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2 WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY

3
4 WYOMING ENVIRONMENTAL QUALITY COUNCIL

5
6 CHAPTER 1

7
8 GENERAL RULES OF PRACTICE AND PROCEDURE

9
10 Section 1. Authority, Purpose, and Construction.

11
12 (a) These rules are promulgated as authorized by the Wyoming Administrative
13 Procedure Act (APA) (W.S. 16-3-101 through 16-3-115) and the Wyoming Environmental
14 Quality Act (Act) (W.S. §35-11-101 through 35-11-1904). These rules shall apply in all
15 proceedings before the Environmental Quality Council (Council) or the Department of
16 Environmental Quality (DEQ) as herein provided.

17
18 (b) For purposes of these rules words of any gender are generic, and include
19 feminine, masculine, and **neutral** genders.

20
21 (c) These rules shall be interpreted and liberally construed to promote fairness
22 and justice. The conduct, demeanor and dress of the parties, attorneys, representatives and
23 witnesses when present during any Department or Council proceedings shall reflect respect
24 for the dignity and authority of the Department, the Council, and their staff members, and,
25 the proceedings shall be maintained as an objective search for the applicable facts and the
26 correct principles of law.

27
28 (d) Unless otherwise directed by statute or more specific rule the following shall
29 apply in all contested case hearings, rule making proceedings and proceedings to designate
30 land as rare or uncommon.

31
32 Section 2. **Definitions.**

33
34 (a) All of the definitions set forth and contained in the Act and the APA are
35 incorporated herein by reference. In addition, the following definitions are set forth. In case
36 of conflict, the provisions of the APA and Act shall govern.

37
38 (i) Administrator: The administrator of each division of the Department
39 of Environmental Quality, excluding the Abandoned Mine Lands Division and Industrial
40 Siting Division.

41
42 (ii) Applicant: Any person applying for a permit authorized under the
43 Environmental Quality Act and in accordance with the Act and the APA.

- 45 (iii) Council: The Environmental Quality Council established by the Act.
46
47 (iv) Chairman: The Chairman of the Environmental Quality Council.
48
49 (v) Executive Secretary: The Executive Secretary of the Environmental
50 Quality Council.
51
52 (vi) Director: The Director of the Wyoming Department of Environmental
53 Quality.
54
55 (vii) Department: The Wyoming Department of Environmental Quality.
56
57 (viii) Electronic: Relating to technology having electrical, digital, magnetic,
58 wireless, optical, electromagnetic or similar capabilities.
59
60 (ix) Hearing Officer: A licensed attorney employed by the Office of
61 Administrative Hearings or the Executive Secretary of the Environmental Quality Council if
62 that person is licensed to practice law in the State of Wyoming or a member of the Council
63 designated by the chairperson.
64
65 (x) Matter: Concerning the merits or critical elements, rather than mere
66 formalities- and also means all final decisions regarding an allegation forming the basis of a
67 claim or defense. Issues of law and fact not form.
68
69 (xi) OAH: Office of Administrative Hearings
70
71 (xii) Parties: The parties to a contested case proceeding are the Petitioner,
72 the Respondent, the any Third Party Respondent and any Intervenors.
73
74 (xiii) Petition: A written request presented to the Council seeking relief. Is
75 Petitions are used to used to initiate a contested cases, a rule making proceeding or a
76 proceeding to designate land as rare or uncommon.
77
78 (xiv) Petitioner: Any person, company, political subdivision, or limited
79 liability company or other corporate entity requesting a hearing before the Environmental
80 Quality Council in accordance with the Environmental Quality Act and who is objecting to a
81 final action of the Department of Environmental Quality and desiring affirmative relief, and .
82 Any party petitioning for rulemaking or designation of land as very rare or uncommon.
83
84 (xv) Presiding officer: The Chairman of the Council or other person
85 designated by the Chairperson of the Council to conduct a specific hearings before the
86 Council.
87
88 (xvi) Respondent: The Department of Environmental Quality in any

89 contested hearing action before the Council.

90
91 (xvii) Third Party Respondent: The permit holder of any permit involved in
92 any contested hearing action before the Council in which the permit holder/applicant is not
93 the petitioner.

94
95 **Section 3. Initiation of Proceedings.**

96
97 (a) All hearings, appeals, or other similar proceedings before the Council, appeals
98 or others, shall be held pursuant to these rules, the provisions of the and the APA. And such
99 other standards of review as specified in 3(f).

100
101 (b) All persons requesting a hearing~~t~~ shall file a petition with the Council. The
102 petitioner shall file the original petition with the Council; a copy shall also be served upon
103 the Director, the Administrator of the appropriate division and the Office of the Attorney
104 General. All subsequent filings shall consist of the original and eight copies. The date of
105 receipt of a filing by the Council, and not the date of deposit in the mail, is the receipt or
106 filing date for all purposes in these rules, except as provided in W.S. 16-4-301-304. All
107 filings made with the Council shall be typed, printed or otherwise legibly reproduced, so far
108 as practicable, on 8 1/2 by 11 inch paper with sufficient margins for use in loose-leaf ring
109 binders.

110
111 (ii) Where petitioner is objecting to a final action of the Department on a
112 permit or permit application, and the petitioner is not the permit holder or applicant, ~~he~~ the
113 petitioner shall also serve the permit applicant or holder, with a copy of the petition and all
114 other pleadings and motions. The permit applicant or holder, if not the petitioner, shall be
115 designated in the caption of all pleadings identified in the petition as the a Third Party
116 Respondent.

117
118 (i) The filing of the petition shall be by mail, hand delivery or electronic
119 filing as hereinafter provided, received at the office of the Council. Any paper filed by
120 electronic means must be followed by an identical signed otherwise duly executed original,
121 or copy of any electronic transmission other than facsimile transmission, together with the
122 fee as set forth in Rule 4 of the Rule For Fees and Costs For Circuit Court, mailed within 24
123 hours of the electronic transmission. The Council upon receiving the original or copy shall
124 note its date of actual delivery, and shall replace the facsimile or other electronic
125 transmission in the Council's file. A paper filed by electronic means in compliance with this
126 rule constitutes a written paper for the purpose of applying these rules. No document which
127 exceeds ten (10) pages in length may be filed by facsimile. All format requirements
128 contained in applicable rules must be followed. The Council may reject any paper filed not in
129 compliance with this rule.

130
131 (iii) The petition shall be served on the respondent and third party
132 respondent by certified mail return receipt requested. Except as otherwise provided in these

133 rules, every order to be served, every pleading subsequent to the original petition, every paper
134 relating to discovery required to be served upon a party and every written notice, appearance,
135 demand, offer of judgment, designation of record on appeal, and similar paper shall be served
136 upon each of the parties. For cases involving objections to a permit under 35-11-406(k)
137 refer to Chapter 2.

138
139 (iv) Whenever under these rules service is required or permitted to be
140 made upon a party represented by an attorney the service shall be made upon the attorney.
141 Service upon the attorney or upon a party shall be made by delivering a copy to the attorney
142 or party or by transmitting it to the attorney or party at the attorney's or party's last known
143 address by mail or by other equally reliable means, including facsimile transmission. Service
144 by mail or transmission by other equally reliable means is complete upon mailing or
145 ~~dispatch~~; provided, however, transmission by facsimile must be received by 4:00 p.m. of the
146 date of transmission, otherwise service is not complete until the next business day.

147
148 (v) All pleadings, affidavits or briefs which make use of acronyms in
149 place of the full words associated with a term shall include an index a glossary with
150 definitions for all Acronyms used within the document.

151
152 (c) The petition for hearing shall set forth:

153
154 (i) Name, address, phone, and, if available, a fax number, and email
155 address of the petitioner, respondent or third party respondent, their the petitioner's
156 designated representative and their the petitioner's attorney, if any.

157
158 (ii) The action, decision, order or permit upon which a hearing is
159 requested or an objection is made. Any pertinent order, letter or permit shall be attached to
160 the petition for hearing. If the pertinent order, letter or permit document is ten pages or less
161 the entire permits shall be attached to the petition. If the pertinent order, letter or permit is
162 more than 10 pages the first page of the permitdocument, all pages containing contested
163 language and the signature page shall be attached to the petition.

164
165 (iii) A statement in ordinary, but concise language of the facts on which the
166 request or protest is based, including whenever possible particular reference to the statutes,
167 rules or orders that the Petitioner alleges have been violated or may be at issue.

168
169 (iv) A request for hearing before the Council.

170
171 (d) The filing of such petition with the Council shall constitute the
172 commencement of the proceeding on the date filed.

173
174 (e) The Respondent and the Third Party Respondent have 30 days from receipt of
175 the petition to file an answer or otherwise plead. (i) For good cause shown the Respondent
176 and or the Third Party Respondent may move the Council for an order extending their time to

177 respond.

178

179 (f) Unless otherwise set forth by statute all contested case proceedings
180 shall be a de novo review consistent with Supreme Court Decisions.

181 Accordingly, when we review the DEQ's interpretations of regulations promulgated under
182 Wyoming's Environmental Quality Act, we apply the same standard the Council was required to
183 use: we accept those interpretations unless they are clearly erroneous or inconsistent with the plain
184 language of the rules. POWDER RIVER BASIN RESOURCE COUNCIL and SIERRA CLUB, Appellants
185 (Petitioners), v. WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY, and BASIN
186 ELECTRIC POWER COOPERATIVE, 2010 WY 25 pg.2
187

188 (g) The burden of proof is a preponderance of the evidence in all proceedings
189 before the Council unless a different burden is required pursuant to statute.

190

191 (h) The burden of persuasion is on the proponent of the order issued by the
192 Department.

193

194 **Section 4 Appeals to Council.**

195

196 (a) Unless otherwise provided by these Rules or the Environmental Quality Act,
197 all appeals to Council from final actions of the Administrators or Director shall be filed with
198 the Council within sixty (60) days of such action.

199

200 (b) Within 30 days after notification of any administrative decision following an
201 informal conference relating to a surface coal mining operation, the applicant or any person
202 who participated in the informal conference may appeal the decision to the Council for a
203 hearing in accordance with Chapters 1 and 2.

204

205 **Section 54. Notice.**

206

207 (a) Notice of hearings shall conform to W.S. § 16-3-107(b). The manner and
208 time for giving notice shall be as follows:

209

210 (i) When the Council determines that it shall hold a hearing on its own
211 motion, it shall give notice as promptly as possible in advance of the hearing date to all
212 parties personally, or U.S. Mail, First Class, postage prepaid or by registered or certified
213 mail, return receipt requested.

214

215 (ii) When a party desires that a hearing be held before the Council he shall
216 file his petition or motion and the Council shall forthwith set a date for hearing and notify the
217 Petitioner, Respondent and Third Party Respondent and any other parties of said hearing
218 date.

219

220 **Section 7 6. Record of Proceedings - Reporter.**

221

222 (a) Unless otherwise agreed by the parties and consented to by the Council, all

223 hearings, excluding pre-trial conferences or scheduling hearings, including all testimony,
224 shall be reported verbatim by a competent reporter. Pre-trial conferences and scheduling
225 hearings shall be recorded by electronic means. The compensation of such reporter shall be
226 paid as required by law. The Council may direct any party or parties to assume the cost of the
227 transcript. The party bringing the action pays for the reporter, unless the council rules
228 otherwise as a result of an appeal by the party.

229

230 Section 7. **Deviation.**

231

232 (a) The Council may permit deviations from these rules insofar as it may find
233 compliance therewith to be impossible or impracticable.

234

235 (b) For good cause shown, extensions and continuances of time may be granted or
236 denied atin the discretion of the Council.

237

238 Section 8. **Exclusion.**

239

240 (a) Nothing in these Rules shall be construed as prohibiting the Council, the
241 Director and the Administrators of the Divisions of Land, Air, Water Quality or Hazardous
242 and Solid Waste or their designee from holding informational proceedings, hearings, or
243 conferences for the purpose of aiding the Council, the Director or the Administrator in
244 ascertaining and determining facts necessary for the performance of their respective duties.
245 Any person believing himself aggrieved by a determination made by the Director,
246 Administrator or his designee following an informational proceeding, hearing, or conference
247 and who is otherwise entitled thereto, may upon filing a petition with the Council, obtain a
248 full hearing or review upon the merits.

249

250 (b) Disrespectful, disorderly or contumacious language or contemptuous conduct,
251 refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to
252 reasonable standards of orderly and ethical conduct, or use of electrical equipment that is
253 disruptive, at any hearing or meeting of the Council, shall constitute grounds for such action
254 and sanctions as the Council may direct including, immediate exclusion from the hearing.

255

256 Section 9. **Meeting of Council**

257

258 (a) All meetings of the Council shall be conducted in accordance with these
259 rules, Robert's Rules of Order, the Act and the APA as they may be applicable. The Council
259 shall on or before May 1 of each year elect a Chairperson, Vice Chairperson and a Secretary.

260

261 (b) The meetings of the Council required by W.S. § 35-11-111(d) of the Act shall
262 be called by the Chairman.

263

264 (c) All persons interested in participating in a meeting of the Council must
265 request inclusion on the agenda, in writing or via telephone, at least fourteen (14) days prior
266 to the meeting date. No matter shall be considered at a meeting of the Council unless it is on

267 the agenda and eight copies of related written materials have been submitted to the Council
268 office in accordance to the schedule set by the Council; provided, however, the Council, on
269 its own motion, may consider other matters of significant importance or emergency.
270

271 (d) The Council shall send a copy of the proposed agenda to all interested persons
272 who request a copy for each Council meeting as soon as practicable before the scheduled
273 meeting. The proposed agenda shall be posted and kept continuously current at the office of
274 the Council and on the web site of the Council located at the time of adoption of this rule at
275 <http://eqc.wyo.gov> . The agenda may be amended up to 24 hours prior to the meeting. In the
276 event of an emergency the agenda may be amended at any time
277

278 (e) Executive Sessions will be conducted pursuant to W.S. § 16-4-405 of the
279 Laws of the State of Wyoming set forth in full below:
280

281 (i) A governing body of an agency may hold executive sessions not open
282 to the public:
283

284 (A) With the attorney general, county attorney, district attorney,
285 city attorney, sheriff, chief of police or their respective deputies, or other officers of the law,
286 on matters posing a threat to the security of public or private property, or a threat to the
287 public's right of access;
288

289 (B) To consider the appointment, employment, right to practice or
290 dismissal of a public officer, professional person or employee, or to hear complaints or
291 charges brought against an employee, professional person or officer, unless the employee,
292 professional person or officer requests a public hearing. The governing body may exclude
293 from any public or private hearing during the examination of a witness, any or all other
294 witnesses in the matter being investigated. Following the hearing or executive session, the
295 governing body may deliberate on its decision in executive sessions;
296

297 (C) On matters concerning litigation to which the governing body
298 is a party or proposed litigation to which the governing body may be a party;
299

300 (D) On matters of national security;
301

302 (E) When the agency is a licensing agency while preparing,
303 administering or grading examinations;
304

305 (F) When considering and acting upon the determination of the
306 term, parole or release of an individual from a correctional or penal institution;
307

308 (G) To consider the selection of a site or the purchase of real estate
309 when the publicity regarding the consideration would cause a likelihood of an increase in
310 price;

311
312 (H) To consider acceptance of gifts, donations and bequests which
313 the donor has requested in writing be kept confidential;
314

315 (I) To consider or receive any information classified as
316 confidential by law;
317

318 (J) To consider accepting or tendering offers concerning wages,
319 salaries, benefits and terms of employment during all negotiations;
320

321 (K) To consider suspensions, expulsions or other disciplinary
322 action in connection with any student as provided by law.
323

324 (ii) Minutes shall be maintained of any executive session. Minutes and
325 proceedings of executive sessions shall be confidential and produced only in response to a
326 valid court order except for those parts of minutes of an executive session reflecting a
327 members' objection to the executive session as being in violation of this act.
328

329 (iii) Unless a different procedure or vote is otherwise specified by law, an
330 executive session may be held only pursuant to a motion that is duly seconded and carried by
331 majority vote of the members of the governing body in attendance when the motion is made.
332

333 (f) All matters shall be decided by a majority vote of those on the council.
334

335 (g) All hearings, except as established by statute, shall be held in Cheyenne,
336 Wyoming, unless otherwise ordered by the presiding officer.
337

338 (h) No single member of the Council shall request a legal opinion from the
339 Attorney General. All requests for legal opinions from the Attorney General shall require a
340 majority vote of the Council and such request shall be forwarded to the Attorney General by
341 the Executive Secretary of the Council. Said request shall indicate whether the Council is
342 requesting informal legal advice or a formal Attorney General Opinion.
343

344 **Section 9. Conflicts of Interest: Generally**
345

346 (a) Section 9-13-106 of the Laws of the State of Wyoming govern conflicts of
347 interest generally.
348

349 (b) A public official, public member or public employee shall not make an
350 official decision or vote on an official decision if the public official, public member or public
351 employee has a personal or private interest in the matter. In determining whether he has a
352 personal or private interest in a matter the public official shall recognize the importance of
353 his right to represent his constituency and shall abstain from voting only in clear cases of a
354 personal or private interest as defined in this subsection. A public official or public member
355 shall not vote to give money or any direct financial benefit to himself except for tax
356 reductions affecting the general public. For the purposes of this section, a personal or private
357 interest:

358
359 (i) Is, with respect to the public official, public employee or public
360 member, an interest which is direct and immediate as opposed to speculative and remote; and
361

362 (ii) Is an interest that provides the public official, public employee or
363 public member, a greater benefit or a lesser detriment than it does for a large or substantial
364 group or class of persons who are similarly situated.
365

366 (c) A public official, public member or public employee described by subsection
367 (b) of this section shall abstain from voting on the decision and from making any official
368 decision in the matter. The public official's, public member's or public employee's abstention
369 from voting must be recorded in the governmental entity's official records.
370

371 (d) This section shall not be construed to supersede W.S. §§15-9-220, 16-6-118
372 or 16-9-203(f). Those provisions shall control to the extent inconsistent with this section.
373

374 **Section 10. Conflicts of Interest Specifically: Contested Water Discharge Permit**
375 **Hearings.**
376

377 (a) Any Members of the Environmental Quality Council, who receives, or has
378 during the previous 2 years received, a significant portion of income directly or indirectly
379 from permit holders or applicants for a permit shall recuse themselves from any contested
380 water discharge permit hearing in which the permit holder or applicant for a permit is the
381 entity from which the Member received a significant portion of their income. In any
382 contested water discharge permit hearing in which the permit holder or applicant for a permit
383 is from the same government, business or industry sector from which the Member received a
384 significant portion of their income the Member is subject to recusal from such hearing upon
385 motion of any party and an affirmative vote of four (4) of the remaining members of the
386 Council.
387 .
388

389 (i) Significant portion is defined as 10 percent or more of gross personal
390 income for a calendar year, except that it means 50 percent or more of gross personal income
391 for a calendar year if the recipient is over 60 years of age and is receiving that portion under
392 retirement, pension, or similar arrangement.

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(ii) Permit holders or applicants for a permit do not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(iii) Income includes retirement benefits, consultant fees, and stock dividends.

(iv) For the purposes of this section, income is not received directly or indirectly from permit holders or applicants for a permit when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

Section 10. Appeals to Council.

(a) Unless otherwise provided by these Rules or the Act, all appeals to Council from final actions of the Administrators or Director shall be made within sixty (60) days of such action.

(b) Within 30 days after notification of any administrative decision following an informal conference relating to a surface coal mining operation, the applicant or any person with an interest which is or may be adversely affected may appeal the decision to the Council for a hearing in accordance with Chapters I and II. The Council shall make a final written decision within thirty (30) days after the hearing and furnish the decision to the applicant and all parties to the hearing.

437 CHAPTER 2
438

439 RULES OF PRACTICE AND PROCEDURE APPLICABLE TO
440 HEARINGS IN CONTESTED CASES
441

442 Section 1. **Answer ~~or appearance~~.**
443

444 (a) Within thirty (30) days of receipt of the petition the Director and Permit
445 Applicant, if the Permit Applicant is not the Petitioner, shall file an answer or otherwise
446 plead to the petition for hearing directed to and served upon all parties and the Council.
447

448 Section 2. **Docket.**
449

450 (a) When a case is initiated, it shall be assigned a number and entered with the
451 date of its filing on a separate page of a on the docket provided for such purpose. This docket
452 may be maintained in an electronic format. The Council shall establish a separate file for
453 each such docketed case, in which shall be systematically placed all papers, pleadings,
454 documents, transcripts, evidence and exhibits pertaining thereto, and all such items shall
455 have noted thereon the docket number assigned, and the date of filing.
456

457 Section 3. **Motions.**
458

459 (a) The Council or presiding officer may, upon reasonable notice to all parties,
460 hear orally, or otherwise, any motion filed in connection with hearings under these rules.
461 The ruling by the Chair or the presiding officer on procedural motions are rulings of the
462 Council and are not reviewable by the Council as a whole. The proponent of a Motion shall
463 file a Proposed Order at the time of the filing of the Motion.
464

465 Section 4. **Pre-Hearing Conference.**
466

467 (a) At a time on or before the day of any hearing, the Council or presiding officer
468 may direct the parties to appear before the Council or presiding officer to participate in pre-
469 trial hearings and matters, including any of the following:
470

471 (i) To review statement of facts, legal issues, final witness lists, exhibit
472 lists and pending motions;
473

474 (ii) The necessity or desirability of amending the pleadings or stipulated
475 facts and exhibits;
476

477 (iii) The possibility of obtaining admissions of the fact and of documents
478 to avoid unnecessary proof;
479

480 (iv) Formulating procedures to govern the hearing;

481
482 (v) Such other matters as may aid in the settlement of the case or hearing
483 procedures; and

484
485 (vi) Estimated time needed for presentation during the hearing.
486

487 (b) Such conferences shall be conducted informally. An order may be prepared
488 which recites the actions taken at the conference, amendments allowed, agreements of the
489 parties and agreements of counsel and the parties. The pre-hearing order will control the
490 course of the hearing unless modified by the presiding officer to prevent manifest injustice.

491
492 (i) If a party determines an order does not fully cover the issues presented,
493 or is unclear, they may petition for a further ruling within ten days after receipt of the order
494 setting forth the specific objections and proposed changes.

495
496 **Section 5. Order of Procedure at Hearings.**

497
498 (a) As nearly as possible, hearings shall be conducted in accordance with the
499 following order of procedure:

500
501 (i) The presiding officer shall announce that the Council is open to
502 transact business and call by docket number and title the case to be heard.

503
504 (ii) The parties will each be allowed an opening statement to briefly
505 explain their position to the Council and outline the evidence they propose to offer together
506 with the purpose thereof.

507
508 (iii) The parties' evidence will be heard. Witnesses may be cross-examined
509 by the opposing party or his attorney, and by members of the Council.

510
511 (iv) The presiding officer or Council staff may offer any evidence
512 necessary on behalf of the Council subject to cross examination or objection. The presiding
513 officer may offer any evidence necessary on behalf of the Council subject to cross
514 examination or objection.
515

516
517 (v) The presiding officer or hearing officer may allow, in his discretion,
518 evidence to be offered in any order, with due regard to which party has the burden of proof or
519 the burden of going forward.
520

521
522 (vi) The Council may allow, after service of copies on all parties of record,
523 and subject to timely objections, the direct testimony of a witness to be in writing, either
524 narrative or question and answer form, upon the witness being sworn and identifying the

525 written testimony. It may be received into the record as if read, in accordance with W.S. § 9-
526 4-16-3-108. The witness giving such testimony in writing shall be subject to cross-
527 examination and such evidence shall be received into the record subject to a motion to strike.
528 The written testimony must be served on all other parties no less than 30 days prior to the
529 hearing at which the written testimony is to be offered unless otherwise ordered by the
530 Council. In the event the witness is not available for cross examination either prior to or at
531 the hearing the written testimony shall not be received by the Council.

532
533 (vii) Closing arguments of the parties will be made in the manner set by
534 the presiding officer.

535
536 (viii) Reasonable time for opening and closing statements and oral argument
537 may be set by the presiding officer.

538
539 (ix) The presiding officer may recess the hearing from time to time as
540 required.

541
542 (x) After all interested parties have been offered the opportunity to be
543 heard, the presiding officer shall declare the evidence closed and excuse all witnesses. The
544 evidence may be reopened at a later date, for good cause shown, by order of the Council or
545 the presiding officer, upon motion by a party or on the Council's own motion and subject to
546 any objections.

547
548 (b) The presiding officer may, at his discretion, require parties to tender written
549 briefs, stipulated agreements as to Controverted and Uncontroverted Facts, and proposed
550 findings of fact and conclusions of law, and set the time for filing thereof.

551
552 (c) The presiding officer may declare that the matter is taken under advisement
553 and that the decision and order of the Council will be announced at a later date.

554
555 (d) The presiding officer shall, for purposes of the hearing, have all necessary
556 powers normally vested in the Chairman and all of the powers and authority of a hearing
557 officer authorized under the Wyoming Administrative Procedures Act.

558
559 **Section 65. Witnesses at Hearings to be Sworn.**

560
561 (a) All persons testifying at any hearing before the Council shall stand and be
562 administered the following oath by the presiding officer: "Do you swear (or affirm) to tell
563 the truth, the whole truth, and nothing but the truth in the matter now before the Council?"
564

565 (b) (⊕) No testimony will be received from a witness except under oath or
566 affirmation.

567
568 **Section 76. Appearance.**

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(a) Appearances and representation of parties shall be made as follows:

(i) An individual may appear and be heard on their own behalf.

(ii) A ~~eo~~-partnership may appear and be represented by a partner.

(iii) A corporation may appear and be represented by an authorized corporate officer or an authorized full-time employee of said corporation.

(iv) A municipal corporation or its Board of Public Utilities may appear and be represented by an authorized municipal officer, an authorized member of said Board or an authorized employee of said municipality or Board.

(v) An unincorporated association may appear and be represented by any bona fide and authorized general officer or full-time employee of such association.

(vi) The Department of Environmental Quality (DEQ) may appear and be represented by the DEQ Director, ~~or~~ the Administrator of the relative division or their designated representative, or by the Attorney General or his representative.

(vii) Any party to a proceeding may appear and be represented therein by an attorney at law who is duly licensed and admitted to practice in Wyoming and an active member of the Wyoming State Bar. Any attorney who is not duly licensed to practice law in Wyoming shall not be entitled to enter his appearance, participate in, prosecute or defend any action or proceeding pending before the Council unless, pursuant to the authority conferred upon this adjudicative body by Supreme Court Rule 11.1, the attorney complies with Supreme Court Rule 11 which states:

(A) Members of the bar of any other state, district or territory of the United States may be admitted to practice pro hac vice, in compliance with Rule 104 of the Uniform Rules for the District Courts of the State of Wyoming or Rule 19.01 of the Wyoming Rules of Appellate Procedure.

(B) Admission pro hac vice under this rule and any other rule concerning admission pro hac vice is discretionary with the court in which the application is made. A judge, hearing officer or person presiding over an administrative hearing or other state tribunal is not obligated to admit an applicant pro hac vice nor is a judge, hearing officer or person presiding over an administrative hearing bound by a prior decision to admit an applicant pro hac vice. Admission pro hac vice may be revoked by the court or tribunal upon its own motion or the motion of a party if, after notice and a hearing, the court or tribunal determines that admission pro hac vice is inappropriate. Admission pro hac vice will be denied or, if granted, will be revoked if the court or tribunal determines that the process is being used to circumvent the normal requirements for the admission of attorneys to the

613 practice of law in this state.

614

615 (C) In determining whether to enter or revoke the order of
616 admission pro hac vice, the court or tribunal may consider any information it considers
617 relevant, including but not limited to whether the applicant:

618

619 (I) Is familiar with Wyoming rules of evidence and
620 procedure, including applicable local rules;

621

622 (II) Is available to opposing parties;

623

624 (III) Has particular familiarity with the legal affairs of the
625 party relevant to the case;

626

627 (IV) Complies with the rulings and orders of the court;

628

629 (V) Has caused delay or been disruptive; and

630

631 (VI) Has been disciplined in any other jurisdiction within the
632 prior seven years.

633

634 (D) The applicant must submit the following to the Wyoming State
635 Bar for each case in which the applicant seeks pro hac vice admission:

636

637 (I) Application on a form prescribed by the Wyoming
638 State Bar;

639

640 (II) Certificate(s) of good standing from the state(s) in
641 which the applicant is licensed, dated no more than 30 days prior to the date of the
642 application; and

643

644 (III) An application fee, determined by and payable to, the
645 Wyoming State Bar.

646

647 (E) Upon approval of the application for admission pro hac vice,
648 the Wyoming State Bar will issue a certificate of compliance with Rule 11. This certificate
649 must be filed in the court or tribunal, along with the motion of the local counsel to admit the
650 applicant pro hac vice and entry of appearance of local counsel.

651

652 (F) Local counsel will perform all duties and satisfy all
653 requirements set forth in Rule 104 of the Uniform Rules for the District Courts of the State of
654 Wyoming or Rule 19.01 of the Wyoming Rules of Appellate Procedure.

655

656 (G) An attorney admitted pro hac vice shall comply with and is

657 subject to Wyoming statutes, rules of the Wyoming Supreme Court, including but not limited
658 to, the Rules of Professional Conduct, the Disciplinary Code for the Wyoming State Bar, the
659 Rules of the Supreme Court providing for the organization and government of the Bar
660 Association and Attorneys at Law, and the rules of the court, tribunal or agency in which the
661 attorney appears.

662

663 **Section 87. Intervention.**

664

665 (a) Any person interested in obtaining the relief sought by a party or otherwise
666 interested in the determination of a proceeding, other than mining operations pending before
667 the Council may petition for leave to intervene in such proceeding no later than 30 days prior
668 to the hearing date, but not thereafter except for good cause shown. The petition shall set
669 forth the grounds of the proposed intervention, the position and interest of the petitioner in
670 the proceeding, and if affirmative relief is sought, the same should conform to the
671 requirements for a formal petition. Leave will not be granted unless the Council determines
672 that the party requesting intervention is adversely affected by the action, has a legal right
673 under the Environmental Quality Act or the Wyoming Administrative Procedure Act. If
674 granted, the leave to intervene may be allowed in a limited capacity.

675

676 (b) For proceedings related to surface coal mining operations, any person may
677 petition for leave to intervene as a full party or, if desired in a limited capacity, at any stage
678 of a proceeding conducted by the Council. The petition shall include the basis for
679 intervention and shall be granted to any person who either could have initiated the
680 proceeding or has an interest which may be adversely affected by the outcome of the
681 proceeding. Regardless of these bases, intervention may be granted whenever appropriate,
682 after consideration of the nature of the issues, the adequacy of the existing parties
683 representation of petitioner's interest, the ability of the petitioner to present relevant evidence
684 and argument, and the effect of intervention on the implementation of the Act. The extent
685 and terms of participation by an intervenor in a limited capacity shall be determined by the
686 Council.

687

688 (c) If ~~leave~~ intervention is granted, the person requesting intervention becomes an
689 intervenor and has the following rights subject to limitations:-the right to have notice, the
690 right to appear at the taking of testimony, the right to produce and cross examine witnesses,
691 and the right to be heard on the argument of the case.

692

693 (d) Any petition to intervene shall be served on all parties to the proceedings.

694

695 **Section 98. General Hearing Rules.**

696

697 (a) Unless otherwise limited by the Council or the presiding officer, ~~Every~~ every party
698 shall be accorded the right to appear and testify in person or ~~by~~ be represented by counsel or
699 other duly qualified representative.

700

701 (b) Every person testifying shall, at the Council's discretion, be qualified prior to
702 testifying. Such qualification may include, as appropriate, ascertaining the residency,
703 occupation, background, education, and expertise or other relevant information.

704
705 (c) Subject to reasonable limitations and restrictions of the Council or presiding
706 officer, all parties shall have the right to respond and present evidence and argument on all
707 issues involved.

708
709 (d) No person shall be required to report, inspect, or perform any investigative act
710 except as may be required or authorized by law.

711
712 (e) Unless confidential or privileged material or otherwise restricted by law, ~~or~~
713 upon payment of a reasonable cost any other party may procure a copy of data or evidence.
714 thereof. All Exhibits or other evidence offered and/or received shall be a permanent part of
715 the record and shall be disposed of according to law. All persons required to submit data or
716 evidence shall be entitled to retain the data or evidence at such time as the data or evidence is
717 no longer required to be maintained in the record of the case.

718
719 (f) All irrelevant, immaterial, or unduly repetitious evidence may be excluded.

720
721 (g) Effect to the rules of privilege shall be given as recognized by law.
722 Documentary evidence may be received in the form of copies ~~of~~ or excerpts, if the original is
723 not available and subject to proper objection thereto. All copies are subject to being
724 compared with the original.

725
726 (h) The Council may, in its discretion, allow any pleadings to be amended or
727 corrected, or any omission therein to be supplied.

728
729 (i)(~~h~~) The presiding officer shall:

730
731 (i) Administer oaths and affirmations.

732
733 (ii) Issue subpoenas.

734
735 (ii) Rule upon offers of proof, objections and receive evidence that is
736 relevant and complies with the Rules of Evidence as promulgated by the Wyoming Supreme
737 Court.

738
739 (iii) Take or cause to be taken depositions or other discovery.

740
741 (iv) Preside over the hearing and regulate its proceedings.

742
743 (v) Preside over and set the time for hearings, pre-hearing conferences and
744 other proceedings as he deems necessary.

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(vi) Dispose of procedural requests with or without legal assistance. The disposition of procedural motions or requests by the presiding officer is the action of the Council and is not reviewable by the Council as a whole.

(vii) The presiding officer shall officially open and officially close the hearing.

Section 10. Documentary Evidence.

(a) Documentary evidence or exhibits shall be marked for identification as directed by the Council.

(b) Documentary evidence claimed to be confidential by any party shall be marked “CONFIDENTIAL” by any party desiring to use the documentary evidence, segregated from the other documentary evidence and submitted in such a manner that the confidential nature of the documentary evidence is protected. The party submitting documentary evidence claimed to be confidential shall submit an index generally identifying the documents and stating the basis for the claim of confidentiality. The presiding officer shall appoint a hearing officer from OAH to conduct a hearing to whether a document shall be deemed confidential. The hearing officer shall forward to the Council their recommended Findings of Fact, Conclusions of Law and Decision.

(c) Exhibits introduced by the parties to a hearing must be submitted on 8.5 x 11 size, or a size that can be folded into this size for retention in the record. The Council or presiding officer may make exceptions for unusual exhibits. Exhibits may be filed electronically after review and approval by the Council.

(d) An original and eight copies of exhibits are required to be submitted.

(e) Any documents offered for the Council’s consideration such as paper copies of power point presentations shall contain, on the front page of the document, the name of the person offering the document.

Section 11. Subpoenas.

(a) Subpoenas requiring the attendance of witnesses from any place in the State of Wyoming at any designated place of hearing or for the production of books, papers, or other documents may be issued by the Council or presiding officer upon written application of any party or upon their own motion in accordance with the Wyoming Rules of Civil Procedure and Administrative Procedure Act.

(i) Items or information sought shall be set forth with particularity.

789 (ii) All subpoenas shall be served by personal delivery or by certified mail
790 return receipt required, to the party served.

791
792 (iii) Cost of the subpoenas shall be paid by the party requesting the service.
793

794 (iv) The format for subpoenas shall follow the acceptable format under the
795 Wyoming Rules of Civil Procedure.

796
797 **Section 12 ~~10~~. Depositions.**

798
799 (a) In all contested matters coming before the Council, the taking of depositions
800 and discovery shall be available to the parties and to the Council on its own motion in
801 accordance with the provisions of W.S. § ~~9-4-16-3-107(g)~~ and the Wyoming Rules of Civil
802 Procedure.

803
804 (b) The Council, for the purposes of allowing orderly presentation of evidence,
805 may govern the conduct of discovery and the time limitations involved.

806
807 **Section 13. Expert Witnesses.**

808
809 If scientific, technical, or other specialized knowledge will assist the Council to
810 understand the evidence or to determine a fact in issue, a witness qualified as an expert by
811 knowledge, skill, experience, training, or education, may testify thereto in the form of an
812 opinion or otherwise. To warrant the use of expert testimony, the following conditions must
813 be met: the proffered expert must be sufficiently qualified to express the proffered opinions;
814 the proposed testimony must reflect scientific knowledge; and the proposed testimony must
815 aid the Council. Expert testimony must be related to scientific, technical, or other
816 specialized knowledge.

817
818 **Section 14. Witness Fees.**

819
820 Witnesses who are summoned before the Council are entitled to the same fees as are
821 paid for like service in the District Courts of the State of Wyoming. Such fees shall be paid
822 by the party at whose insistence the testimony was taken or may be assessed against any party
823 as part of the approved costs of the hearing except the DEQ.

824
825 **Section 15. Decision and Order.**

826
827 The Council shall make a written decision and order in all cases, within the time
828 prescribed by law, unless otherwise extended, and which decision shall contain findings of
829 fact and conclusions of law based exclusively on the record and include how each Council
830 member ~~the~~ voted on the decision. The decision and order of the Council shall be placed in
831 the record of the case which shall be retained by the Council. The Council or presiding
832 officer may direct the parties to prepare and submit to the Council proposed findings of fact

833 and conclusions of law, and set time limits thereon.

834

835 **Section 16. Applicability of Rules of Civil Procedure.**

836

837 (a) The rules of the Wyoming Rules of Civil Procedure contained in Appendix A
838 of these rules are hereby adopted for use by the Council in contested
839 case hearings. Upon motion of any party or upon the Council's own
840 motion, the Council may adopt for use in a particular contested case
841 hearing any other of the rules from the Wyoming Rules of Civil
842 Procedure that are not contained in Appendix A.

843

844 (b) A contested case may be expedited if the case is:

845 i) A matter in which there are no disputed issues of material
846 fact; or

847 ii) A matter in which the parties agree to an expedited
848 proceeding, provided the Council retains the authority to
849 convert at any time the proceeding to a regular contested case
850 when it appears essential facts must be determined in order to
851 permit adequate presentation and disposition of the case.

852 iii) Any party shall have fifteen (15) days from the date of the
853 Council order scheduling a matter as an expedited case to
854 request reconsideration.

855 iv) An expedited contested case shall consist of review of any
856 written arguments and evidence. Limited oral argument to the
857 Council after submission of all written material shall be
858 permitted upon the written request of a party.

859

860 **Section 17. Signing of pleadings, motions, and other papers; representations to**
861 **Council; sanctions.**

862

863 (a) Signature. Every pleading, written motion, and other paper shall be signed by
864 at least one attorney of record in the attorney's individual name, or, if the party is not
865 represented by an attorney, shall be signed by the party or a duly authorized officer, employee
866 or representative. Each paper shall state the signer's representative capacity, address and
867 telephone number, if any. Except when otherwise specifically provided by rule or statute,
868 pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be
869 stricken unless omission of the signature is corrected promptly after being called to the
870 attention of the attorney or party.

871

872 (b) Representations to Council. By presenting to the Council (whether by signing,
873 filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney
874 or unrepresented party is certifying that to the best of the person's knowledge, information,
875 and belief, formed after an inquiry reasonable under the circumstances:

876

877 (i) It is not being presented for any improper purpose, such as to harass or
878 to cause unnecessary delay or needless increase in the cost of litigation;

879

880 (ii) The claims, defenses, and other legal contentions therein are warranted
881 by existing law or by a nonfrivolous argument for the extension, modification, or reversal of
882 existing law or the establishment of new law;

883

884 (iii) The allegations and other factual contentions have evidentiary support
885 or, if specifically so identified, are likely to have evidentiary support after a reasonable
886 opportunity for further investigation or discovery; and

887

888 (iv) The denials of factual contentions are warranted on the evidence or, if
889 specifically so identified, are reasonably based on a lack of information or belief.

890

891 (c) Sanctions. If, after notice and a reasonable opportunity to respond, the
892 Council determines that subdivision (b) has been violated, the Council may, subject to the
893 conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or
894 parties that have violated subdivision (b) or are responsible for the violation.

895

896 (i) How initiated.

897

898 (A) By motion. A motion for sanctions under this rule shall be
899 made separately from other motions or requests and shall describe the specific conduct
900 alleged to violate subdivision (b). It shall be served as provided in Chapter 1, Section 3, but
901 shall not be filed with or presented to the Council unless, within 21 days after service of the
902 motion (or such other period as the Council may prescribe), the challenged paper, claim,
903 defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If
904 warranted, the Council may award to the party prevailing on the motion the reasonable
905 expenses and attorney's fees incurred in presenting or opposing the motion. Absent
906 exceptional circumstances, a law firm shall be held jointly responsible for violations
907 committed by its partners, associates, and employees.

908

909 (B) On Council's initiative. - On its own initiative, the Council may
910 enter an order describing the specific conduct that appears to violate subdivision (b) and
911 directing an attorney, law firm, or party to show cause why it has not violated subdivision (b)
912 with respect thereto.

913

914 (ii) Nature of sanction; limitations. A sanction imposed for violation of
915 this rule shall be limited to what is sufficient to deter repetition of such conduct or
916 comparable conduct by others similarly situated. Subject to the limitations in subparagraphs
917 (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an
918 order to pay a penalty to the Council, or, if imposed on motion and warranted for effective
919 deterrence, an order directing payment to the movant of some or all of the reasonable
920 attorney's fees and other expenses incurred as a direct result of the violation.

921
922 (A) Monetary sanctions may not be awarded against a represented
923 party for a violation of subdivision (b)(ii).

924
925 (B) Monetary sanctions may not be awarded on the Council's
926 initiative unless the Council issues its order to show cause before a voluntary dismissal or
927 settlement of the claims made by or against the party which is, or whose attorneys are, to be
928 sanctioned.

929
930 (iii) Order. When imposing sanctions, the Council shall describe the
931 conduct determined to constitute a violation of this rule and explain the basis for the sanction
932 imposed.

933
934 (d) Inapplicability to discovery. Subdivisions (a) through (c) of this rule do not
935 apply to discovery requests, responses, objections, and motions that are subject to the
936 provisions of Wyoming Rules of Civil Procedure Rules 26 through 37.

937
938 Section 18: **Surface Coal Mining.**

939
940 To the degree these rules are not inconsistent with Wyoming Statutes 35-11-437
941 et.seq. they shall be used in contested cases arising under 35-11-437 et.seq.
942

943 CHAPTER 3

944
945 RULES OF PRACTICE AND PROCEDURE APPLICABLE
946 TO RULE-MAKING HEARINGS
947

948 Section 1. **Applicability of Rules.**
949

950 (a) Except as otherwise directed by the Council, the provisions of the Rules
951 contained in this Chapter ~~(III), (Sections 1 et seq.)~~, shall govern:

952
953 (i) ~~(a)~~ Any hearings conducted pursuant to a petition (within the meaning of
954 W.S. 9-4-16-3-06) for the promulgation, amendment, or repeal of any rules (as defined in
955 W.S. 9-4-16-3-101(a)(vii));:-

956
957 (ii) ~~(b)~~ Any hearings conducted pursuant to W.S. 9-4-16-3-103 for the
958 promulgation of rules and regulations recommended by the Director and respective Advisory
959 Board ~~or Administrator~~:-

960
961 (iii) Any hearings by the Council for a variances under W.S. 35-11-601(d).

962
963 (iv) Any hearings conducted by the Council for the classification of surface
964 waters the designation of Class I surface waters of the State of Wyoming.
965

966 Section 2. **Citizen Petition.**
967

968 (a) Any citizen of the State of Wyoming may petition the Council to promulgate,
969 amend, or repeal any rule or rules relating to the administration of the statutes governing the
970 Department of Environmental Quality, Land, Air, Water and Solid Waste Divisions, pursuant
971 to W.S. 16-3-106 and may accompany the petition with relevant data, views and arguments,
972 and a fee to cover the expense of the rule making.
973

974 (b) Eight copies of the petition must be submitted with the proposed language,
975 rule, or change to the Council and one copy to the DEQ Director.
976

977 (c) Except as otherwise provided by the Council, the filing of a petition under this
978 section shall not stay the effectiveness of any rule or rules.
979

980 (d) Upon submission of a petition, the Council shall as soon as practicable, either
981 accept or deny the petition in writing (stating its reasons therefore for the denial). or If the
982 Council accepts the petition the Council shall request that the department initiate rule-making
983 procedures in consultation with the Attorney General and in accordance with Section 4 and
984 W.S. 16-3-103. The Petitioner may withdraw the petition from Council consideration until
985 such time as a public hearing has been scheduled for the receipt of public comments. After
986 such time the petition can only be withdrawn upon a motion by the petitioner and a majority

987 vote of the Council

988

989 (e) Upon acceptance of a petition for rule making the Council may forward a
990 request to the Director to have such petition scheduled by the appropriate Advisory Board for
991 hearing pursuant to Chapter IX.

992

993 (f) The Council shall schedule at least one public hearing on the proposed rule.

994

995 (g) The Department of Environmental Quality shall publish notice of the date,
996 place and time of the public hearing in a newspaper of general circulation in the State of
997 Wyoming for four consecutive weeks prior to the public hearing. The last notice shall not be
998 any less than 7 days before the public hearing. The notice shall contain a general statement
999 regarding the contents of the rule and the recommendations of the Advisory Board and the
1000 Director, the date, place and time of the public hearing.

1001

1002 (h) The Council may establish time lines for written comments, may limit the
1003 time for oral comments. A digital copy of any proposed electronic presentations, such as
1004 power point presentations, shall be delivered to the Council no less than seventy-two (72)
1005 hours prior to the day of the public hearing at which the presentation is to be made. Failure
1006 to provide a digital copy in accordance with the time line set forth in this rule shall result in
1007 the presentation not being allowed. Any documents offered for the Council's consideration
1008 shall contain, on the front page of the document, the name of the person offering the
1009 document.

1010

1011 (i) The Council, upon its own motion or upon the motion of any party, to
1012 promote the orderly presentation of evidence, may adopt one or more of the provisions
1013 contained in Chapter 2 of these Rules governing procedures in contested cases. Such action
1014 by the Council shall not constitute an agreement or designation that the proceeding before the
1015 Council is in the nature of a contested case.

1016

1017 (j) The Council, in order to facilitate an orderly presentation of information to the
1018 Council may identify specific individuals or groups to provide testimony at a specific time so
1019 long as the public in general has an opportunity to provide testimony at a reasonable time
1020 during the proceeding to adopt the rule. The Council, through staff, may enter information
1021 from staff research conducted at the request of any Council member into the record for
1022 consideration by the Council. Information obtained by staff research shall be made available
1023 to the public for viewing by entry onto the web page of the Council under a separate link not
1024 a part of the official record until such time as it is offered at a subsequent hearing.

1025

1026 (k) Prior to holding a public hearing on the rule that is for the public in general to
1027 provide testimony, the Council may hold a public meeting in which the purpose of the
1028 hearing is to allow the Department the opportunity to present the rule and their reasons for
1029 implementation of the rule.

1030

1031 (l) The provisions of W.S. 16-3-107 through 16-3-112 (relating to the conduct of
1032 hearings for contested cases) do not apply to hearings held under this Chapter. As a fact-
1033 finding legislative proceeding, each hearing is non-adversarial and there are no formal
1034 pleadings or adverse parties.

1035
1036 (m) The presiding officer may recess the hearing from time to time as required.

1037
1038

1039 **Section 3. Department Initiated Rule Making Proceedings.**

1040

1041 (a) The Department may initiate rule making proceedings before the Council by
1042 filing an original recommendation of the Director and the Advisory Board along with the
1043 requested rule package that shows deletions and insertions. Other documents that the
1044 Department shall provide are as follows:

1045

1046 (i) Transcripts of all Advisory Board hearings and meetings regarding the
1047 proposed rule package;

1048

1049 (ii) All written comments filed with the Department or the Advisory
1050 Board and the Department's responses thereto;

1051

1052 (iii) Clean copy of the rule package as proposed;

1053

1054 (iv) Proposed notice for public comment and for public hearing; and

1055

1056 (v) Proposed Notice of Intent and Statement of Principal Reasons.

1057

1058 (b) ~~(a)~~ The provisions of W.S. ~~9-4-16-3-107~~ through ~~9-4-16-3-112~~ (relating to the
1059 conduct of hearings for contested cases) do not apply to hearings held under this Chapter. As
1060 a fact-finding legislative proceeding, each hearing is non-adversarial and there are no formal
1061 pleadings or adverse parties.

1062

1063 (c) Prior to the adoption, amendment or repeal of any rules, other than
1064 interpretive rules or statements of general policy, the Department shall publish notice of its
1065 intended action, including the date, time and place of any public hearing, in a newspaper of
1066 general circulation in the state, and afford a forty-five (45) day written public comment
1067 period after the last publication. The notice shall be published one time per week for two
1068 consecutive weeks with the last publication to be no less than seven days prior to the hearing.

1069 In addition, the eCouncil will hold at least one public hearing on the proposed action, unless
1070 by a majority vote of the Council such public hearing is waived. All information will be
1071 received by the Council without regard to rules of evidence.

1072

1073 (d) ~~(e)~~ The public hearing is directed to receiving factual evidence and testimony and
1074 expert opinion testimony relative to the issues in the proceeding. The Director may withdraw

1075 the petition from Council consideration until such time as a public hearing has been
1076 scheduled for the receipt of public comments. After such time the petition can only be
1077 withdrawn upon a motion by the Director and a majority vote of the Council.
1078

1079

1080 (e) The Council, upon its own motion or upon the motion of any party, to
1081 promote the orderly presentation of evidence, may adopt one or more of the provisions
1082 contained in Chapter 2 H of these Rules governing procedures in contested cases. Such action
1083 by the Council shall not constitute an agreement or designation that the proceeding before the
1084 Council is in the nature of a contested case.

1085

1086 (f) ~~(e)~~ The Council may impose time limitations upon oral presentations. A digital
1087 copy of any proposed electronic presentations, such as power point presentations, shall be
1088 delivered to the Council no less than seventy-two (72) hours prior to the day of the public
1089 hearing at which the presentation is to be made. Failure to provide a digital copy in
1090 accordance with the time line set forth in this rule shall result in the presentation not being
1091 allowed. Any documents offered for the Council's consideration shall contain, on the front
1092 page of the document, the name of the person offering the document.

1093

1094 (g) The Council, in order to facilitate an orderly presentation of information to the
1095 Council may identify specific individuals or groups to provide testimony at a specific time so
1096 long as the public in general has an opportunity to provide testimony at a reasonable time
1097 during the proceeding to adopt the rule.

1098

1099 (h) Prior to holding a public hearing on the rule that is for the public in general to
1100 provide testimony, the Council may hold a public meeting in which the purpose of the
1101 hearing is to allow the Department the opportunity to present the rule and their reasons for
1102 implementation of the rule.

1103

1104 (i) The presiding officer may recess the hearing from time to time as required.

1105

1106 Section 4 5. **Witnesses.**

1107

1108 (a) The Council, or ~~the~~ presiding officer may direct that summaries ~~to~~ of the
1109 testimony of witnesses be prepared in advance of the hearing. If so directed, the original and
1110 eight copies of such summaries shall be served upon the members of the Council and ~~or~~
1111 Administrator or upon any other party as the Council or the presiding officer may direct.

1112

1113 (b) Witnesses will be permitted to read summaries of their testimony into the
1114 record or make other oral statements as they so desire and subject to reasonable limitations
1115 imposed by the Council or presiding officer. Witnesses shall not be available for cross-
1116 examination, but will be permitted to answer questions directed to them by members of the
1117 Council, presiding officer, the Director or his designee.

1118

1119 (c) When necessary to prevent undue prolongation of the hearing, the Council or
1120 the presiding officer may limit the number of times or length of time any witness may testify.

1121

1122 (d) The council, except for good cause shown, shall not to accept evidence or
1123 testimony from parties which fail to participate, comment or provide written remarks in the
1124 advisory board hearing on the rules under consideration.

1125

1126 Section 6. **Comments.**

1127

1128 (a) The Council or presiding officer may set time limits for the submittal and
1129 form of comments. All timely comments shall be considered by the Council before final
1130 action is taken on any proposal to promulgate, amend, or repeal any rule. Late submittals
1131 shall not be considered by Council members unless the Council votes to reopen the record.

1132

1133 Section 7. **Decision.**

1134

1135 As soon as practicable after receipt of the official transcript or as soon as practicable
1136 after the expiration of the time set for the submittal of written public comments, the Council
1137 shall render a written decision on the issues presented at the hearing.

1138 CHAPTER 4
1139 RECONSIDERATION

1140
1141 Section 1. **Motion for Reconsideration.**
1142

1143 (a) Any party seeking any change in any decision of the Council may file a
1144 motion for reconsideration within twenty (20) days after the written decision of the Council
1145 has been issued.

1146
1147 (b) Any motion for reconsideration filed under this section must be confined to
1148 new questions raised by the decision or new evidence and upon which the petitioner had no
1149 opportunity to argue before the Council.

1150
1151 (c) Any motion for reconsideration must specify whether the prayer is for
1152 reconsideration, rehearing, further hearing, modification of effective date, vacation,
1153 suspension or otherwise.

1154
1155 (d) Except as the Council may otherwise direct, the filing of a motion under this
1156 section shall not stay the effectiveness of any decision respecting the promulgation,
1157 amendment, or repeal of any rule or rules.

1158
1159 (e) Rule 59 and 60 of the Rules of Civil Procedure are not applicable to this
1160 provision and are not grounds for reconsideration, rehearing, modification, vacation or
1161 suspension of an order entered by the Council.

1162
1163 Section 2. **Scope.**
1164

1165 (a) A motion for reconsideration may be filed in hearings conducted under
1166 Chapter 2 or Chapter 3.

1167
1168 (b) The granting of a motion to reconsider is solely within the discretion of the
1169 Council.

1170 CHAPTER 5 ✕
1171 MOTIONS FOR AWARD OF COSTS AND
1172 EXPENSES UNDER W.S. 35-11-437(f) SURFACE COAL MINING
1173

1174 Section 1. **Motions and Responses.**
1175

1176 (a) Pursuant to W.S. 35-11-437(f), any party may file a motion for award of costs
1177 and expenses within forty-five (45) days of receipt of a final order from the Council. Any
1178 person served with a copy of the motion shall have thirty (30) days from service within
1179 which to file response to the motion. Failure to make a timely filing of the motion or may
1180 constitute a waiver of the right to such an award or objection.
1181

1182 (b) The motion shall contain the petitioner's name and a detailed accounting,
1183 including receipts, of all costs and expenses authorized under W.S. 35-11-437(f). Where
1184 attorneys' fees are claimed, the motion shall include evidence concerning the hours expended
1185 on the case, the customary commercial rate of payment for such services in the area, and the
1186 experience, reputation and ability of the individual(s) performing the services.
1187

1188 Section 2. **Who May Receive an Award.**
1189

1190 (a) Appropriate costs and expenses including attorneys' fees may be awarded:
1191

1192 (i) From the permittee to any person if the person ~~he~~ initiates or
1193 participates in any administrative proceeding reviewing enforcement actions or failure to
1194 enforce actions, but only if the Council finds that:
1195

1196 (A) A violation of the Act, regulations or permit has occurred, or
1197 that an imminent hazard existed; and
1198

1199 (B) The petitioner substantially contributed to a full and fair
1200 determination of the issues.
1201

1202 (ii) To a permittee from any person, but only if the Council finds that:
1203

1204 (A) The person initiated or participated in an enforcement action or
1205 failure to enforce action in bad faith for the purpose of harassing or embarrassing the
1206 permittee.
1207

1208 (iii) If permitted by law, to any person, other than a permittee or his
1209 representative, from the Department if the person initiates or participates in any contested
1210 case proceeding under the Act as it provides for regulation of surface coal mining and
1211 reclamation operations in accordance with P.L. 95-87, who prevails in whole or part,
1212 achieving at least some degree of success on the merits and the Council finds that the person
1213 substantially contributed to a full and fair determination of the issues.

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(iv) If permitted by law, To a permittee from the Department when the Council finds that the Department issued an order of cessation, a notice of violation or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee.

(v) To the Department where it demonstrates that a person initiated or participated in reviewing of any enforcement action in bad faith for the purpose of harassing or embarrassing the Department.

Section 3. **Awards.**

(a) An award under this chapter may include:

(i) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred as a result of initiation and/or participation in a proceeding under the Act as it provides for regulation of surface coal mining and reclamation operations in accordance with P.L. 95-87.

(ii) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred in seeking the award before the eCouncil.

1235 CHAPTER 6

1236 REVIEW BY THE-DIRECTOR OR ADMINISTRATOR

1237
1238
1239 Section 1. **Review by the Director.**

1240
1241 (a) Pursuant to the supervisory authority recognized in W.S. 35-11-110, and
1242 subject to any applicable law and to any right of appeal to the Council, the Director may
1243 review by informal conference or otherwise and affirm, modify, terminate or vacate any
1244 decision, order, notice by the Administrator, or assessment of penalty by the agency. The
1245 review includes but is not limited to:

1246
1247 (i) Any hearings by the Administrator on land, air or water quality or
1248 solid waste management permits held because of significant public comment;

1249
1250 (ii) Any hearings by the Administrator for a variance under W.S. 35-11-
1251 601; and

1252
1253 (iii) Any informal conference held by the administrator of Land Quality on
1254 a permit application. However, a record shall be made of the conference, unless waived by
1255 all parties. Such record shall be maintained and shall be accessible to the parties until final
1256 release of the performance bond.

1257
1258 (b) Such review and action shall be taken by the Director when required by law.
1259 Apart from this, the Director may grant a petition for review filed with him by any interested
1260 person after considering the following factors:

1261 (i) the need for a consistent policy in the area;

1262 (ii) the final nature of the decision;

1263 (iii) the amount of discretion statutorily vested with the Administrator;

1264 (iv) any potentially adverse environmental or public health or safety related
1265 impacts; and

1266 (v) consistency of the Administrator's decision with law or regulations.
1267

1272 Section 2. **Initiation of Review.**

1273
1274 (a) The petition for review by the Director shall set forth in writing those items
1275 required by Chapter 1 I, Section 3,- (c)-(i) through (iv). Upon receipt, the Director shall
1276 forward a copy thereof to the affected Administrator and to any party who appeared in prior
1277 proceedings pertaining to the same matter. A petition for review of a notice of abatement or
1278

1279 the amount of the penalty under W.S. 35-11-437 shall be filed within fifteen (15) days. All
1280 other notices shall be filed within fifteen (15) days.

1281
1282 (b) Within thirty (30) days the Director shall grant or deny the petition and
1283 schedule any requested conference.

1284
1285 (c) Notice of the decision on the petition shall be sent to the petitioner, the
1286 affected Administrator, any person served with the petition and all district offices. If the
1287 petition is denied, the Director shall give a brief statement of the reasons for the denial.

1288
1289 **Section 3. Informal Conference for Coal Mining Permitting Applications.**

1290
1291 (a) Any request that the Director hold an informal conference under W.S. 35-11-
1292 406 on any application for a surface coal mining permit shall briefly state:

1293
1294 (i) The issues to be discussed,
1295
1296 (ii) Whether the requester desires the conference to be held in the locality
1297 of the proposed mining operation, and whether access to the proposed permit area is desired.
1298 If requested or necessary, the Director may arrange with the applicant to grant interested
1299 parties to the conference access to the permit area for the purpose of gathering information
1300 relative to the conference.–

1301
1302 (iii) Be filed with the administrator no later than thirty (30) days after the
1303 last publication of the newspaper notice as required by W.S. 35-11-406(j).

1304
1305 (b) The conference shall be held within 20 days after the final date for filing
1306 objections unless a different period is stipulated to by the parties. The conference shall be
1307 held in the locality of the operation or at the state capitol, at the option of the requester.

1308
1309 (c) The Director shall publish notice of the time, date, and location of the
1310 conference in a newspaper of general circulation in the locality of the proposed operation
1311 once a week for two (2) consecutive weeks immediately prior to the conference.

1312
1313 (d) If all parties requesting the conference reach agreement and withdraw their
1314 request, the conference need not be held.

1315
1316 (e) If in the event a petitioner simultaneously files a request for an informal
1317 conference with the Director and a request for a hearing before the Council, the Council shall
1318 not take jurisdiction unless a party to the informal conference appeals the Director's decision
1319 to the Council.

1320
1321 **Section 4 3. Conduct of Conference and Decision.**

1322

1323 (a) If an informal conference is held, any person has the right to attend the
1324 conference. The Department shall give sufficient notice of such informal conference schedule
1325 to the permittee and any known parties. The procedure shall be informal, with no pre-
1326 hearing conference, discovery or cross-examination. The Director may accept oral or written
1327 statements and any other relevant information from any participant to the conference. An
1328 electronic or stenographic record shall be made of the conference proceeding, unless waived
1329 by all the participants. The record shall be maintained and shall be accessible to the
1330 participants of the conference.

1331
1332 (b) Following the Director's review, including any informal conference, the
1333 Director shall give each participant and the Administrator a brief written statement of
1334 findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of
1335 the agency's discretion, together with a notice of any available appeal to the Council.

1336

1337 **Section 5 4. Appeal to the Council.**

1338

1339 (a) Where an appeal to the Council of the Director's decision is afforded, a
1340 petition must be filed with the Council within sixty (60) days of the final action being
1341 contested unless otherwise provided by law. The Council shall conduct the hearing as if the
1342 informal hearing had not occurred, provided however, that the Director's decision may be
1343 introduced into evidence.

1344

1345 (c) At formal review proceedings before the Council, no evidence as to
1346 statements made or evidence produced by one participant at a
1347 conference shall be introduced as evidence by another participant.

1348 (d)

1349 **Section 5. Miscellaneous.**

1350

1351 (a) This Chapter shall not be construed to allow the Director to review matters or
1352 issues and grant relief either in areas which are within the exclusive jurisdiction of the
1353 Council.

1354

1355 (b) Unless review by the Director is required by law, failure to seek review shall
1356 not be construed as a failure to exhaust administrative remedies.

1357

1358

CHAPTER 7

DESIGNATION OF AREAS PURSUANT TO W.S. §35-11-112(a)(v)

Section 1. **Authority.**

These rules are promulgated by authority of the Environmental Quality Act, W.S. §35-11-112 and W.S. §16-3-103.

Section 2. **Purpose.**

These rules are intended to provide a process to implement W.S. §35-11-112(a)(v) of the Environmental Quality Act which provides that the Council shall designate those areas of the state that are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical or scenic value. These rules apply only to the Land Quality Article, Article 4., of the Environmental Quality Act. The scope of these rules is limited to areas sought to be designated for purposes related to the permit approval and denial process contained in W.S. §35-11-406(m) for non-coal mining operations. Included in these rules are criteria to be used in evaluating lands of the state that are being considered for this designation. The hearing procedure is similar to that of Chapter 3 ~~III~~ of these rules, and is authorized by W.S. §16-3-103.

Section 3. **Applicability.**

(a) Areas designated pursuant to these rules are subject to the limitation contained in W.S. §35-11-406(m). A designation under Chapter 7 ~~VII~~ shall not bar issuance of a coal mining permit under W.S. 35-11-406(n).

(b) No areas subject to existing mining operations for which the Department of Environmental Quality shall have issued a permit shall be affected by a designation so long as the permit remains in effect.

(c) No area subject to an application for a noncoal mining permit shall be considered for designation if the petition to designate is filed after the close of the public comment period allowed by W.S. §35-11-406(k).

(d) A designation as very rare or uncommon shall not restrict non-mining agricultural operations. Nor shall such designation restrict activities excluded from the Environmental Quality Act W.S. 35-11-401(e) and W.S. 35-11-1104.

Section 4. **Definitions.**

(a) “Critical habitat” as defined in Land Quality Division Coal Rules and Regulations Chapter 1, Section 2(v) means those areas essential to the survival and recovery

1403 of species listed by the United States Secretary of the Interior as threatened or endangered
1404 under the authority of 50 CFR, Part 17.

1405
1406 (b) “Crucial habitat” as defined in LQD coal Rules and Regulations, Chapter 1,
1407 Section 2(w), means those areas, designated as such by the Wyoming Game and Fish
1408 Department, which determine a population’s ability to maintain and reproduce itself at a
1409 certain level over the long term.

1410
1411 (b c) “Important habitat” as defined in LQD Coal Rules and Regulations, Chapter
1412 1, Section 2(ax), means that habitat which, in limited availability, supports or encourages a
1413 maximum diversity of wildlife species or fulfills one or more living requirements of a
1414 wildlife species. Examples of important habitat include, but are not limited to, wetlands,
1415 riparian areas, rimrocks, areas offering special shelter or protection, reproduction and nursery
1416 areas, and wintering areas.

1417
1418 (e d) “Fragile lands” means geographic areas containing natural, ecologic, scientific
1419 or aesthetic resources that could be damaged or destroyed by mining operations. For
1420 examples of fragile lands see Section 1-(a), Chapter 17, Coal Rules and Regulations of the
1421 Land Quality Division.

1422
1423 (e) “Scenic Values” means a physiographic area composed of land, water, biotic, and
1424 cultural elements which may be viewed and mapped from one or more viewpoints and which
1425 has natural beauty and/or aesthetic values.

1426
1427 (f) UNCOMMON: not ordinarily encountered, unusual 2: remarkable,
1428 exceptional

1429
1430 (g) VERY RARE: Marked to a high degree of unusual quality, merit or
1431 appeal, exceedingly distinctive. In actual fact, truly seldom occurring or found.

1432
1433

1434 Section 5. **General Procedure.**

1435
1436 (a) The rules in this Chapter shall supersede the rules of Chapter 3

1437
1438 (b) The hearing under this chapter is not a contested case proceeding but is a non-
1439 adversarial legislative proceeding.

1440
1441 (c) The Council, on its own motion or on the motion of any person, in the
1442 interests of developing information about the area considered for designation, may adopt one
1443 or more of the provisions contained in Chapter 2 II of the rules governing procedures in
1444 contested cases. Such action by the Council shall not constitute a finding that the proceeding
1445 before the Council is in the nature of a contested case.

1446

1447 Section 6. **Initiation of Proceedings.**
1448

1449 (a) Any resident of the State of Wyoming who has attained the age of majority,
1450 may file a petition to designate lands as very rare or uncommon pursuant to W.S. §35-11-
1451 112(a)(v) or a petition to modify or terminate an existing designation. The petition shall
1452 contain the following:

1453
1454 (i) The name, address, phone number, and fax number for the petitioner;

1455
1456 (ii) The location by legal description, including section, township and
1457 range, of the area the petitioner is proposing for designation;

1458
1459 (iii) The names, if any, by which an area may be known locally;

1460
1461 (iv) The distance of the area to the nearest city or town, and the county in
1462 which the area is located;

1463
1464 (v) An original USGS topographic map showing the area in question
1465 which reflects the surface land ownership pattern (private, state, federal) in the area;

1466
1467 (vi) A list of the names and addresses of the surface and mineral owners
1468 whose lands are included within the area proposed for designation, modification, or
1469 termination with a description of the ownership interest of each surface and mineral owner,
1470 including a legal description of the lands in which each person has an interest;

1471
1472 (vii) A concise statement of the reasons the area is alleged to be very rare or
1473 uncommon and a description of the archaeological, surface geological, historical, wildlife,
1474 botanical, or scenic attributes of the area, or, if the petition seeks to modify or terminate an
1475 existing designation, a concise statement of the reasons for the modification or termination
1476 including an explanation of the substantial change in circumstances that has occurred since
1477 the designation;

1478
1479 (viii) A description of the current and historical land use in the area;

1480
1481 (ix) A list of any special designations or descriptions of the area made by
1482 other governmental agencies, including, but not limited to, designations by the Department of
1483 Interior Bureau of Land Management or Office of Surface Mining, designations by the U.S.
1484 Fish and Wildlife Service, and designations by the Wyoming Department of Game and Fish;

1485
1486 (x) The names and addresses of all expert witnesses whose work or whose
1487 testimony may be offered by the petitioner to support the petition;

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1489 (xi) A list of any scientific documents to be offered by the petitioner to
1490 support the petition that discuss the area to be designated, modified, or terminated; and

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(xii) At the time of filing, original and eight (8) copies of the petition shall be submitted to the Council at the Council's office. The petition shall be considered to be filed as of the date it is received in that office. The petitioner only needs to file one copy of the USGS topographic map required under subsection (v) of this section with the original petition.

(b) Upon receipt of a petition under these rules the Council shall consider the petition at a regularly scheduled Council meeting and shall notify the petitioner and surface and mineral owners whose lands or minerals are within the area proposed for designation of the time, date, and location of the meeting. The Council's consideration shall be limited to whether the petition should be accepted or dismissed. Grounds for denial include but are not limited to:

i. Failure to supply any information set forth in section (a) i-xiii.

(c) Service shall be by certified mail return receipt requested. All return receipts will be filed with a certificate of service within 10 days of service of the petition. The surface and mineral owners shall respond to the petition within 30 days of receipt of the Petition by the owner.

(d) Within 30 days of receipt of the last response timely filed with the Council, the Council shall schedule a public hearing on the petition.

Section 7. **Hearing and Notice.**

(a) The Council shall:

(i) Set the time, date, and location of a hearing on the petition, and

(ii) Schedule the hearing within the county in which the lands or a major portion thereof are located.

(b) Subject to the review and approval of the form of the public notice by the Council, the petitioner shall:

(i) Publish notice of the hearing once per week for four (4) consecutive weeks with the last notice published no less than seven (7) days and no more than ten (10) days in advance of the hearing in a newspaper of statewide circulation and a newspaper of general circulation in the vicinity of the area proposed for designation, modification, or termination;

(ii) Serve notice of the hearing by personal service or by certified mail to all surface and mineral owners whose lands and/or mineral interests are included within the area proposed for designation, modification, or termination;

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(iii) Serve notice of the hearing by regular mail to the county commissioners of the counties wherein lands proposed to be designated lie, or a designation may be modified or terminated, ~~lie~~, the Attorney General’s Office, and the Governor’s Office; and

(iv) Except as otherwise provided in these rules, notice shall be served in accordance with the Wyoming Rules of Civil Procedure.

(c) Costs of the publication and mailing of notice of the proceedings shall be borne by the petitioner.

(d) If the Council denies a petition to designate, modify or terminate a designation of very rare or uncommon pursuant to W.S. §35-11-112(a)(v) on the merits no petition shall be considered by the council regarding the same parcels of land or a petition regarding a substantial portion of the same parcel of land within 12 months of the decision declining to designate, modify or terminate a designation of very rare or uncommon pursuant to W.S. §35-11-112(a)(v).

Section 8. Witnesses.

(a) Any person may comment on a proposed designation, modification, or termination either by appearing at the hearing and entering comments into the record orally, or by submitting written comments within a time period set by the Council.

(b) Witnesses submitting testimony in writing shall submit eight (8) copies, of their complete testimony to the Council.

(c) Witnesses will not be cross-examined except by the Council, or other persons designated by the Council.

(d) Whenever the Council allows testimony to be submitted in writing, the testimony shall be considered to be timely filed if it is received in the office of the Environmental Quality Council by the end of the business day on the date set by the Council. Late submittals shall not be considered by Council members unless the Council votes to reopen the record.

(e) Witnesses may be called by the Council, and expenses of these witnesses will be paid by the Council.

(f) The Council may impose time limitations on oral presentations at hearings. A digital copy of any proposed electronic presentations, such as power point presentations, shall be delivered to the Council no less than seventy-two (72) hours prior to the day of the public hearing at which the presentation is to be made. Failure to provide a digital copy in

1579 accordance with the time line set forth in this rule shall result in the presentation not being
1580 allowed.

1581

1582 **Section 9. Record.**

1583

1584 The hearing proceedings, including all testimony, shall be reported verbatim by a
1585 certified court reporter or by other appropriate means determined by the Council. A copy of
1586 the proceedings will be furnished to any person upon written request and the payment of a
1587 reasonable fee. If a person elects to have the hearing transcribed by a certified court reporter,
1588 he or she must make the necessary arrangements and bear the cost thereof.

1589

1590 **Section 10. Decision.**

1591

1592 (a) The Council, in its discretion, may direct the petitioner, the Council's staff, or
1593 others to analyze the oral and written comments.

1594

1595 (b) An analysis of comments shall be in writing, submitted at a time to be set by
1596 the Council, and be a part of the record of the designation proceedings. The analysis may
1597 include recommendations to modify the petition to designate.

1598

1599 (c) The Council shall issue a written decision outlining the Findings of Facts and
1600 Conclusions of Law. The decision may be to designate all or a portion of the area or to deny
1601 the petition.

1602

1603 (d) The petitioner shall be served with a copy of the Council's decision and
1604 statement of reasons.

1605

1606 **Section 11. Criteria for Designation.**

1607

1608 (a) In considering designations, the Council shall follow a two-tiered review
1609 process. First, the Council must determine whether the area is eligible for designation by
1610 virtue of the existence of one or more of the particular values specified in the statute.
1611 Secondly, the Council must determine whether any particular value that is found to exist is
1612 very rare or uncommon.

1613

1614 (b) For an area to be eligible for designation, the Council must make an initial
1615 finding that the area at issue possesses particular historical, archaeological, wildlife, surface
1616 geological, botanical or scenic value. For purposes of making the initial finding, or refusing
1617 to make the initial finding, the Council shall consider the significance and the weight of all
1618 specifically identified factors that are set forth in these criteria.

1619

1620 (c) For purposes of determining whether an area of the State may be considered
1621 to have particular historical, prehistorical, or archaeological value the Council shall consider
1622 the following factors:

- 1623
- 1624 (i) Whether the area is mentioned prominently in historic journals or
1625 other historic literature;
- 1626
- 1627 (ii) Whether the area is important because it is associated with cultural or
1628 religious traditions and practices;
- 1629
- 1630 (iii) Whether the area has received designation pursuant to state or federal
1631 laws that provide for special protection and management due to outstanding historic or
1632 prehistoric values such as national historic landmarks, national historic sites, or the National
1633 Register of Historic Places; or
- 1634
- 1635 (iv) Whether the area contains buildings, structures, artifacts, or other
1636 features that are significant in the history or prehistory of the state and are not protected
1637 under any other local, state or federal programs, designations or laws .
- 1638
- 1639 (d) For purposes of determining whether an area has particular wildlife value the
1640 Council shall consider the following factors:
- 1641
- 1642 (i) Whether the area includes lands that are considered irreplaceable fish
1643 or wildlife habitat;
- 1644
- 1645 (ii) Whether the area includes preserves or easements which have been
1646 established and used for the protection for habitat for wildlife;
- 1647
- 1648 (iii) Whether the area includes lands that the Game and Fish Department
1649 has designated as crucial or vital habitat for resident species;
- 1650
- 1651 (iv) Whether the area contains or may affect fisheries classified as class I
1652 by the Wyoming Game and Fish Department;
- 1653
- 1654 (v) Whether the area includes fragile lands that offer unique wildlife or
1655 scientific values;
- 1656
- 1657 (vi) Whether the area includes federally designated critical habitat for
1658 threatened or endangered plant or animal species which is determined by the U.S. Fish and
1659 Wildlife Service or the Wyoming Game and Fish Department to be of essential value and
1660 where the presence of threatened or endangered species has been scientifically documented;
- 1661
- 1662 (vii) Whether the area contains a bald or golden eagle nest or nest site that
1663 is determined to be active and includes all or a portion of a buffer zone of land around the
1664 nest which has been evaluated and approved by the U.S. Fish and Wildlife Service;
- 1665
- 1666 (viii) Whether the area includes bald and golden eagle roost and

1667 concentration areas used during migration and wintering;
1668
1669 (ix) Whether the area contains a falcon (excluding kestrel) cliff nesting site
1670 with an active nest and a buffer zone around the nest site which has been evaluated and
1671 approved by the U.S. Fish and Wildlife Service; or
1672
1673 (x) Whether the area includes lands which are high priority habitat for
1674 migratory birds of high federal interest on a regional or national basis as determined by the
1675 U.S. Fish and Wildlife Service.
1676
1677 (e) For purposes of determining whether an area has particular surface geological
1678 value the Council shall consider the following factors:
1679
1680 (i) Whether the area has unique surface geological formations that expose
1681 upheavals and faults that are indicative of sub-surface geological features;
1682
1683 (ii) Whether the area has significant paleontological resources; or
1684
1685 (iii) Whether the area has geologic features with unusual or substantial
1686 recreational, aesthetic, or scientific value.
1687
1688 (f) For purposes of determining whether an area has particular botanical value the
1689 Council shall consider the following factors:
1690
1691 (i) Whether the area is critical habitat for endangered or threatened plant
1692 species as designated by state or federal agencies;
1693
1694 (ii) Whether the area contains stands of a rare native vegetation type, or
1695 contains stands of a native vegetation type that is now rare, or contains stands of a native
1696 vegetation type in pristine condition for which pristine stands are unusual; or
1697
1698 (iii) Whether the area contains plant species and habitat determined to be
1699 crucial or vital for resident wildlife species.
1700
1701 (g) For purposes of determining whether an area has particular scenic value the
1702 Council shall consider the following factors:
1703
1704 (i) Whether the area includes lands within or adjacent to a corridor for a
1705 river designated as a National Wild and Scenic River or a corridor for a National Scenic
1706 Byway;
1707
1708 (ii) Whether the area has been the subject of substantial artistic attention
1709 in the works of artists, sculptors, photographers, or writers; or
1710

1711 (iii) Whether the area has substantial aesthetic value and its value would be
1712 apparent to a reasonable person.

1713

1714 (h) An area shall be designated pursuant to W.S. §35-11-112(a)(v) if, in addition
1715 to finding that the area is eligible for designation pursuant to Section 11.a., the Council finds
1716 that the area is very rare or uncommon. For purposes of determining if an area is very rare or
1717 uncommon the Council shall consider the following:

1718

1719 (i) Whether the area exhibits historical, archaeological, wildlife, surface
1720 geological, botanical, or scenic values that are very rare of uncommon when compared with
1721 other areas of the state or a region therein;

1722

1723 (ii) Whether the area contains historical, archaeological, wildlife, surface
1724 geological, botanical, or scenic values seldom found within the state or a region therein; or

1725

1726 (iii) Whether the area contains historical, archaeological, wildlife, surface
1727 geological, botanical, or scenic values known or suspected to be declining which, if left
1728 unprotected, could become extinct or extirpated.

1729

1730 Section 12. **Burden.**

1731

1732 The burden of proof, persuasion and going forward is the burden of the Petitioner.
1733 The standard for the burden of proof will be by a preponderance of the evidence. At the
1734 close of the Petitioner's evidence if the Council believes the Petitioner has established a
1735 prima facie case for designation the Council shall receive any evidence that any other person
1736 wishes to provide in opposition to the designation. If the at the close of the Petitioner's
1737 evidence the Council does not believe the Petitioner has established a prima facie case for
1738 designation the Council may close the hearing and deny the petition without taking any
1739 evidence in opposition to the petition.

1740

1741 Section 13. **Map.**

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1743 The Council shall work with the State Geological Survey or the Department to
1744 construct a certified map of the lands designated very rare or uncommon under this
1745 Chapter and shall maintain such map at the Council offices.

CHAPTER 8

SMALL BUSINESS VOLUNTARY DISCLOSURE INCENTIVE

Section 1. **Purpose.**

This Rule sets forth the requirements for waiving penalties against small businesses that voluntarily disclose environmental non-compliance to the Department or discover violations through compliance assistance or outreach seminars, and then, correct those violations in accordance with this rule. It is the Department's objective to provide small businesses with an incentive to approach the agency for assistance by reducing the fear of penalties.

Section 2. **Definition of a Small Business.**

(a) A small business includes any person, as defined in W.S. 35-11-103(vi), with 100 or fewer employees in all of its facilities or operations, whether located in or outside of the State of Wyoming, except that:

(i) Businesses seeking a penalty waiver for air quality violations under Article 2 of the Environmental Quality Act, W.S. 35-11-201 through 212, must meet the definition of a small business stationary source found in W.S. § 35-11-209 and cannot be a major source of hazardous pollutants under W.S. 35-11-203(a)(i)(B);

(ii) Businesses regulated under Article 5 of the Environmental Quality Act, W.S. 35-11-501 through 520, are not entitled to a penalty waiver under this rule for violations of W.S. 35-11-501 through 520 if they are a large quantity generator or are classified as a treatment, storage or disposal facility under the state hazardous waste regulations; and

(iii) Businesses under control or ownership of a large parent organization that does not qualify under this rule, are not small businesses.

(b) The number of employees shall be calculated by determining the full-time equivalents on an annual basis and does not include contractors and consultants. The Department shall not consider employees who work less than 35 hours per week as full-time equivalents.

Section 3. **Qualifications for Penalty Waiver.**

1786 (a) The Department will not seek civil penalties from a small business that
1787 voluntarily discloses in writing to the Department non-compliance with the Act, any rule,
1788 regulation or standard promulgated under the Act, within 60 days of discovering the
1789 violation, provided that the business has corrected the violation or corrects the violation in
1790 accordance with a compliance schedule approved by the Department. The burden will be on
1791 the business to demonstrate that it has disclosed the violation within 60 days of discovery. If
1792 the business is unable to correct the violation within 180 days or violates a compliance
1793 schedule issued by the Department establishing a shorter period for correcting the violation,
1794 the business will no longer qualify for the penalty waiver. Upon good cause shown by the
1795 small business, the Director may grant an extension of the deadline for correcting the
1796 violation.

1797
1798 (b) The Department will not seek civil penalties from a small business that has
1799 made a good faith effort to operate in compliance prior to discovery of the violation, as
1800 evidenced by a request for compliance assistance from the Department or attendance at one
1801 or more compliance assistance seminars; and as evidenced by prompt correction of any
1802 violations discovered through such efforts and implementation of good environmental
1803 management practices. To qualify for the waiver, the business must document its
1804 participation in compliance assistance or outreach seminars and the steps it has taken as a
1805 result to improve compliance or correct the violations. In the event that the Department
1806 believes the small business needs to take further steps to correct a violation, the Department
1807 shall issue a compliance schedule. The small business must meet the requirements of the
1808 compliance schedule to maintain the penalty waiver.

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1810 **Section 4. Exceptions to Penalty Waiver.**

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1812 (a) The penalty waiver is unavailable if:

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1814 (i) The Department has previously issued a warning letter, a notice of
1815 violation or taken other enforcement action against the small business for violation of the
1816 same standard disclosed to the Department;

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1818 (ii) The small business has been subject to three or more enforcement
1819 actions for any non-compliance of environmental regulations within the last 5 years;

1820
1821 (iii) The small business violates a Department permit or order of the
1822 Council;

1823
1824 (iv) The small business is under investigation for any violation of the Act
1825 at the time it discloses the violation to the Department, seeks compliance assistance from the
1826 Department or participates in an outreach seminar;

1827
1828 (v) The violation involves criminal conduct;

1829

1830 (vi) The violation results in a significant economic advantage for the
1831 business;

1832
1833 (vii) The violation was committed willfully; or

1834 (ix) The violation presents a significant threat or imminent and substantial
1835 endangerment to public health or the environment;

1836

1837 **Section 5. Mandatory Disclosure.**

1838

1839 Notwithstanding Sections 1 through 4 above, disclosure of a violation is mandatory
1840 and not subject to a penalty waiver under this rule when the Environmental Quality Act, any
1841 rule, regulation, standard, federal law or regulation, local ordinance, order of the Council or
1842 any court, or any Department permit requires reporting of the violation to the Department.

1843

1844 **Section 6. Limitations of the Rule.**

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1846 (a) Nothing in this rule diminishes the Department's authority to conduct
1847 investigations, investigate complaints, or to issue notices of violation and orders under
1848 Article 7 of the Environmental Quality Act, W.S. § 35-11-701, or to seek injunctive relief
1849 under W.S. § 35-11-115 or Article 9 of the Environmental Quality Act, W.s.S §§ 35-11-901
1850 through 904.

1851

1852 (b) Nothing in this rule prohibits a small business that otherwise qualifies for a
1853 penalty waiver from declining to exercise the waiver and allowing the Department to seek a
1854 penalty.