



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 prior to the presentation of these proposed revisions to the Environmental Quality Council. DEQ is taking this opportunity to summarize and respond to all comments officially submitted in advance of the October 22, 2018 deadline of the public notice period.

On September 6, 2018, DEQ requested publication of a 45-day public notice of the intent to adopt rulemaking revisions to Chapter 1 of the Rules of Practice and Procedure 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 October 22, 2018.

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

Comment: Charging fees to access records creates an unlawful barrier to their availability 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. 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.

The Clean Water Act, in 33 USC 1318(B), states, "Any records, reports or information obtained under this section shall be made available to the public." The Environmental Quality Act uses the same phrasing in Wyoming Statute 35-11-1101. The Environmental Protection Agency, developed its own rules, at 40 CFR 2.107, to charge fees for public records. Those rules do not make any exceptions for Clean Water Act records, which means that the federal government has interpreted "available to the public" as not prohibiting reasonable copying and assembly-type costs for those records. Similarly, most other state environmental agencies have rules for charges to public records and those states have not been found to be in violation of the Clean Water Act or their federal primacy agreements as a result of those rules. Furthermore, it's a well-established statutory interpretation principle to avoid reading conflict between statutes. Statutes should be read harmoniously whenever possible. The U.S. Supreme Court case *Watt v. Alaska* held that they must read potentially conflicting statutes to "give effect to each, if we can do so, while preserving their sense of purpose." DEQ has determined there is no conflict between the Act and the recovery of costs associated with the construction and manufacture of public records.

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 intended to encourage more specific and detailed requests for electronic public records and to alleviate burdens on state agencies such as DEQ, and are not designed to inhibit transparency. 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: The proposed rules are not tailored to the agency's particular needs including not charging the public to access records that are a part of an agency permitting, enforcement, or rulemaking process, where the public needs to have access to the information to participate in DEQ's comment processes – or even to decide whether to participate in the comment processes.

Department Response: Many of DEQ's permitting programs post permitting documents, including statements of basis, on our website. Those programs that do not post their documents online make the hard copies available, free of charge, for public inspection at multiple locations.

Each division posts rulemaking documents on the individual division's "Proposed Rules & Regulations" pages during any outreach comment periods and in advance of any required advisory board meeting presentation. Additionally, each division posts all rulemaking materials on the Environmental Quality Council website in advance of any Council hearing. All rulemaking hard copy documents are also available for inspection, free of charge, in the Cheyenne office.

DEQ posts all notices of violation and related settlement agreements on the individual division webpages under "Enforcement Actions." These documents are also available for inspection in hardcopy form, free of charge, in the Cheyenne office.

W.S. § 16-3-103(j) states that "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. DEQ is proposing incorporation by reference of A & I's uniform rule because our reviews of the Environmental Quality Act and the various primacy agreements the agency has with federal agencies, such as the Environmental Protection agency and the Office of Surface Mining, did not demonstrate a conflict with the uniform rule. Since our review did not demonstrate a conflict with the "specific and distinct requirements of the agency...or federal law governing or applicable to the agency," we see no legal justification for deviating from the mandate that all agencies adopt as much of the uniform rules as is practicable.

Comment: Charging high fees to make the records available means that public access and information will be effectively denied.

Department Response: DEQ considered this comment. 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. 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 and will encourage applicants to narrow their requests.

Attachment A
Commenters

Commenter

Powder River Basin Resource Council