

IDAPA 58 - DEPARTMENT OF ENVIRONMENTAL QUALITY

58.01.01 - RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO

DOCKET NO. 58-0101-1601

NOTICE OF RULEMAKING - PROPOSED RULE

AUTHORITY: In compliance with Section 67-5221(1), Idaho Code, notice is hereby given that this agency has initiated proposed rulemaking. The action is authorized by Sections 39-105, 39-107, and 39-114, Idaho Code.

PUBLIC HEARING SCHEDULE: A public hearing concerning this proposed rulemaking will be held as follows:

Tuesday, October 11, 2016, 3:00 pm

**Department of Environmental Quality
Conference Room A
1410 N. Hilton, Boise, Idaho**

The hearing site will be accessible to persons with disabilities. Requests for accommodation must be made no later than five (5) days prior to the hearing. For arrangements, contact the undersigned at (208) 373-0418.

DESCRIPTIVE SUMMARY: The Crop Residue Burning (CRB) Program has been implemented by DEQ since 2008. One aspect of the program requires that, prior to approving a crop residue burn, DEQ must determine that 1) air quality is not exceeding 75% of any National Ambient Air Quality Standard (NAAQS), and 2) air quality is not projected to exceed such level during the next 24 hours. Fine particulate matter (PM_{2.5}) is the pollutant most directly affected by crop residue burning. There are days when PM_{2.5} concentrations are not a concern, but ozone concentrations exceed or are projected to exceed 75% of the ozone NAAQS.

In 2015, the U.S. Environmental Protection Agency (EPA) reduced the ozone NAAQS from 75 ppb to 70 ppb. The ozone NAAQS reduction is included in DEQ's incorporation by reference rule docket 58-0101-1603. As a result of the ozone NAAQS reduction, there would be fewer days when DEQ could approve crop residue burns despite the fact that 1) the weather conditions exhibit good smoke dispersion characteristics, and 2) DEQ technical staff expect the burns to have minimal impact on ambient ozone concentrations (NAAQS). Therefore, burning may not be allowed on good burn days even when the burn is not predicted to cause or significantly contribute to a violation of the ozone NAAQS.

Through the negotiated rulemaking process, DEQ developed a proposed rule that gives DEQ the authority to allow crop residue burning when ozone levels are not exceeding, or expected to exceed, 90% rather than 75% of the ozone NAAQS. This new 90% level is still protective of the ozone NAAQS, and also provides farmers the ability to burn while following smoke management best practices. This rule will be promulgated under Docket No. 58-0101-1601 and is published with this notice. As an outgrowth of the negotiations, DEQ also developed an interim rule that allows the CRB Program to continue operating under the 2008 ozone NAAQS until EPA approves the new 90% ozone level in a revised State Implementation Plan (SIP). This rule will be promulgated separately under Docket No. 58-0101-1604.

Before the Board of Environmental Quality (Board) can adopt the rule, it is necessary to revise Idaho Code § 39-114 for consistency with the revisions in this proposed rule docket. DEQ intends to submit draft proposed legislation to the 2017 Legislature. If the legislation is passed by the Legislature and approved by the Governor, it will become effective immediately. DEQ will then present the final rule proposal to the Board for adoption.

Interim Rule Proposed Under Rule Docket 58-0101-1604:

The proposed revisions in rule docket 58-0101-1604 allow that, for purposes of the ozone NAAQS, the 2008 NAAQS shall apply. The adoption of this proposed rule would maintain the status quo for the 2017 burn season, allowing the CRB Program to utilize the 2008 ozone NAAQS until EPA approves the SIP revision for rule docket 58-0101-1601. It is anticipated that EPA will approve the SIP revision by February 28, 2018. Without using the 2008 ozone NAAQS, the reduction in burn days could cause considerable economic hardship to grass seed growers for no environmental or public health benefit.

90% Ozone NAAQS Proposed Under Rule Docket 58-0101-1601:

The proposed revision in rule docket 58-0101-1601 changes the percent of the ozone NAAQS, upon which no crop residue burning is allowed, from 75% to 90%. If the rule is adopted by the Board, DEQ will prepare a technical document demonstrating that the change from 75% to 90% will not cause or significantly contribute to a violation of the ozone NAAQS. DEQ will then submit the rule and technical document to EPA as a SIP revision under Section 110 of the Clean Air Act. Contingent upon EPA SIP approval, Subsection 621.01 adopted under rule docket 58-0101-1601 would take effect on February 28, 2018 replacing Subsection 621.01 adopted under rule docket 58-0101-1604. Consequently, state law and Idaho's federally approved SIP will mirror each other at that time.

Farmers desiring to burn crop residue, members of the regulated community who may be subject to Idaho's air quality rules, special interest groups, Idaho State Department of Agriculture, tribes, public officials, and members of the public who have an interest in the regulation of air emissions from sources in Idaho may be interested in commenting on this proposed rule. The proposed rule text is in legislative format. Language the agency proposes to add is underlined. Language the agency proposes to delete is struck out. It is these additions and deletions to which public comment should be addressed.

After consideration of public comments, and after passage of companion legislation revising Idaho Code § 39-114, DEQ intends to present the final rule proposal to the Board for adoption of a temporary/pending rule. If adopted by the Board, temporary rule docket 58-0101-1604 will become effective immediately and temporary rule docket 58-0101-1601 will become effective February 28, 2018. The rules will then be submitted to the 2018 Legislature for review and approval. Pursuant to Idaho Code § 67-5226(1)(c), the Governor has found that adoption of a temporary rule is appropriate as it will provide greater flexibility to farmers using the tool of crop residue burning while still following good smoke management best practices.

NEGOTIATED RULEMAKING: The text of the proposed rule was drafted based on discussions held and concerns raised during negotiations conducted pursuant to Idaho Code § 67-5220 and IDAPA 58.01.23.810-815. The Notice of Negotiated Rulemaking was published in the May 2016 issue of the Idaho Administrative Bulletin, and a preliminary draft rule was made available for public review. Meetings were held on May 18, June 23, July 20, and July 27, 2016. Members of the public participated in the negotiated rulemaking process by attending the meetings and by submitting written comments. The negotiated rulemaking record, which includes the negotiated rule drafts, written public comments, documents distributed during the negotiated rulemaking process, and the negotiated rulemaking summary, is available at www.deq.idaho.gov/58-0101-1601.

All comments received during the negotiated rulemaking process were considered by DEQ when making decisions regarding development of the rule. At the conclusion of the negotiated rulemaking process, DEQ formatted the final draft (Draft No. 4) for publication as a proposed rule. DEQ is now seeking public comment on the proposed rule.

IDAHO CODE SECTION 39-107D STATEMENT: This proposed rule does not regulate an activity not regulated by the federal government, nor is it more stringent than federal regulations.

In January 2007, the Ninth Circuit Court of Appeals held that Idaho's crop residue burning rules were illegal because there was not an adequate demonstration that the rules were compliant with the federal Clean Air Act. As a result, Governor Otter called for growers and activists to join with state regulators to negotiate a statute and implementing rules that would allow crop residue burning to resume under the Clean Air Act. The statute, Idaho Code § 39-114, and rules, IDAPA 58.01.01.618 through 624, together with an air quality demonstration that open burning when ambient air quality is at or below 75% of any NAAQS does not cause or significantly contribute to a violation of the NAAQS, were then submitted to EPA for approval as part of Idaho's SIP. EPA approved the SIP submittal as compliant with the Clean Air Act on August 1, 2008.

As noted, Idaho Code § 39-114 includes the requirement to review all NAAQS prior to approving a crop residue burn. Consequently, that is what is now required by state law and federal law in the federally approved SIP. The prohibition of crop residue burning if particulate matter is at, or expected to reach, 75% of the NAAQS mirrors EPA Region 10's Federal Air Rules for Reservations (FARR).

It is anticipated the 2017 Legislature will revise Idaho Code § 39-114 for consistency with the revisions in the

proposed rule docket. Because the Interim Rule and 90% Ozone Rule require a review of all NAAQS prior to allowing a crop residue burn, while the FARR requires EPA and/or the Tribes to review the particulate matter NAAQS, one could argue the rules and statute are broader in scope than federal regulations. However, because the current specifically negotiated statute and rules are in the federally approved SIP, they are now considered federal law. The Interim Rule maintains the status quo while the 90% Ozone Rule will be submitted to EPA for approval as a SIP revision. To obtain EPA approval, DEQ will provide the best available peer reviewed science and supporting information to demonstrate that loosening the ozone burn approval criteria from 75% to 90% of the ozone NAAQS will not cause or significantly contribute to a violation of the ozone NAAQS.

INCORPORATION BY REFERENCE: Pursuant to Section 67-5229(2)(a), Idaho Code, the following is a brief synopsis of why the incorporation by reference is necessary: Not Applicable

FISCAL IMPACT STATEMENT: The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year: Not Applicable

ASSISTANCE ON TECHNICAL QUESTIONS AND SUBMISSION OF WRITTEN COMMENTS: For assistance on technical questions concerning this rulemaking, contact Mary Anderson at mary.anderson@deq.idaho.gov or (208) 373-0202.

Anyone may submit written comments by mail, fax or e-mail at the address below regarding this proposed rule. DEQ will consider all written comments received by the undersigned on or before October 11, 2016.

Dated this 7th Day of September, 2016

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THE FOLLOWING IS THE PROPOSED TEXT OF DOCKET NO. 58-0101-1601
(Only Those Sections With Amendments Are Shown.)

621. BURN DETERMINATION.

01. Burn Approval Criteria. The Department shall develop a Crop Residue Operating Guide to use in assisting in the determination of burn approvals. The permittee shall obtain initial approval from the Department for the proposed burn at least twelve (12) hours in advance of the burn. The permittee shall confirm, with the Department, the approval the morning of the proposed burn. The Department may shorten this time frame if meteorological or other applicable conditions change that will impact the air quality during the proposed burn period. To approve a permittee's request to burn, the Department must determine that ambient air quality levels do not exceed ninety percent (90%) of the ozone national ambient air quality standard (NAAQS) and seventy-five percent (75%) of the level of any ~~national ambient air quality standards~~ other NAAQS on any day and are not projected to exceed such level over the next twenty-four (24) hours, and ambient air quality levels have not reached, and are not forecasted to reach and persist at, eighty percent (80%) of the one (1) hour action criteria for particulate matter under Section 556 of these rules. In making this determination, the Department shall consider the following: ~~(5-8-09)~~()

- a. Expected Emissions. Expected emissions from all burns proposed for the same dates; (5-8-09)
- b. Proximity of Other Burns. The proximity of other burns and other potential emission sources within

- the area to be affected by the proposed burn; (5-8-09)
- c.** Moisture Content. Moisture content of the material to be burned; (5-8-09)
 - d.** Acreage, Crop Type, and Fuel Characteristics. Acreage, crop type, and fuel characteristics to be burned; (5-8-09)
 - e.** Meteorological Conditions. Meteorological conditions; (5-8-09)
 - f.** Proximity to Institutions with Sensitive Populations. The proximity of the burn to institutions with sensitive populations, including public schools while in session; hospitals; residential health care facilities for children, the elderly or infirm; and other institutions with sensitive populations as approved by the Department. The Department shall not authorize a burn if conditions are such that institutions with sensitive populations will be adversely impacted or when the plume is predicted to impact such institutions; (5-8-09)
 - g.** Proximity to Public Roadways. Proximity to public roadways; (5-8-09)
 - h.** Proximity to Airports. Proximity to airports; and (5-8-09)
 - i.** Other Relevant Factors. Any other factors relevant to preventing exceedances of the air quality concentrations of Section 621. (5-8-09)
- 02. Notification of Approval.** If the Department approves the burn, then it will post on its website written notification of the approval and any specific conditions under which the burn is approved. Special conditions may include, but are not limited to: (5-8-09)
- a.** Conditions for burns near institutions with sensitive populations; (5-8-09)
 - b.** The requirement to withhold additional material such that the fire burns down if the Department determines pollutant concentrations reach the levels in Subsection 621.01 of this rule; (5-8-09)
 - c.** Conditions to ensure the burn does not create a hazard for travel on a public roadway; and (5-8-09)
 - d.** The requirement to consult with the Department to determine actions to be taken if conditions at the burn site fail to satisfy the conditions specified in the notice of approval to burn. (5-8-09)