

1                                   **Summary of Changes and Corrections to 1/19/17 Draft**

2    Section 1

3                    Added underlining to the section. The section was previously blue to note that it  
4    had been added.

5    Section 3

6                    3(b)(ii): Corrected spacing error.

7 CHAPTER ~~III~~ 3  
8 ~~RULES OF PRACTICE AND PROCEDURE APPLICABLE~~  
9 ~~TO RULE-MAKING HEARINGS OR HEARINGS~~  
10 ~~BY AN ADMINISTRATOR OF A DIVISION OF DEQ~~  
11 RULEMAKING  
12

13 Section 1. Authority.  
14

15 ~~Except as otherwise directed by the Council, the provisions of the Rules contained~~  
16 ~~in this Chapter (III), (Sections 1 et seq.), shall govern:~~  
17

18 (a) ~~Any hearings conducted pursuant to a petition (within the meaning of~~  
19 ~~W.S. 9-4-106) for the promulgation, amendment, or repeal of any rules (as defined in~~  
20 ~~W.S. 9-4-101(a)(vii)).~~  
21

22 (b) ~~Any hearings conducted pursuant to W.S. 9-4-103 for the promulgation of~~  
23 ~~rules and regulations recommended by the Director or Administrator.~~  
24

25 (c) ~~Any hearings by the Administrator on land, air or water quality or solid~~  
26 ~~waste management permits held because of significant public comment.~~  
27

28 (d) ~~Any hearings by the Administrator for a variance under W.S. 35-11-601,~~  
29 ~~excluding SO<sub>2</sub> variances.~~  
30

31 (e) ~~Any hearings by the Council to consider the designation of areas of unique~~  
32 ~~and irreplaceable historical, archaeological, scenic or natural value pursuant to W.S. 35-~~  
33 ~~11-112(a)(v).~~  
34

35 (f) ~~Any informal conference held by the administrator of Land Quality on a~~  
36 ~~permit application. However, a record shall be made of the conference, unless waived by~~  
37 ~~all parties. Such record shall be maintained and shall be accessible to the parties until~~  
38 ~~final release of the performance bond.~~  
39

40 The Council may promulgate rules necessary for the administration of the  
41 Wyoming Environmental Quality Act after receiving a recommendation to adopt a  
42 proposed rule or rules from the Director under W.S. 35-11-112(a)(i). The Department  
43 may begin preliminary rulemaking on its own, in response to a suggestion from the  
44 Council or advisory boards, or in response to a petition for rulemaking.  
45

46 Section 2. Definitions.  
47

48 The following definitions supplement the definitions found in the Wyoming  
49 Administrative Procedure Act and the Wyoming Environmental Quality Act.  
50

51 (a) “Initiate rulemaking” means to submit notice of the intent to adopt,  
52 amend, or repeal any rule, other than an interpretive rule or statement of general policy,  
53 to the Secretary of State’s Office, the Legislative Service Office, and the Attorney  
54 General’s Office, as required by W.S. 16-3-103(a)(i).

55  
56 (b) “Preliminary rulemaking” is the rule development process that occurs at  
57 the Department prior to initiating rulemaking.

58  
59 (c) “Preliminary rule” is a rule that the Department has not filed with the  
60 Council.

61  
62 (d) “Proposed rule” is a rule that the Department has filed with the Council.  
63

64 Section 3. ~~Informal Conference.~~ Petition for Rulemaking.

65  
66 ~~(formerly Section 3(a))—Any request that the Administrator hold an informal~~  
67 ~~conference on any application for a surface coal mining permit shall briefly state the~~  
68 ~~issues to be discussed, whether the requester desires the conference to be held in the~~  
69 ~~locality of the proposed mining operation, and whether access to the proposed permit area~~  
70 ~~is desired. If requested, the Administrator may arrange with the applicant to grant parties~~  
71 ~~to the conference access to the permit area for the purpose of gathering information~~  
72 ~~relative to the conference. The conference shall be held in the locality of the operation or~~  
73 ~~at the state capitol, at the option of the requester, within 20 days after the final date for~~  
74 ~~filing objections unless a different period is stipulated to by the parties. If all parties~~  
75 ~~requesting the conference reach agreement and withdraw their request, the conference~~  
76 ~~need not be held.~~

77  
78 ~~(b)—Where a hearing is requested pursuant to Chapter I, Section 16b, the~~  
79 ~~Council may, under such conditions as it may prescribe, grant such temporary relief as it~~  
80 ~~deems appropriate pending final determination of the proceedings if:~~

81  
82 ~~(i)—All parties to the proceedings have been notified and given an~~  
83 ~~opportunity to be heard on a request for temporary relief;~~

84  
85 ~~(ii)—The person requesting that relief shows that there is a substantial~~  
86 ~~likelihood that he will prevail on the merits of the final determination of the proceeding;~~

87  
88 ~~(iii)—Such relief will not adversely affect the public health or safety or~~  
89 ~~cause significant imminent environmental harm to land, air or water resources; and~~

90  
91 ~~(iv)—The relief sought is not the issuance of a permit where a permit has~~  
92 ~~been denied by the Administrator.~~

93  
94 ~~(formerly Section 2)~~ Any interested person party may petition the Council or the  
95 Department to promulgate requesting the promulgation, amend amendment, or repeal of

96 any rule ~~or rules. (formerly Section 2(a)) Each petition must be submitted in duplicate to~~  
97 ~~the Chairman of the Environmental Quality Council and to the Director of the~~  
98 ~~Department of Environmental Quality. The Director shall be copied on any petition~~  
99 ~~directed to the Council and the Chair of the Council shall be copied on any petition~~  
100 ~~directed to the Department.~~

101  
102 (a) Each petition shall identify the rule or rules to be promulgated, amended,  
103 or repealed and shall provide support for the proposed rulemaking in the form of  
104 argument, data, legal citation, or other justification, as appropriate.

105  
106 ~~(formerly Section 2(b))—Except as otherwise provided by the Council, the filing~~  
107 ~~of a petition under this section shall not stay the effectiveness of any rule or rules.~~

108  
109 ~~(formerly Section 2(e))—After filing of the petition, the Council may hold a~~  
110 ~~prehearing conference to review the petition and its persuasiveness.~~

111  
112 ~~(formerly Section 2(e))—Before the adoption, issuance, amendment, or repeal of~~  
113 ~~any rule, or the commencement of any hearing on such proposed rule making, the~~  
114 ~~Council shall cause notice to be given in accordance with the provisions of W.S. 9-4-103.~~

115  
116 (b) For any petition that is directed to the Council, the Council shall, as soon  
117 as practicable, either deny or redirect the petition to the Director.

118  
119 (i) The Council may hold a hearing to request additional information  
120 from the petitioner or members of the public before acting on a petition.

121  
122 ~~(formerly Section 2(d)) (ii) —As soon as practicable, the Council shall~~  
123 ~~deny the petition in writing (stating its reasons for the denial) or initiate rule making~~  
124 ~~procedures. If the Council denies the petition, the Council shall notify the petitioner in~~  
125 ~~writing, setting forth the reasons for denial. The Council shall provide a copy of the~~  
126 ~~denial to the Director.~~

127  
128 (iii) If the Council redirects the petition to the Director, the Council  
129 shall provide a copy of that determination to the petitioner.

130  
131 (c) Upon receiving a petition from a member of the public or one that is  
132 redirected by the Council, the Director shall, as soon as practicable, either deny the  
133 petition in writing or begin preliminary rulemaking.

134  
135 (i) The Director may request additional information from the  
136 petitioner before acting on the petition and may seek additional input from members of  
137 the public through public meetings, hearings, or other outreach.

138

139                   (ii)    If the Director denies the petition, the Director shall notify the  
140 petitioner in writing, setting forth the reasons for the denial.

141  
142                   (iii)   If the Director begins preliminary rulemaking in response to a  
143 petition, the Director shall notify the petitioner in writing of that determination.

144  
145                   (iv)   If the Director begins preliminary rulemaking in response to a  
146 petition and subsequently decides not to initiate rulemaking, the Director shall notify the  
147 petitioner in writing of that decision, setting forth the reasons for doing so. The decision  
148 not to initiate rulemaking is a denial of the rulemaking petition.

149  
150                   (v)    The Director shall provide the Council with a copy of all notices  
151 required by this subsection.

152  
153                   (d)    A written denial of any rulemaking petition is final agency action and is  
154 not subject to judicial review.

155  
156           Section 4. **Preliminary Rulemaking Hearings before the Advisory Boards.**

157           ~~(formerly Section 4(a))—The provisions of W.S. 9-4-107 through 9-4-112~~  
158 ~~(relating to the conduct of hearings for contested cases) do not apply to hearings held~~  
159 ~~under this Chapter (III) of these Rules. As a fact-finding legislative proceeding, each~~  
160 ~~hearing is nonadversary and there are no formal pleadings or adverse parties.~~

161  
162           ~~(formerly 4(b))—Prior to the adoption, amendment or repeal of any rules, other~~  
163 ~~than interpretive rules or statements of general policy, the Department shall publish~~  
164 ~~notice of its intended action, including the date, time and place of any hearing, in a~~  
165 ~~newspaper of general circulation in the state, and afford a thirty (30) day public comment~~  
166 ~~period after the last publication. In addition, the council will hold at least one public~~  
167 ~~hearing on the proposed action. All information will be received by the council without~~  
168 ~~regard to rules of evidence.~~

169  
170           ~~(formerly 4(c))—The hearing is directed to receiving factual evidence and expert~~  
171 ~~opinion testimony relative to the issues in the proceeding.~~

172  
173           ~~(formerly 4(d))—The Council, upon its own motion or upon the motion of any~~  
174 ~~party, to promote the orderly presentation of evidence, may adopt one or more of the~~  
175 ~~provisions contained in Chapter II of these Rules governing procedures in contested~~  
176 ~~cases. Such action by the Council shall not constitute an agreement that the proceeding~~  
177 ~~before the Council is in the nature of a contested case.~~

178  
179           ~~(formerly 4(e))—The Council or Administrator may impose time limitations~~  
180 ~~upon oral presentations.~~

181

182 (a) The air, land, solid and hazardous waste management, and water divisions  
183 of the Department may conduct preliminary rulemaking hearings before their related  
184 advisory boards by submitting the following materials to the affected board:

185  
186 (i) Strike and underscore and clean copies of the preliminary rule;

187  
188 (ii) Copies of all public comments received to date and proposed  
189 responses, if applicable; and

190  
191 (iii) Any additional materials that the divisions and advisory boards  
192 believe are necessary to explain the content of the preliminary rules.

193  
194 (b) The Department may not initiate rulemaking and submit a proposed rule to  
195 the Council for consideration without first securing a recommendation to adopt the  
196 preliminary rule from the affected advisory board. At the conclusion of a preliminary  
197 rulemaking hearing, an advisory board may:

198  
199 (i) Choose to continue discussion of the preliminary rule at the next  
200 regularly scheduled meeting or schedule a special meeting specifically to  
201 discuss the proposed rule, retaining the ability in either situation, to also  
202 re-open and extend the public comment period for the proposed rule;

203  
204 (ii) Remand the preliminary rule to the division for further action,  
205 including addressing questions regarding specific aspects of the  
206 preliminary rule; or

207  
208 (iii) Recommend that the Department initiate rulemaking and submit  
209 the preliminary rule to the Council for adoption.

210  
211 (c) When preliminary rules involve more than one of the divisions of the  
212 Department, the Director may call a joint meeting of the affected advisory boards. The  
213 advisory boards shall select one member to preside over the joint meeting. Any formal  
214 action taken on a preliminary rule discussed during a joint meeting of the advisory boards  
215 must be voted on individually by each advisory board.

216  
217 (d) The divisions may consult with the advisory boards through special  
218 meetings after preliminary rulemaking hearings. The divisions may incorporate  
219 suggestions that arise during preliminary rulemaking hearings or any subsequent special  
220 meetings without conducting additional preliminary rulemaking hearings.

221  
222 Section 5. ~~Witnesses~~ Promulgating Rules.

223  
224 (formerly Section 5(a)) — ~~The Council, designated hearing officer, or~~  
225 ~~Administrator may direct that summaries to the testimony of witnesses be prepared in~~  
226 ~~advance of the hearing. If so directed, copies of such summaries shall be served upon the~~

227 ~~members of the Council or Administrator or upon any other party as the designated~~  
228 ~~hearing officer may direct.~~

229

230 ~~(formerly 5(b))—Witnesses will be permitted to read summaries of their~~  
231 ~~testimony into the record or make other oral statements as they so desire. Witnesses shall~~  
232 ~~not be available for crossexamination, but will be permitted to answer questions directed~~  
233 ~~to them by members of the Council or Administrator.~~

234

235 ~~(formerly 5(c)) When necessary to prevent undue prolongation of the hearing, the~~  
236 ~~presiding officer may limit the number of times any witness may testify.~~

237

238 (a) When the Department initiates rulemaking, it shall file the following with  
239 the Council:

240

241 (i) Strike and underscore and clean copies of the proposed rule;

242

243 (ii) Proposed Statement of Principal Reasons for adopting the  
244 proposed rule;

245

246 (iii) Copies of all public comments received to date and proposed  
247 responses, if applicable;

248

249 (iv) Record or minutes of any public hearings or meetings conducted  
250 by the Department and the affected advisory board or boards;

251

252 (v) Statement from the Director indicating that the proposed rule was  
253 recommended for adoption by the affected advisory board or boards through the affected  
254 division administrator or administrators;

255

256 (vi) Recommendation from the Director that the Council adopt the  
257 proposed rule; and

258

259 (vii) Any additional materials that the Department believes are  
260 necessary to explain the contents of the proposed rule.

261

262 (b) When initiating rulemaking, the Department shall provide the Council  
263 with an index of materials relied upon to develop the proposed rule.

264

265 (i) The Department may update the index until the public comment  
266 period on the proposed rule, as required by W.S. 16-3-103(a)(i), is closed. After the  
267 comment period is closed, the Department may only update the index with responses to  
268 comments.

269

270 (ii) All indexed materials shall be open for inspection by any person at  
271 reasonable times during business hours of the Department.

272  
273 (c) In the case of judicial review of any rule adopted by the Council, all  
274 indexed materials shall be included in the administrative record submitted to the court,  
275 together with any additional materials considered by the Council during rulemaking  
276 hearings.

277  
278 Section 6. ~~Comments~~ Rulemaking Hearings before the Council.

279  
280 ~~(formerly Section 6 (a)) — All timely comments shall be considered by the~~  
281 ~~Council before final action is taken on any proposal to promulgate, amend, or repeal any~~  
282 ~~rule. Late filed comments may be considered so far as possible without incurring~~  
283 ~~additional expenses or delay.~~

284  
285 (a) The Council chair shall assign a hearing officer from among the Council  
286 members by filing a notice of appointment with the Council within thirty (30) days of the  
287 Department filing the proposed rule with the Council. The appointed hearing officer shall  
288 preside over all proceedings before the Council related to the proposed rule. If the  
289 assigned Council member leaves the Council through resignation, expiration of  
290 membership, or otherwise, the chair shall assign a hearing officer as a replacement and  
291 shall serve as the hearing officer in the interim before the substitute assignment is made.

292  
293 (b) Any member of the public, subject to reasonable time restrictions  
294 established by the presiding officer, may address the Council at any meeting in which the  
295 Council is considering proposed rules. The Council shall allow meaningful opportunity  
296 for public comment at each rulemaking hearing.

297  
298 (i) No person may address the Council without first being recognized  
299 by the presiding officer.

300  
301 (ii) The Council may provide a telephonic or internet-based method to  
302 receive public comments during Council proceedings.

303  
304 (iii) Members of the public may not directly address each other in  
305 proceedings before the Council, and shall address any questions to the hearing officer.

306  
307 (iv) Members of the public seeking recognition in proceedings before  
308 the Council shall state their name and whether they are speaking on behalf of an  
309 organization. The Council shall consider all comments to be made in a person's  
310 individual capacity unless an affiliation is disclosed to the Council.

311  
312 (v) In considering proposed rules, the Council shall consider all  
313 properly submitted public comments.

314  
315 (vi) Comments shall be directed to the Council as a whole and not to  
316 individual Council members. If a member of the public approaches an individual Council



317 member to discuss a proposed rule, that member shall direct the person to submit a  
318 comment for full consideration by the Council. If a Council member receives information  
319 through informal contact with a member of the public, that member shall disclose the  
320 contact and the information received to the rest of the Council in an open meeting. If the  
321 information is reduced to writing in physical or electronic format, the Council member  
322 shall provide the information to the other Council members and the writing shall become  
323 part of the record.

324

325 (c) The Council may make changes to proposed rules based on its  
326 independent analysis of the form and substance of the proposed rules. In doing so, the  
327 Council may consider testimony received during a rulemaking hearing and materials  
328 submitted to the rulemaking docket.

329

330 (i) In considering potential changes to proposed rules, the Council  
331 shall consider the following:

332

333 (A) Whether the contemplated change meets all procedural  
334 requirements of the Wyoming Administrative Procedure Act, including whether the  
335 change is a logical outgrowth of the proposed rule;

336

337 (B) Whether the opportunity for public participation was  
338 meaningful and sufficient given the nature of the contemplated change to the proposed  
339 rule;

340

341 (C) Whether the contemplated change imposes an unwarranted  
342 administrative burden on the Department; and

343

344 (D) Whether the contemplated change impacts the  
345 Department's ability to maintain primacy over the relevant regulatory area. The Council  
346 shall allow the Department to provide a primacy analysis in the context of any  
347 contemplated changes.

348

349 (ii) The Council shall not modify a proposed rule if the Council  
350 determines that:

351

352 (A) The contemplated change conflicts with state or federal  
353 law;

354

355 (B) The contemplated change is not a logical outgrowth of the  
356 proposed rule; or

357

358 (C) The opportunity for public participation was not  
359 meaningful or sufficient given the nature of the contemplated change.

360

361

~~Section 7. Decision.~~

362

363

364

365

366

~~(a) — As soon as practicable after receipt of the official transcript or as soon as practicable after the expiration of the time set for the submittal of written comments, the Council or Administrator shall render a written decision on the issues presented at the hearing.~~