

subject to public and EPA review. This is in marked contrast to the other types of sources that are exempt from minor NSR in Idaho, for which the public and EPA have had an opportunity to review and comment on the emission levels and source categories that set the boundaries for the minor NSR exemptions.

It is true that EPA regulations do not require the issuance of a permit for the construction or modification of minor sources provided the SIP includes 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. EPA statutes and regulations do require, however, that SIP revisions be subject to public comment and EPA approval, CAA 110(l) and 40 CFR 51.104, and also that the public have an opportunity to review and comment on a State's proposed approval of a new source or modification, 40 CFR 51.161(a). At no point in the process is IDEQ's decision that a particular source does not need approval or a permit to construct because it should be exempt under IDAPA 58.01.01.222.03 subject to EPA or public review. Moreover, EPA regulations require that a State's new source review regulations specifically identify the types and sizes of sources subject to review. See 40 CFR 51.160(e). The Idaho rules do not meet this requirement because sources that are initially required by the rules to get a permit can subsequently be exempted from that requirement by the Director of IDEQ without EPA or public notice or approval.

In short, IDAPA 58.01.01.222.03 in effect authorizes IDEQ to revise the SIP without a SIP revision that is subject to public or EPA review. Sections 110(i) and (l) of the CAA specifically preclude States from changing the requirements of the SIP except through SIP revisions adopted by the State after reasonable notice and public hearing and approved by EPA. This "director's discretion" provision of IDAPA 58.01.01.222.03 is inconsistent with those requirements, as well as the requirements of CAA section 110(a)(2)(C), 40 CFR 51.104, 40 CFR 51.160, and 40 CFR 51.161. Therefore, EPA is taking no action on this provision. As noted in the proposal, if IDEQ determines to exempt a source from new source review under the authority of IDAPA 58.01.01.222.03, the source is not exempt from new source review as a matter of Federal law unless and until the exemption has been approved by EPA as a source-specific SIP revision. See 67 FR 52670.

*Comment 4:* IDEQ commented on EPA's proposal not to act on IDAPA 58.01.01.401.04, which authorizes IDEQ to issue a Tier II operating permit with a future compliance date and requires EPA approval prior to issuance of such a permit. Idaho agrees that operating permits sanctioning a requirement that conflicts with the SIP may require a SIP revision. IDEQ asserts, however, that just as IDEQ enters into consent orders and settlement agreements with compliance schedules, IDEQ issues Tier II operating permits containing compliance schedules. IDEQ notes that compliance orders in Tier II permits use language similar to that in Tier II (title V) operating permits, that is, that the terms and conditions of the compliance schedule are supplemental to, and do not sanction noncompliance with, the underlying applicable requirement. For this reason, IDEQ asserts, EPA should approve IDAPA 58.01.01.401.04 as part of the SIP.

*Response 4:* By its terms, a compliance schedule issued under the authority of IDAPA 58.01.01.401.04, allows a source a future compliance date of up to three years beyond the compliance date of any provisions in IDAPA chapter 58. In other words, a compliance schedule issued under the authority of this provision is intended to delay the time for required compliance, in essence, to change the requirement for the source.<sup>2</sup> As such, it is a SIP revision that must be approved by EPA. This is in contrast to the kinds of compliance schedules issued under IDEQ's Tier I (title V) operating permit program or under other authority of State law, under which the compliance schedule sets forth a series of milestones for bringing a source into compliance with an applicable requirement. As noted by IDEQ, a compliance schedule issued in a Tier I (title V) operating permit does not sanction noncompliance with the underlying applicable requirement and does not extend the compliance date for the source. In contrast, a compliance schedule issued under the authority of IDAPA 58.01.01.401.04 by its terms extends the applicable compliance date for the source. In any event, because Idaho regulations provide that compliance schedules issued under the authority of IDAPA 58.01.01.401.04 must be approved by EPA, it is not necessary to include this provision as part of the SIP. Moreover, its inclusion in the SIP could cause confusion.

<sup>2</sup> Such a mechanism would perhaps be better characterized as a compliance extension.

Therefore, EPA is taking no action on this provision.

It may be that IDEQ has authority elsewhere in its Tier II permit program or under other provisions of Idaho law to issue a compliance schedule as part of a Tier II permit that sets forth a series of milestones for bringing a source into compliance with certain requirements, but that does not delay the compliance date, as does a compliance schedule issued under the authority of IDAPA 58.01.01.401.04. EPA's decision to take no action on IDAPA 58.01.01.401.04 has no bearing on IDEQ's authority to issue other types of compliance schedules. EPA recommends, however, that IDEQ carefully identify in any Tier II permit that contains a compliance schedule the regulatory provision under which such a compliance schedule is issued so that the procedure for issuing such a compliance schedule and the legal effect of such a compliance schedule is readily apparent.

*Comment 5:* IDEQ commented that EPA improperly places the burden on Idaho to establish that it has jurisdiction within Indian country with respect to regulation of persons who are not members of the tribe. IDEQ asserts that, under settled Indian law principles, Idaho presumptively has jurisdiction over persons that reside on Indian Reservations in Idaho who are not members of Tribes, citing to *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 257–58 (1992). Equally important, according to IDEQ, the CAA itself preserves State law from preemption in section 116 of the CAA, 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. IDEQ asserts that EPA therefore should expressly provide in the final rule that nothing in its approval is intended to preclude the exercise of State regulatory authority within Idaho Indian country independent of the CAA to the extent consistent with applicable Indian law principles.

*Response 5:* EPA reads this comment as a request that EPA clarify the status of State law as it applies within Indian reservations or other parts of Indian country.<sup>3</sup> EPA's proposed and final

<sup>3</sup> "Indian country" is defined under 18 U.S.C. 1151 as: "(1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently