

Wyoming Department of Environmental Quality's
Response to Comments For
Proposed Revisions to Rules of Practice and Procedure

The following document details the actions taken by the Wyoming Department of Environmental Quality (Department) to gather public comments and input regarding the proposed revisions to Chapters 1, 2, 3, 5, 6, and 7 of the Rules of Practice and Procedure prior to the presentation of these proposed revisions to the joint meeting of the Air Quality Advisory Board, Land Quality Advisory Board, and Water and Waste Advisory Board. The Department is taking this opportunity to summarize and respond to all comments officially submitted in advance of the June 29, 2016 joint advisory board meeting.

On May 16, 2016, the Department published public notice of a joint meeting of the Air Quality Advisory Board, Land Quality Advisory Board, and Water and Waste Advisory Board (Joint Meeting) in the Casper Star Tribune. The Wyoming Attorney General's Office representatives for both the Department and the Environmental Quality Council worked on this rule package collectively. In its notice, the Department informed readers that the Joint Meeting was scheduled to consider a rule package from the Department regarding several proposed changes to the Rules of Practice and Procedure. In particular, readers were informed that the proposed revisions were being recommended in order to adopt the uniform contested case rules developed by Wyoming Office of Administrative Hearings (OAH) in accordance with W.S. 16-3-102, to the extent possible under applicable state and federal law. The uniform rules themselves went through a public comment period before being finalized by the OAH on October 17, 2014. The proposed revisions also update and clarify requirements applicable to rulemaking, petitions for award of costs and expenses under W.S. 35-11-437(f), director review involving surface coal mining operations, hearings before the department, and very rare or uncommon areas. Readers were provided an electronic link to the proposed revisions and also invited to submit comments to the Director. The written comment period closed on June 16, 2016.

The Department received comments from the Powder River Basin Resource Council (PRBRC), the Wyoming Mining Association (WMA), and Klaus Hanson, a member of both the Air Quality Advisory Board and the Water and Waste Advisory Board, commenting in his individual capacity. Generally, both PRBRC and WMA were supportive of the Department's effort to revise and overhaul the rules of practice and procedure. The interest groups shared some of the same concerns about specific words that each identified as ambiguous, as well as general concerns about primacy. Klaus Hanson provided a list of line-by-line comments that identified typographical errors and provided editorial suggestions.

The Department appreciates the effort that each commenter made in reviewing the proposed rules and intends to adopt the majority of the recommended changes. This document breaks the comments down by chapter and section, noting overlap between commenters where applicable, and includes the Department's response to each comment.

Chapter 1

Comment 1: (PRBRC): Section 1(b) should clarify that, in case of conflict, the Wyoming Environmental Quality Act (WEQA) controls over the Wyoming Administrative Procedure Act (WAPA), because the WEQA was both enacted more recently than the WAPA and more specific as to the Department and the Environmental Quality Council (Council).

Department Response 1: The Department appreciates this comment and recommends providing the requested clarity by adding the following sentence to the end of section 1(b):

“In case of conflict between the Wyoming Administrative Procedure Act and the Wyoming Environmental Quality Act, the Wyoming Environmental Quality Act governs.”

Comment 2: (PRBRC): Section 1(c) should contain similar clarification.

Response 2: The Department appreciates this comment and recommends providing the requested clarity by changing the language in section 1(c) as follows:

(c) All hearings before the Council shall be held pursuant to these rules, the provisions of the Wyoming Environmental Quality Act, and, to the extent they do not conflict, the Wyoming Administrative Procedure Act.

Comment 3: (PRBRC): Section 2(d) should clarify that the hearing officer for a specific hearing also presides over all motions practice, discovery disputes, scheduling, and other non-hearing matters related to the docketed matter.

Response 3: The Department appreciates this comment, but does not recommend making any changes at this time. This is language from the uniform rules adopted by the OAH. As mentioned above, these rules were proposed by the OAH to establish a common set of rules for practice and procedure across all state agencies. Additionally, the clarity sought by PRBRC is provided through W.S. 16-3-112(b).

Comment 4: (PRBRC): Section 4(b) should indicate that there are specific types of hearings that the Department must notice through newspaper publication under the WEQA and related regulations. Additionally, the Department and the Council should utilize additional notification methods, including through newspaper publication and the distribution of press releases to newspapers and radio stations.

Response 4: The Department appreciates this comment, but does not recommend making any changes at this time. Section 4(b) was drafted specifically to describe notice requirements applicable to the Council for hearings before the Council. Section 4(b) is not related to and does not alter any statutory or regulatory notice requirements applicable to the Department. In the future, either the Department or the Council may choose to utilize additional methods of outreach.

Comment 5: (PRBRC): Section 5(a) should let parties waive recordings of proceedings to save costs. The Council’s ability to order parties to pay the costs of a court reporter may deter groups from exercising legal rights to appeal Department decisions to the Council. Additionally, this section may create problems for primacy over regulatory programs. If this section remains, it should contain additional criteria to clarify when the Council may require parties to pay court reporter’s expenses, including how to obtain cost waivers for parties acting in good faith and in the public interest.

Response 5: The Department appreciates this comment and recommends using the uniform language developed by the OAH instead of retaining the requirements from prior versions of the Rules of Practice and Procedure. The uniform language, with removal of an appendix, is below:

Record of Proceeding. The referring agency or adjudicative agency shall make appropriate arrangements to assure that a record of the proceeding is kept pursuant to Wyoming Statute § 16-3-107(o) and (p), which are set forth in their entirety in Appendix A. Copies of the transcript taken at any hearing may be obtained by any party, interested person, or entity from the court reporter taking the testimony at such fee as the reporter may charge.

Comment 6: (PRBRC): Sections 6 and 7 should contain more procedural guidance to explain how a member of the Council would declare a conflict of interest. Additionally, these sections should be broadened to cover (1) all hearings before the Council and (2) all Council members, not just hearing officers.

Response 6: The Department appreciates this comment, but does not recommend making any changes at this time because modifying the language in either section could have primacy implications for Clean Water Act and Clean Air Act programs. Section 6 has been in effect and approved by the EPA for many years. The Council has developed and uses a form related to section 6 compliance, which they will likely revise to be able to use for section 7 compliance as well. Section 7, currently under review by the EPA, is consistent with language used in Colorado regulations, previously approved by the EPA.

Finally, the Department believes that PRBRC’s concern that a Council member would not self-recuse in the event of a conflict are minimized by the ethical laws applicable to all Council members and specifically to contested case hearing officers in W.S. §§ 9-3-106 and 9-3-112.

Comment 7: (Klaus Hanson): Section 8, line 147 should be changed from “he” to “s/he” or “he/she”

Response 7: The Department appreciates this comment and recommends changing “he” to “they” in line 147 for grammatical consistency. Although not at issue here, the Department notes that under W.S. 8-1-103(vi), “words in the masculine gender include the feminine and neuter genders.”

Comment 8: (WMA): Section 8(c)(iv) may conflict with the WEQA.

Response 8: The Department appreciates this comment, but does not recommend making any changes at this time. The permitting right described in W.S. 35-11-405(e) is not “temporary relief” discussed in the proposed rule. There are certain conditions necessary for a permittee to be entitled to a permit renewal under W.S. 35-11-405(e) and the WEQA does not allow the Council to renew a permit during the pendency of an action contested the occurrence or non-occurrence of any of those conditions. In any event, chapter 1, section 1(b) is clear that, if there is an actual conflict between the rules and the WEQA, the WEQA prevails.

Comment 9: (PRBRC): Section 14(a) used to require the Council and Advisory Boards to follow Robert’s Rules of Order and that requirement should not have been repealed.

Response 9: The Department appreciates this comment, but does not recommend making any changes at this time. Under W.S. 16-3-103(h)(ii), rules must incorporate all referenced material, as the material was in effect at the time of rule promulgation, excluding later versions. Robert’s Rules is regularly updated and requiring the Council and Advisory Boards to follow Robert’s Rules by regulation would require them to follow the version in effect upon promulgation of these rules. Deleting this requirement would not bar any hearing officer from choosing to utilize the most current version of Robert’s Rules of Order during a rulemaking hearing under chapter 3, section 6(a).

Chapter 2

Comment 10: (PRBRC): Section 3(a) should require continuance motions for informal settlement negotiations as well as more formal mediation or arbitration.

Response 10: The Department appreciates this comment and recommends adding the following sentence at the end of section 3(a):

“If the parties choose to engage in informal settlement discussions, they may file a joint request for continuance pending outcome of the informal settlement discussions.”

Comment 11: (PRBRC and WMA): Section 4(a): “and any other parties” in line 38 is vague.

Response 11: The Department appreciates this comment, but does not recommend making any changes at this time. This is language from the uniform rules adopted by the OAH. As mentioned above, these rules were proposed by the OAH to establish a common set of rules for practice and procedure across all state agencies. Additionally, the clarity sought is provided through W.S. 16-3-101(vi).

Comment 12: (PRBRC): Section 4(a)(i) should clarify that service after the initial petition can be made through the Council’s electronic docket system, using the language from section 5(b).

Response 12: The Department appreciates this comment, but does not recommend making any changes at this time. Section 4(a) relates to the commencement of a contested case hearing and only discusses service of the initial petition. Section 5(b) applies to all service thereafter and it would be redundant to repeat language from section 5(b).

Comment 13: (PRBRC): Section 4(a)(ii) should clarify what address to use for a permit applicant because the organization sometimes uses the address of a company's registered agent and sometimes uses the address on a permit application and it would be easier to have a definitive answer on what address is appropriate to use.

Response 13: The Department appreciates this comment, but does not recommend making any changes at this time. The law governing whether a party has been properly served is case-specific and regulations purporting to allow improper service might not protect a person from a subsequent challenge to improper service.

Comment 14: (PRBRC): Section 4(a)(iii) should be added to clarify that service should be to the representative of a party, instead of to a represented party.

Response 14: The Department appreciates this comment, but does not recommend making any changes at this time. The Wyoming Rules of Civil Procedure make clear that, when a party is represented by counsel, service must be to the party's attorney. Additionally, this is language from the uniform rules adopted by the OAH. As mentioned above, these rules were proposed by the OAH to establish a common set of rules for practice and procedure across all state agencies. In order to retain that consistency, the Department does not recommend making any changes at this time.

Comment 15: (PRBRC): Section 4(a) and 4(c) are inconsistent and section 4(c) should be deleted.

Response 15: The Department appreciates this comment, but does not recommend making any changes at this time. Section 4(a) describes how to file and serve an initial petition and section 4(c) describes how to determine when a contested case has commenced.

Comment 16: (PRBRC and WMA): Section 4(c): Sixty days is too long for mailing to ensure service prior to commencement of a contested case. PRBRC suggests an alternate timeline of seven days.

Response 16: The Department appreciates this comment and recommends deleting chapter 2, section 4(c) in its entirety and renumbering chapter 2, section 4(d) to 4(c).

Comment 17: (Klaus Hanson): Section 7, line 113: "recommended decision" is unclear.

Response 17: The Department appreciates this comment, but does not recommend making any changes at this time. The language is clear that the hearing officer makes the recommended decision to the Council. This is language from the uniform rules adopted by the OAH. As mentioned above, these rules were proposed by the OAH to establish a

common set of rules for practice and procedure across all state agencies. In order to retain that consistency, the Department does not recommend making any changes at this time.

Comment 18: (Klaus Hanson): Section 7, line 134: “biased or prejudiced” is unclear.

Response 18: The Department appreciates this comment, but does not recommend making any changes at this time. This is language from the uniform rules adopted by the OAH. As mentioned above, these rules were proposed by the OAH to establish a common set of rules for practice and procedure across all state agencies. In order to retain that consistency, the Department does not recommend making any changes at this time.

Comment 19: (WMA): Section 7(c)(ii): Concern that “interest” is too broad, suggest including qualifiers to minimize likelihood of parties stalling proceedings on frivolous grounds.

Response 19: The Department appreciates this comment and recommends using the uniform language developed by the OAH by making the following change to line 127:

(ii) Has a material interest in the outcome of the action;

Comment 20: (PRBRC): Section 7(d): In some circumstances, an affidavit might be unnecessary to support a motion for recusal, for example if publicly available records such as websites could demonstrate a conflict of interest.

Response 20: The Department appreciates this comment, but does not recommend making any changes at this time. This is language from the uniform rules adopted by the OAH. As mentioned above, these rules were proposed by the OAH to establish a common set of rules for practice and procedure across all state agencies. In order to retain that consistency, the Department does not recommend making any changes at this time.

Comment 21: (Klaus Hanson): Section 9, line 211 contains a typographical error.

Response 21: The Department appreciates this comment and recommends changing line 139 as follows:

“If the ~~to~~ motion to intervene is granted”

Comment 22: (PRBRC): Section 9(a) should not allow motions to intervene to be filed at the hearing. Instead, it should establish a deadline to ensure intervenors can participate in discovery.

Response 22: The Department appreciates this comment, but does not recommend making any changes at this time. Although there is a benefit to inserting a deadline to ensure that intervenors can participate in discovery, there are certain instances where an interested party may not hear about a matter in advance of the hearing, and those parties should not be barred from intervening due to late notice. This is particularly true for 20-day hearings, where a neighbor or other interested party might not hear about a contested case hearing until the last minute. It is crucial to the process that all interested parties are given the

opportunity to participate. The benefits of ensuring that all timely intervenors participate in discovery do not outweigh the costs of barring the participation of other intervenors.

Comment 23: (PRBRC): Section 9(a) should describe how the petitioner and other parties may file responses in opposition to or in support of motions to intervene, similar to section 11.

Response 23: The Department appreciates this comment, but does not recommend making any changes at this time. Section 11 applies to all motions, including motions to intervene. Therefore, the Department believes that no changes are necessary.

Comment 24: (PRBRC): Section 9(a) should refer to the standards set out in Wyoming Rules of Civil Procedure Rule 24 instead of the phrase “legal right to intervene.”

Response 24: The Department appreciates this comment and recommends changing line 197 as follows:

“...intervene, under the standards set out in W.R.C.P. Rule 24.”

Comment 25: (Klaus Hanson): Section 22, line 429 contains a typographical error.

Response 25: The Department appreciates this comment, but does not recommend making any changes at this time. This is not a typographical error, the language means that a case will be heard as an expedited hearing, which is a type of contested case. This is language from the uniform rules adopted by the OAH. As mentioned above, these rules were proposed by the OAH to establish a common set of rules for practice and procedure across all state agencies. In order to retain that consistency, the Department does not recommend making any changes at this time.

Comment 26: (PRBRC): Section 22 should not use the word “expedited” because that term implies that the hearing will be prioritized over other hearings. Instead section 22 should use the term “abbreviated” which is more accurate description

Response 26: The Department appreciates this comment, but does not recommend making any changes at this time. The language was provided in the uniform rules developed by the OAH. As mentioned above, these rules were proposed by the OAH to establish a common set of rules for practice and procedure across all state agencies. In order to retain that consistency, the Department does not recommend making any changes at this time.

Comment 27: (PRBRC): Section 22 should include the applicable provisions of Wyoming Rules of Civil Procedure Rules 56 and 56.1.

Response 27: The uniform rules developed by the OAH include wholesale incorporation of certain Wyoming Rules of Civil Procedure. To provide the clarity requested by PRBRC, the Department recommends adding the following section to Chapter 2, in between current sections 16 and 17, based on language developed by the OAH in their uniform rules:

Summary Disposition.

12(b)(6), 52(c), 56.1, and 56, Wyoming Rules of Civil Procedure, apply to contested cases.

Comment 28: (Klaus Hanson): Section 25, line 468, question about effective date.

Response 28: The Department appreciates this comment, but does not recommend making any changes at this time. As mentioned above, when incorporating something by reference, under W.S. 16-3-103(h)(ii), all of the referred matter will be incorporated as they were in effect on the date of the adoption of these rules. By providing a date, the Department is providing clarity as to what rules are to be followed.

Comment 29: (PRBRC): Section 25(a) should incorporate discovery rules or specify which, if any, apply to section 15.

Response 29: Please refer to Department Response 27 above.

Comment 30: (PRBRC): Section 25(a-b) should not only incorporate the Wyoming Rules of Civil Procedure in effect on July 1, 2016 because they are only amended for good reason after much deliberation by bar and bench.

Response 30: The Department appreciates this comment, but does not recommend making any changes at this time. Under W.S. 16-3-103(h)(ii), all of the referred matter will be incorporated as it was in effect on the date of the adoption of these rules. However, if the incorporated matter is amended, the Department can update the incorporations, similar to the process used by Divisions that directly incorporate certain requirements from the Code of Federal Regulations.

Comment 31: (PRBRC): Section 25(c) contains an incorrect link.

Response 31: The Department appreciates this comment and recommends changing the link in line 469 to:

“http://www.courts.state.wy.us/Documents/CourtRules/Rules/WYOMING_RULES_OF_CIVIL_PROCEDURE.pdf”

Chapter 3

Comment 32: (PRBRC): General disagreement with “the new interpretation of the WEQA that limits the ability of the EQC to independently respond to a citizen proposed rulemaking, as [PRBRC] believe[s] it improperly takes away some of the EQC’s important oversight authority over DEQ.” Recommend all rulemaking petitions be filed directly with the Department.

Response 32: The Department appreciates this comment, but does not recommend making any changes at this time. The WEQA is clear that only the Department may initiate rulemaking. However, the WEQA does not expressly bar citizens from petitioning either agency, so it is reasonable to interpret this statutory gap to allow citizens to submit petitions to either or both the Department or the Council. This reasonable interpretation enables the Council to provide input to the Department upon receiving and analyzing citizen petitions for rulemaking, even though only the Department may make the decision to initiate rulemaking. The suggested alternative, to fill in the statutory gap by wholly barring citizens from submitting petitions to the Council, seems unduly harsh.

Comment 33: (PRBRC): Section 3 should clarify that the process before the Advisory Boards is the same as the process before the Council, described in section 4.

Department Response 33: The Department appreciates this comment, but does not recommend making any changes at this time. The processes before the boards and the Council are different under the WEQA, necessitating different procedural sections. WAPA, W.S. 16-3-103(a)(i), is clear that rulemaking begins upon notifying the Attorney General, Secretary of State, and, if applicable, the Legislative Services Office. The WEQA is equally clear that prior to this stage, the Department must first go before the relevant Advisory Board(s) and obtain a recommendation to begin formal rulemaking. This statutory framework necessitates the definition of “preliminary rulemaking” before the Advisory Boards, which is different from what occurs before the Council after the Department has “initiated rulemaking” under W.S. 16-3-103(a)(i).

Comment 34 (PRBRC): Section 4(b) appears to give the Advisory Boards veto power over the Department’s rulemaking authority, which could have serious implications for primacy over regulatory programs.

Response 34: The Department appreciates this comment, but does not recommend making any changes at this time. Under the WEQA, the Department may not initiate a rulemaking if the affected Advisory Board(s) do not recommend the rulemaking. The language identified as potentially creating challenges for primacy over regulatory programs has been in the WEQA for many years and neither the EPA nor OSM have ever identified this language as problematic.

Chapter 5

Comment 35: (PRBRC): Concern that section 1(c) overcomplicates the procedure to obtain an award of costs. Instead, a petition for award of costs should be treated as a summary proceeding, described in chapter 2, section 22, instead of as a contested case hearing.

Response 35: The Department appreciates this comment, but does not recommend making any changes at this time. The Department believes that Chapter 2, section 22, which relates to expedited hearings, would apply to these petitions as well.

Chapter 7

Comment 36: (Klaus Hanson): General concern about exclusion of Native American sites.

Response 36: The Department appreciates this comment, but does not recommend making any changes at this time. Federal statutes such as the National Environmental Policy Act, Native American Graves Protection and Repatriation Act, and section 106 of the National Historic Preservation Act ensure protection of Native American sites. Additionally, the enabling legislation of the Department and Council, the WEQA, does not address these types of sites and therefore, they may be beyond the jurisdiction of this rulemaking.

Comment 37: (Klaus Hanson): Section 7, line 228 contains a typographical error.

Response 37: The Department appreciates this comment and recommends changing “incudes” to “includes” in line 228.

Chapter 9

Comment 38: (Klaus Hanson): Suggested using “reason” instead of “reasoning” in line 68.

Response 38: The Department appreciates this comment, but does not recommend making any changes at this time. The word “reasoning” encompasses multiple reasons, whereas using the word “reason” implies that there can only be a singular reason to make a particular request.