September 12, 2002

David Bray
U.S. EPA Region 10
1200 Sixth Avenue
Seattle, WA 98101

Re: Comments on the Proposed Rule Approving revisions to the State of Idaho's State Implementation Plan – 67 Fed. Reg. 52666-52674 (August 13, 2002)

Dear Mr. Bray:

The Idaho Department of Environmental Quality (DEQ) supports Region 10 of the U.S. Environmental Protection Agency (EPA) in your proposal to approve numerous revisions to Idaho's State Implementation Plan (SIP) submitted to EPA in a series of transmittals over the past nine years. There are a few rule provisions EPA has proposed not to act on, and one rule provision EPA proposes to conditionally approve. Please accept the following comments on your proposal.

Prepermit Construction Approval – Section 213

In proposing to approve Section 213, EPA states "[a]lthough this provision is somewhat different than the traditional minor new source review programs in most States, EPA believes it is consistent with the requirements of the CAA and EPA's regulations, and is therefore approvable as a SIP revision." 67 Fed. Reg. 52669. Several paragraphs later EPA states:

> However, in order to ensure that sources do not inappropriately begin construction using this provision, EPA is proposing to approve this rule with the condition that IDEQ submit to EPA, within five (5) working days of issuance, copies of all written approvals, draft permits, and final permits for sources which utilize this provision.

Id. at 52670. Your proposal to approve Section 213, conditioned on the sharing of already issued documents, is inappropriate and unacceptable to DEQ. From an administrative and legal

standpoint, DEQ opposes approval on the conditions you propose. If a document were not sent to EPA within five days, would it void EPA approval of the Rule?

As a matter of course, DEQ provides EPA with a copy of every permit issued, including Permits to Construct, Tier II Operating Permits and Tier I Operating Permits. If EPA wishes to request other submittals from DEQ, we may be able to document this commitment in a written agreement. Documenting it as a condition to EPA approval of the SIP is unworkable.

Permit to Construct Exemptions – Section 220 through 223

IDAPA 58.01.01.220.01.a.iii requires sources that are not specifically listed as exempt under Section 222.02 to demonstrate, with modeling, that the source will not cause or contribute to a violation of an ambient air quality standard. EPA's proposal states that the exemption provisions would be approvable without the modeling requirement. Id. at 52670. The modeling requirement was included in the Idaho Rules as a means to ensure non-listed, exempt sources do not cause or significantly contribute to a violation of an ambient air quality standard. As such, the requirement is a necessary part of Idaho's program to "assure that national ambient air quality standards are achieved" as required by section 110(a)(2)(C) and (D) of the Clean Air Act (CAA). This provision is appropriately included as part of Idaho's SIP, and subsequently enforceable by EPA or in a citizen suit.

EPA proposes to not approve Section 222.03 claiming it conflicts with Section 110(a)(2)(c) of the CAA and 40 C.F.R. 51.160, which require that the SIP identify types and sizes of sources subject to review and enforcement. To qualify for an exemption under Section 222.03, a source must be a natural minor source (the potential to emit cannot equal or exceed 100 tons per year of any regulated air pollutant). Section 220.01. Additionally, the emissions increase cannot constitute a major modification (for a major facility, the potential to emit emissions cannot equal or exceed the significant emissions rates set out in the definition of significant at Section 006). Section 220.01. Finally, and most importantly, DEQ must review and approve the ambient modeling to ensure the source's proposed emissions would not cause or significantly contribute to a violation of any ambient air quality standard. Section 222.03.b. The type and size of sources subject to review is identified and the predicted ambient impact is assessed. The Section 222.03 exemption is not prohibited under the CAA and should be approved as part of Idaho's SIP.

Earlier in the proposal, EPA states:

> EPA regulations do not require the issuance of a permit for the construction or modification of minor sources, but only that the SIP include a procedure to prevent the construction of a source or modification that would violate the SIP control strategy or interfere with attainment or maintenance of the NAAQs.

Id. at 52669. The Section 222.03 exemption does not violate any control strategy nor interfere with attainment of the NAAQS. DEQ reasserts that this provision be approved. Tier II

The proposal notes that EPA does not intend to act on Section 401.04. That section authorizes the Department to issue a Tier II operating permit with a future compliance date. The section also requires EPA approval prior to issuance. EPA asserts future compliance date extensions must be submitted and approved as a SIP revision; therefore, EPA concludes, the section is not approvable. We agree that operating permits sanctioning a requirement that conflicts with the SIP may require a SIP revision. However, just as DEQ enters into Consent Orders, and Settlement Agreements with compliance schedules, DEQ issues Tier II operating permits containing compliance schedules. The Tier II schedules use language similar to that in Title V operating permits, i.e., that the terms and conditions of the compliance schedule are supplemental to, and do not sanction noncompliance with, the underlying applicable requirement. IDAPA 58.01.01.322.10.a.v, 40 C.F.R. 70.5(c)(8)(ii)(c). For this reason, EPA should include this Section in those to be approved as part of the SIP.

DEQ is moving toward a "merged" air quality permitting program. Air quality permits combining the requirements of Tier II operating permits and permits to construct will be issued pursuant to various compliance schedules in Tier I (Title V) operating permits. Within the next couple of years DEQ hope to develop with the assistance of EPA, Idaho industry and others, a single permit program that provides greater efficiency, and clarity to all.

Indian CountryEPA states that "Idaho has not demonstrated authority to implement and enforce IDAPA Chapter 58 within 'Indian Country' as defined in 18 U.S.C. § 1151" and that "EPA proposes that this SIP approval not extend to 'Indian Country' in Idaho." 67 Fed. Reg. at 52673. EPA additionally identifies "Indian Country" to include, *inter alia*, "the Nez Perce Reservation as described in the 1863 Nez Perce Treaty." Id. at 52673 n.2. Idaho disputes both statements.

First, EPA improperly places the burden on Idaho to establish that it has jurisdiction within Indian country with respect to regulation of nonmembers. As the agency knows, a substantial number of persons reside within the Coeur d'Alene Reservation and the Nez Perce Reservation as described in the proposed rulemaking, who are not members of the Coeur d'Alene Tribe or the Nez Perce Tribe. These persons also own a large percentage of land within those reservations. Idaho presumptively has jurisdiction over them and their land under settled Indian law principles. E.g., County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 257-58 (1992) ("[t]his Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands") Equally important, the CAA itself preserves state law from preemption in section 116, 42 U.S.C. § 7416, with respect to air emission standards except in specified situations, and nothing in the statute itself expressly precludes the exercise of such

authority in Indian country. The EPA therefore should expressly provide in the final rule that nothing in such rule is intended to preclude the exercise state regulatory authority within Idaho Indian country independently of the CAA to the extent consistent with applicable Indian law principles.

Second, disagreement exists over the continued existence of the Nez Perce Reservation as described in Article 2 of the 1863 Treaty with the Nez Perces, 14 Stat. 647 (1863). The IDEQ believes that a cession agreement between the United States and the Tribe ratified by Congress in 1894, 28 Stat. 326 (1894), has diminished the Reservation's land base substantially and that the Reservation now encompasses only those lands retained presently in trust pursuant to the terms of the cession agreement. See United States v. Webb, 219 F.3d 1127 (9th Cir. 2000), cert. denied, 531 U.S. 1200 (2001) (holding that Indian country-status, and therefore federal criminal jurisdiction, existed over allotment within 1863 Nez Perce Reservation which passed into fee ownership, and distinguishing lands allotted to tribal members from "surplus lands" purchased by non-Indians). The EPA and IDEQ acknowledged this controversy in a December 2000 memorandum of understanding concerning implementation of title V of the CAA. In view of the decision in Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001), the EPA should make clear its rationale for excluding the *entirety* of the 1863 Reservation from the scope of the proposed action.

If you have any questions or need more information please contact me at (208) 373-0445.

Sincerely,

Katherine B. Kelly

Julie Vergeront

05/20/2002 10:37 AM

To: LISA KRONBERG <LKRONBER@DEQ.STATE.ID.US>
cc: DANIEL SALGADO <DSALGADO@DEQ.STATE.ID.US>, FAYE WEBER <FWEBER@DEQ.STATE.ID.US>, KATHERINE KELLY <KKELLY@DEQ.STATE.ID.US>, MARJORIE MARTZEMERSON <MMARTZEM@DEQ.STATE.ID.US>, MICHAEL SIMON <MSIMON@DEQ.STATE.ID.US>, SUZANNE CROCKETT <SCROCKET@DEQ.STATE.ID.US>, WILLIAM ROGERS <WROGERS@DEQ.STATE.ID.US>, Jeff Kenknight/R10/USEPA/US@EPA, Dave Bray/R10/USEPA/US@EPA, Bonnie Thie/R10/USEPA/US@EPA, Elizabeth Waddell/R10/USEPA/US@EPA
Subject: Re: Tier 11

I will get back to you as soon as I hear from Dave re; his availability this week.

Here is a summary of the issues/concerns we have with the Tier II rule/title V interface.

Note that the Title V compliance schedule issue is toward the end.

The attached document is structured in the order of 401. It was necessary for my management to understand the scope of Idaho's tier II program and the different reasons Idaho issues Tier II permits in order to understnad the title V compliance schedule issue. Note that I have also indicated a few other questions we have about the Tier II rule as we move forward with the SIP approval. We hope to discuss thes issues at the same time, or soon thereafter.

tierII-t5 issues.wpd

TIER II SIP AND TITLE V ISSUES

Section 401.01—Optional Tier II permits (synthetic minor limits, etc.)

- Limited to non-Title V sources only.
- Only issued at the request of the source.
- EPA believes this provision meets EPA's requirements for federally-enforceable State operating permit programs as set forth in the June 28, 1989 Federal Register (54 FR 27281), except with respect to subsection (a) (bubbles). EPA plans to take no action on subsection (a). As is currently the case under the SIP, bubbles must be approved as case-by-case SIP revisions.

Section 401.02—Required if the source has a limit in a PTC that is different from a SIP limit

- Limited to non-Title V sources only.
- When does DEQ use this? What is purpose?
- What is included in the Tier II permit for such a source? The rule does not give an indication.
- What ensures that permit renewals and revisions (section 404.04) cannot be used to revise a Tier II operating permit issued under Section 401.02 to increase allowable emissions to levels above that contained in the PTC unless the revision would be authorized under the PTC rules?
- Is there any reason such an operating permit for a non-Title V source with a PTC with limits different than the SIP needs to be federally enforceable given that:
  a) the PTC is a permanent element of the SIP and cannot be superseded by a Tier II permit; and
  b) the PTC is already federally enforceable and includes all terms and conditions necessary to ensure compliance with all applicable requirements.

Section 401.03.a.—Authorizes DEQ to issue Tier II permits when emission reductions are necessary to attain or maintain any ambient air quality standard or applicable PSD increment

- Not limited to Title V sources.
- Note that issuance of such a permit, even if federally enforceable, does not alleviate the need to include the limits in a source-specific SIP revision if the permit is issued to address a violation of the NAAQS or a PSD increment. This is being done in the Sandpoint SIP, where we are specifically incorporating by reference the PM limits in the

Tier II permits submitted as part of the PM-10 SIP for Sandpoint if they are more stringent than the general SIP limits.

Section 401.03.b.—Authorizes DEQ to impose specific emission standards or requirements on operation or maintenance in a Tier II permit, as necessary to ensure compliance with any applicable emission standard or rule

- Not limited to Title V sources.

- Idaho is interpreting this provision to allow DEQ to impose requirements in a Tier II operating permit in lieu of requiring a source to obtain a PTC, including a PSD permit, in the case where a source did not obtain a PTC prior to construction or modification. For Title V sources that are not in compliance with PTC/PSD requirements, DEQ plans to issue Title V permits with compliance schedules that require sources to obtain Tier II permits that meet the requirements of the PTC/PSD program.

- DEQ's interpretation appears to be that section401.03.b. gives DEQ authority to impose any requirement upon a source in a Tier II permit in lieu of any current SIP requirement and determine that the source is in compliance with the SIP if it is in compliance with the conditions of the Tier II operating permit.

- This is a far broader interpretation of this section than EPA had previously understood.

- EPA has several concerns with DEQ's interpretation of section 401.03.b. and approach to Title V compliance issues, both in the case of sources that failed to comply with PSD and for sources that otherwise failed to obtain a PTC permit.

    - How can DEQ insure that all substantive and procedural requirements of the PTC program (including PSD) will be met through issuance of a Tier II permit. Although the procedural requirements are similar for non-PSD PTCs and Tier II permits, the PSD program affords many more procedural protections.
    - How can DEQ insure that a limit in a Tier II permit that is issued to comply with PTC or PSD requirements will only be revised (perhaps four or five years later) in accordance with the requirements of Idaho's SIP-approved PTC/PSD program.
    - This approach is at odds with Section 406 (OBLIGATION TO COMPLY), which states that receiving a Tier II operating permit shall not relieve any owner or operator of the responsibility to comply with all applicable local, state and federal rules and regulations.
    - This approach is at odds with EPA's requirements for approvable FESOP programs which must specifically require that the source comply with all existing applicable requirements. An operating permit cannot be used to change any requirement of the SIP.

- We do not believe we can approve this provision into the SIP if DEQ interprets this provision to allow Tier II permits to be used in lieu of other SIP approved programs, such

the as PTC/PSD program.

Section 401.04-- Authorizes DEQ to issue a Tier II permit that includes a future compliance date (e.g., a compliance extension) for any provision of the Idaho rules

- This section expressly conditions issuance of such permit upon the approval of EPA.
- EPA plans to take no action on this subsection. As is currently the case under the SIP, compliance extensions must be approved as case-by-case SIP revisions.

TETON SALES CO.

EPA Comments on Draft Permit No. 027-0067 April 4, 2002

Condition 3.2: Filter System Pressure Drop

The permit should specify the appropriate range of pressure drop for the control device. You may also want to consider the kind of monitoring for paint booths used by SCAPCA in their Huntwood Industries permit (see http://www.scapca.org/aop_permit.html) or PSCAA's Ball Metal permit (see http://www.pscleanair.org/news/titlev.shtml).

Condition 3.5: Visible Emissions

Why specify quarterly monitoring for the door coating operations when the facility wide monitoring is monthly?

Conditions 7.1 through 7.3: Compliance Schedule

Please delete the phrase "or such other time as determined by the Department in writing/unless a different time period is specified in writing by the Department". This is too open ended. Also, please note that the milestones in the statement of basis differ from those in the permit. This should be reconciled.

Condition 8: Insignificant Activities

I do not understand the listing of insignificant activities "to qualify for a permit shield". I will call to discuss this with you.

Condition 20.1: Compliance Schedule

I suggest you add a parenthetical to link this section to section 7 - e.g., (see section 7).

Statement of Basis

4.4: Permitting History

At the end of this section, direct the reader to the discussion of the compliance schedule in section 10. This could be done by adding the sentence: "See section 10 for discussion of the compliance schedule for this source."

10.2: Compliance Plan

As written, this section could be read to imply that the source will be in compliance with the permit to construct requirements once the title V permit is issued because the source is subject to a compliance schedule. As you know, the source remains in noncompliance until the appropriate permits are obtained and the source is in compliance with all permit requirements. Also, this section also implies that no

enforcement action was taken or is needed, again, because of the compliance schedule. Of course, the steps needed to come into compliance and the appropriate response for past noncompliance are separate issues To address these concerns, I suggest the following rewrite:

> DEQ has determined that the facility can be brought into compliance with the PTC issues listed above through the issuance of a Tier II OP that establishes enforceable limits and operational parameters that, when met, assure compliance with all applicable air quality rules and regulations. The Tier II OP will not be issued prior to issuance of the Tier I OP. Therefore, a compliance schedule has been developed, as required by IDAPA 58.09.01.314.10.iv.
>
> DEQ has determined that the facility can be brought into compliance with the PSD issues listed above through the issuance of permits in accordance with IDAPA 58.01.01.205, and 40 CFR 52.21. The PSD permit will not be issued prior to issuance of the Tier I OP. Therefore, a compliance schedule has been developed, as required by IDAPA 58.09.01.314.10.iv.

Please note that EPA is unclear if IDEQ has adequate authority under the Tier II permit program to address all NSR noncompliance issues (in particular, federal PSD). Also, it is not clear if you intend to use the Tier II permit to create limits on potential to emit in lieu of PSD permitting. In the absence of compelling circumstances, it is EPA's position that, in the case of a source that failed to obtain any type of permit at the time of construction, the source should not be allowed to avoid installation of control technology by obtaining a synthetic minor limit on potential to emit. Please refer to Guidance on Appropriate Injunctive Relief for Violation of Major New Source Review Requirements, dated November 17, 1998 for a discussion of EPA's policy on this issue.

Also, section 10.2 should be renamed Compliance Schedule and combined with section 10.3. The part 70 rules direct the source to submit a compliance *plan* and the permitting authority to incorporate a compliance *schedule* into the permit. Although Idaho's rules initially referred to DEQ developing a compliance plan and a compliance schedule, Idaho has revised its rules so that, like part 70, the source is required to develop and submit a compliance plan and the permitting authority is required to include a compliance schedule, based on the compliance plan, into the permit. This is a minor point.

10.3.2 Obtain Tier II Operating Permit

Delete the phrase "or such other time as approved by DEQ in writing". This is too open ended.

10.3.3 Obtain Modified Tier I Operating Permit No. 027-00067

Please delete the phrase "or such other time as approved by DEQ in writing". This is too open ended. Also, please note that the milestones in the statement of basis differ from those in the permit. This should be reconciled.

Robert.Wilkosz@deq.idaho.gov

09/21/2005 01:47 PM

To: Mahbubul Islam/R10/USEPA/US@EPA
cc: Pete.Wagner@deq.idaho.gov, Donna Deneen/R10/USEPA/US@EPA
Subject:

Mahbubul,

I want to give you some advance information on our discussions regarding the Portneuf Valley SIP on Friday. One of the sensitivities in this area is a comment that asked for preview of specific language in the final document. We have thought about this considerably over the past few weeks. We think this concern is probably due to the practice on including specific source permit restrictions into the SIP document. Thus any source changes need to be approved via the CFR route. This, of course, has been a headache for all concerned. We think we have discovered a solution.

In Idaho's SIP as federally published we see the following:

40 CFR 52.681.
Except as otherwise provided in paragraph (b) of this section, emission limitations and other provisions contained in Permits to Construct and Tier II operating permits issued by the Idaho Department of Environmental Quality in accordance with the Federally-approved State of Idaho Rules for Control of Air Pollution in Idaho, incorporated by reference in section 52.670 (IDAPA 58.01.01.200 through 222, IDAPA 58.01.01.400 through 406), shall be applicable requirements of the Federally-approved SIP (in addition to any other provisions) for the purposes of section 113 of the Clean Air Act and shall be enforceable by EPA and by any person in the same manner as other requirements of the SIP.

What we thus read is that all our issued PTC and Tier II permits are federally enforceable and part of the SIP. Thus it seems straightforward that permit provisions do not need to be referenced in the Portneuf Valley Attainment SIP document nor the Maintenance Plan document - that would be redundant.

We have discussed this internally at length and we think that modeling practices follow EPA guidelines and other permitting activities are formalized and oriented to ensure protection of the NAAQS. So this idea has been carefully considered. We will "roll out" this proposition to you and your staff further on Friday; but I wanted you to have advance notice on this idea. We simply think that recounting permit requirements in area SIPs is unnecessary and afford no further protection beyond what is already codified in existing CFR. I look forward to working with you on this.

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