

December 29, 2011



Administrator  
WDEQ/AQD  
Herschler Building 2-E  
122 W. 25th Street  
Cheyenne, WY 82002

**Re: Notice of Proposed Rulemaking Revising Wyoming Air Quality Standards and Regulations; Public Hearing Scheduled for January 13, 2012; Comments of Basin Electric Power Cooperative.**

Dear Administrator:

I submit the following comments on behalf of Basin Electric Power Cooperative (Basin Electric). Basin Electric appreciates the opportunity to comment on the proposed amendments to the Wyoming Air Quality Standards and Regulations, scheduled for public hearing on January 13, 2012. These comments are limited to the proposed changes to Chapter 6 of the WAQS&R, Section 4(b)(i)(A).

It appears from the proposed changes to this Section that the Wyoming Department of Environmental Quality (WDEQ) seeks to accomplish three objectives: (1) to add PSD increments for PM<sub>2.5</sub>, consistent with the increments adopted by the EPA; (2) to add Significant Impact Levels (SILs) for PM<sub>2.5</sub>, consistent with the SILs adopted by the EPA; and (3) to provide, consistent with EPA, that compliance with the National Ambient Air Quality Standard (NAAQS) and the relevant PSD increment for PM<sub>2.5</sub> is demonstrated if the impact of a proposed source or modification alone is less than the relevant SIL at all locations, or less than the relevant SIL at all locations where cumulative modeling shows an exceedance of a PM<sub>2.5</sub> NAAQS or PSD increment.

Basin Electric supports these objectives, which provide for a reasonable balance between protecting air quality and allowing economic development. The WDEQ's proposal to establish SILs is aligned with the well-established principle that agencies may exempt sources from burdensome regulations where the burdens yield only trivial benefits. *See, e.g., Alabama Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979). However, Basin Electric is concerned that the language proposed by the WDEQ might not accomplish the third objective noted above as clearly as it could, and therefore proposes alternative language which is consistent with the WDEQ's intent but which may provide greater certainty. We also urge the WDEQ to undertake a further rulemaking as soon as reasonably possible to provide explicitly for the use of SILs for other pollutants.

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The primary reason for Basin Electric's proposed alternative language is the Wyoming Supreme Court's decision in *Powder River Basin Resource Council v. Wyoming Dep't of Environmental Quality*, 2010 WY 25, 226 P.3d 809 (2010). In that case, the Court held that SILs could not be used to demonstrate compliance with the PSD increment for SO<sub>2</sub> where cumulative modeling predicted violations of the increment, even though the impact of Basin Electric's proposed source at the time and place of the predicted violations was far less than SILs that had been allowed by EPA for projects in other states.

The Court relied largely on the language in the Wyoming regulation that "[a] permit to construct . . . shall be issued only . . . if the predicted impact . . . is less than the maximum allowable increment . . ." *Powder River Basin Resource Council*, 226 P.3d at 815-16, citing 6 WAQS&R Section 4(b)(i)(A)(I). The Court held that this language must be read literally and that it precluded the use of SILs even in cases where the contribution of a source to an increment exceedance was infinitesimally small. This language remains unchanged in the WDEQ's proposed rule. The Court also stated that "[i]f the DEQ is going to use Significant Impact Levels to vary from those specific [increment] numbers, then it should incorporate the Significant Impact Levels into its regulations in order to provide notice of that practice to the regulated community and other interested parties." *Id.* at 820.

The WDEQ's proposed language might be sufficient to satisfy the Supreme Court's concerns and accomplish the agency's objectives, but Basin Electric is concerned that some ambiguity might remain. There could be a potential question whether the new rule will persuade the Wyoming Supreme Court that SILs may be used not only at the screening level to avoid cumulative modeling of PM<sub>2.5</sub> sources, but also to allow a permit to be issued, despite cumulative modeling of NAAQS or increment exceedances, as long as the contribution of the source to such exceedances is less than SILs.

One reason for concern is that the proposed rule change does not alter the language that the Court held precluded the use of SILs where cumulative modeling shows a NAAQS or increment exceedance. This fact and the proposed requirement that impacts be less than SILs "in all areas" suggest that it would be helpful to be more explicit about the circumstances in which SILs may apply, in order to avoid future misunderstanding.

The proposed Table 2 and the language preceding Table 2 is patterned directly on the EPA regulation that adopted SILs for PM<sub>2.5</sub>. EPA explains in the preamble to the regulation that SILs may be used both for screening purposes to avoid cumulative modeling and, if cumulative modeling is performed, to allow issuance of a permit despite a NAAQS or increment exceedance, where the source's contribution to such exceedance is less than SILs. These less-than-SILs impacts are not deemed to "cause or contribute" to the exceedance. 75 Fed. Reg. at 64890-91 (October 20, 2010). This rule was adopted after the Wyoming Supreme Court's ruling in *Powder River Basin Resource Council*, and it is not unreasonable to hope that the WDEQ's

adoption of a rule that significantly parallels the EPA rule might cause the Supreme Court to come to a different conclusion in the future.

That said, the Wyoming rule change, unlike the EPA rule, does not contain “cause or contribute” language but instead still states that a permit may be issued only if the impact of cumulative sources would not exceed a NAAQS or PSD increment. It is true that the WDEQ’s proposal states that this requirement is satisfied if the impact of the source alone is less than the applicable SIL, and hopefully that could satisfy the Supreme Court in a future case with similar facts as *Powder River Basin Resource Council*.

However, the proposed rule also states that the requirement is satisfied if the impact of the source is less than SILs “in all areas”. We believe it is the intent of the WDEQ that, when cumulative modeling is done, “in all areas” should mean only those areas where a NAAQS or increment would be exceeded, and should not mean areas where impacts of the source might exceed a SIL but cumulative impacts remain below NAAQS and increment levels. However, Basin Electric is concerned that there is at least some risk of ambiguity, and that risk can readily be removed by stating the intent more explicitly.

EPA uses the same “in all areas” phrase, and did not intend this phrase to preclude permitting of a project, despite NAAQS or increment exceedances, as long as the impact of the project at the times and places of such exceedances are less than SILs. However, given the problems that the Supreme Court had with language that remains unchanged in the proposed rule, and the possibility that “in all areas” might be misconstrued to preclude permitting of a source with *de minimis* impacts, the rule should be especially clear on this point.

Enclosed with these comments is a markup of the current rule that includes alternative language to the WDEQ’s proposal. Basin Electric believes that the alternative language is consistent with the WDEQ’s intent, but may provide additional clarity regarding the intent and effect of the rule change. Basin Electric’s alternative adds “cause or contribute” language that parallels the EPA rule, as well as explicitly stating that the PM 2.5 SILs apply both as a screening tool to avoid unnecessary cumulative modeling, and also at the cumulative modeling stage to allow permitting despite exceedances of a NAAQS or increment as long as the contribution of the source to the exceedance is less than the SIL. We encourage the WDEQ to recommend, and the Environmental Quality Council to adopt, this alternative language as the final rule.

Equally important, Basin Electric encourages the WDEQ to undertake a further rulemaking as soon as possible to provide for the same treatment for other pollutants. Basin Electric submits that projects that are beneficial to Wyoming’s economy and its citizens, and that provide jobs and tax revenues while meeting important energy needs, should not be precluded

where any contribution to a NAAQS or increment exceedance is *de minimis* and where other sources, including sources in other states, are the true cause of such exceedances.

Thank you again for the opportunity to comment on the proposed rule.

Respectfully submitted,



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(b) Any person who plans to construct any major stationary source or undertake a major modification of an existing stationary source shall be subject to the conditions outlined below.

(i) (A) (I) The review of the stationary source for the construction or modification permit(s) required under Chapter 6, Section 2 of these regulations shall apply and shall be expanded so as to include analysis of the predicted impact of the allowable and secondary emissions from the stationary source on the ambient air quality in areas affected by such emissions. An analysis of the predicted impact of emissions from the stationary source is required for all pollutants for which standards have been established under these regulations or under the Federal Clean Air Act and which are emitted in significant amounts. An analysis of the impact of other pollutants may be required by the Administrator. Such analysis shall identify and quantify the impact on the air quality in the area of all emissions not included in the baseline concentrations including, but not limited to, those emissions resulting from the instant application and all other permits issued in the area. The purpose of this analysis is to determine the total deterioration of air quality from the baseline concentrations; however, projections of deterioration due to general non-stationary source growth in the area predicted to occur after the date of application is not required. A permit to construct pursuant to Chapter 6, Section 2 shall be issued only if the conditions of Chapter 6, Section 2 are complied with and if the allowable emission increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:

(a) any national ambient air quality standard in any air quality control region; or

(b) any applicable maximum allowable increase over the baseline concentration, the predicted impact (over and above the baseline concentration) of emissions defined above is less than the maximum allowable increment shown in Table 1, for the classification of the area in which the impact is predicted, and if the ambient standard for the pollutant(s) is not exceeded.

Table 1  
Maximum Allowable Increments of Deterioration -  $\mu\text{g}/\text{m}^3$

Pollutant	Class I	Class II
Particulate Matter:		
PM <sub>2.5</sub> , annual arithmetic mean	1	4
PM <sub>2.5</sub> , 24-hr maximum	2	9
PM <sub>10</sub> , annual arithmetic mean	4	17
PM <sub>10</sub> , 24-hour maximum	8	30
Sulfur Dioxide:		
Annual arithmetic mean	2	20
24-hour maximum*	5	91
3-hour maximum*	25	512
Nitrogen Dioxide		
Annual arithmetic mean	2.5	25

\*Maximum allowable increment may be exceeded once per year at any receptor site.

(1.) For purposes of PM<sub>2.5</sub>, the demonstration required in paragraph (b)(1)(A)(I) of this section is deemed to have been made if the air quality impacts caused by the emissions increase from the new stationary source alone or from the modification alone would cause, in all areas, air quality impacts be less than the amounts specified in Table 2 either: (a) in all areas, or (b) at any location where cumulative impacts from all applicable sources would exceed an ambient air quality standard or a maximum allowable increase over the baseline concentration.

Table 2

Pollutant	Averaging Time	Class I	Class II
PM <sub>2.5</sub>	Annual	0.06 $\mu\text{g}/\text{m}^3$	0.3 $\mu\text{g}/\text{m}^3$
	24-hour	0.07 $\mu\text{g}/\text{m}^3$	1.2 $\mu\text{g}/\text{m}^3$