



Eric Milstead  
Director

# Legislative Services Office

## Idaho State Legislature

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### MEMORANDUM

**TO:** Senators HEIDER, Souza, Jordan and,  
Representatives RAYBOULD, Thompson, Smith

**FROM:** Katharine Gerrity - Deputy Division Manager

**DATE:** May 03, 2017

**SUBJECT:** Temporary Rule

IDAPA 58.01.01 - Rules for the Control of Air Pollution in Idaho - Adoption of Temporary and Pending Rule - Docket No. 58-0101-1601

IDAPA 58.01.01 - Rules for the Control of Air Pollution in Idaho - Adoption of Temporary Rule - Docket No. 58-0101-1604

We are forwarding this temporary rule to you for your information only. No analysis was done by LSO. This rule is posted on our web site. If you have any questions, please call Katharine Gerrity at the Legislative Services Office at (208) 334-4834. Thank you.

Attachment: Temporary Rule

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## 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 – ADOPTION OF TEMPORARY AND PENDING RULE

**EFFECTIVE DATE:** This rule has been adopted by the Board of Environmental Quality (Board) as a temporary and pending rule. The temporary rule will become effective on February 28, 2018. The pending rule will become final and effective immediately upon the adjournment sine die of the Second Regular Session of the Sixty-fourth Idaho Legislature unless prior to that date the Legislature specifies by concurrent resolution a different effective date, or rejects the rule in whole or in part by concurrent resolution in accordance with Idaho Code Sections 67-5224 and 67-5291. In no case shall the temporary or pending rule become effective before the date EPA approves the State Implementation Plan submittal that changes the percent of the ozone NAAQS, upon which no crop residue burning is allowed, from 75% to 90%, as promulgated under Docket No. 58-0101-1601.

**AUTHORITY:** In compliance with Sections 67-5224 and 67-5226, Idaho Code, notice is hereby given that the Board has adopted a temporary and pending rule. This action is authorized by Sections 39-105, 39-107, and 39-114, Idaho Code (S1009).

**DESCRIPTIVE SUMMARY:** A detailed summary of the reason for adopting this rule is set forth in the initial proposal published in the Idaho Administrative Bulletin, September 7, 2016, [Vol. 16-9, pages 288 through 291](#). After consideration of public comments, the rule has been adopted as initially proposed. The Rulemaking and Public Comment Summary can be obtained at [www.deq.idaho.gov/58-0101-1601](http://www.deq.idaho.gov/58-0101-1601) or by contacting the undersigned.

**TEMPORARY RULE JUSTIFICATION:** 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.

**IDAHO CODE SECTION 39-107D STATEMENT:** This 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).

This rule is consistent with the revisions to Idaho Code § 39-114 enacted by the 2017 Legislature (S1009). 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 2008 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.

**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: N/A

**ASSISTANCE ON TECHNICAL QUESTIONS:** For assistance on technical questions concerning this rulemaking, contact Mary Anderson at [mary.anderson@deq.idaho.gov](mailto:mary.anderson@deq.idaho.gov) or (208) 373-0202.

Dated this 3rd day of May, 2017.

Paula J. Wilson  
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**DOCKET NO. 58-0101-1601 - ADOPTION OF PENDING AND TEMPORARY RULE**  
**THE FOLLOWING IS THE TEXT OF THE TEMPORARY RULE FOR DOCKET NO. 58-0101-1604**  
**(Only Those Sections With Amendments Are Shown.)**

**Note:** This rule was promulgated under Docket No. 58-0101-1601 (90% ozone NAAQS rule) and will become effective on February 28, 2018. Until the date this rule becomes effective, the interim rule promulgated under Docket No. 58-0101-1604 will remain in effect and is available at [www.deq.idaho.gov/58-0101-1604](http://www.deq.idaho.gov/58-0101-1604).

**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)~~ (2-28-18)T

- 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)

## IDAPA 58 – DEPARTMENT OF ENVIRONMENTAL QUALITY

### 58.01.01 – RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO

#### DOCKET NO. 58-0101-1604

#### NOTICE OF RULEMAKING – ADOPTION OF TEMPORARY RULE

**EFFECTIVE DATE:** This temporary rule was adopted by the Board of Environmental Quality (Board) on March 16, 2017. The temporary rule shall be effective on March 17, 2017, and shall remain in effect until February 28, 2018. In the event that EPA does not approve by February 28, 2018, the State Implementation Plan (SIP) submittal that changes the percent of the ozone NAAQS, upon which no crop residue burning is allowed, from 75% to 90%, as promulgated under Docket No. 58-0101-1601, the temporary rule will remain in effect until the adjournment sine die of the Second Regular Session of the Sixty-fourth Idaho Legislature unless prior to that date the rule is extended by concurrent resolution. In no case shall the temporary rule remain in effect beyond the date EPA approves the SIP submittal.

**AUTHORITY:** In compliance with Section and 67-5226, Idaho Code, notice is hereby given that the Board has adopted a temporary rule. This action is authorized by Sections 39-105, 39-107, and 39-114, Idaho Code (S1009).

**DESCRIPTIVE SUMMARY:** A detailed summary of the reason for adopting this rule is set forth in the initial proposal published in the Idaho Administrative Bulletin, September 7, 2016, [Vol. 16-9, pages 292 through 295](#). The rule was not revised in response to public comments but was revised for consistency with Idaho Code § 39-114 as amended by the 2017 Legislature in S1009. The Rulemaking and Public Comment Summary can be obtained at [www.deq.idaho.gov/58-0101-1604](http://www.deq.idaho.gov/58-0101-1604) or by contacting the undersigned.

**TEMPORARY RULE JUSTIFICATION:** 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.

**IDAHO CODE SECTION 39-107D STATEMENT:** This 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).

This rule is consistent with the revisions to Idaho Code § 39-114 enacted by the 2017 Legislature (S1009). 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 2008 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.

**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: N/A

**ASSISTANCE ON TECHNICAL QUESTIONS:** For assistance on technical questions concerning this rulemaking, contact Mary Anderson at [mary.anderson@deq.idaho.gov](mailto:mary.anderson@deq.idaho.gov) or (208) 373-0202.

Dated this 3rd day of May, 2017

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**THE FOLLOWING IS THE TEXT OF THE TEMPORARY RULE FOR DOCKET NO. 58-0101-1604**  
**(Only Those Sections With Amendments Are Shown.)**

Note: This rule was promulgated under Docket No. 58-0101-1604 (interim rule) and will be effective on March 17, 2017 until February 28, 2018. On February 28, 2018, the rule promulgated under Docket No. 58-0101-1601 (90% ozone NAAQS rule) will become effective and is available at [www.deq.idaho.gov/58-0101-1601](http://www.deq.idaho.gov/58-0101-1601).

**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 seventy-five percent (75%) of the level of any national ambient air quality standard\* (NAAQS) on any day, provided however, for purposes of the ozone NAAQS, the 2008 standard of point zero seven five (.075) parts per million, 73 Fed. Reg. 16435, 16511 (March 27, 2008) shall apply, 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)~~(3-17-17)T

- 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)