other changes required to obtain a license. At that point, the court said the Commission was estopped from changing its interpretation of the statute as to this application and it could not deny the applicant a liquor license on the basis that its club did not comply with the 600-foot requirement.

Eldredge v. Utah State Ret. Bd., 795 P.2d 671 (Utah App. 1990), presents a situation in which Eldredge, a Country employee, could accept an open window for early retirement (25 years of service regardless of age) if about 6 years of initial service were credited to his years of service. Relying on the Retirement Board's specific representation that his initial service would be credited at no cost to him, Eldredge accepted early retirement. After paying Eldredge retirement benefits based on 26 plus years of service, the Retirement Board informed Eldredge he was ineligible for the initial six years of service, thereby reducing his benefits or requiring him to pay a lump sum, which would bankrupt him. The court analogized Eldredge to the position of the liquor licensee in Celebrity Club. Similar to the club owner, Eldredge sought guidance from the Retirement Board before retiring and relied on that representation to resign from a position be cannot regain. However, unlike Celebrity Club, "[t]he critical nature of the irrevocable, once-in-a-lifetime retirement decision of a public employee imposes a strict duty of certitude upon those

charged with the supervision of implementation of the [retirement] system." 795 P.2d at 676. The Board was estopped from denying the initial six years of service.

Unlike Eldredge, the court did not uphold estoppel in Holland v. Career Serv. Rev. Bd., 856 P.2d 678 (Utah App. 1993). As part of a reduction in force, Holland was laid off from his job as an apprentice graphic art specialist at the State Printing Office, Grade 19, with a hourly mid-point salary range of $10.84 and hourly maximum of $12.67. Holland declined other job offers and was placed on the statewide reapportionment register. Holland filed a grievance because he was not considered an applicant with reapportion rights when he applied for a Graphic Arts Specialist 19 position with an hourly mid-point salary range of $10.94 and hourly maximum of $13.06 per hour, requiring four years of prior experience. The reason for denial of reapportion rights was based on Holland's lower previous salary in a position that required only one year of experience. In applying the equitable estoppel factors, the court found Holland did not received any "specific written representation" that he was entitled to reinstatement at Grade 19; Holland did not rely on reinstatement at Grade 19 because he had previously applied for both Grade 17 and 19 positions; and because "Holland was never qualified for reinstatement into a Grade 19 position, he did not have a right thereto, and DHRM's refusal to reinstate him into such a position cannot be viewed as causing him injury." Holland 856 P.2d at 682-83.

Applying the equitable estoppel factors to Mr. McIntyre's situation, there was no "specific written representation" by a government official like there was in Celebrity Club or Eldredge. Mr. McIntyre did not obtain a letter from DAQ saying a non-EPA certified kit would be eligible for a tax credit. Rather he relied on a generalized statement in the *State Bulletin*, addressed to the public at large, regarding the costs and effect of the new rule change. Mr. McIntyre's reliance on

the notice in the *State Bulletin* is similar to Holland's reliance on his generalized Grade 19 position. Accordingly, the specificity of the notice has not been met.

Nor did Mr. McIntyre suffer injury of sufficient gravity to invoke equitable estoppel. Mr. McIntyre's alleged injury is that he was not treated the same as 2007 tax credit applicants, thereby making him ineligible for a tax credit. The grievance here does not compare with those in Celebrity Club and Eldredge. The case here is also unlike one filed in Utah Third District Court against the Department of Public Safety for changing its safety inspection manual (without going through rulemaking) making a vehicle *per se* ineligible to pass a safety inspection if it had installed a non-EPA certified conversion kit.[16] Here, Mr. McIntyre is still able to have full use of his vehicle. Moreover, as we are dealing with a tax credit statute, it is strictly construed against the taxpayer.[17]

Mr. McIntyre has not shown that he has suffered injury because, based on the conclusion above, the Board has not promulgated a rule recognizing I/M testing as means of satisfying

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[16]*See* Lieber, *et al.* v Davenport, *et al.*, Third District Court, Salt Lake Dept., Civil No. 090901808. This case, brought by three non-EPA CNG conversion kit manufacturers and an individual, settled based on a stipulation permanently enjoining the Department of Public Safety from enforcing a provision that mandated rejection of any vehicle equipped with a CNG conversion on the basis that the conversion is not EPA-certified but the injunction did not preclude rejection based on safety factors. Id. Stipulation and Settlement Agreement (filed August 28, 2009).

[17]Continental Tel. Co. of Utah v. State Tax Comm'n of Utah, 539 P.2d 447, 450 (Utah 1975) ("While the general rule as to taxing statutes is that they are construed strictly against the taxing authority and favorably to the taxpayer, the reverse is true as to provisions allowing deductions. It is usually held that deductions are allowed as a matter of grace and therefore should be strictly construed.") *Cf.* McFarlane v Utah Tax Comm'n, 2006 UT 25, ¶¶ 11, 20, 134 P.3d 1116 (Recognizing the general proposition that tax credit statutes are to be strictly construed against the taxpayer, the court nonetheless found the plain language of the statute is clear in extending certain tax credits.).

method three. Nor has he shown that the plain language of the statute entitles him to a tax credit rebate. The agency is not estopped from enforcing R307-121, as amended in 2007.[18]

C. The Agency's Implementation and Enforcement of the Tax Credit Statute

Having found Mr. McIntyre's application ineligible for a tax credit does not mean that the agency's implementation and enforcement of the tax credit statute is not subject to legitimate criticism. Notably, the "Certification by the Board" statutory provision was enacted in 1996 and has remained the same since then, except for renumbering and minor editorial changes. Only recently, starting January 1, 2008, does the agency enforce the certification provision by requiring individual tax claimants submit proof that (1) a converted vehicle has an EPA or other recognized State certified kit installed or (2) a vehicle was tested before and after kit installation under 40 C.F.R. Part 86 Federal Test Procedures. Before the 2007 rule change, the agency had not been enforcing this statutory requirement. It had essentially been granting some taxpayers a windfall because the Executive Secretary had been approving tax credit applications as eligible for a tax credit even though the converted vehicle did not have an appropriately certified kit installed or had not undergone Federal Test Procedures.[19] Stip. Facts ¶ 16.

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[18]At oral argument counsel for the Executive Secretary asserted that as Mr. McIntyre only raised equitable estoppel in his reply, it is untimely and improperly pled. Tr. at 68. *See* Estate of Justheim v. Ebert, 824 P.2d 432 (Utah App. 1991). It is unnecessary to decide whether McIntyre's estoppel argument is timely because the issue has been decided against him.

[19]The agency's decision to not apply the new rule in mid-2007 was reasonable because it avoided treating some 2007 taxpayers differently from other 2007 taxpayers. In hindsight, the rule should have been written to apply at the beginning the calendar year.

Another shortcoming in the agency's practice is the lack of clarity in its major overhaul of R307-121 in 2007. Rather than the stated purpose of simplifying R307-121,[20] the amended rule makes no distinction between what a tax claimant must submit to demonstrate a reduction in emission, on the one hand, and proof of purchase on the other, or provides no guidance at all. The introductory sentence to R307-121-4, *Procedures for Vehicles Converted to Clean Fuels*, says "proof of purchase shall be made by submitting the following documentation to the executive secretary."[21] The rule then conflates "proof of purchase" and reduction in emissions by requiring "proof of certification required in 59-10-1009(1)(b)" under item 6 of R307-121-4.[22] The agency seems to believe that demonstration of the reduction in emission pursuant to Section 59-10-1009(1)(b) is self executing. It is not. While the reduction in emission language is contained in the definition of "certified by the board," it is a substantive requirement that R307-121 should address with specificity. It is recommend that the rule be re-drafted to clearly delineate the requirements to satisfy the statutory certification provision and, separately, the proof of purchase provision.

As to the certification provision, the rule should articulate what documentation is required to prove that a claimant has installed an EPA kit or kits whose certification standards are

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[20]*See* Att. 5, May 1, 2008, *Utah State Bulletin* at 14 ("The purpose of the change is to clarify and simply the language of the rule . . . .").

[21]The complete sentence reads: "To demonstrate that a conversion of a motor vehicle to be fueled by clean fuel is eligible, proof of purchase shall be made by submitting the following documentation to the executive secretary." Utah Admin. Code R307-121-4.

[22]The rule is also ambiguous whether details about the conversion system manufacturer and installer in item 5 satisfy item 6 that the vehicle has an appropriately certified kit installed on the vehicle. *See* Utah Admin. Code R307-121-4(5) and (6).

recognized by the Board.[23]

The agency cannot change the statute as written. But it should not leave the impression that an individual tax claimant can satisfy the reduction in emissions requirement under methods 2 and 3. It is irrational that method 2, using a 40 C.F.R. Part 86 Federal Test Procedure,[24] is something a tax claimant requesting a tax credit of $2,500 or less will use. First, there are no Federal Test Procedure facilities located in Utah.[25] Second, it costs tens of thousands of dollars and takes more than 24 hours to have a vehicle tested under Federal Test Procedures.[26]

Finally, R307-121-4 should be absolutely clear that currently there is no Board rule that recognizes any other test or standard to demonstrate a reduction in emission. Of course, it is within the Board's power to direct the Executive Secretary to draft a rule recognizing a standard should the Board decide there is another way a tax credit applicant can demonstrate a reduction in emission.

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[23]The record contains a fax listing CARB-approved natural gas conversion equipment but there is nothing in the record to indicate whether or not the Board has recognized these CARB-approved kits. *See* Record CNGConv at 439-48.

[24]*Federal Test Procedure*, or *FTP* is defined by EPA to mean "the test procedure as described in § 86.130–00 (a) through (d) and (f) which is designed to measure urban driving tail pipe exhaust emissions and evaporative emissions over the Urban Dynamometer Driving Schedule as described in appendix I to this part." 40 C.F.R. § 82.002

[25]Oral Argument Tr. at 29 (the closest facilities to Utah are in Colorado and Arizona). *See also* http://www.mlmwatchdog.com/_____New_lablist.pdf (unofficial list showing FTP facilities located the western United States to be in Mesa, Arizona; Fort Collins and Aurora, Colorado; and others in California).

[26]An EPA schedule shows the fee in 2006 for compliance with emission requirements (including those in Part 86) for light duty trucks to be $33,883.00 for a Federal certificate and $16,944.00 for a California-only certificate. 40 C.F.R. §§ 85.2405(a) and 85.2403(a) (definition of "Federal certificate"). The test sequence for the Federal Test Procedure shows procedures at the beginning of the test lasting 6-36 hours and12-36 hour for a later part of the test. 40 C.F.R. § 86.130-96, Fig. B96-10, *Test Sequence*.

VIII. FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties' stipulated undisputed facts, as set forth in part III above, are adopted as the findings of facts for purposes of deciding the parties' summary judgment motions.

Based on the Analysis in Part VII above, the conclusions of law are as follows:

1. The Inspection and Maintenance Program, as incorporated into the State Implementation Plan, which in turn is incorporated into R307-110-33, does not constitute a "test or standard recognized by board rule" pursuant to Utah Code Ann. § 59-10-1009(1)(b)(i) (C)(III) (West 2008).

2. The Executive Secretary met the notice requirements when proposing changes to R307-121 in 2007. *See Utah State Bulletin,* Vol. 2007, No. 9 at 14-17 (May 1, 2007).

3. The Executive Secretary is not estopped from denying that Mr. McIntyre was ineligible for a tax credit.

4. Tax claimant McIntyre was not entitled to a tax credit for conversion of his Chevy Tahoe to operate on gasoline and compressed natural gas using a conversion kit that was not certified by EPA or other State whose certification standards are recognized by the Board.

IX. RECOMMENDED ORDER

Based on the memoranda filed in this proceeding, the oral arguments presented, and the analysis above, it is recommended,

1. The Board affirm the Executive Secretary's decision to reject Mr. McIntyre's tax credit application as eligible for a tax credit pursuant to Utah Code Ann. § 59-10-1009(1)(b)(i) (C)(III) (West 2008).

2. The Board direct the Executive Secretary and her staff to re-draft R307-121 so that the rule clearly describes the documentation and information needed to satisfy both the certification and proof of purchase statutory provisions.

DATED this 8th day of December, 2009.

/s/ Denise Chancellor

Denise Chancellor
Administrative Law Judge
Utah Attorney General's Office
160 East 300 South, 5th Floor
PO Box 140872
Salt Lake City UT 84114-0873
Email: dchancellor@utah.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2009, I caused a copy of the RECOMMENDED MEMORANDUM DECISION AND ORDER to be to be mailed, postage prepaid by United States mail (unless otherwise stated) and emailed, to the following:

Cheryl Heying
Executive Director
Utah Air Quality Board
150 North 1950 West
Salt Lake City UT 84114
(State Building Mail)
cheying@utah.gov

Richard R. Golden
Kristin Jacobs
McIntyre and Golden, P.C.
3838 South West Temple, Suite 3
Salt Lake City UT 84115
rick@mcintyre-golden.com
Counsel for Mr. McIntyre

Christian Stephens
Assistant Attorney General
Utah Division of Air Quality
150 North 1950 West
Salt Lake City UT 84114
(State Building Mail)
cstephens@utah.gov
Counsel for the Executive Secretary

Fred G Nelson
Assistant Attorney General
160 East 300 South, 5th Floor
PO Box 140873
Salt Lake City UT 84114-0873
(Hand Delivery)
fnelson@utah.gov
Counsel to the Utah Air Quality Board

Paul McConkie
Assistant Attorney General
160 East 300 South, 5th Floor
PO Box 140873
Salt Lake City UT 84114-0873
(Hand Delivery)
pmcconkie@utah.gov
Counsel for the Executive Secretary

/s/ Denise Chancellor

Denise Chancellor
Administrative Law Judge