

CHAPTER III 3
~~RULES OF PRACTICE AND PROCEDURE APPLICABLE~~
~~TO RULE-MAKING HEARINGS OR HEARINGS~~
~~BY AN ADMINISTRATOR OF A DIVISION OF DEQ~~
RULEMAKING

Section 1. Authority.

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

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

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

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

(d) — Any hearings by the Administrator for a variance under W.S. 35-11-601, excluding SO₂ variances.

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

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

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

Section 2. Definitions.

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

(a) “Initiate rulemaking” means to submit notice of the intent to adopt, amend, or repeal any rule, other than an interpretive rule or statement of general policy, to the Secretary of

46 State’s Office, the Legislative Service Office, and the Attorney General’s Office, as required by
47 W.S. 16-3-103(a)(i).

48
49 (b) “Preliminary rulemaking” is the rule development process that occurs at the
50 Department prior to initiating rulemaking.

51
52 (c) “Preliminary rule” is a rule that the Department has not filed with the Council.

53
54 (d) “Proposed rule” is a rule that the Department has filed with the Council.

55
56 **Section 3. ~~Informal Conference.~~ Petition for Rulemaking.**

57
58 ~~(formerly Section 3(a))—Any request that the Administrator hold an informal~~
59 ~~conference on any application for a surface coal mining permit shall briefly state the issues to be~~
60 ~~discussed, whether the requester desires the conference to be held in the locality of the proposed~~
61 ~~mining operation, and whether access to the proposed permit area is desired. If requested, the~~
62 ~~Administrator may arrange with the applicant to grant parties to the conference access to the~~
63 ~~permit area for the purpose of gathering information relative to the conference. The conference~~
64 ~~shall be held in the locality of the operation or at the state capitol, at the option of the requester,~~
65 ~~within 20 days after the final date for filing objections unless a different period is stipulated to by~~
66 ~~the parties. If all parties requesting the conference reach agreement and withdraw their request,~~
67 ~~the conference need not be held.~~

68
69 ~~(b)—Where a hearing is requested pursuant to Chapter I, Section 16b, the Council may,~~
70 ~~under such conditions as it may prescribe, grant such temporary relief as it deems appropriate~~
71 ~~pending final determination of the proceedings if:~~

72
73 ~~(i)—All parties to the proceedings have been notified and given an opportunity~~
74 ~~to be heard on a request for temporary relief;~~

75
76 ~~(ii)—The person requesting that relief shows that there is a substantial~~
77 ~~likelihood that he will prevail on the merits of the final determination of the proceeding;~~

78
79 ~~(iii)—Such relief will not adversely affect the public health or safety or cause~~
80 ~~significant imminent environmental harm to land, air or water resources; and~~

81
82 ~~(iv)—The relief sought is not the issuance of a permit where a permit has been~~
83 ~~denied by the Administrator.~~

84
85 ~~(formerly Section 2)~~ Any interested person party may petition the Council or the
86 Department to promulgate requesting the promulgation, amend amendment, or repeal of any rule
87 or rules. (formerly Section 2(a)) Each petition must be submitted in duplicate to the Chairman of
88 the Environmental Quality Council and to the Director of the Department of Environmental
89 Quality. The Director shall be copied on any petition directed to the Council and the Chair of the
90 Council shall be copied on any petition directed to the Department.

91

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

95
96 ~~(formerly Section 2(b))—Except as otherwise provided by the Council, the filing of a~~
97 ~~petition under this section shall not stay the effectiveness of any rule or rules.~~

98
99 ~~(formerly Section 2(e))—After filing of the petition, the Council may hold a~~
100 ~~prehearing conference to review the petition and its persuasiveness.~~

101
102 ~~(formerly Section 2(e))—Before the adoption, issuance, amendment, or repeal of any~~
103 ~~rule, or the commencement of any hearing on such proposed rule making, the Council shall~~
104 ~~cause notice to be given in accordance with the provisions of W.S. 9-4-103.~~

105
106 (b) For any petition that is directed to the Council, the Council shall, as soon as
107 practicable, either deny or redirect the petition to the Director.

108
109 (i) The Council may hold a hearing to request additional information from the
110 petitioner or members of the public before acting on a petition.

111
112 ~~(formerly Section 2(d)) (ii) —As soon as practicable, the Council shall deny the~~
113 ~~petition in writing (stating its reasons for the denial) or initiate rule making procedures. If the~~
114 Council denies the petition, the Council shall notify the petitioner in writing, setting forth the
115 reasons for denial. The Council shall provide a copy of the denial to the Director.

116
117 (iii) If the Council redirects the petition to the Director, the Council shall
118 provide a copy of that determination to the petitioner.

119
120 (c) Upon receiving a petition from a member of the public or one that is redirected by
121 the Council, the Director shall, as soon as practicable, either deny the petition in writing or begin
122 preliminary rulemaking.

123
124 (i) The Director may request additional information from the petitioner
125 before acting on the petition and may seek additional input from members of the public through
126 public meetings, hearings, or other outreach.

127
128 (ii) If the Director denies the petition, the Director shall notify the petitioner in
129 writing, setting forth the reasons for the denial.

130
131 (iii) If the Director begins preliminary rulemaking in response to a petition, the
132 Director shall notify the petitioner in writing of that determination.

133
134 (iv) If the Director begins preliminary rulemaking in response to a petition and
135 subsequently decides not to initiate rulemaking, the Director shall notify the petitioner in writing

136 of that decision, setting forth the reasons for doing so. The decision not to initiate rulemaking is a
137 denial of the rulemaking petition.

138
139 (v) The Director shall provide the Council with a copy of all notices required
140 by this subsection.

141
142 (d) A written denial of any rulemaking petition is final agency action and is not
143 subject to judicial review.

144
145 **Section 4. Preliminary Rulemaking Hearings before the Advisory Boards.**

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

150
151 ~~(formerly 4(b))—Prior to the adoption, amendment or repeal of any rules, other than~~
152 ~~interpretive rules or statements of general policy, the Department shall publish notice of its~~
153 ~~intended action, including the date, time and place of any hearing, in a newspaper of general~~
154 ~~circulation in the state, and afford a thirty (30) day public comment period after the last~~
155 ~~publication. In addition, the council will hold at least one public hearing on the proposed action.~~
156 ~~All information will be received by the council without regard to rules of evidence.~~

157
158 ~~(formerly 4(c))—The hearing is directed to receiving factual evidence and expert opinion~~
159 ~~testimony relative to the issues in the proceeding.~~

160
161 ~~(formerly 4(d))—The Council, upon its own motion or upon the motion of any party, to~~
162 ~~promote the orderly presentation of evidence, may adopt one or more of the provisions contained~~
163 ~~in Chapter II of these Rules governing procedures in contested cases. Such action by the Council~~
164 ~~shall not constitute an agreement that the proceeding before the Council is in the nature of a~~
165 ~~contested case.~~

166
167 ~~(formerly 4(e))—The Council or Administrator may impose time limitations upon oral~~
168 ~~presentations.~~

169
170 (a) The air, land, solid and hazardous waste management, and water divisions of the
171 Department may conduct preliminary rulemaking hearings before their related advisory boards
172 by submitting the following materials to the affected board:

173
174 (i) Strike and underscore and clean copies of the preliminary rule;

175
176 (ii) Copies of all public comments received to date and proposed responses, if
177 applicable; and

178
179 (iii) Any additional materials that the divisions and advisory boards believe are
180 necessary to explain the content of the preliminary rules.

181

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

186
187 (i) Choose to continue discussion of the preliminary rule at the next regularly
188 scheduled meeting or schedule a special meeting specifically to discuss the
189 proposed rule, retaining the ability in either situation, to also re-open and extend
190 the public comment period for the proposed rule;

191
192 (ii) Remand the preliminary rule to the division for further action, including
193 addressing questions regarding specific aspects of the preliminary rule; or

194
195 (iii) Recommend that the Department initiate rulemaking and submit the
196 preliminary rule to the Council for adoption.

197
198 (c) When preliminary rules involve more than one of the divisions of the Department,
199 the Director may call a joint meeting of the affected advisory boards. The advisory boards shall
200 select one member to preside over the joint meeting. Any formal action taken on a preliminary
201 rule discussed during a joint meeting of the advisory boards must be voted on individually by
202 each advisory board.

203
204 (d) The divisions may consult with the advisory boards through special meetings after
205 preliminary rulemaking hearings. The divisions may incorporate suggestions that arise during
206 preliminary rulemaking hearings or any subsequent special meetings without conducting
207 additional preliminary rulemaking hearings.

208
209 **Section 5. ~~Witnesses~~ Promulgating Rules.**

210
211 ~~(formerly Section 5(a))—The Council, designated hearing officer, or Administrator may~~
212 ~~direct that summaries to the testimony of witnesses be prepared in advance of the hearing. If so~~
213 ~~directed, copies of such summaries shall be served upon the members of the Council or~~
214 ~~Administrator or upon any other party as the designated hearing officer may direct.~~

215
216 ~~(formerly 5(b))—Witnesses will be permitted to read summaries of their testimony into~~
217 ~~the record or make other oral statements as they so desire. Witnesses shall not be available for~~
218 ~~cross-examination, but will be permitted to answer questions directed to them by members of the~~
219 ~~Council or Administrator.~~

220
221 ~~(formerly 5(c)) When necessary to prevent undue prolongation of the hearing, the~~
222 ~~presiding officer may limit the number of times any witness may testify.~~

223
224 (a) When the Department initiates rulemaking, it shall file the following with the
225 Council:

226
227 (i) Strike and underscore and clean copies of the proposed rule;

- 228
229 (ii) Proposed Statement of Principal Reasons for adopting the proposed rule;
230
231 (iii) Copies of all public comments received to date and proposed responses, if
232 applicable;
233
234 (iv) Record or minutes of any public hearings or meetings conducted by the
235 Department and the affected advisory board or boards;
236
237 (v) Statement from the Director indicating that the proposed rule was
238 recommended for adoption by the affected advisory board or boards through the affected
239 division administrator or administrators;
240
241 (vi) Recommendation from the Director that the Council adopt the proposed
242 rule; and
243
244 (vii) Any additional materials that the Department believes are necessary to
245 explain the contents of the proposed rule.

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

249
250 (i) The Department may update the index until the public comment period on
251 the proposed rule, as required by W.S. 16-3-103(a)(i), is closed. After the comment period is
252 closed, the Department may only update the index with responses to comments.

253
254 (ii) All indexed materials shall be open for inspection by any person at
255 reasonable times during business hours of the Department.

256
257 (c) In the case of judicial review of any rule adopted by the Council, all indexed
258 materials shall be included in the administrative record submitted to the court, together with any
259 additional materials considered by the Council during rulemaking hearings.

260
261 **Section 6. ~~Comments~~ Rulemaking Hearings before the Council.**

262
263 ~~(formerly Section 6 (a)) — All timely comments shall be considered by the Council~~
264 ~~before final action is taken on any proposal to promulgate, amend, or repeal any rule. Late filed~~
265 ~~comments may be considered so far as possible without incurring additional expenses or delay.~~

266
267 (a) The Council chair shall assign a hearing officer from among the Council members
268 within thirty (30) days of the Department filing the proposed rule with the Council. The
269 appointed hearing officer shall preside over all proceedings before the Council related to the
270 proposed rule. If the assigned Council member leaves the Council through resignation, expiration
271 of membership, or otherwise, the chair shall assign a hearing officer as a replacement and shall
272 serve as the hearing officer in the interim before the substitute assignment is made.

273

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

278
279 (i) No person may address the Council without first being recognized by the
280 presiding officer.

281
282 (ii) The Council may provide a telephonic or internet-based method to receive
283 public comments during Council proceedings.

284
285 (iii) Members of the public may not directly address each other in proceedings
286 before the Council, and shall address any questions to the hearing officer.

287
288 (iv) Members of the public seeking recognition in proceedings before the
289 Council shall state their name and whether they are speaking on behalf of an organization. The
290 Council shall consider all comments to be made in a person's individual capacity unless an
291 affiliation is disclosed to the Council.

292
293 (v) In considering proposed rules, the Council shall consider all properly
294 submitted public comments.

295
296 (vi) Comments shall be directed to the Council as a whole and not to
297 individual Council members. If a member of the public approaches an individual Council
298 member to discuss a proposed rule, that member shall direct the person to submit a comment for
299 full consideration by the Council. If a Council member receives information through informal
300 contact with a member of the public, that member shall disclose the contact and the information
301 received to the rest of the Council in an open meeting. If the information is reduced to writing in
302 physical or electronic format, the Council member shall provide the information to the other
303 Council members and the writing shall become part of the record.

304
305 (c) The Council may make changes to proposed rules based on its independent
306 analysis of the form and substance of the proposed rules. In doing so, the Council may consider
307 testimony received during a rulemaking hearing and materials submitted to the rulemaking
308 docket.

309
310 (i) In considering potential changes to proposed rules, the Council shall
311 consider the following:

312
313 (A) Whether the contemplated change meets all procedural
314 requirements of the Wyoming Administrative Procedure Act, including whether the change is a
315 logical outgrowth of the proposed rule;

316
317 (B) Whether the opportunity for public participation was meaningful
318 and sufficient given the nature of the contemplated change to the proposed rule;

319

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

322
323 (D) Whether the contemplated change impacts the Department's ability
324 to maintain primacy over the relevant regulatory area. The Council shall allow the Department to
325 provide a primacy analysis in the context of any contemplated changes.

326
327 (ii) The Council shall not modify a proposed rule if the Council determines
328 that:

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

330
331 (B) The contemplated change is not a logical outgrowth of the
332 proposed rule; or

333
334
335 (C) The opportunity for public participation was not meaningful or
336 sufficient given the nature of the contemplated change.

337 **~~Section 7. Decision.~~**

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339
340 ~~(a) As soon as practicable after receipt of the official transcript or as soon as~~
341 ~~practicable after the expiration of the time set for the submittal of written comments, the Council~~
342 ~~or Administrator shall render a written decision on the issues presented at the hearing.~~