

July 30, 1998

Patrick A. Takasugi, Director
Idaho State Department of Agriculture
2270 Old Penitentiary Road
Boise, ID 83712

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Idaho Code § 22-110 as it Relates to the
Disposal of Crop Residue Through Burning

Dear Mr. Takasugi:

You have asked the Office of the Attorney General whether Idaho Code § 22-110 gives the Director of the Idaho State Department of Agriculture (ISDA) the authority to regulate the disposal of crop residue through burning. If so, you indicated that ISDA intends to promulgate rules that would establish statewide guidelines for crop residue burning, mandatory training and licensing related to the crop residue burning, and a system to investigate complaints received as a result of crop residue burning. You also asked how such intended rules would interface with Idaho's Smoke Management Act found at Idaho Code §§ 39-2301, *et seq.* A review of state and federal law is required to answer your question.

As you are aware, Idaho Code § 22-110(1) states in pertinent part that "the director of the state department of agriculture shall have authority to regulate agricultural solid waste, agricultural composting and other similar agricultural activities to safeguard and protect animals, man and the environment."

Idaho's Smoke Management Act states:

The legislature finds that current knowledge and technology support the practice of burning grass seed fields to control disease, weeds, and pests and the practice of burning cereal crop residues where soil has inadequate decomposition capacity. It is the intent of the legislature to promote those agricultural activities currently relying on field burning and minimize any potential effects on air quality. It is the further intent of the legislature that the department [of Health and Welfare (IDHW)] shall not promulgate rules and regulations relating to a smoke management plan, but rather that the department cooperate with the agricultural community in establishing a voluntary smoke management program.

Idaho Code § 39-2301. In Kootenai and Benewah counties registration with IDHW of each field to be burned is required pursuant to Idaho Code § 39-2305. For many years the Idaho Department of Health and Welfare, Division of Environmental Quality (DEQ), has entered into a voluntary Smoke Management Plan Agreement with stakeholders in Kootenai and Benewah counties.¹

The Idaho Environmental Protection and Health Act (EPHA) gives the director of IDHW the power and duty (1) to formulate and recommend to the board rules related to air pollution, (Idaho Code § 39-105(2)), (2) to supervise and administer “a system to safeguard air quality and for limiting and controlling the emission of air contaminants” (Idaho Code § 39-105(3)(j)), and (3) to enforce all laws relating to environmental protection and health (Idaho Code § 39-105(3)(n)). Idaho Code § 39-108 requires the director to ensure regular or periodic investigations of air contaminant sources are conducted. Idaho Code § 39-112 grants the director and board of the IDHW emergency order authority, “any other provision of the law to the contrary notwithstanding,” if a generalized condition of air pollution exists and such condition creates an emergency requiring immediate action to protect human health or safety.

The Rules for Control of Air Pollution in Idaho (Rules), promulgated pursuant to the EPHA, allow open burning in a few limited circumstances. *See* IDAPA 16.01.01.600 through 616. These Rules are part of Idaho’s federally approved state implementation plan (SIP) pursuant to section 110 of the Clean Air Act. 42 U.S.C. § 7410. IDAPA 16.01.01.614, which addresses Smoke Management Plans for Prescribed Burning, states in pertinent part that, “any person who conducts or allows prescribed burning shall meet all conditions set forth in a Smoke Management Plan for Prescribed Burning.”² Failure by the state to conform to the SIP could result in the U.S. Environmental Protection Agency’s (EPA) promulgating a federal implementation plan (FIP) for the state. *See* 42 U.S.C. § 7410(c).

In summary, ISDA has the general authority to regulate agricultural solid waste. The Smoke Management Act prohibits IDHW from promulgating mandatory rules relating to a smoke management plan, but, instead, requires IDHW to work cooperatively with the agricultural community in establishing a voluntary smoke management program. The EPHA imposes on IDHW the duty to protect air quality and the authority to issue emergency orders prohibiting open burning. The Rules promulgated pursuant to the EPHA require prescribed burning to conform to a Smoke Management Plan developed by IDHW. Pursuant to the Smoke Management Act, such plan shall be developed in cooperation with the agricultural community. Failure to implement and abide by a Smoke Management Plan could result in EPA’s promulgating and enforcing a FIP.

While Idaho law grants ISDA the general authority to regulate agricultural waste, unlike the Smoke Management Act, it does not address the specific issue of burning crop residue. Similarly, while ISDA has the authority to regulate agricultural waste, it is not given the specific duty to ensure adequate protection of air quality. When “two statutes deal with the same subject matter, the more specific will prevail.” State v. Betterton, 127 Idaho 562, 903 P.2d 151 (1995), *citing* State v. Wilson, 107 Idaho 506, 508, 690 P.2d 1338, 1340 (1984). *See also*, Tomich v. City of Pocatello, 127 Idaho 394, 901 P.2d 501 (1995); City of Sandpoint v. Sandpoint Indep. Highway Dist., 126 Idaho 145, 879 P.2d 1078 (1994); Ausman v. State, 124 Idaho 839, 864 P.2d 1126 (1993); Richardson v. One 1972 GMC Pickup, 121 Idaho 599, 826 P.2d 1311 (1992). There is a presumption that the legislature is aware of existing law relating to the same subject when creating new statutes. State v. Betterton, 127 Idaho 562, 903 P.2d 151 (1995); State v. Long, 91 Idaho 436, 423 P.2d 858 (1967). The legislature is presumed not to overturn or impliedly repeal established principles of law without a clear expression of intent. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990). And, there cannot be an implied repeal unless new legislation is irreconcilable with preexisting legislation. Cox v. Mueller, 125 Idaho 734 (1994).

Idaho Code § 22-110 can be reconciled easily with the authorities under the EPHA by resolving that the legislature did not intend the ISDA to begin regulation of smoke management or other air quality legislation that is specifically delegated to IDHW. The EPHA and the Smoke Management Act are more specific and unambiguous in their delegation. Thus, the specific language in the Smoke Management Act, which prohibits promulgation of rules relating to the burning of crop residue, and IDHW’s duty under the EPHA to protect air quality, including the issuance of emergency orders requiring cessation of air pollution emissions, govern over ISDA’s general authority to regulate agricultural waste.

That said, “separate statutes dealing with the same subject matter should be construed harmoniously, if at all possible, so as to further legislative intent.” State v. Seamons, 126 Idaho 809, 811-812, *citing* State v. Malland, 124 Idaho 537, 540. ISDA, IDHW and members of the agricultural community could enter into a memorandum of understanding, or other sort of agreement, wherein the respective state agencies and members of the agricultural community agree on statewide guidelines for burning crop residue, training and investigation of complaints. This in turn could become part of the Smoke Management Plan pursuant to the Smoke Management Act and section 614 of the Rules. Specific emergency order powers and the duty to protect air quality would remain with IDHW.

I hope this analysis is of assistance to you. If you have any questions, please feel free to contact me.

Sincerely,

LISA J. KRONBERG
Deputy Attorney General

¹ It is my understanding that DEQ is presently developing a Smoke Management Plan similar to the Kootenai and Benewah counties plan for southern Idaho.

² IDAPA 16.01.01.608 and 613 allow for limited open burning to control weeds, protect orchard crops and dispose of orchard clippings. Additionally, IDAPA 16.01.01.611 allows for open burning of residential solid waste in limited circumstances. IDAPA 16.01.01.603.02 prohibits open burning during any stage of an air pollution episode declared by the IDHW in accordance with IDAPA 16.01.01.551, 557 and 561.