IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-75269

SAFE AIR FOR EVERYONE, AMERICAN LUNG ASSOCIATION OF IDAHO, AND NOËL STURGEON

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, STEPHEN L. JOHNSON, Administrator, United States Environmental Protection Agency, and L. MICHAEL BOGERT, Region 10 Administrator, United States Environmental Protection Agency,

Respondents.

Opening Brief of Petitioners

Petition for Review of Final Action
of the United States Environmental Protection Agency

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and Noël Sturgeon

DATED: December 15, 2005

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Respondents.	)	

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, petitioners Safe Air for Everyone (SAFE) and American Lung Association of Idaho state that neither SAFE nor American Lung Association of Idaho have parent companies, and that there are no publicly-held companies that have a 10% or greater ownership interest in SAFE or American Lung Association of Idaho.

SAFE is the designated business name of the Idaho Clean Air Foundation, a non-profit organization incorporated in Bonner County, Idaho. SAFE's purposes

include the protection of public health from air pollution generated by grass field burning in northern Idaho.

American Lung Association of Idaho is a designated business name of the American Lung Association of Washington, a non-profit corporation located in Seattle, Washington. American Lung Association of Idaho has a contractual relationship with the American Lung Association. American Lung Association of Idaho is dedicated to preventing lung disease and promoting lung health for the people of Idaho, the Pacific Northwest, and the entire United States.

Respectfully submitted this 15th day of December, 2005.

_____

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GLOSSARY

ALA	American Lung Association of Idaho
APA	Administrative Procedure Act
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
ER	excerpt of record
I	certified index
IDAPA	Numbering designation for rules adopted pursuant to the Idaho Administrative Procedure Act
IDEQ	Idaho Department of Environmental Quality
NAAQS	national ambient air quality standards
PM-2.5	particulate matter 2.5 microns and smaller in diameter
PM-10	particulate matter 10 microns and smaller in diameter
SAFE	Safe Air for Everyone
SIP	state implementation plan

STATEMENT OF JURISDICTION

This petition challenges action by the United States Environmental Protection Agency (EPA) that relaxes a ban on open burning in Idaho's federally approved state implementation plan adopted pursuant to the Clean Air Act. EPA had jurisdiction to take this action pursuant to §110(k) of the Clean Air Act, 42 U.S.C. §7410(k). The action appealed from is final, in that it is labeled by EPA as a "final" rule. Excerpt of Record (ER) 548. This Court has jurisdiction to review EPA's action pursuant to 42 U.S.C. §7607(b)(1). Notice of the action was published in the Federal Register on July 11, 2005, and the Petition for Review of the action was filed in this Court on September 9, 2005. Pursuant to 42 U.S.C. §7607(b)(1), the Petition for Review was timely because it was filed within sixty days of publication of notice in the Federal Register.

STATEMENT OF ISSUES

Whether EPA acted arbitrarily, capriciously, and contrary to law in approving an Idaho clean air plan revision allowing the widespread burning of crop residue, a practice that generates extensive plumes of dense smoke, where:

1. EPA failed to determine, as mandated by the Clean Air Act, whether the plan revision would interfere with attainment and maintenance of clean air standards and other applicable requirements of the Act; and

2. The revision substantially weakened pollution control requirements in the federally approved plan in effect prior to 1990 without assuring equivalent or greater pollution reductions.

STATEMENT OF THE CASE

This is a petition to review action by the Administrator of the United States Environmental Protection Agency ("the Administrator" or "EPA") under the Clean Air Act. On July 11, 2005, EPA approved an Idaho clean air plan revision that authorizes the open burning of crop residue throughout the state, a practice not authorized under the pre-existing plan. Such burning generates extensive plumes of dense smoke that can travel for miles, degrading air quality not only in Idaho, but also in neighboring states and Canada.

Petitioner Safe Air for Everyone (SAFE) is a nonprofit foundation incorporated in Bonner County, Idaho. Its purposes include the protection of public health from air pollution generated by crop residue burning in northern Idaho. SAFE has members who live, work, and recreate in areas adversely affected by such burning, including Bonner, Benewah, Kootenai, Latah, Shoshone, and other counties in Idaho, eastern Washington, western Montana, and British Columbia, Canada.

American Lung Association of Idaho (ALA) is a designated business name of the American Lung Association of Washington, a nonprofit corporation located in Seattle, Washington. Its organizational purposes include the prevention of lung

disease and promotion of lung health for the people of Idaho and Washington, and the protection of public health from air pollution. ALA has members who live, work, and recreate throughout Idaho and Washington, including portions of these states adversely affected by smoke from crop residue burning in Idaho.

Noël Sturgeon lives with her husband and son in Pullman, Washington, and her family also owns a house in East Hope, Idaho, that they use periodically on weekends and sometimes for longer periods in the summer. Sturgeon has had asthma in the past and is concerned about the health threat posed to herself and her family by crop residue burning in Idaho, which produces smoke that sometimes reaches Pullman and East Hope. The Sturgeon house in East Hope overlooks Lake Pend Oreille, and smoke from crop residue burning is sometimes so intense as to impair her view of the lake and substantially diminish her aesthetic enjoyment of the area. Her family cancelled a trip to their house in East Hope one weekend last summer due to fears that smoke from the burning would make driving hazardous. Sturgeon also enjoys hiking in the Cabinet Mountains (located in Montana about 25 miles from East Hope) and is concerned about the threat posed by smoke from crop residue burning to the scenic views and wildlife that she enjoys there.

The challenged action authorizes the exposure of SAFE/ALA members and Ms. Sturgeon to smoke from crop residue burning that threatens their health and welfare. As further detailed below, such smoke has been linked to severe adverse

health and welfare impacts in areas where SAFE/ALA members and Ms. Sturgeon live, work, and/or recreate, including premature deaths, asthma attacks, increased hospital and emergency room visits, and impaired visibility. EPA's action further deprives SAFE/ALA members and Ms. Sturgeon of health, welfare, and procedural protections guaranteed by the Clean Air Act for reasons described below.

REVIEWABILITY AND STANDARD OF REVIEW

The standard of review for all issues is whether EPA's action was either: a) arbitrary, capricious, an abuse of discretion or contrary to law; or b) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. Ober v. EPA, 84 F.3d 304, 307 (9th Cir. 1996). Petitioners raised each of the issues presented herein in written comments timely filed with EPA. ER 155.

STATEMENT OF FACTS

A. Nature of the Problem

Each summer Idaho farmers burn thousands of acres of cropland as a cheap way of removing crop residue left over after the harvest. See ER 146. This practice generates large plumes of dense smoke that can travel for many miles, severely impacting communities not only in Idaho, but also in other states and Canada. ER 44, 270-71, 296-99, 311-461, 469a. Some of the most intensive burning occurs in northern Idaho, particularly in Kootenai and Benewah counties. Farmers there grow thousands of acres of grass to produce grass seed and routinely

burn the stubble left over after the seed is harvested. Smoke from this burning is sometimes so thick that it creates severe traffic hazards on roads and sets off home smoke alarms. ER 44, 313, 322, 471, 475. The burning regularly generates hundreds of complaints from residents who are exposed to dense clouds of smoke over a wide area. ER 39, 147, 316.

Figure 1: Photo from SAFE comments, Exhibit E (9-3-01 article from U.S. News and World Reports), ER 461a

Smoke from burning on the Rathdrum Prairie in Kootenai County often migrates north into Bonner County, where it degrades air quality in communities

such as Sandpoint, Sagle, Hope and East Hope.[1] E.g., ER 73, 290-99, 323-30, 344-46, 363-64, 398-99. Figure 2 below shows the impact of crop residue smoke at Lake Pend Oreille near Hope, Idaho, in 2001. Other impacted communities include Coeur d'Alene, Rathdrum and Hayden in Benewah county. E.g., ER 290-99, 348-49, 352-53, 356-57. Smoke from Idaho field burning also sometimes travels to Eastern Washington state, Western Montana and British Columbia in Canada. ER 367-68, 427-32, 454-56, 469a. The smoke infiltrates homes, cars, and even hospital emergency rooms. E.g., ER 251, 324, 335, 357.

[Text continues on page 8.]

[1]Maps showing the location of counties and towns discussed in the text are provided in an addendum at the end of this brief.

Exhibit C

Exhibit D

Figure 2: Photos of Lake Pend Oreille in North Idaho showing field burning smoke impacts (Exh. C) as compared to a clear day Exh. D. From affidavit of Bruce Rothermel, ER 326.

The health impacts of the smoke are extreme, life threatening, and sometimes fatal. Fine particles from the smoke can travel deep into the respiratory system where they irritate and inflame tissues of the lungs and bronchial tubes, significantly impairing the ability to breathe. ER 44, 235. The record contains affidavits from more than 100 people describing how they suffer (or have family members who suffer) severe breathing problems when exposed to smoke from grass field burning in Idaho, including debilitating asthma attacks and intense respiratory distress. Certified Index (I) doc. No. 41, Exh.A. Many of these people have to drastically curtail everyday activities during the grass burning season, and some are forced to flee their homes. ER 326-460.

Local physicians report significant increases in patient visits, hospital admissions, and emergency room visits due to respiratory problems during the grass burning season. ER 182-272. A pulmonologist in Coeur d'Alene states that, each year, "exposure to smoke from grass field residue burning causes significant deterioration in the overall condition of many of my patients and precipitates numerous acute episodes of respiratory distress, which can be dangerous and life threatening." ER 216. According to another Kootenai County pulmonologist, "exposure to smoke from grass residue burning presents a significant and imminent danger to the health" of his respiratory patients. ER 223. Other physicians report that crop residue smoke "causes substantial aggravation of the medical condition of

many pulmonary illness patients every year" (ER 239), "significantly exacerbates the severity and frequency of symptoms" in asthma and bronchitis patients (ER 253), and "presents a substantial danger to public health" (ER 269). Physicians also report advising pulmonary patients to leave impacted areas during the grass burning season in order to avoid the severe health threats presented by the smoke. E.g., ER 186, 270.

In 2000, the Kootenai County coroner found that grass residue burning caused the death of Marsha Mason, a resident of Rathdrum, Idaho. According to the coroner: "[I]t is my opinion, to a reasonable degree of medical certainty, that Marsha Mason's death was caused by status asthmaticus precipitated by exposure to severe air pollution from grass field burning." ER 277. In another case, a pulmonologist attributed the death of a Coeur d'Alene man to smoke from field burning: "[A]s respiratory Care Medical Director of Kootenai Medical Center in Coeur d'Alene, Idaho, I have witnessed the immediate death of at least one patient who was exposed to smoke from North Idaho grass residue burning, experienced immediate respiratory difficulty, and expired as a result of an exacerbation of his respiratory disease." ER 222. A Bonner County physician attributes the death of local resident to "exacerbation of her asthma by grass residue burning." ER 184.

Health effects are especially profound in young children because their airways are smaller. A Sandpoint pediatrician reports having to prescribe home

breathing machines for as many as 20 patients per week to alleviate symptoms caused or exacerbated by crop residue smoke. ER 186. Visits by her patients to emergency rooms increase by as much as 50% during the burn season. Id. Another pediatrician states that "smoke from agricultural residue burning contributes to numerous dangerous Asthmatic episodes in my patients each year," and that "some of these patients require hospitalization or immediate medication to avoid death." ER 197. He describes the effect on these children as "severe," "frightening," and "dangerous." Id. These and other serious health impacts have prompted calls for an end to grass residue burning by 28 of the 32 physicians practicing in Bonner County, more than 80 Kootenai County physicians, and 23 physicians in Latah County, Idaho and Whitman County, Washington. ER 210, 219, 273, 320.

In addition to direct health impacts, field burning smoke often obscures or blocks visibility on Idaho roads, creating dangerous driving conditions. ER 44, 313, 471. At least one traffic fatality has been linked to the smoke. ER 469a. Pollution from the burning also mars scenic vistas in northern Idaho and elsewhere, sometimes entirely blotting out views that are easily visible on non-burn days. See, e.g., Figure 2, supra. And because the smoke moves across state boundaries, it can lead to the formation of regional haze in pristine and scenic areas outside of Idaho. ER 44.

Economically viable alternatives to field burning plainly exist. Only a few miles away in Washington, the State mandated a phase-out of grass residue burning after an exhaustive research and public participation process determined that alternatives were economically available and feasible, and after a peer-reviewed study showed that the public health costs from grass residue burning outweighed the economic benefits. ER 150. The burning ban has been in effect for several years, and grass seed farming in Eastern Washington continues to thrive. Research conducted by Washington State University and Oregon State University likewise indicates that there are economically viable alternatives available that reduce or eliminate the need for burning. ER 150-51.

Nevertheless, the burning continues unabated in Idaho, where state officials have largely turned a blind eye to the public health and environmental consequences. The state agriculture department has a "smoke management" program that tells farmers not to burn on certain days based on weather and air quality conditions, but noncompliance is widespread and EPA has found it inadequate to address the problem. ER 42, 73, 462, 469a-470, 475. The program does not limit smoke emissions, but rather merely attempts to move the smoke around (spatially and temporally) in the hopes of directing it away from populated areas and mitigating impacts. See ER 533. This approach is often ineffective, as evidenced by the severe and widespread health impacts cited above. Further,

although aware of the dangers of crop residue smoke, Idaho officials refuse to even provide advance notice to residents of the exact location of planned field burns. ER 175. Thus, someone living next door to a field often will not find out about a burn until they see the plumes of billowing smoke approaching them.

B. The Clean Air Act

Congress adopted the Clean Air Act ("CAA" or "the Act") for the express purpose of protecting public health and welfare from air pollution. 42 U.S.C. §7410(b)(1). As enacted in 1970 and amended in 1977 and 1990, the Act requires the EPA Administrator to set clean air standards for certain air pollutants that threaten public health and welfare. Id. §§7408, 7409. These National Ambient Air Quality Standards (NAAQS) establish concentrations of each pollutant allowable in outdoor air, and must be protective enough to prevent adverse effects to public health with an adequate margin of safety. Id. §7409(b). EPA designates communities as "attainment" or "nonattainment" areas based on whether they meet the standards. Id. §7407(d).

Since 1971, the NAAQS have included standards for airborne particulate matter (PM). 36 Fed. Reg. 8186 (1971); 40 C.F.R. pt. 50 (2005 & prior editions). This form of air pollution includes small particles of smoke, soot, soil, and other material emitted by agricultural operations, factories, diesel trucks, and other sources. See H.R. Rep. No. 490, 101st Cong., 2d Sess. 207-08 (1990)("House Report"). The

first NAAQS for PM, adopted in 1971, limited "total suspended particulates." EPA revised the NAAQS in 1987 to limit particles 10 microns in diameter and smaller ("PM-10"), and added standards in 1997 for particles 2.5 microns and smaller ("PM-2.5"). See 62 Fed. Reg. 38652, 38652-4 (1997). Crop residue burning generates high concentrations of fine particles, including both PM-10 and PM 2.5. ER 44, 290-99. EPA has designated five areas in Idaho as "nonattainment" for the PM-10 standard, including the Sandpoint area, portions of Shoshone County in northern Idaho, and portions of Power and Bannock counties. 40 C.F.R. §81.313 (2005).

Each state must submit to EPA a State Implementation Plan ("SIP" or "plan") to implement, maintain, and enforce the standards. 42 U.S.C. §§ 7407(a), 7410(a)(1). SIPs must contain enforceable control measures adequate to bring nonattainment areas into compliance with standards "as expeditiously as practicable" but not later than deadlines set forth in the Act. Id. §§ 7410(a)(2)(A), 7502(c). In 1970, Congress set a 1975 outside deadline for attaining standards, but extended the deadline in 1977 and again in 1990, each time adopting more prescriptive requirements for SIPs. See House Report 144-50; Hall v. EPA, 273 F.3d 1146, 1153-54 (9th Cir. 2001). The 1990 CAA amendments set a 1994 outside attainment deadline for PM-10 nonattainment areas. 42 U.S.C. §7513(a), (c)(1). If an area failed to meet that deadline, the Act provided for an extension to 2001, and possibly to 2006, but required adoption of stronger SIP control measures

with each extension. Id. §§7513(b), (e), 7513a. SIPs for PM-10 nonattainment areas must also contain quantitative emission reduction milestones to be achieved every 3 years until the area is redesignated attainment, and that assure reasonable further progress toward attainment. 42 U.S.C. §7513a(c). Areas that fail to attain by the extended deadlines must adopt SIP revisions assuring at least a 5% annual cut in PM-10 emissions. Id. §7513a(d).

In addition to the requirements for nonattainment areas, all SIPs must assure continued compliance with standards (i.e., "maintenance") in areas that meet standards, and prevention of significant deterioration of air quality in such areas. Id. §§7410(a)(1), 7471, 7505a. The plans must further provide for cleanup of regional haze that clouds the skies of national parks and wilderness areas. Id. §§ 7491(b)(2), 7492(e)(2); 40 C.F.R. §51.308 (2005). Each SIP must also prohibit emissions that will contribute significantly to nonattainment in any other state, interfere with maintenance in any other state, or interfere with measures required in another state to prevent air quality degradation and protect visibility. 42 U.S.C. §7410(a)(2)(D).

SIPs typically consist of state-adopted rules to limit emissions from various sources, commitments from the state to implement them, and other measures to assure compliance with the Act. States must adopt their SIPs (and any revisions thereto) after a public hearing and submit them to EPA for approval. Id

§7410(a)(1), (k). "The requirement that the States ... submit [SIPs] to EPA for review allows for federal oversight of the States' efforts to achieve and maintain the required level of air quality." S. Rep. No. 101-228, at 9 (1989). EPA's approval of a SIP or SIP revision is a rulemaking subject to the notice-and-comment requirements of the Administrative Procedure Act. Ober v. EPA, 84 F.3d 304, 312 (9th Cir. 1996). Thus, EPA cannot approve a SIP or SIP revision unless the agency first proposes such approval in the Federal Register, accepts public comment thereon, and publishes its final approval action in the Federal Register. Id.; 5 U.S.C. §§ 552(a)(1), 553.

Once EPA approves a SIP or revision, it becomes the state's "applicable implementation plan" for purposes of the Act, and its provisions become federally enforceable, both by EPA and by citizens. 42 U.S.C. §7602(q); Trustees for Alaska v. Fink, 17 F.3d 1209, 1210 n.3 (9th Cir. 1994). Thereafter, the approved SIP remains the applicable implementation plan for the state unless and until a revision thereto is approved by EPA. General Motors Corp. v. U.S., 496 U.S. 530, 540 (1990). Thus, a state cannot change its federally enforceable SIP merely by changing rules at the state level. Only if the change is formally approved by EPA after completing the above-described notice and comment process does it have the effect of modifying the applicable implementation plan. Id.

The Act further limits EPA's authority to approve SIP revisions. Pursuant to §110(l) of the Act, EPA "shall not approve a revision to a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement" of the Act. 42 U.S.C. §7410(l). This Court has construed §110(l) as requiring EPA to, among other things, "measure the existing level of pollution, compare it with the national standards, and determine the effect on this comparison" of the proposed SIP revision. Hall v. EPA, 273 F.3d 1146, 1160-61 (9th Cir. 2001)(citation omitted). In addition, the Act bars modification of any SIP control requirement in effect prior to November 15, 1990 (the date of enactment of the 1990 CAA Amendments) in any nonattainment area unless the revision assures equivalent or greater emission reductions. 42 U.S.C. §7515. This "antibacksliding" provision strictly limits EPA's authority to approve the relaxation of pre-November 15, 1990 control requirements in SIPs.

C. The Idaho Implementation Plan's Restrictions on Open Burning

Pursuant to the Clean Air Act, Idaho has a federally-approved state implementation plan that has been revised at various times since enactment of the original Clean Air Act in 1970. In 1972, EPA approved an Idaho SIP provision that prohibited open burning, with limited exceptions. ER 482, 485-94. One of the limited exceptions allowed the open burning of plant life grown in the course of an agricultural operation, but only where it could be shown that such burning was

"necessary and that no fire or traffic hazard [would] occur." ER 486-87 (§3.H). Moreover, the exception did not apply at all where the burning was "determined to be a nuisance, hazard, or source of air pollution." ER 485 (§2.C). The SIP further limited the allowable "opacity" of smoke to no more than 20% over any 3-minute period within an hour. ER 5-6. Opacity is a measure of smoke density expressed in terms of the percentage of light blocked by the smoke.

In 1982, EPA approved a SIP revision that recodified the above-described open burning provisions, but made no substantive change therein. ER 1-6, 12, 482, 495. Thereafter, the federally-approved Idaho SIP provisions on open burning remained unchanged until July 23, 1993. See ER 482. At that time, EPA approved a SIP revision submitted by the state that, among other things, eliminated the exemption for agricultural burning from the ban on open burning. ER 14-19,[2] 20-24, 482, 520-24. The SIP as revised provided that "[n]o person shall allow, suffer, cause or permit any open burning operation unless it is in a category of open burning set forth in section 01.01153" of the rule. ER 15. Section 01.01153 of the rule listed ten allowable categories of open burning, specifically: Recreational and Warming Fires; Weed Control Fires; Training Fires; Industrial Flares; Residential Solid Waste Disposal Fires; Landfill Disposal Site Fires; Orchard Fires; Prescribed

[2] The document beginning at ER 14 is described in EPA's Certified Index as "3/12/1985 and 12/31/91 open burning provisions approved at 58 FR 39445, July 23, 1993, (from EPA Docket ID-3-1-5794)." ER 556.

Burning; Dangerous Material Fires; and Infectious Waste Burning. ER 17-19, 24. None of the listed categories included agricultural or crop residue burning.[3] The SIP further provided that even a listed category of allowable open burning would be prohibited within two years after approval by the Director of the state environmental agency of "any economical and reasonable alternative" to that form of burning. ER 16. The SIP defined an "economical and reasonable alternative" as one that "has demonstrated similar benefits to open burning at non-prohibitive cost." Id .

On January 16, 2003, EPA approved revisions to Idaho's SIP that renumbered the open burning provisions and made a few editorial changes, but left the provisions substantively unchanged from the version approved in 1993. ER 483, 537, 544-45. Thus, the SIP continued to ban open burning except for specific listed activities that did not include agricultural or crop residue burning.

On June 25, 2003, SAFE served notice on a number of north Idaho grass seed farm operations of its intent to file a citizen suit to enforce the SIP's open burning prohibition against them under §304 of the Clean Air Act. ER 137. Section 304 authorizes citizen suits in U.S. District Court to enforce any emission standard or limitation in effect under an EPA-approved SIP. 42 U.S.C. §7604(a)(1).[4]

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[3] EPA agrees that crop residue burning does not qualify as "prescribed burning," as that category applies only to burning of "wild land fuels," not residue of cultivated crops. ER 550 n.1.

[4] SAFE served a second notice on four growers on May 19, 2005. ER 476.

On June 7, 2004, EPA proposed to approve a SIP revision adding "Crop Residue Disposal" to the list of activities exempt from the Idaho SIP's open burning ban. ER 152. Under the proposal, an entirely new section 617 would be added to the SIP's open burning rules, providing as follows:

> **617. CROP RESIDUE DISPOSAL**
>
> The open burning of crop residue on fields where the crops were grown is an allowable form of open burning if conducted in accordance with the Smoke Management and Crop Residue Disposal Act, Chapter 48, Title 22, Idaho Code, and the rules promulgated pursuant thereto, IDAPA 02.06.16, "Crop Residue Disposal Rules".

ER 75-76, 87, 133. Thus, the proposal explicitly expanded the SIP's list of allowable forms of open burring to include a completely new category, in language that had never before appeared in the SIP. EPA nonetheless described the revision as merely a "clarifying" change in the SIP, and proposed to approve it without any analysis of its impact on attainment and maintenance of standards, interference with other applicable requirements of the CAA, or compliance with the anti-backsliding provisions of CAA §193. ER 153 .

SAFE and ALA filed extensive public comments opposing EPA's June 7, 2004 proposal. ER 155. Among other things, SAFE argued that the proposal was unlawful because EPA had not conducted the analysis required by §110(l) of the Act to determine whether the SIP revision would "interfere with any applicable requirement concerning attainment [of clean air standards]….or any other applicable

requirement" of the Act. ER 175-79. SAFE pointed out that this Court had construed section 110(l) to impose an affirmative duty on EPA to determine whether a SIP as modified by a proposed revision would be adequate to attain and maintain the NAAQS. ER 175-76, citing Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001). Here, EPA had conducted no analysis of the effect of the revision on attainment and maintenance of standards, even though Idaho has five areas designated as "nonattainment" for PM-10, a pollutant emitted by the crop residue burning authorized by the revision. Nor had EPA conducted any analysis to determine whether the revision would interfere with other applicable requirements of the Act, such as maintenance of standards, prevention of significant deterioration in "attainment" areas, protection of visibility in national parks and wilderness areas, and prevention of significant contribution to nonattainment in other states. ER 175-76, 179. SAFE further contended that the proposed revision would violate §193 of the Act, which prohibits relaxation of any SIP control requirement in effect prior to the 1990 CAA Amendments. ER 166-69.

On July 11, 2005, EPA approved the SIP revision adding crop residue disposal to the list of activities exempted from the SIP's ban on open burning (hereinafter "the revision" or "2005 SIP revision"). ER 548 . In response to SAFE's comments, EPA conceded that the pre-existing SIP "d[id] not, on its face, appear to identify crop residue disposal as a category of allowed burning." ER 549. The agency

nevertheless asserted that creation of a new "crop residue disposal" exemption from the open burning ban was merely a "clarification" because the state had long allowed such burning under state laws and rules not incorporated into the SIP. ER 549-50. EPA further asserted that because the revision purportedly did not change or relax an existing control measure, it necessarily did not interfere with attainment and maintenance of standards, other applicable requirements of the Act, or the anti-backsliding provisions of CAA §193. ER 549-51. Accordingly, EPA offered no §110(l) analysis of the impact of the revision on attainment and maintenance of standards, deterioration of air quality, or visibility in parks and wilderness area. Nor did EPA provide any analysis of whether the revision assured equivalent or greater emission reductions to the pre-1990 SIP, as required by CAA §193.

Petitioners SAFE and American Lung Association of Idaho have members who suffer severe – and sometimes life-threatening – impacts from the intense smoke generated by crop residue burning in Idaho. Such burning likewise threatens the health of Petitioner Sturgeon and her family, and their use and enjoyment of scenic areas in Idaho and nearby Montana. EPA's approval of the SIP revision allowing crop residue burning throughout Idaho without even evaluating the impact of such burning on air quality threatens the health and welfare of SAFE/ALA members and Sturgeon and deprives them of substantive and procedural protections to which they are entitled under the Clean Air Act. Moreover, EPA's approval of the

SIP revision effectively undermines the citizen suit that SAFE had previously noticed under the Act to enforce the pre-existing open burning ban against grass seed growers in Northern Idaho.[5] Accordingly, petitioners respectfully request that the Court vacate EPA's action for reasons more fully set forth below.

SUMMARY OF ARGUMENT

EPA acted illegally and arbitrarily in approving a new "crop residue disposal" exemption from the Idaho SIP's open burning ban without conducting the air quality and other analyses required by CAA §110(l). The pre-existing SIP on its face prohibited all forms of open burning except for specified categories that did not include crop residue disposal. By adding an entirely new section authorizing crop residue burning, the 2005 SIP revision substantially changed and relaxed the pre-existing SIP, thereby triggering EPA's duty to fully evaluate the impacts of the revision under §110(l). Contrary to EPA's assertions, prior state laws and practices allowing field burning could not be deemed a part of the pre-existing SIP, when those

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[5] SAFE's efforts to protect its members and others from the adverse health effects of grass burning in Idaho were previously before this Court in Safe Air for Everyone v Meyer, 373 F.3d 1035 (9th Cir. 2004), a citizen suit by SAFE under the Resource Conservation and Recovery Act ("RCRA") against grass growers who burned their fields in North Idaho. SAFE alleged that the grass residue being burned was a solid waste and that the burning was creating an imminent and substantial endangerment to public health. A divided panel of this Court held that as a matter of law the residue was not a solid waste, and therefore SAFE's action was not cognizable under RCRA. The Court did not reach the health issues and emphasized that the action before it did not involve any Clean Air Act issues.

laws and practices had never been proposed or approved by EPA as SIP revisions. Further, the 2005 SIP revision substantially relaxed those prior state laws as well by, for the first time, exempting crop residue burning from nuisance and trespass restrictions, and from opacity rules limiting the allowable density of smoke emitted.

Even if the 2005 SIP revision was not such a clear relaxation of the pre-existing SIP, EPA's failure to conduct a §110(l) analysis would still render its action invalid under Hall v. EPA. There, this Court expressly held that "non-relaxation" was not by itself sufficient to demonstrate, as required by §110(l), that a SIP revision would not interfere with attainment and other applicable requirements. Rather, to find "non-interference" under §110(l), EPA must (among other things) measure the existing level of pollution, compare it with the national standards, and determine the effect on this comparison of the proposed SIP revision. EPA conducted no such analysis here. Moreover, here, as in Hall, there is no necessary correlation between maintaining the stringency of the pre-existing SIP and meeting the Act's attainment requirements, particularly given that five areas in Idaho continued to be designated "nonattainment" for PM-10 (a pollutant contained in smoke) under the pre-existing SIP.

EPA also failed to evaluate interference of the SIP revision with other applicable requirements of the Act as required by §110(l). In particular, EPA performed no analyses of whether Idaho's SIP revision would interfere with the Act's

applicable requirements for limiting interstate pollution and for protecting visibility in parks and wilderness areas. The need for such analyses is particularly compelling here, as smoke from crop residue burning crosses state lines and contributes to significant visibility impairment.

Finally, EPA violated §193 of the Act by relaxing SIP control requirements in effect prior to the 1990 CAA Amendments. Among other things, the pre-1990 SIP prohibited agricultural burning that amounted to a "nuisance, hazard, source of air pollution," or that created a "fire or traffic hazard." It also strictly limited the density of smoke emitted by burning operations to no more than 20% opacity. The 2005 SIP revision not only drops these important limitations, but also effectively **exempts** crop residue burning from nuisance, trespass, and opacity restrictions. Thus, the revision violates §193 by substantially weakening pre-1990 requirements without assuring equivalent or greater emission reductions. EPA's approval of the 2005 revision was also arbitrary and capricious because the agency failed to provide any analysis or explanation as to how and why the revision complied with §193.

ARGUMENT

I. EPA ACTED ILLEGALLY AND ARBITRARILY IN APPROVING A NEW EXEMPTION FROM THE SIP'S OPEN BURNING BAN WITHOUT CONDUCTING THE AIR QUALITY AND OTHER ANALYSES REQUIRED BY CAA §110(l).

Section 110(l) of the Act provides that the EPA Administrator "shall not approve a revision of a plan if the revision would interfere with any applicable

requirement concerning attainment and reasonable further progress . . .or any other applicable requirement" of the Act. 42 U.S.C. § 7410(l). In Hall v. EPA, this Court held that §110(l) imposed an affirmative duty on EPA to conduct an air quality impact assessment of proposed SIP revisions. In particular, the Court found that §110(l) requires EPA "to 'measure the existing level of pollution, compare it with the national standards, and determine the effect of this comparison of the specified emission modifications'" in a proposed SIP revision. 273 F.3d at 1159, quoting Train v. NRDC, 421 U.S. 60, 93 (1975). In other words, "EPA must determine the extent of pollution reductions that are required" to attain standards and determine whether the emissions changes effected by a proposed revision will be adequate to the task. Id. Hall further held that EPA could not meet its duties under §110(l) merely by asserting that a proposed revision did not relax pre-existing SIP rules – particularly where nonattainment of standards had continued under the pre-existing rules. 273 F.3d at 1160-62.

Here, EPA conducted no air quality impact assessment at all of the SIP revision allowing crop residue burning. Nowhere did the agency "measure the existing level of pollution, compare it with the national standards, and determine the effect on this comparison" of allowing crop residue burning as provided in the revision. EPA's sole basis for claiming compliance with §110(l) was its assertion that the SIP revision did not relax pre-existing SIP requirements, and therefore no

further analysis was necessary. As further discussed below, EPA's claim of non-relaxation is both utterly false and plainly insufficient to comply with §110(l).

A. The Addition of a New Exemption for Crop Residue Burning Constituted a Major Relaxation of the Pre-existing SIP.

The SIP revision approved by EPA in this case plainly constituted a substantial relaxation of the pre-existing plan. Prior to the revision at issue here, the Idaho SIP (as approved in 1993 and re-approved in 2003) explicitly stated that "[n]o person shall allow, suffer, cause or permit any open burning operation, unless it is a category of open burning set forth in Section 600 through 616." ER 56. Crop residue disposal was not one of the categories of allowable open burning set forth in Sections 600 through 616. ER 57-59. The SIP revision at issue here, approved in 2005, **added** an entirely new section 617 creating a new and distinct category of allowable open burning for "crop residue disposal." ER 129-33.[6] Moreover, that new section authorized open burning of crop residue in accordance with the Idaho "Smoke Management and Crop Residue Disposal Act" and rules promulgated thereunder, provisions never before incorporated into the SIP.[7] Id.

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[6] The document at ER 129 is described in EPA's certified index as "Redline/strike-our document comparing IDAPA 58.01.01.600 through 616 federally-approved on 1/16/2003 (68 FR 2217) with IDAPA 58.01.01.600 through 617,as submitted by IDEQ [Idaho Department of Environmental Quality] on 5/22/2003." ER 562.

[7] The revision also deleted from the SIP the provision barring any form of open burning two years after the state environmental agency approved an alternative as being economical (defined as non-prohibitive in cost) and reasonable. In its place, the revision allows only the state Agriculture Department to make such a

EPA conceded that, "on its face," the pre-existing SIP did not identify crop residue burning as a category of allowed burning. ER 549. The agency nevertheless claimed that revising the SIP to expressly allow such burning was merely a "clarification" because the state had in practice allowed agricultural burning in the past. EPA also cited several provisions of state law that were not part of the pre-existing federally approved SIP as evidence that the state had previously intended to allow agricultural field burning. ER 549-50. Whatever the state may have previously allowed or intended as a matter of state law, however, the revision here was plainly a major relaxation of the **federally-approved and applicable SIP** for Idaho, which clearly did not authorize crop residue disposal as a category of allowable open burning after 1993, or contain any reference to allowing such burning under a state "smoke management" program. The simple fact is that the state law provisions cited by EPA as allowing agricultural burning were not a part of the federally approved Idaho SIP in effect immediately before EPA approved the SIP revision at issue here. Such provisions did not appear anywhere in the list of rules and statutes comprising the federally approved SIP after EPA's 1993 and 2003

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determination, and only with respect to crop residue burning. Moreover, the revision allows such a determination only where an alternative is found to be "economically viable" (as opposed to the prior SIP provision requiring only that alternatives be "non-prohibitive" in cost), a term that has been defined by the state as requiring (in effect) that an alternative cannot reduce the grower's profits. Idaho Code §22-4803(7).

approval actions. See ER 522-25,542-46; 40 C.F.R. §52.679 (2004)(reproduced in addendum hereto).[8]

For purposes of the Clean Air Act, the "applicable implementation plan" is "the portion (or portions) of the implementation plan, or most recent revision thereof, **which has been approved**" by EPA under §110 of the Act. 42 U.S.C. §7602(q) (emphasis added). Thus, state laws and rules (or changes therein) do not become part of the applicable SIP until they are formally approved by EPA as SIP revisions. Even where a state has changed state law and submitted the change as a proposed SIP revision to EPA, the previously approved SIP remains the applicable and federally enforceable SIP until the revision is actually approved by EPA. General Motors Corp. v. United States, 496 U.S. 530, 540 (1990) ("There can be little or no doubt that the existing SIP remains the 'applicable implementation plan' even after the state has submitted a proposed revision"); United States v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077, 1085-86 (3d Cir. 1987) ("There is simply no statutory, regulatory, or case authority that supports the district court's reliance on Wheeling's [SIP revision] application as a basis for relieving it of the compliance schedule"

[8] In its approval of the 2005 SIP revision, EPA noted (at ER 549) that an appendix to a 1996 air quality plan for Sandpoint made reference to the state's voluntary smoke management program, but that reference was purely informational in nature, and did not purport either to add the smoke management program to the SIP or to supercede the SIP's open burning restrictions. ER 30-32, 34-36.

required by the SIP, when EPA had not yet approved the application); Duquesne Light Co. v. E.P.A., 698 F.2d 456, 471 (D.C. Cir. 1983) ("EPA rested on the ground that current SIPs remain in force until EPA grants formal approval to a revision. EPA is clearly correct as to the legal status of proposed revisions: they are proposals and nothing more. Otherwise, as this court has noted, states could circumvent requirements of the Act by proposing revisions to their SIPs")(citation omitted).

EPA's claim that the pre-existing SIP somehow implicitly incorporated state laws allowing crop residue burning also conflicts with the Administrative Procedure Act. As noted above, EPA's approval of a SIP revision is a rulemaking requiring public notice and opportunity to comment. Ober, 84 F.3d at 312. Thus, if EPA ever intended to approve any Idaho laws or rules as SIP revisions, including those purporting to allow field burning, it had to publish a proposal to do so in the Federal Register and accept comment thereon. Yet EPA did not do so, either when it proposed approval of the revision ultimately approved in 1993, or when it reapproved the relevant SIP language in 2003. Had the agency done so, petitioners could have filed comments opposing such a proposal – as they did here. A reading of the pre-existing SIP as incorporating new exemptions not specified (or even referenced) in the proposed approval of that SIP would therefore violate the APA's notice and comment requirements. Id. 3112-15 (EPA could not add key component to SIP submittal after close of public comment).

Nor could EPA somehow read an exemption for crop residue burning into the pre-existing SIP. Where, as here, the language of the pre-existing SIP was plain "on its face," EPA could not modify that language by interpretation. Bayview Hunters Point Community Advocates v. Metropolitan Transp. Comm'n, 366 F.3d 692, 703-04 (9th Cir. 2004)(no deference to EPA interpretation that conflicts with plain language of SIP). The Court "is not at liberty to extrapolate from the Plan or flesh out strategies not expressly contained therein." Citizens for a Better Environment v. Deukmejian, 731 F. Supp. 1448, 1459 (N.D. Cal. 1990).

Finally, even if the pre-existing SIP could somehow be construed as allowing open burning under state law provisions not included in that SIP, the revision approved in 2005 would still represent a relaxation in several key respects. For example, the 2005 revision authorizes crop residue burning "if conducted in accordance with the Smoke Management and Crop Residue Disposal Act, Chapter 48, Title 22, Idaho Code" (hereinafter "Smoke Management Act"). ER 133. When the state proposed this revision to EPA (May 22, 2003), the Smoke Management Act had just been amended, earlier in 2003, in several ways that substantially weakened restrictions on field burning. For example, the 2003 amendments for the first time exempted crop residue burning from longstanding Idaho rules limiting the "opacity" (i.e., visible density) of smoke emitted from any source. ER 533. Such an exemption was not provided under pre-existing Idaho law or the pre-existing SIP.

The 2003 amendments also for the first time declared that crop residue burning conducted in accordance with the state's smoke management program "shall not constitute a private or public nuisance or a trespass." ER 535. Again, Idaho statutes did not previously allow crop residue burning to generate smoke or other hazards so severe as to create a nuisance or a trespass. Indeed, an Idaho trial court in August 2002 enjoined field burning in north Idaho (except under specified conditions) in a suit by residents alleging that the smoke constituted a nuisance and trespass. See Moon v. North Idaho Farmers Ass'n, 96 P.3d 637, 640 (Idaho 2004), cert denied, 125 S.Ct. 1299 (2005). Although enforcement of the injunction was subsequently blocked on other grounds (see id), the Idaho Supreme Court found that, prior to the 2003 amendments, "an action could be said to lie in nuisance and in trespass, respectively, given the invasion of the thick, oppressive smoke generated by the farmers' burning and the particulates emitted from the smoke onto the plaintiffs' land." Id. 642. The 2003 amendments, however, curtailed plaintiffs' rights to file nuisance and trespass actions to enjoin field burning.

For all the foregoing reasons, the 2005 revision was plainly a substantial change from and relaxation of the pre-existing SIP. EPA's claims to the contrary are utterly unfounded, and therefore provide no basis for the agency's failure to conduct the air quality impact analysis required by §110(l) of the Act.

B. This Court's Decision in Hall Requires EPA to Conduct An Air Quality Impact Analysis under §110(l) Even if a Revision is Not a Relaxation of the Pre-Existing SIP.

Although the 2005 SIP revision was plainly a relaxation of the pre-existing SIP, the Act as construed by this Court in Hall requires a §110(l) air quality impact analysis even if there was no relaxation. In Hall, a citizen challenged EPA's approval of a SIP revision that changed permitting requirements for major new air pollution sources in the Las Vegas area. Among other things, the citizen argued that EPA's approval action was unlawful because the agency had failed to conduct a §110(l) analysis of the revision. In response, EPA asserted - as it does here - that a §110(l) analysis was unnecessary because the revision did not relax the pre-existing SIP, and therefore could not interfere with applicable requirements concerning attainment, reasonable further progress, or other applicable requirements of the Act. The Court explicitly rejected EPA's rationale:

> The EPA argues that, so long as revision to an air quality plan does not relax existing pollution control measures, there necessarily will be no interference with attainment requirements. The EPA concluded that the revisions at issue here did not relax the preexisting rules; so, without further inquiry, the EPA made a determination of "non-interference." **This truncated analysis – which, as the EPA admits, at most assures that the rules as revised will not "exacerbate the existing situation" – does not fulfill the EPA's responsibility under § 110(l). That provision requires the EPA to evaluate whether the plan as revised will achieve the pollution reductions required under the Act, and the absence of exacerbation of the existing problem does not assure this result**.

273 F.3d at 1152 (emphasis added). The Court further explained that to find "non-interference" under §110(l), EPA had to, among other things, "measure the existing level of pollution, compare it with the national standards, and determine the effect on this comparison" of the proposed SIP revision. Id. 1159 (citation omitted). EPA had not conducted any such analysis in Hall.

The Court further found that EPA's "non-relaxation" rationale was particularly inadequate to satisfy §110(l) in light of the fact that the affected area (Las Vegas) continued to be designated nonattainment for the relevant pollutants (PM-10 and carbon monoxide). Given the failure of the area to achieve attainment under the pre-existing SIP, there was "no necessary correlation" between maintaining the stringency of that SIP and meeting current attainment requirements. Id. 1160-61.

The Hall rationale applies directly to this case. Here, as in Hall, EPA's sole basis for claiming compliance with §110(l) is the alleged non-relaxation of the pre-existing SIP. Here, as in Hall, the agency conducted no evaluation whatsoever of "whether the plan as revised will achieve the pollution reductions required under the Act." Id. 1152. Here, as in Hall, there is no necessary correlation between the alleged non-relaxation of the SIP and compliance with current attainment requirements. Indeed, just as in Hall, the area directly affected by the revision here (Idaho) includes PM-10 nonattainment areas (five in all) that have failed to achieve redesignation to attainment under the pre-existing SIP. The 2005 SIP revision authorizes crop residue

burning in all of these areas – burning that generates smoke containing high levels of PM-10. Moreover, the revision authorizes crop residue burning outside of nonattainment areas as well, and because (as noted above) smoke from such burning can travel for many miles, such smoke can and does impact nonattainment areas. The record shows, for example, that smoke from crop residue burning on the Rathdrum prairie in Kootenai county sometimes degrades air quality in the Sandpoint PM-10 nonattainment area in neighboring Bonner County. E.g., ER 290-99 .

EPA's non-relaxation rationale is also inadequate to satisfy §110(l) in this case because the agency has never conducted a comprehensive evaluation of the impacts of crop residue burning on the ability of Idaho and neighboring states to attain and maintain clean air standards or comply with other applicable requirements of the Act. This is not a situation where EPA previously concluded after careful study and analysis that crop residue burning would not interfere with attainment, maintenance and other applicable requirements anywhere in Idaho or elsewhere. A claim of non-relaxation cannot possibly show compliance with §110(l) when EPA never demonstrated compliance with §110(l) under the pre-existing state of affairs.

C. EPA Failed to Evaluate Interference with Other Applicable Requirements of the Act as Required by §110(l).

Section 110(l) is not limited to prohibiting SIP revisions that interfere with attainment and reasonable progress toward attainment; it also prohibits SIP revisions that interfere with "any other applicable requirement" of the Act. Here, EPA failed

to address or evaluate interference by the SIP revision with at least two such "other" applicable requirements, further described below. EPA's "non-relaxation" rationale did not satisfy the agency's §110(l) duty with respect to these requirements, not only because the 2005 revision plainly did relax the pre-existing SIP (see part I.A above), but also because the state has yet to even adopt SIPs that purport to fully meet these requirements.

1. Interstate Transport of Pollution

Section 110(a)(2)(D)(i) of the Act requires each state's SIP to prohibit emissions from within the State that : I) contribute significantly to nonattainment in, or interfere with maintenance of standards by any other state; or II) interfere with measures required to be included in the SIP for any other State to prevent significant deterioration of air quality or to protect visibility. 42 U.S.C. §7410(a)(2)(D)(i). EPA performed no evaluation whatsoever of whether Idaho's SIP revision allowing crop residue burning would interfere with these applicable requirements for limiting interstate transport of pollution. Moreover, EPA's "non-relaxation" rationale was inapplicable to these requirements because, with respect to PM 2.5, the state has never before submitted a SIP to address them.

EPA first adopted the PM 2.5 NAAQS in 1997 to provide health and welfare protection in addition to that provided by the PM-10 standard. 62 Fed. Reg. 38652

(1997).[9] The Act required Idaho to submit a SIP revision by 2000 to implement the PM 2.5 standard, including the requirements for limiting interstate transport of that pollutant. 42 U.S.C. §7410(a)(1) of the Act. 70 Fed. Reg. 21147, 21148 (2005). At the time of the action challenged here, Idaho had still not submitted such a SIP revision. Id. (notifying Idaho and other states of their failure to timely submit legally mandated PM 2.5 SIPs to address interstate transport of pollution). Because Idaho has yet to even submit its SIP addressing interstate impacts from Idaho PM 2.5 pollution, there is no necessary connection between non-relaxation of the pre-existing SIP (which did not address PM 2.5 transport to other states at all) and non-interference with the Act's applicable requirements for preventing such impacts.

Although it is EPA's duty to fully evaluate the potential interstate impacts of crop residue burning in Idaho on PM 2.5 pollution (a duty the agency has yet to fulfill), Petitioners note that there is significant potential for smoke from such burning to interfere with air quality in other states. As noted in the Statement of Facts, such smoke can travel for many miles from burn sites, and has in fact reached Washington, Montana, and Canada in the past at levels sufficient to produce adverse health and welfare impacts. Given this potential, it is all the more important that EPA fully evaluate the potential interstate impacts of Idaho crop residue burning to

[9] Smoke from crop residue burning contains both PM-2.5 and PM-10. See ER 290-99.

determine whether allowing such burning will interfere with the Act's applicable requirements for prevention of adverse PM 2.5 impacts in other states.

2. Visibility Protection

The Act establishes "as a national goal the prevention of any future, and the remedying of any existing , impairment of visibility" in 156 "Class I" national parks and wilderness areas throughout the nation. 42 U.S.C. §7491(a)(1); 64 Fed. Reg 35714 (1999). The Act and EPA rules further require each state to revise its SIP to include emission limits and other measures as may be necessary to make reasonable progress toward meeting that national goal. 42 U.S.C. §7491(b)(2); 40 C.F.R. 51.308 (2005). Among other things, these state "visibility" SIPs must prevent degradation of visibility in Class I areas on days with the best visibility and assure visibility improvement on days with the worst visibility impairment. 40 C.F.R. §51.308(d)(1). The SIP must meet these visibility protection requirements not only for Class I areas within the state, but also for Class I areas outside of the state where emissions from the state may reasonably be anticipated to contribute to visibility impairment. States must submit SIP revisions meeting these requirements no later than December 17, 2007. Id. §51.308(b).

Idaho has not yet submitted the above-described visibility SIP to EPA. Thus, with respect to the Act's applicable requirements for visibility protection, EPA's "non-relaxation" rationale is again utterly irrelevant: EPA cannot possibly claim

non-relaxation of a non-existent SIP. Nor is EPA excused from conducting a §110(l) analysis with respect to the Act's visibility requirements merely because the full visibility plan is not yet past due. In Hall, the Court indicated that EPA must determine whether the specific SIP revision before it will interfere with applicable requirements of the Act, even where the agency does not yet have before it the whole plan for meeting those applicable requirements. In such a situation, EPA must, at the very least, evaluate the SIP revision before it and determine whether it is "consistent with development of an overall plan capable of meeting" the Act's requirements. Hall, 273 F.3d at 1161. With respect to the Act's visibility requirements, this means that EPA must evaluate whether the emissions allowed by the 2005 SIP revision are consistent with developing a visibility SIP that will meet the Act's requirements. EPA has not even attempted to conduct such an evaluation here.

EPA's failure to conduct the required §110(l) analysis is particularly inexcusable because there are two Class I areas within the State that the state's visibility SIP must protect: the Selway Bitterroot Wilderness Area and the Hells Canyon Wilderness Area. 64 Fed. Reg. at 35716. Another Class I area, the Cabinet Mountains Wilderness Area, is located on the Montana-Idaho border, east of field burning areas in northern Idaho. Id. EPA itself has found that field burning in the Northwest "may lead to the formation of regional haze in pristine and scenic areas." ER 44. At the very least, EPA was obligated to evaluate the impact of allowing field

burning in Idaho on the state's ability to assure reasonable progress toward clear skies in these Class I areas.

II. EPA ILLEGALLY RELAXED PRE-1990 REQUIREMENTS OF THE IDAHO SIP, IN VIOLATION OF CAA §193.

Section 193 of the Act provides as follows:

> No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990, in any area which is a nonattainment area for any pollutant may be modified after November 15, 1990 in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

42 U.S.C. § 7515. According to the House Report on the 1990 amendments, "[t]he antibacksliding language in this section prohibits the relaxation of control requirements currently in effect, or required to be adopted by any order, settlement agreement, or plan currently in effect after enactment of the Clean Air Act Amendments of 1990." House Report at 273. The Report noted that while the 1990 Amendments gave many nonattainment areas additional time to attain standards, "all areas must continue to use pollution control measures already in place . . .in order to assure attainment as expeditiously as practical." Id.

The 2005 SIP revision violated the antibacksliding prohibition in §193. As further detailed below, the 2005 revision modified the SIP's pre-1990 restrictions on agricultural open burning (restrictions that applied statewide) without insuring equivalent or greater emission reductions.

A. The 2005 SIP Revision Substantially Weakened Pre-1990 SIP Control Requirements.

At the time of the 1990 Amendments, the only EPA-approved Idaho SIP regulation on open burning was the one originally approved by EPA in 1972, and reapproved (in renumbered form) in 1982. The stated "purpose and intent" of that regulation was "to eliminate all forms of open burning except those for which an alternate means of producing a similar public benefit does not exist." ER 1 (§1-1151.01). Section 1-1152.02 of the regulation provided: "No person shall allow, suffer, cause or permit any open burning operation which does not fall into at least one (1) of the categories of Manual Section 1-1153." ER 2. It further provided that "[a]ny open burning operation that would normally be allowed by Section 1-1153 of this regulation, but is determined to be **a nuisance, hazard, or source of air pollution, shall be prohibited**." ER 2 (emphasis added).

Section 1-1153 of the SIP regulation set out 9 categories of allowable open burning, along with restrictions on each. The category relevant to agricultural burning was defined as follows:

> The open burning of plant life grown on the premises in the course of any agricultural, forestry, or land clearing operation may be permitted **when it can be shown that such burning is necessary and that no fire or traffic hazard will occur.** Convenience of disposal is not of itself a valid necessity for burning.

ER 4 (§1-1153.08, emphasis added). The regulation further required any person conducting such burning to make every reasonable effort to burn "only when an

economical and reasonable alternate method of disposal is not available." Id. In addition, the regulation provided that "[w]hen such burning creates air pollution or a public nuisance, additional restrictions may be imposed to minimize the effect upon the environment."[10] Id.

The pre-1990 SIP further limited the allowable density (opacity) of smoke discharged from any point of emission. ER 5-6. Specifically, the SIP prohibited visible emissions of smoke having an opacity of greater than 20% over any period of more than 3 minutes in any 60 minute period. ER 5. The SIP set out six exemptions from this opacity limit, none of which included agricultural burning, and even those exempt activities were subject to an alternative opacity limit of 40%. ER 5-6 .

In summary, the pre-1990 Idaho SIP was designed to eliminate all forms of opening burning except those for which alternatives did not exist. It further prohibited agricultural burning that created "a nuisance, hazard, or source of air pollution," or that created a "fire or traffic hazard." Moreover, the pre-1990 SIP allowed agricultural burning only where shown to be "necessary," and only when an economical and reasonable alternate method of disposal was not available. And the

[10] This language provided the state with additional authority to impose restrictions on agricultural burning: It did not exempt such burning from the broad prohibition in section 1-1152.02 on creation of a "nuisance, hazard, or source of air pollution" by any open burning operation otherwise allowed under section 1-1153. See, e.g., Pronsolino v. Nastri, 291 F.3d 1123, 1138 (9th Cir. 2002)(all provisions of statute apply absent irreconcilable conflict).

pre-1990 SIP strictly limited the opacity or density of smoke emitted by burning operations. These provisions would have prohibited the type of widespread and intensive crop residue burning now occurring in Idaho, or at the very least required substantial additional restrictions on such burning.

The 2005 SIP revision represents a major relaxation of the pre-1990 SIP in several key respects:

*** Purpose**: The stated purpose of the pre-1990 SIP was to "eliminate all forms of open burning" except where an alternative did not exist. That purpose appears no where in the 2005 revision, which instead states an intent to support crop residue burning, and provide a "safe harbor" to farmers when burning crop residues under the state's smoke management program. ER 531.

***Nuisance, hazard, and air pollution**: The pre-1990 SIP prohibited agricultural burning determined to be a nuisance, hazard or source of air pollution. The 2005 revision not only deletes this prohibition entirely, but also allows burning to occur under the state's smoke management law – a law that declares that crop residue burning can never constitute a nuisance or trespass. ER 535. Thus, the 2005 revision allows burning to create severe air pollution, public nuisances, and trespasses that would have been prohibited under the pre-1990 SIP. As noted above, an Idaho court issued an order limiting field burning in 2002 in a suit alleging that the smoke constituted a nuisance and trespass. See Moon, 96 P.3d at 640. Under the

2005 SIP revision, crop residue burning can no longer be limited even where it generates pollution so severe as to create a nuisance or trespass. The 2005 revision therefore amounts to a major relaxation of the pre-1990 SIP.

The state's smoke management program does not remedy this rollback. That program does not prohibit field burning that causes air pollution, nuisances, or trespasses; nor does it require a reduction in burning or emissions therefrom. Rather the smoke management program focuses mainly on regulating the timing of burning, so that it occurs on days when air quality impacts are predicted to be less severe, and when winds are predicted to carry smoke away from populated areas. Because such predictions are fraught with uncertainty, and because people live in almost every direction from the fields, the program often fails to prevent severe smoke impacts on the public, as documented above. EPA itself has found that Idaho's smoke management program is "inadequate to protect public health and safety," that smoke management alone cannot prevent the health and environmental problems caused by routine wide-spread burning, and that alternatives to burning are needed. ER 42, 469a-470, 475.

***Traffic Hazards:** The pre-1990 SIP prohibited any agricultural burning that created a traffic hazard. The 2005 SIP revision contains no such prohibition.[11] This

[11] A 2003 rule adopted by the state Agriculture department provides that "[b]urning of fields adjacent to roads and highways shall be approved on a case-by-case basis taking into account the time of day, field size and wind direction." ER 468. This

represents a clear relaxation from the pre-1990 SIP. EPA itself acknowledges that dense smoke from crop residue burning in Idaho can create dangerous driving conditions, and has been linked to a traffic fatality in Idaho. ER 44, 322, 469a, 471, 475.

***Alternatives:** The pre-1990 SIP prohibited agricultural burning where economical and reasonable alternatives were available. The SIP stated this as an absolute requirement, and, as noted above, further stated that the whole purpose of the SIP open burning rules was to "eliminate all forms of open burning except those for which an alternate means of producing a similar public benefit does not exist." In contrast, the 2005 Revision does not require the use of alternatives to crop residue burning unless the director of the state Agriculture department makes a discretionary finding that economically viable alternatives to burning are available. ER 533. Moreover, the state now defines the test of "economic viability" as excluding any alternative that results in lower profits for the growers. Idaho Code § 22-4802(7). The agriculture director has never found an alternative that survives this restrictive test. Thus, the 2005 SIP revision relaxes the pre-1990 SIP by changing a mandatory requirement for the use of alternatives to one that is wholly within the discretion of a

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provision merely provides for approval of burning adjacent to roads: It does not prohibit such burning from creating a traffic hazard, nor does it apply at all to burning that is not adjacent to a road.

state agency using a standard for qualifying alternatives as "economically viable" that virtually assures that none will be required.

* **Opacity:** The pre-1990 SIP prohibited emissions of visible smoke and other air pollutants with greater than 20% opacity measured over specified time frames. Thus, even where open burning was allowed, the density of smoke emitted could not exceed 20% opacity. The 2005 revision effectively exempts crop residue burning from this limit on the visible density of smoke, a clear and substantial relaxation of the pre-1990 control requirement. ER 533. As a result of the 2005 revision, field burning operations can now emit much denser smoke than they could under the pre-1990 SIP.

For all the foregoing reasons, the 2005 SIP revision violated CAA §193 by significantly relaxing the pre-1990 SIP control requirements governing agricultural burning and failing to ensure equivalent or greater emission reductions.

B. EPA Failed to Adequately Evaluate or Explain Compliance with §193.

Even if violation of §193 was not so apparent from the record, EPA's approval of the SIP revision would still be arbitrary and capricious because the agency failed to provide an adequate or reasoned explanation of how and why the revision complied with §193. As with §110(l), EPA's sole basis for claiming that the 2005 SIP revision complied with §193 was that Idaho had in practice allowed crop residue burning for a long time pursuant to state laws and rules. The specific inquiry

required by §193, however, is whether the 2005 SIP revision modifies the terms of the pre-1990 EPA-approved SIP, and if so, whether the revision assures equivalent or greater emission reductions. That inquiry is not answered by generalized assertions that the state has allowed field burning in practice, or by citing state law provisions not incorporated into the EPA-approved SIP before 1990. Rather, the §193 inquiry requires EPA to first compare the text of the revision to the text of the applicable pre-1990 SIP, and if the revision modifies that language, determine whether the modification insures equivalent or greater emission reductions.

EPA completely failed to conduct the evaluation required by §193 in this case. The agency did not examine how the 2005 SIP revision changed the pre-1990 SIP, nor did it even attempt an analysis of whether the former assured the same or greater emission reduction as the latter. EPA's claims that field burning has long been allowed under state law did not answer the question presented by §193 of whether the specific restrictions on such burning under the 2005 SIP revision did or did not assure emission reductions at least as great as those under the pre-1990 SIP. As detailed above, the 2005 revision plainly did not impose the same restrictions on field burning as the pre-1990 SIP. As in Hall, EPA was obligated to evaluate the effect of the 2005 revision on emissions and compare the results of that evaluation with emissions allowed under the pre-1990 SIP. Because EPA failed to conduct any such analysis here, its claim that the 2005 SIP revision complied with §193 was arbitrary,

capricious, and contrary to law. Motor Vehicle Mfrs Assn v. State Farm Mutual Auto. Ins. Co, 463 U.S. 29, 43 (1983)(agency action arbitrary and capricious where agency fails to articulate "a rational connection between the facts found and the choice made.").

CONCLUSION

Petitioners respectfully request that the Court vacate EPA's approval of the 2005 SIP revision for the reasons set forth above. Petitioners further request that they be awarded costs of litigation, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 7607(f).

DATED this 15th day of December, 2005.

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 05-75269, I certify that the attached opening brief of Petitioners Safe Air for Everyone, American Lung Association of Idaho, and Noël Sturgeon is proportionately spaced, has a typeface of 14 points or more and contains 11,053 words.

Dated: December 15, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Opening Brief of Petitioners** were mailed by United States priority mail, postage prepaid, this 15th day of December, 2005, to:

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