Words Speak Louder than Actions: Ninth Circuit Narrows Exception to Plain Meaning Interpretation of SIP's. Safe Air for Everyone v. EPA

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I. INTRODUCTION

The balance between traditional agricultural practices and protection of the environment has led to a heated debate in the northwestern states. The federal government has an interest in ensuring that state environmental policies regulate agricultural practices, but the Clean Air Act ("CAA") still grants substantial amounts of discretion to the states to comply with federal standards. The government relies upon each state to implement policies that address diverse local concerns. This note explores the consequences of allowing states to participate in the creation of federal regulations under this act, and comments on one court's approach to resolve the inherent problems that arise out of this unusual regulatory process.

II. FACTS AND HOLDING

The instant case involves the agricultural practice of open field burning for purposes of economically and efficiently removing stubble remaining from crop harvesting.\(^2\) The practice of field burning is particularly common in rural areas of northwest Idaho, because farmers assert that the process also "improves the productivity of their fields and has certain environmental benefits."\(^3\) Evidence has shown that the benefits

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1. 475 F.3d 1096 (9th Cir. 2007) [hereinafter SAFE].
2. Brief of Respondent at 1, Safe Air for Everyone v. EPA, 475 F.3d 1096 (9th Cir. 2007) (No. 05-75269), 2006 WL 2351247. The process has also been shown to effectively and efficiently control insects and pests. Id. at 2.
3. Safe Air for Everyone v. EPA, 475 F.3d 1096, 1099 (9th Cir. 2007). The opinion points out that the Idaho legislature has expressed agreement with the view of most farmers in the region. See Idaho Code Ann. § 22-4801 (2006) ("The legislature finds that the current knowledge and technology support the practice of burning crop residue to control disease, weeds, pests, and to enhance crop rotations . . . . The legislature finds that due to
include: (1) extending “the productive life of bluegrass fields,” (2) restoring “beneficial minerals and fertilizers to bluegrass fields,” (3) reducing or eliminating “insects on bluegrass fields,” and (4) maximizing “the soil’s sunlight absorption to increase the crop yield for the following crop.” Of course, these benefits do not come without a price as asserted by environmental groups opposing such practices. Field burning has been shown to be “a source of particulate matter that contributes to air pollution” with the effect of large clouds looming over portions of the region and negative health consequences, which force residents with respiratory problems to abandon their homes simply to avoid the smoke. The instant court also noted, “a coroner’s report linked at least one fatality to field burning.” Moreover, the EPA has also concluded that, based on scientific studies and resident complaints, field burning in the Northwest raises substantial environmental and health concerns. These two perspectives of agricultural field burning essentially represent opposing sides on a very controversial issue in the northwestern states; therefore, one can imagine the strong influence of policy concerns behind this decision, which mostly turns on regulatory interpretation.

The dispute arose when the respondent, the United States Environmental Protection Agency (“EPA”) approved Idaho’s 2005 amendment to its State Implementation Plan (“SIP”). A SIP is a system implemented by the Clean Air Act (“CAA”), “whereby states submit, climate, soils, and crop rotations unique to north Idaho counties, crop residue burning is a prevalent agricultural practice and that there is an environmental benefit to protecting water quality from the growing of certain crops in environmentally sensitive areas”).

4 Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1043-44 (9th Cir. 2004).
6 SAFE, 475 F.3d at 1100.
7 Id.
8 EPA, Agricultural Burning: EPA Makes Northwest Field Burning a Top Priority 2 (November 2000), available at http://yosemite.epa.gov/r10/AIRPAGE.NSF/webpage/Agricultural+Burning (follow “EPA Makes Northwest Field Burning a Top Priority” hyperlink) (“Even though agricultural burning can have serious environmental and health effects, the emissions from this practice rarely exceed federal air quality standards which limits EPA’s ability to take action.”)
9 Brief of Respondent, supra note 2, at 1-2.
10 SAFE, 475 F.3d at 1103.
subject to the [EPA’s] review and approval, proposed methods for maintaining air quality."11 Idaho first submitted a SIP in 1972, when all states were required to submit a SIP to the EPA within 13 months of the passage of the CAA in 1970.12 In the 1972 SIP, a provision representing Idaho’s regulation of open burning was included that essentially outlined the types of burning that are permitted within the state.13 Land clearing burning was specifically included among the permitted types subject to regulations in place to minimize air pollution.14 Ten years later, Idaho submitted amendments to incorporate Idaho’s recodification of air pollution regulations, but the 1982 amendment was merely a renumbering that maintained all of the provisions from 1972, including permissive field burning.15 In 1991, the Idaho government changed its air pollution regulations substantially, and in 1993, the EPA approved its subsequent

11 Id. at 1099. “The CAA “authorizes the creation of air quality standards for a number of pollutants, including particulate matter produced as a byproduct of burning.” Id. at 1098-99.

12 SAFE, 475 F.3d at 1101.

13 Id.

14 Id. “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 the such burning is necessary and that no fire or traffic hazard will occur.” Id. (citing Section 3(H) of Idaho’s Air Pollution Rules; ER 486-487).

15 Id. at n.2.
amendment to the SIP to reflect those changes. "Consequently, both Idaho's Air Pollution Rules and the EPA-approved SIP were [ ] silent regarding the specific practice of agricultural burning or crop residue disposal burning." Finally, in 2005, the EPA approved the amendment in question and incorporated the portion of the Idaho Administrative Code that authorizes the practice of field burning. The court noted that Idaho had statutes dealing with the limited permission to practice field burning since 1985; however, the 2005 amendment to the SIP was the first time those statutes had been referenced in the SIP. The issue brought before the court was whether the EPA violated the CAA in approving an amendment to the SIP that "clarified that the open burning of crop residue was an otherwise allowable form of open burning."

The petitioner organization, Safe Air for Everyone ("SAFE"), was formed in 2001 as a coalition made up of citizens and community leaders to "protect the health of area citizens by ending grass field burning in North Idaho." SAFE challenged the approval of the SIP amendment, because the change effectively authorized field burning and contravened provisions in the CAA. Two particular sections in the CAA essentially require that EPA approvals of a clarification or amendment of a SIP must not weaken the prior SIP. Therefore, as SAFE argues, the 2005

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16 Id. at 1101.
17 Brief of Respondent, supra note 2, at 14-15. Another amendment occurred in 2003 took place, but "[t]he substantive language of the incorporated provisions on open burning was identical to the language approved in the 1993 SIP." SAFE, 475 F.3d at 1102.
18 SAFE, 475 F.3d at 1102. "The relevant provision, incorporating section 58.01.01.617 of the Idaho Administrative Code in effect on March 21, 2003, states: '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 and the rules promulgated pursuant thereto.'" Id.
19 Id.
20 Brief of Intervenor at 1, Safe Air for Everyone v. EPA, 475 F.3d 1096 (9th Cir. 2007) (No. 05-75269), 2006 WL 2967585.
22 SAFE, 475 F.3d at 1099.
23 Id. at 1109. The sections of the CAA in pertinent part read as follows: The EPA "shall not approve a revision of a [SIP] if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress...or any other applicable requirement of this chapter." 42 U.S.C. § 7410(l). "No control requirement in
amendment made field burning in Idaho legal, when under federal law, field burning had been illegal since the 1993 amendment to the SIP. The EPA, on the other hand, argued that following the plain meaning of the SIP would be contrary to the true intent of Idaho's policy makers to permit field burning. Moreover, the agency suggested that the amendment merely clarified that which state law had already established, rather than permitting an activity that causes air pollution that once was allegedly prohibited.

SAFE filed its petition for review on September 9, 2005 in the Ninth Circuit U.S. Court of Appeals to determine if the EPA acted reasonably in approving Idaho's SIP revision, or if the court should vacate the EPA decision. The court considered the two arguments put forth by the parties, and on January 30, 2007, the court concluded that the EPA's approval of the SIP amendment was erroneous. The court granted the petition for review and remanded the issue to the "EPA for its consideration of Idaho's proposed amendment as a change in the

**Section 7515.**...

SAFE, 475 F.3d at 1099. "Once approved by the EPA, [SIP's] have the force and effect of federal law." Id. (citing Trs. For Alaska v. Fink, 17 F.3d 1209, 1210 n.3 (9th Cir. 1994).

Reply Brief of Petitioners at 4, Safe Air for Everyone v. EPA, 475 F.3d 1096 (9th Cir. 2007) (No. 05-75269), 2006 WL 3023222.

SAFE, 475 F.3d at 1107.

Id. at 1109.

Brief of Respondent, supra note 2, at 1. The court had jurisdiction pursuant to 42 U.S.C. § 7607, which reads in pertinent part:

A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title...or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.


SAFE, 475 F.3d at 1109.
preexisting SIP, rather than as simply a clarification of it." The court based this conclusion on the point that the EPA should not have found "that the preexisting SIP did not ban field burning," because the plain language of the SIP revealed otherwise. Since this premise was essential to the EPA's conclusion that it did not violate the requirements of the CAA, that conclusion was "arbitrary, capricious, or otherwise not in accordance with law." Therefore, the court held under the CAA, when a SIP is amended and submitted for approval to the EPA, the agency must review and interpret the amendment based on its plain meaning in reference to the plain meaning of prior SIP's to ensure that the CAA is not violated.

III. Legal Background

A. The Clean Air Act

In 1963, Congress passed the CAA with the purpose to protect and improve air quality, advance research and development to further prevent and control air pollution in the future, support local government programs designed to prevent and control air pollution, and help facilitate the development of programs preventing and controlling air pollution regionally. The CAA designates two distinct approaches for achieving

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30 Id. at 1109-10.
31 Id. at 1109.
32 Id.
33 Id.
34 42 U.S.C. § 7401(b) (2000). Congress made this declaration after stating the following findings:

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;
(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation; (3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air
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these particular purposes: (1) requiring all states to keep concentrations of pollutants in the air at levels prescribed by national standards; and (2) requiring the Administrator of the EPA to identify particular stationary sources that are likely to endanger the public health or welfare.\(^{35}\)

This note focuses on the shifts of responsibility of air quality control to state and local governments within regions designated by the EPA.\(^{36}\) To implement this approach, the CAA requires each state to submit a SIP, which specifies how each particular state or region will achieve primary and secondary air quality standards required by the act.\(^{37}\) Primary standards are those related to public health while secondary standards are those that are necessary to protect the public welfare as determined by the Administrator of the EPA.\(^{38}\) Collectively, these standards are referred to as the National Ambient Air Quality Standards and are proposed and published by the Administrator for any air pollutant for which quality criteria are issued under 42 U.S.C. § 7408.\(^{39}\)

\(^{35}\) Id. The predecessor to the CAA and the “first legislative act to address the issue of air pollution was the passage of the Air Pollution Control Act of 1955.” Erin C. Bartley, Creative Statutory Interpretation: How the EPA Escaped Regulation of Motor Vehicle Emissions Under the Clean Air Act, 13 MO. ENVTL. & POL’Y REV. 136, 140 (2005).

\(^{36}\) 42 U.S.C. § 7407(a) (2000). “To assure that such air quality standards are met, the CAA establishes a system heavily dependant upon state participation.” SAFE, 475 F.3d at 1100. The act also requires the Administrator of the EPA to “encourage cooperative activities by the States and local governments for the prevention and control of air pollution.” 42 U.S.C. § 7402(a) (2000).

\(^{37}\) 42 U.S.C. § 7407(a) (2000). “Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.” Id.


In creating and drafting the details of a SIP, the CAA grants states a significant amount of flexibility. However, to reach the minimum level requirements of the CAA, each SIP must include several statutory elements before submission to the EPA. The required element at issue in the present case is "the mandate that state plans provide for regular revisions to reflect evolving air quality conditions and standards." The EPA treats revisions just like a new SIP with regard to the fact that they must be open to public hearing and comment and subsequently submitted to the EPA for approval. Specifically, "[t]he State must submit with the plan, revision, or schedule a certification that" a hearing was held in accordance with notice as required by EPA regulations. A state does not


41 42 U.S.C. § 7410(a)(2) (2000). In summary, a SIP must include:

- enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act.

42 42 U.S.C. § 7410(a)(2)(H). Each plan submitted by a state to the EPA shall provide for revision of such plan--

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

43 Sierra Club v. Ga. Power Co., 443 F.3d 1346, 1348 (11th Cir. 2006). "The SIP can be modified only through the SIP revision process." Sierra Club v. Tennessee Valley Authority, 430 F.3d 1337, 1346 (11th Cir. 2005) (citing 40 C.F.R. § 52.1384 (2006)).

44 40 C.F.R. § 51.102(f).

Except as otherwise provided in paragraph (c) of this section, States must conduct one or more public hearings on the following prior to adoption and submission to EPA of: (1) Any plan or revision of it required by § 51.104(a).
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need to submit revisions to a SIP to the EPA as a full reconstruction of the plan, meeting all the formal requirements of the act for approval or disapproval of the whole plan. Instead, the CAA "provides for piecemeal submission of SIP revisions," while "leaving most of the plan untouched." Once a revision to a SIP has been successfully submitted to the EPA, the Administrator is required to approve the submission as long it meets all the requirements of the CAA. However, the Act forbids the Administrator from approving the revision if it "interfere[s] with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of this chapter." Also, the general savings clause of the CAA requires that no plan in effect before

(2) Any individual compliance schedule under (§ 51.260). (3) Any revision under § 51.104(d).

40 C.F.R § 51.102(a) (emphasis added).

Any hearing required by paragraph (a) of this section will be held only after reasonable notice, which will be considered to include, at least 30 days prior to the date of such hearing(s): (1) Notice given to the public by prominent advertisement in the area affected announcing the date(s), time(s), and place(s) of such hearing(s); (2) Availability of each proposed plan or revision for public inspection in at least one location in each region to which it will apply, and the availability of each compliance schedule for public inspection in at least one location in the region in which the affected source is located; (3) Notification to the Administrator (through the appropriate Regional Office); (4) Notification to each local air pollution control agency which will be significantly impacted by such plan, schedule or revision; (5) In the case of an interstate region, notification to any other States included, in whole or in part, in the regions which are significantly impacted by such plan or schedule or revision.

40 C.F.R. § 51.102(d) (emphasis added).

45 Hall v. EPA, 273 F.3d 1146, 1159 (9th Cir. 2001).
46 Id.
47 SAFE, 475 F.3d at 1100.
49 42 U.S.C. § 7410(l) (2000). "The term 'reasonable further progress' means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date."

November 15, 1990, in a nonattainment area, may be modified "unless the modification insures equivalent or greater emission reductions."\(^{50}\)

**B. Plain Language of a SIP**

A SIP is interpreted based upon the plain language of the plan, and if that language is clear, the court does not give any deference to agency interpretation.\(^{51}\) Public policy mandates that the EPA, as an agency, cannot "interpret a regulation contrary to its unambiguous meaning" because the "agency must adhere to its own rules and regulations."\(^{52}\) In addition to the restrictions placed on the EPA, "[a] state's 'interpretation of its SIP cannot change the act's mandate of continuous compliance."\(^{53}\) The primary reasoning behind the rule is that once the Administrator of the EPA approves the plan, it has the force and effect of federal law to advance a strict level of environmental standards across the nation.\(^{54}\) To enforce the plan and ensure the states meet the EPA's standards, the EPA Administrator may file suit in federal court, states may take action in individual state courts, and citizens may seek remedies in limited circumstances pursuant to the CAA.\(^{55}\) Thus, no state or agency has the power to alter the meaning or construe the plain language of the federally

\(^{50}\) 42 U.S.C. § 7515 (2000). "The term 'nonattainment area' means, for any air pollutant, an area which is designated 'nonattainment' with respect to that pollutant within the meaning of section 7407(d) of this title." 42 U.S.C. § 7501(1) (2000). An area designated as "nonattainment" is "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant." 42 U.S.C. § 7407(d)(1)(A)(i) (2000).


\(^{53}\) Sierra Club v. Tennessee Valley Authority, 430 F.3d 1348.

\(^{54}\) Espinosa v. Roswell Tower, Inc., 32 F.3d 491, 492 (10th Cir. 1994).

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implemented regulation under the CAA without revision and approval of the EPA.\textsuperscript{56}

Regulations are not construed based on plain language, however, when that construction leads to conclusions contrary to the intent of the agency that implemented the regulation,\textsuperscript{57} or if "such plain meaning would lead to absurd results."\textsuperscript{58} Under this exception, "the intent of Congress or the Agency concerning the disputed language must be resolved through application of various settled rules of construction and interpretation, including analysis of the underlying statute's structure and purpose."\textsuperscript{59}

C. The Administrative Procedure Act

Congress enacted the Administrative Procedure Act ("APA") with the purpose to "insure uniformity, impartiality, and fairness in the procedures employed by federal administrative agencies."\textsuperscript{60} The notice provisions of the APA contribute to the fairness purpose by requiring each agency to publish specific rules, statements, descriptions, and revisions with the Federal Register for "guidance of the public."\textsuperscript{61} The publication

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\item \textsuperscript{56} 40 C.F.R. § 51.105 (2006).
\item \textsuperscript{58} Dyer v. United States, 832 F.2d 1062, 1066 (9th Cir. 1987).
\item \textsuperscript{59} American Alternative, 176 F. Supp. 2d at 555.
\item \textsuperscript{60} 2 Am. Jur. 2d Administrative Law § 14 (2007).
\item \textsuperscript{61} 5 U.S.C. § 552(a)(1).

Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

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required by this section of the APA "had as its principal purpose that there was to be disclosure to the public of the manner in which the Government conducts its business. Congress additionally was concerned with the dilemma in which the public finds itself when forced to 'litigate with agencies on the basis of secret laws or incomplete information.'"62

The APA also requires notice of any proposed rule making by federal agencies.63 When proposing a rule, agencies must give notice of any rulemaking proceedings, legal authority, and the substance of the rule by publication in the Federal Register.64 However, the same section specifically provides for several exceptions for publication of notice including any rules deemed merely interpretive rather than substantive.65

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(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

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6 Id.

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved...

Id.65 Id.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
The distinction between interpretive rules and substantive rules is difficult to discern. The Ninth Circuit has defined interpretive rules as "those which merely clarify or explain existing laws or regulations. They are 'essentially hortatory and instructional,' reflecting the administrator's thinking 'in particular, narrowly defined, situations.'" In contrast are substantive rules, which the Ninth Circuit has defined "to include those [rules] that work a change in extant law or policy. Substantive rules are said to create law incrementally, pursuant to authority properly delegated by Congress." The purpose of this exception is to permit agencies to explain themselves without going through extensive and time-consuming proceedings. The application of the interpretive and substantive definitions in determining whether a rule falls within the interpretive rule exception is largely specific to the facts of the case, and courts are likely afforded a substantial amount of discretion.

IV. INSTANT DECISION

Judge Berzon delivered the opinion of the court, joined by Judges Alarcon and Rymer. The opinion began by looking at the plain meaning of Idaho's 2003 SIP to determine if the regulation prohibited field burning (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Id.

66 Alcaraz v. Block, 746 F.2d 593, 613 (9th Cir. 1984).
67 Flagstaff Medical Center, Inc. v. Sullivan, 962 F.2d 879, 886 (9th Cir. 1992). Another Ninth Circuit case similarly states, "In general terms, interpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule." Hemp Indus. Ass'n v. DEA, 333 F.2d 1082, 1087 (9th Cir. 2003); see also, Animal Legal Defense Fund v. Veneman, 469 F.3d 826, 838 (9th Cir. 2006). The United State Supreme Court held that interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 88 (1995).
68 Flagstaff, 962 F.2d at 886.
70 Id.
71 SAFE, 475 F.3d at 1098.
on its face.\textsuperscript{72} The court found that the "SIP mandated 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 ten specified sections that 'establish categories of open burning that are allowed when done according to the prescribed conditions.'"\textsuperscript{73} The court then concluded that field burning did not fit into any of the ten open burning exceptions.\textsuperscript{74} Because the SIP did not fit into any of these exceptions, the court found that there was no question as to whether the broad prohibition on open burning applied to field burning.\textsuperscript{75}

Next, the court noted that the interpretation and analysis of the SIP would proceed no further, because when interpreting a SIP, the court "look[s] toward the 'plain meaning of the plan and stop[s] there if the language is clear.'"\textsuperscript{76} The opinion cited several cases where other Ninth Circuit appellate panels and District Courts similarly adopted the preceding rule, and applied the same methodology used in those examples.\textsuperscript{77} The court concluded that the Idaho SIP did not facially permit field burning.\textsuperscript{78}

The court's subsequent analysis turned to whether interpretation of a regulation based on intent or general understanding would overcome the plain meaning of the SIP that the court found controlling in the preceding analysis.\textsuperscript{79} The court began by looking at an analogous case where the Supreme Court interpreted a SIP under the Clean Water Act.\textsuperscript{80} In that case, the Supreme Court held that the act incorporated state standards for

\textsuperscript{72} Id. at 1103.
\textsuperscript{73} Id.
\textsuperscript{74} Id. The ten categories that serve as exceptions to the ban on open burning are: "'Recreational and Warming Fires'; 'Weed Control Fires' for 'abatement along fence lines, canal banks, and ditch banks'; 'Training Fires' for firefighting training; 'Industrial Fares'; 'Residential Solid Waste Disposal Fires'; 'Landfill Disposal Site Fires'; 'Orchard Fires'; 'Prescribed Burning' for fire management purposes; 'Dangerous Material Fires'; and 'Infectious Waste Burning.'" Id. The ten categories are incorporated into the Idaho Administrative Code. Idaho Admin. Code r. 58.01.01.606 et seq. (2007).
\textsuperscript{75} SAFE, 475 F.3d at 1103.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 1103-04.
\textsuperscript{78} Id. at 1104.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
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water quality, and such standards, approved by the EPA, become a part of federal law.81 Because the SIP has "the force and effect of federal law,"82 the court noted that the "state may not unilaterally alter the plan" or make any changes without approval of the EPA.83 Therefore, the court concluded that even though a state may explicitly incorporate its interpretation of a SIP into state law, that interpretation is not necessarily applicable to the SIP as a matter of federal law.84

Next, the Ninth Circuit turned to the plain meaning of the SIP, and noted that as an exception, such meaning or interpretation will not control in a circumstance where "administrative intent is to the contrary" or "such plain meaning would lead to absurd results."85 The court admitted that there was no guidance on how agencies or legislatures should express intent, but concluded that under the APA, published notices accompanying the rulemaking process must reference at least some regulatory intent in order to overcome the plain language meaning of a SIP.86 The court's reasoning was that without notice published in the Federal Register, interested or concerned parties would have no way of knowing important details of proposed regulations, nor would they have any opportunity to comment on such proposals.87 In light of this reasoning, the court found that parties, who would normally comment on, or contest a regulation, might fail to do so in the requisite time allotted by the CAA,88 because they would not have notice of the unpublished intent and would ultimately assume the plain meaning of the regulation controls.89 Thus, the court did not find any administrative intent clearly and expressly contrary to the

82 Trs. For Alaska v. Fink, 17 F.3d 1209, 1210 (9th Cir. 1994) (quoting Union Elec. Co. v. EPA, 515 F.2d 206, 211 (8th Cir. 1975), aff'd, 427 U.S. 246 (1976)).
83 SAFE, 475 F.3d at 1105.
84 Id.
85 Id. (citing Dyer v. United States, 832 F.2d 1062, 1066 (9th Cir. 1987)). The court notes that the actual language of the exception is "legislative intent to the contrary," but the court uses "administrative intent" based on the analysis in Dyer and for clarity. SAFE, 475 F.3d at 1105 n.7.
86 Id. at 1105. See 5 U.S.C. §§ 552(a)(1) & 553(b) (2000).
87 SAFE, 475 F.3d at 1106.
88 The CAA requires that any judicial challenges to a SIP must be filed within 60 days of EPA approval. 42 U.S.C. § 7607(b)(1) (2000).
89 SAFE, 475 F.3d at 1106.
plain meaning of the SIP, because the EPA did not publish or give notice of Idaho's intent to continue allowing open field burning during the rulemaking period leading up to the approval of Idaho's SIP.\textsuperscript{90}

The court then examined whether the plain meaning of the SIP would lead to absurd results, and concluded in the negative based on two arguments.\textsuperscript{91} First, since the administrative record showed that field burning creates many air quality and health problems, the court found that it would not be difficult to conclude that Idaho may wish to take steps to ban field burning under the CAA in order to reduce the pollution that causes these problems.\textsuperscript{92} Second, because the neighboring state of Washington has effectively banned open burning of fields, it would not be absurd to conclude that Idaho sought to follow the lead of its sister state.\textsuperscript{93} Therefore, the court found that the "plain language is not absurd at all, much less sufficiently absurd to justify departure from a plain words interpretation."\textsuperscript{94}

Finally, the court addressed two arguments first raised by the EPA on appeal.\textsuperscript{95} The EPA's first point was federal courts have prohibited the EPA from independently making a SIP more strict than originally proposed by the state submitting the plan.\textsuperscript{96} The court distinguished this argument by pointing out the decisions cited by the EPA all involved the interpretation of CAA provisions to determine if the EPA had authority to

\begin{footnotes}
\item [90] Id. The court noted that that "Idaho lawmakers and regulators made their intentions toward field burning know through more formal actions, such as enacting legislation and regulations allowing field burning, none of these measures were referenced in the published materials that accompanied adoption of the earlier SIPs." Id. at 1107.
\item [91] Id.
\item [92] Id. See supra notes 6-8.
\item [93] SAFE, 475 F.3d at 1107. "The Washington Clean Air Act prohibits open burning of field and turf grasses grown for seed whenever ecology has concluded, through a process spelled out in the act, that any procedure, program, technique, or device constitutes a practical alternate agricultural practice to open burning, and that alternate is reasonably available." Wash. Admin. Code 173-430-045(1) (2007).
\item [94] SAFE, 475 F.3d at 1107.
\item [95] Id.
\item [96] Id. at 1107-08. The court cites several federal cases to support this contention. See Riverside Cement Co. v. Thomas, 843 F.2d 1246, 1247-48 (9th Cir. 1988); Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1035-36 (7th Cir. 1984); Train v. Natural Res. Def. Council, 421 U.S. 60, 79 (1975); Hall v. EPA, 273 F.3d 1146, 1153 (9th Cir. 2001).
\end{footnotes}
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"approve or deny SIPs."\textsuperscript{97} The court found that, because the present matter dealt with the interpretation of SIP language originally drafted by the state, the court would not extend the cited cases to support the EPA's assertion.\textsuperscript{98} Next, the court entertained the EPA's second argument that a plain meaning interpretation would violate the rule "prohibiting the EPA from approving SIPs based on 'an elusive and illusory measure.'"\textsuperscript{99} In other words, the Ninth Circuit prohibits the EPA from approving a SIP that is perhaps indefinite or contingent, because there is a chance that the SIP may never become an effective regulation.\textsuperscript{100} Once again, the court disagreed with the EPA's reasoning because it found the plan submitted by Idaho to be anything but illusory.\textsuperscript{101} In fact, the court noted that the case cited by the EPA instead supported the opinion of the court, because the court in that case also looked at the plain language of a SIP to determine if it was illusory, indefinite, or contingent.\textsuperscript{102} Because the court rejected the two preceding arguments by the EPA and held that the plain meaning of the Idaho SIP clearly\textsuperscript{103} prohibited field burning by failing to provide an exception to a broad prohibition, then Idaho's SIPs prior to 2005 effectively banned field burning under federal law as adopted by the EPA.\textsuperscript{104}

\textbf{V. COMMENT}

The Ninth Circuit ultimately held that the language in the preexisting Idaho SIP banned field burning because the plain meaning of the regulation was "apparent, not absurd, and not contradicted by the manifest intent of the EPA, as expressed in the promulgating documents

\textsuperscript{97} \textit{SAFE}, 475 F.3d at 1108.
\textsuperscript{98} \textit{Id}.
\textsuperscript{99} \textit{Id.} (citing \textit{Riverside Cement}, 843 F.2d at 1248).
\textsuperscript{100} \textit{SAFE}, 475 F.3d at 1108.
\textsuperscript{101} \textit{Id}.
\textsuperscript{102} \textit{Id.} \textit{See} \textit{Riverside Cement}, 843 F.2d at 1248.
\textsuperscript{103} An SIP is clear when its "meaning is apparent, not absurd, and not contradicted by the manifest intent of EPA, as expressed in the promulgating documents available to the public." \textit{SAFE}, 475 F.3d at 1108.
\textsuperscript{104} \textit{Id}.
This holding is clear, rational, and supported by precedent, but this note disagrees with the court’s statement that the EPA must express its intent in publicly available documents. The court in the instant case failed to properly analyze a well-established exception to the “plain meaning” interpretation rule to reach its ultimate holding. In 1980, the United States Supreme Court stated, “the familiar canon of statutory construction [is] that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”

Extending this rule to apply to the administrative intent of the EPA, the court in SAFE presumed without basis that the notice requirements of the APA were necessary to show such intent. The APA essentially requires the EPA to publish any adopted substantive rules, interpretations, or general policy statements, and any proposed rule making in the Federal Register for purposes of guiding the public. By failing to publish in the Federal Register, the court found that the EPA did not clearly express its administrative intent and thus the exception to the “plain meaning” interpretation rule would not apply. The court’s presumption is erroneous for two reasons.

First, the court argues that the notice requirements of the APA are essential to show regulatory intent so that any interested parties can have an opportunity to comment on proposed regulations. The court reasoned that because the 1993 Idaho SIP appeared to disallow field burning on its face, notice publication by the EPA within the Federal Register is the only means for interested parties to have an opportunity to comment on proposed regulations where intent is contrary to the plain meaning of the

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105 SAFE, 475 F.3d at 1108.
107 See supra note 71.
108 SAFE, 475 F.3d at 1105-06.
110 SAFE, 475 F.3d at 1106.
111 Id. at 1107.
112 Id. In the proposed rulemaking process, notice is sufficient if it gives interested parties “a meaningful opportunity to comment on the proposed revisions.” Hall v. EPA, 273 F.3d 1146, 1162 (9th Cir. 2001).
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regulation. However, publication of notice for comment purposes was unnecessary in this case because any interested parties could have simply referenced the Idaho Code to realize that Idaho clearly intended to keep field burning legal. Moreover, any interested parties wishing to comment on the Idaho’s SIP would likely have been aware that growers continued to burn fields for over a decade. Therefore, it would be redundant to require the EPA to publish the intent of the Idaho SIP in the Federal Register to keep field burning legal, when statute and practice within the state both indicate Idaho’s intent.

It is important to note that this argument does not assert that interested parties should not have the opportunity to exercise their “right to participate in the rulemaking process.” Moreover, there is no dispute that the opportunity to comment on proposed regulations applies to SIP revisions. Rather, the issue is the form by which Idaho or the EPA may show regulatory intent in order to rebut the plain language of Idaho’s SIP. The court openly admits that the form of intent is an issue that the court has yet to address. As shown above, Idaho’s intent to keep field burning legal came in the form of continued practice and statutes sufficient to give any interested parties notice of such intent. The instant court cited no authority to support the argument that notice of intent on the level prescribed by the APA is required to rebut the plain language of Idaho’s SIP. Therefore, the need for interested parties to have the opportunity to comment on the SIP revision is an insufficient reason to require the

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113 SAFE, 475 F.3d at 1106.
114 Brief of Respondent, supra note 2, at 35.
115 Id. “State regulators, grass growers, and environmental groups participated in discussions that led to voluntary smoke management plans and similar agreements in Idaho. In addition, EPA, ISDA [Idaho Department of Agriculture], IDEQ [Idaho Department of Environmental Quality], and Indian tribes entered into memoranda of understanding in which the parties pledged to share information and work together to manage smoke from agricultural burning in the region. Moreover, ISDA and IDEQ produced annual reports that summarized the burn season and discussed issues, solutions and recommendations. Moreover, the applicable state statute specifically authorized certain agricultural burning.” Id. (citations omitted).
116 SAFE, 475 F.3d at 1106.
117 SAFE, 475 F.3d at 1106; Ober v. EPA, 84 F.3d 304, 312.
118 SAFE, 475 F.3d at 1105.
119 See supra notes 100-01.

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application of APA notice requirements to this exception to the plain language rule.

Second, when courts examine the plain language of SIP regulations that are contrary to the intent behind the regulation, courts are more likely to find evidence of such intent in the policies and practices of the state government, rather than the EPA. In the instant case, Idaho governmental agencies, with the approval of the Idaho Legislature, conceptualized, developed, and drafted the SIP before submitting it to the EPA for approval. This process "is described as an 'experiment in federalism" because states have a role in the creation of federal environmental policies. Even though the policies found in a SIP are federal policies, they originate from the state; therefore, any intent behind Idaho's SIP regulation would have its source from within the Idaho government. Moreover, courts have held that "a federal agency should defer to a state's interpretation of the terms of its air pollution control plan when such interpretation is consistent with the Clean Air Act." This is exactly what the EPA did when it approved Idaho's SIP clarification. Knowing that the state continuously and consistently permitted field burning under statutes and regulations, the EPA interpreted Idaho's SIP based on the Idaho government's apparent intent to allow field burning. Therefore, it was irrational for the Ninth Circuit to look to the EPA to determine

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120 Brief of Respondent, supra note 2, at 6. "Since at least 1970, IDEQ or its predecessor agency, the Idaho Department of Health and Welfare ("IDHW"), have, subject to any limitations on their authority under state law, issued Rules and Regulations for the Control of Air Pollution in Idaho." Id. at 6-7.
121 Scott Josephson, This Dog Has Teeth... Cooperative Federalism and Environmental Law, 16 VILL. ENVTL. L.J. 109, 109 (2005).
122 Id.
123 U.S. v. General Dynamics Corp., 755 F. Supp. 720, 722 (N.D.Tex. 1991) (citing Florida Power and Light Co. v. Costle, 650 F.2d 579, 588 (5th Cir. 1981)). See also U.S. v. Interlake, Inc., 432 F. Supp. 985, 987 (N.D. Ill. 1977). The Ninth Circuit Court of Appeals "ordinarily grants substantial deference to such interpretations. If an agency's interpretation is a reasoned and consistent view of its regulations, we will not substitute our own interpretation for that of the agency's." (deference would have been granted to IDEQ, but for the inconsistent interpretation the agency made in this particular case). The instant case is distinguished from this case in that the IDEQ interpretation of Idaho's SIP is not inconsistent or unreasonable in light of the CAA.
124 See Brief of Respondent, supra note 2, at 15.
125 Id.; Idaho Code § 22-4801.
whether it had sufficiently expressed the intent behind Idaho's SIP in accordance with the APA. Instead, the Court should have gone directly to the source, the Idaho government, to seek out the true intent behind the SIP. The APA clearly exempts "the governments of the territories or possessions of the United States" from compliance with notice provisions. Therefore, under this view, the state drafting agencies of the Idaho SIP would not need to comply with the APA.

Assuming arguendo that the notice provisions of the APA are necessary to show the EPA's administrative intent contrary to the plain meaning of a SIP, those provisions still would not require published notice in the Federal Register or otherwise as the instant court suggests. The court cites two statutes to support its contention, but neither applies to the facts of the instant matter. The first statute, 5 U.S.C. § 552(a)(1), requires publication of adopted rules, but has been interpreted "to provide a shield for a petitioner before an agency... It is not a sword by which a petitioner can strike down the agency's order on the ground that the agency has not authorized itself to issue that type of order, by publishing a statement in the Federal Register." However, in the instant case, the court uses the statute as a sword to attack the EPA's failure to publish notice of intent to allow field burning in Idaho. The second statute, 5 U.S.C. § 553(b), requires publication of proposed rulemaking, but "does not apply... to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." The EPA's approval of

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127 SAFE, 475 F.3d at 1107.
128 Id. at 1105 n.8. See supra note 72.
130 5 U.S.C. § 553(b). See, e.g., Citizens to Save Spencer County v. EPA, 600 F.2d 844 (D.C. Cir 1979) (EPA passed a regulation that incorporated statutory changes to the Prevention of Significant Deterioration standards of the Clean Air Act into its regulations. The court found the regulation to be interpretive and not subject to notice and comment procedures); General Motors v. Ruckelshaus 742 F.2d 1561 (D.C. Cir. 1984) (The EPA passed a rule to correct nonconformities with the CAA, justified only by statutory interpretation. The court found that the notice and comment procedures of the APA did not apply because the rule did not create any new rights or duties, but simply

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the SIP was merely an interpretive clarification of existing law that field burning was an allowable category of open burning. Furthermore, courts should defer to agency intention that a revision is a mere clarification rather than a substantive change to the law. The clarification did not change the permissibility of field burning, which growers in Idaho have continued to practice, and the Idaho Code has continued to authorize. Therefore, without any substantive change to the force and effect of the EPA regulation clarifying Idaho’s SIP, the rule is nothing but interpretive and outside the scope of the publishing and notice requirements of 5 U.S.C. § 553(b).

The instant court’s application of the APA supported the ultimate holding, but it has a weak foundation in precedent, logic, or common sense. In addition, the opinion failed to consider the practical consequences of applying the act, which had the ultimate effect of an unsubstantiated analysis by the court. Had the court formed a stronger basis for its opinion, its ruling may have been more consistent with the prevailing law on this subject.


Brief of Respondent, supra note 2, at 42. See supra, note 67.

First Nat. Bank of Chicago v. Standard Bank & Trust, 172 F.3d 472, 478 (7th Cir. 1999). “If the agency expressly communicates that its intention in issuing the regulation was to clarify rather than change existing law, courts should defer to such announcements unless the revisions are in plain conflict with earlier interpretations.” Id.

Idaho Code § 22-4801.

The court in Ober v. EPA, held that 5 U.S.C. § 553(b)-(c) applies to SIP revisions, but the instant case is distinguished from this because the revisions in that case made substantive changes to the EPA regulations. 84 F.3d 304, 312 (9th Cir. 1996). Therefore, the case does not fall under the interpretive rule exception.

Solis v. Saenz, 60 Fed. Appx. 117, 119 (9th Cir. 2003). “We examine the language of the regulation by looking to provisions of the whole law, and to its object and policy. We also take into account common sense, the regulatory purpose, and the practical consequences of the proposed interpretation.” Id.
VI. Conclusion

The instant court’s decision to remand the approval of the Idaho SIP revision back to the EPA was the most reasonable conclusion for the court. As shown above, the use of the APA notice procedures as a means to determine whether the intent of the Idaho SIP clearly contradicts the plain language is without foundation. Moreover, the court’s holding severely limits the intent exception to the plain meaning interpretation rule. Without this limitation, the court still probably would have concluded that Idaho’s intent was not sufficient to overcome the plain meaning of the SIP. Therefore, the application of the APA was unnecessary for the court to conclude that field burning in Idaho was illegal. Regardless, the important thing to remember here is this case simply sent the regulation back to the EPA for review, rather than invalidating the SIP revision altogether. There is still a significant chance that the EPA will approve the modification of the Idaho SIP once again, but with better reasoning. This case unfortunately focuses so much on regulatory technicalities, and effectively permitted the words in Idaho’s SIP to speak louder than the actions of Idaho grass farmers and the state legislature.

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