

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

The following document details the actions that were taken by the Wyoming Department of Environmental Quality (DEQ) to gather public comments and input regarding the proposed revisions to Rules of Practice and Procedure Chapter 1 related to the December 12, 2017 Air Quality Advisory Board meeting. DEQ is taking this opportunity to summarize and respond to all comments officially received prior to the adjournment of the December 12, 2017 meeting.

On November 10, 2017, DEQ published a public notice of the Air Quality Advisory Board meeting in the Casper Star Tribune. In its notice, DEQ informed readers that DEQ is proposing changes to the Rules of Practice and Procedure Chapter 1. Readers were informed that the proposed revisions were being recommended in order to incorporate by reference the uniform public records rules developed by Wyoming Department of Administration and Information (A & I). The uniform rules themselves went through a public comment period before being finalized by A & I on September 6, 2016. Readers were provided an electronic link to the proposed revisions and also invited to submit comments to DEQ. The written comment period closed on December 12, 2017.

DEQ received 10 separate written comments and two oral comments, listed in Attachment A of this document. DEQ appreciates the effort that each commenter made in reviewing the proposed rules. This document summarizes the comments and includes DEQ's response to each comment.

Comment: DEQ records should be available at no cost.

Department Response: In 2002, the Legislature passed Wyoming Statute (W.S.) § 16-4-202(d)(i), which requires the custodians of electronic public records to charge reasonable costs of producing those records. 2002 Wyo. Sess. Laws 53 (“The reasonable costs of producing a copy of the public record shall be borne by the party making the request.”). In 2014, the Legislature amended W.S. § 16-4-204 to task A & I was then tasked with “adopt[ing] uniform rules for the use of state agencies establishing procedures, fees, costs and charges for inspection, copies and production of public records under W.S. 16-4-202(d)(i), 16-4-203(h)(i) and 16-4-204.” Wyo. Stat. § 16-4-204; 2014 Wyo. Sess. Laws 109.. In the same act, the Legislature required state agencies to adopt as much of A & I’s uniform rules as is consistent with the requirements of the agency and state or federal law applicable to the agency. 2014 Wyo. Sess. Laws 109; W.S. § 16-3-103. Therefore, DEQ is required to adopt A & I’s uniform rules in full unless there is a conflict with another state or federal law that DEQ must follow. Based on its statutory duty, A & I initiated the rulemaking process to create these rules for public records. During its rulemaking process, A & I received public comment and crafted rules that reflected the public input it received. Under the statute, A & I could have created rules with no threshold for assessing fees. A & I, however, In crafting its rules, A & I wanted to strike a fair balance between the statutory requirement that the applicant reimburse an agency its production and construction costs, the public’s right to inspect electronic public records and burdens placed upon state agencies when responding to electronic public records requests. After receiving public comment, A & I ultimately settled on creating an accommodating \$180 cost threshold or credit that will apply to all electronic public records requests.

DEQ is adopting A & I’s uniform rules on fees for public records because it is statutorily required to do so. See Wyo. Stat. § 16-3-103(j) (“Each state agency shall adopt as much of the uniform rules promulgated pursuant to the following provisions as is consistent with the specific and distinct requirements of the agency and state or federal law governing or applicable to the agency: (i) W.S. 16-3-102(d); (ii) W.S. 16-4-204(e).”). Furthermore, there is no fee for inspecting DEQ’s public records in person. The proposed adoption of A & I’s uniform rule allows DEQ to assess a reasonable fee for the production and construction of its electronic public records and reasonable fees for copying, transmitting, or hard-copy conversion of its non-electronic public records. DEQ believes these rules make electronic public records requests and the subsequent production or construction of those more efficient by encouraging specific and detailed requests which help both the requestor and the state agency.

Comment: Charging fees to access records is restrictive and violates the Environmental Quality Act.

Department Response: DEQ has reviewed the uniform rules and has compared them against the Environmental Quality Act (Act), specifically W.S. § 35-11-1101. DEQ has determined there is no conflict between the Act and the recovery of costs associated with the construction and manufacture of public records. The Act specifically states that all records are available to the public unless they divulge trade secrets. DEQ's policy in that regard has not changed. The records are available to the public. The records are always open, in-house for public inspection and review. Adoption of A & I's uniform rule does not conflict with the Act because DEQ's records have been, always have been, and will continue to be available to the public.

As stated previously, there is no fee for inspecting DEQ's public records in person. The proposed adoption of the uniform rule allows DEQ to assess a reasonable fee for the production and construction of electronic public records and reasonable fees for copying, transmitting, or hard-copy conversion of non-electronic public records. By adopting the uniform rules, DEQ's fees will be consistent with other state agencies.

The fees are not designed to inhibit transparency, but are intended to encourage more specific and detailed requests for electronic public records and to alleviate burdens on state agencies such as DEQ. Voluminous records requests stress agency resources. Complying with the legislative mandate that all state agencies adopt A & I's uniform rule will lessen the resource burden on DEQ. By encouraging records requestors to narrow their requests as much as possible, DEQ should generally be able to fulfill requests faster and with less expense of agency resources.

Comment: DEQ needs to produce records faster and make more information available to the public.

Department Response: DEQ agrees with this comment and is in the process of several initiatives that use software applications that will make public records easier to access. Almost all of the Abandoned Mine Lands Division's documents are currently online. Solid and Hazardous Waste Division and Air Quality Division are both in the midst of scanning processes to digitize their documents. Water Quality Division and Land Quality Division are currently in the analysis phase of their digitization projects. DEQ is committed to moving its records to electronic formats to make them more easily accessible to the public. DEQ is working through this process as quickly as it can, but DEQ does not currently have a timeline or a completion date.

Comment: Charging for records violates primacy agreements under multiple federal programs.

Department Response: DEQ considered this comment. DEQ reviewed its primacy statutes and agreements and did not find any conflict between A & I's rule on public records and DEQ's primacy agreements. Furthermore, there are currently at least forty-four (44) state environmental agencies that have cost reimbursement programs in place that are similar to the rule A & I crafted. These states fall under the

same federal regulations for primacy that Wyoming falls under. The Wyoming Environmental Quality Act may differ from other states, but Wyoming and the other forty-four (44) states are all subject to the same federal requirements. Each of the remaining five (5) states have legislative authority to charge for the reproduction of records, but DEQ was unable to find their specific procedures in its research. The states that do have cost reimbursement programs in place have not had their primacy questioned. DEQ's interpretation of this is that there is no conflict and DEQ does not believe its primacy programs are jeopardized by adopting the A & I rule.

Comment: The fee of \$180 is arbitrary. This threshold is too low, which is problematic.

Department Response: A & I considered and received public comment on the threshold amount during its own rulemaking process. A & I believes the threshold balances the statutory requirements, the public's rights to inspect records, and the burdens on agencies.

The vast majority of the public records requests that agencies receive, including requests to DEQ, are well under the threshold of \$180. A & I and DEQ believe the amount is appropriate and fair. Furthermore, because W.S. § 16-3-103(j) requires each state agency to adopt as much of A & I's uniform rules as is consistent with the agency's requirements, DEQ does not have the statutory authority to modify the \$180 threshold that A & I promulgated in its uniform rules.

Comment: Programming and computer services should be absorbed as part of the agency's mission and function.

Department Response: Occasionally agencies receive extensive requests that need to be handled by Enterprise Technology Services (ETS). Depending on the situation, ETS may need to apply additional programming or computer services that are outside the normal daily functions. Because the function of the A & I rule is to reduce the burden on state agencies, if DEQ were to incur a programming or computer service cost that exceeds \$180, DEQ would seek reimbursement for that cost because it falls outside of DEQ's normal daily business. Furthermore, Section 4(c)(iv) of A & I's rule requires agencies to charge the "actual cost of programming and computer services." Because W.S. § 16-3-103(j) requires each state agency to adopt as much of A & I's uniform rules as is consistent with the agency's requirements, DEQ does not have the statutory authority to modify this requirement that A & I promulgated in its uniform rules.

Comment: Prepayment of fees is unnecessary.

Department Response: A & I developed the fee structure in its rule after receiving public comment. A & I believes that prepayment is necessary to ensure that the process functions efficiently and effectively. Because W.S. § 16-3-103(j) requires each state agency to adopt as much of A & I's uniform rules as is consistent with the

agency's requirements, DEQ does not have the statutory authority to modify this requirement that A & I promulgated in its uniform rules.

Comment: The electronic record inspection requirement is unnecessary.

Department Response: This requirement, developed by A & I after public comment, encourages applicants to craft request records requests as narrowly as practicable and follow through with obtaining them. This requirement will not affect the majority of the record requests DEQ receives but will allow DEQ to close records requests in a timely manner, once DEQ has done its due diligence. Because W.S. § 16-3-103(j) requires each state agency to adopt as much of A & I's uniform rules as is consistent with the agency's requirements, DEQ does not have the statutory authority to modify this requirement that A & I promulgated in its uniform rules.

Comment: The "request priority" requirement is unnecessary.

Department Response: This provision will ensure that requests that are at or below the \$180 threshold, which are the majority of the requests the DEQ receives, do not become backlogged behind voluminous records requests that will take much longer to complete. Because W.S. § 16-3-103(j) requires each state agency to adopt as much of A & I's uniform rules as is consistent with the agency's requirements, DEQ does not have the statutory authority to modify this requirement that A & I promulgated in its uniform rules.

Comment: The scanning fee is unnecessary as agencies do not bear a cost burden for scanning records.

Department Response: State agencies such as DEQ do bear a cost burden for scanning in our monthly copier leases. The fee allows DEQ to receive a reimbursement for that use. Because W.S. § 16-3-103(j) requires each state agency to adopt as much of A & I's uniform rules as is consistent with the agency's requirements, DEQ does not have the statutory authority to modify this requirement that A & I promulgated in its uniform rules.

Comment: DEQ should not charge fees to the public for records related to permitting, enforcement, or rulemaking so that the public has access to the information in order to participate.

Department Response: AQD's Title V permitting program makes each draft Title V permit and statement of basis available publicly online for all of its permitting actions during the public notice period. Members of the public are provided a website link that allows them to download those materials so they may participate in the permitting process. Additionally, once a facility is issued a final Title V permit, each Title V permit and statement of basis are publicly available online. Likewise, AQD's NSR permitting program makes the materials for each of its public noticed permitting

actions, including the technical analysis, draft permit, and application the company submitted, available online during the public notice period. Members of the public are provided a website link that allows them to download those materials so that they may participate in the permitting process. DEQ is also in the process of several initiatives that use software applications that will make public records easier to access. The Air Quality Division is in the midst of scanning processes to digitize its documents.

DEQ makes all of its Notices of Violation publicly available on its website for members of the public to access and download. Narrow requests that seek other kinds of specific enforcement documents for a facility will likely not exceed the \$180 threshold that A & I established.

DEQ posts documents related to rulemaking on its website. Each Division handles their document location slightly differently, but each Division includes the web address for all of the available rulemaking documents in the public notices and listserv notifications that we send out at the start of a public comment period.

DEQ is committed to moving its records to electronic formats to make them more easily accessible to the public. DEQ is working through this process as quickly as it can, but DEQ does not currently have a timeline or a completion date. Because W.S. § 16-3-103(j) requires each state agency to adopt as much of A & I's uniform rules as is consistent with the agency's requirements, DEQ does not have the statutory authority to modify the uniform rules A & I promulgated, as applied to these categories of documents.

Comment: DEQ already has all the information electronically and the public paid for it to be put on their computers.

Department Response: As stated previously, agencies occasionally receive extensive requests that need to be handled by Enterprise Technology Services (ETS). Depending on the situation, ETS may need to apply additional programming or computer services that are outside the normal daily functions. Because the function of the A & I rule is to reduce the burden on state agencies, if DEQ were to incur a programming or computer service cost that exceeds \$180, DEQ would seek reimbursement for that cost because it falls outside of DEQ's normal daily business. Because W.S. § 16-3-103(j) requires each state agency to adopt as much of A & I's uniform rules as is consistent with the agency's requirements, DEQ does not have the statutory authority to modify this requirement that A & I promulgated in its uniform rules.

Comment: Government agencies that work behind the curtains are not responsible agencies and have no accountability.

Department Response: As stated previously, there is no fee for inspecting DEQ's public records in person. The proposed adoption of the uniform rule allows DEQ to assess a reasonable fee for the production and construction of electronic public records and reasonable fees for copying, transmitting, or hard-copy conversion of non-electronic public records. By adopting the uniform rules, DEQ's fees will be consistent with other state agencies.

The fees are not designed to inhibit transparency but are intended to encourage more specific and detailed requests for electronic public records and to alleviate burdens on state agencies such as DEQ. Voluminous records requests stress agency resources. Complying with the legislative mandate that all state agencies adopt A & I's uniform rule will lessen the resource burden on DEQ. By encouraging records requestors to narrow their requests as much as possible, DEQ should generally be able to fulfill requests faster and with less expense of agency resources.

Comment: Where do the fees go?

Department Response: The fees are deposited into the State's General Fund. The Legislature has not granted authority for any agency to deposit collected fees into other accounts.

Comment: The Department of Administration and Information (A & I) should have consulted the Air Quality Advisory Board and voting against the rule would send a clear message to A & I that the rules are flawed.

Department Response: A & I followed the statutory requirements applicable to their agency when they promulgated their rules. When agencies promulgate rules, the proposed rules are reviewed by the Governor's Office, the Attorney General, and the Legislative Services Office. If any of these separate agencies determines that a rule is administratively defective, the rule is not signed into effect by the Governor.

As of the meeting date of December 12, 2017, thirteen other state agencies, including the Governor's Office, the Attorney General's Office, the Wyoming Oil and Gas Conservation Commission, and the Water Development Commission had adopted or were in the process of adopting A & I's rules. The thirteen agencies adopting A & I's rule also are subject to the statutory process that includes oversight by the Governor's Office, the Attorney General's Office, and the Legislative Services Office. To date, no agency has determined that A & I's rule is administratively defective.

The Environmental Quality Act, which authorizes the Air Quality Advisory Board and the Department of Environmental Quality, has no regulatory authority over A & I. A & I is under no regulatory requirement to promulgate new rules based on DEQ's inability to adopt them. Instead, DEQ is statutorily required to adopt as much of A & I's uniform rules as is consistent with its requirements. Therefore, DEQ is required to adopt A & I's uniform rules in full unless there is a conflict with another state or

federal law that DEQ must follow. DEQ has determined that there is no such conflict that would prevent it from complying with both the state and federal laws that govern the agency's actions and the legislative directive in W.S. § 16-3-103(j) that requires it to adopt A & I's uniform rules.

Attachment A
Commenters

Commenters

Marcia Westkott

Christina Gerrits

Debbie Trapp

Wyoming Outdoor Council

Donna Birkholz

Equality State Policy Center

Linda Olinger

Robin EH. Bagley

William Adsit

Powder River Basin Resource Council, Wyoming Outdoor Council, & Others

Powder River Basin Resource Council Members

Mary Flanderka, Wyoming Outdoor Council

Casey Quinn, Powder River Basin Resource Council

Air Quality Advisory Board Member Comments

Diana Hulme

Klaus Hanson