UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
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AIR & RADIATION
DIVISION

December 10, 2021

Ms. Paula Wilson
Idaho Department of Environmental Quality
1410 North Hilton
Boise, Idaho 83706

Dear Ms. Wilson:

The Environmental Protection Agency has reviewed the preliminary draft rule changes in the Idaho DEQ zero-based regulation docket 58-01-01-2101, posted on October 12, 2021. Enclosed are our comments.

Thank you for the opportunity to engage with you on this topic. If you have any questions, please contact Kristin Hall at (206) 553-6357.

Sincerely,

Gina Bonifacino, Section Chief
Air and Radiation Division

Enclosures

cc: Mr. Carl Brown
Idaho Department of Environmental Quality

Ms. Mary Anderson
Idaho Department of Environmental Quality

U.S. Environmental Protection Agency's Comments on the Idaho DEQ zero-Based Regulation
Docket 58-01-01-2101
Posted for Stakeholders Review on October 12, 2021

Comment 1: Definitions

Many terms and definitions are proposed to be struck from the Idaho air rules, without making clear in rule language which specific federal terms and definitions apply. In a few places, the existing rules or the proposed revisions do make clear what definitions apply and for what program purposes, for example, in IDAPA 58.01.01.204 and 205 for purposes of the prevention of significant deterioration and nonattainment new source review permit programs. In many other places, however, it is completely unclear what definitions apply under the proposed revisions. For example, Idaho DEQ proposes to eliminate all definitions that are based on definitions in Clean Air Act section 112 and parts 60, 61, and 63 because Idaho DEQ incorporates these sections by reference. However, these provisions state that the defined terms apply "for the purposes of this section" or "for the purposes of this part" or subpart, and it is not clear to the EPA (and we presume, will not be clear to the regulated community) whether and when these definitions apply to Idaho DEQ's remaining regulations. Similarly, it is not clear to the EPA and, we presume to owners and operators of regulated sources, which of the many definitions in the many federal rules incorporated by reference in IDAPA 58.01.01.107 apply to the minor NSR permit program, Tier II operating permit program, and in many other places in Idaho's rules. Eliminating definitions and rules does not, in our view, ease the regulatory burden on regulated sources if they cannot readily determine their compliance obligations from the rules that remain. In addition, the EPA will not be in a position to approve revised regulations if the rules do not make clear what definitions apply under what rules.

We also intend to request an Attorney General opinion to address the proposed repeal of key definitions such as nonattainment area and (national) ambient air quality standards to ensure Idaho retains adequate authority to implement the NAAQS planning requirements of the CAA required for continued approval. Similarly, we further intend to request an AG statement to address revisions to Idaho's major source operating permit program and ensure the program remains consistent with the requirements of title V of the CAA.

Comment 2: "Shall" to "Must" or "Will"

We understand that Idaho agencies have been directed to eliminate the use of "shall" in rules and replace that word with more commonly understood words. We also understand that, in these proposed revisions, Idaho DEQ has generally replaced "shall" with "must" with respect to obligations on regulated sources and has generally replaced "shall" with "will" with respect to requirements on Idaho DEQ.

We have noted on the enclosed document containing the proposed revisions that there are several places where "will" is proposed in place of "shall" for an obligation on a regulated source, inconsistent with our understanding of Idaho DEQ's intent. We also identified several places where neither "shall," "must" nor "will," is needed and the language is clearer without these words (Idaho DEQ similarly deleted "shall" in numerous places without replacing it with "will" or "must" where the active verb alone is sufficient).

There are also a few places where Idaho DEQ proposes to replace "shall not" with "cannot" with respect to obligations on regulated sources. "Cannot" means "is not capable of," and in most cases the regulated entity is capable of the action (indeed, that is why there is a need for the prohibition). In such places, "cannot" must be replaced with "may not," "is prohibited from," "is not permitted/authorized to" or some other phrasing to make clear that the action is prohibited, as is the case under the current regulations.

With respect to Idaho DEQ's replacement of "shall" with "will" with respect to Idaho DEQ's actions, to the extent Idaho DEQ finalizes these revisions, the EPA intends to request, at the time of submission of the revisions for the EPA approval of a particular CAA program/delegation, an Attorney General opinion making clear that no change in meaning is intended. For many of the revised provisions, the CAA requires the state or local agency to take a certain action as a condition of program approval or delegation (e.g., requiring an opportunity for a 30-day comment period on certain permits). An Attorney General opinion is needed to ensure federal requirements for program approval or delegation continue to be met. To the extent Idaho DEQ uses "will", "cannot", or "can" with respect to obligations on regulated sources, we would also intend to request an Attorney General opinion to make clear there is no change in meaning with respect to those provisions.

Comment 3: Rationale for Changes

We recommend explaining the basis for the changes to each section of the Idaho air rules and explaining some of the changes in more detail. Many of the proposed changes are followed by text boxes with explanations, but not all sections are followed by text boxes. In addition, in many places, the explanation in the text box is too cursory to be helpful (e.g., "no longer needed"). More detailed explanations will help create a record for why the changes are not substantive, will facilitate Idaho DEQ's implementation of the regulations in the event a regulated source later asserts that a change in meaning was intended by the revisions, and will facilitate the EPA review and approval of requested revisions to Idaho DEQ's CAA approved and delegated programs. Detailed explanations as part of the rulemaking record in Idaho may minimize the need for an Attorney General opinion on some issues.

Comment 4: Authority Provisions

A number of authority and compliance provisions are proposed to be struck from the Idaho air rules. We are concerned that this may deprive Idaho DEQ of authority needed to implement and enforce federally approved or delegated permitting programs, regional haze plans, and other control measures, or that the proposed revisions may provide regulated sources with legal arguments that Idaho DEQ no longer has authority to take a particular action. We recommend Idaho DEQ review the proposed rule changes to ensure the Department retains adequate authority to implement air quality programs in Idaho and will likely request an Attorney General opinion to make clear that Idaho DEQ retains all authorities necessary to implement and enforce the EPA approved and delegated programs notwithstanding the removal of these broad authority provisions. This is also an example of where a more specific explanation of the reason for the removal of a specified provision would better help the EPA understand that Idaho DEQ will retain all necessary authority even with the removal of the provision and will help Idaho better withstand future challenges from regulated sources that Idaho DEQ does not have authority to require a certain action.

Comment 5: Reserve Rule Sections
Many entire rule sections are being removed, but instead of reserving those sections, Idaho DEQ has proposed to renumber the sections that follow. We recommend that section numbers be "reserved" instead of renumbered. Comprehensive renumbering has caused additional work and challenges in other states because it makes it more difficult to correlate a citation in a permit written under rules that have since been renumbered with current rule requirements. Another benefit of reserving repealed rule sections is creating a visual record documenting the zero-based regulation.

Comment 6: Non-interference Demonstration for SIP Relaxations
Certain rule changes will likely need to be accompanied, at the time of submission for approval, by a demonstration under CAA section 110(l) that the SIP revision will not interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement. We have noted in our comments several places where it is likely such a demonstration will be needed for the EPA to approve the proposed revision. Examples include the proposed change to remove the ban on planned maintenance during air quality episodes and proposed changes to the scope of the agricultural burning rules (e.g., the addition of "pastures").

Comment 7: Transportation Conformity Rules
The proposed changes strike the transportation conformity rules in their entirety. We have previously discussed that this change to the SIP may be approved if Idaho replaces the rules with the federal program and a memorandum of understanding with sister agencies in Idaho that spells out consultation procedures and other aspects of the conformity process in Idaho. Our understanding is that this memorandum of understanding is not yet in place. We would therefore be unable to approve the removal of the transportation conformity rules as a SIP revision at this time.

Comment 8: Major Source Permit to Construct Programs
Given this effort to streamline and clarify Idaho's air rules, we encourage Idaho DEQ to take the opportunity to add language in IDAPA 58.01.01.204 to more clearly convey source obligations. Idaho's rules rely on the incorporation by reference of the nonattainment NSR requirements in 40 CFR 51.165. That federal provision is not written as a directly enforceable permitting program, but instead sets forth requirements state programs must meet. As an example, we recommend that Idaho add language making clear that where the federal provisions incorporated by reference say, "all such plans shall," "the plan shall," and "the state may," the meaning in the Idaho rules is intended to be "these rules require."

For similar reasons, it is important not to strike the language in IDAPA 58.01.01.205 that clarifies the definitions in 40 CFR 52.21 adopted for purposes of PSD permitting. The language in IDAPA 58.01.01.205 is important for making clear how 40 CFR 52.21 applies where Idaho DEQ is the permitting authority. Removal of this language may impact approvability of the PSD program or require an Attorney General opinion explaining why there is no substantive change.

Comment 9: 30-day Public Notice for Synthetic Minor Permits
A July 8, 2021, Office of the Inspector General report advised the EPA to improve oversight of synthetic minor permitting programs, including reviewing state programs for adequate public participation. We recommend Idaho DEQ clarify what public notice and comment requirements apply to synthetic minor permits to avoid the need to address this through rulemaking in a future action.

Enclosure: Please also see our comments in the track/changes document enclosed.