Klaus Hanson

P-1-1:

I read through all the clean versions for the meetings and have a few suggestions, editorial, spelling and otherwise....

Chapter 1, line 147: Should it be s/he of he/she?

Chapter 2, line 113: "a recommended decision" leaves unclear WHO would be recommending the decision.
Chapter 2, line 134: "Biased or prejudiced" is not defined as to who decides that. That seems a very wide open statement, and anyone can claim bias or prejudice. Perhaps "in the eyes of some one?" might be appropriate?
Chapter 2, line 211 should read: "If the motion to intervene is granted...."
Chapter 2, line 429 "may be heard AT an expedited hearing"????
Chapter 2, line 468: Is that date correct?

Chapter 7: just a general; question: native American special sites seem to be excluded here? Should they be listed, like in line 16?
Chapter 7, line 141 mentions historical and archeological sites, but again no word about native American holy sites?
Chapter 7, line 228: should read "includes"

Chapter 9, line 68: should read "the reason for the request..."

Powder River Basin Resource Council
Wyoming Outdoor Council

June 16, 2016

Director Todd Parfitt
Department of Environmental Quality
200 W 17th Street, 4th Floor
Cheyenne, WY 82002

Submitted online via http://wq.wyomingdeq.commentinput.com/

RE: Comments on Proposed DEQ Rules of Practice and Procedure

Dear Director Parfitt and Members of the DEQ Advisory Boards,

On behalf of our members in Wyoming, we offer the following comments on the Department of Environmental Quality's ("DEQ") proposed rules of practice and procedure. Our organizations are frequent users of the Environmental Quality Council ("EQC" or "Council") contested case and rulemaking processes, and therefore our perspective is important for you to consider as you review the proposed rules.

At the outset, we want to say that we greatly appreciate the effort to overhaul the rules. Changes to DEQ's rules of practice and procedure are long overdue and greatly needed. Many of the changes will clarify the procedures that groups like ours need to follow before the EQC. The changes will also modernize and simplify contested case hearings before the EQC, bringing them more in line with the Wyoming Administrative Procedure Act ("APA") and administrative appeals processes of other agencies, which will be helpful for all parties involved.

However, we have some concerns with some of the proposed language and we offer the following comments for your consideration and action:

Comments on Proposed Chapter 1

Section 1(b) should be clarified to reflect that, in cases of conflict, the Wyoming Environmental Quality Act ("WEQA") governs over the APA. The WEQA post-dates the APA and is more specific to the DEQ and EQC.

Similarly, we suggest amending Section 1(c) to "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 provisions of the Wyoming Administrative Procedure Act."

To better describe that the hearing officer would oversee any motions practice, discovery disputes, scheduling, and other non-hearing items associated with a case, Section 2(d) should be amended to: "Hearing officer" means a person designated by the Chair of the Council to preside over a contested case or rulemaking, including any associated hearings.

While we appreciate that Section 4(b) provides that notice should include electronic notice through the Council's website, this subsection should provide that notice by publication is also required in some cases by the WEQA and DEQ rules. Additionally, we encourage newspaper publication of certain hearings, especially rulemaking hearings, to reach an audience broader than groups or individuals who have signed up for electronic notices. While not required, we also encourage DEQ to issue press releases and/or otherwise engage radio stations and newspapers about rulemakings to solicit the broadest possible participation from the public.

We are concerned that Section 5(a) requires recordings of all hearings. Not all proceedings need a transcript or recording. We suggest adding the ability for parties to waive recordings of a proceeding, which will save costs.

We are very concerned about Section 5(b) which allows the EQC to require any party to a proceeding to pay for court reporter costs. Requiring a Petitioner to pay for court reporter compensation will likely deter groups from exercising their legally afforded rights to appeal DEQ decisions. Additionally, there may be some issues with how this provision complies with primacy agreements DEQ has with EPA, OSM, and NRC. We encourage the Advisory Boards and the EQC to fully vet this proposed rule, and ensure its compliance with the WEQA and federal law and regulation. At the very least, the rule should include criteria to use in deciding whether to make a party pay for court reporting or other hearing expenses, including waiving costs for a Petitioner who brings a case in the public interest and in good faith.

We support sections 6 and 7, which address conflicts of interest under the Clean Water Act and Clean Air Act as they are legally required for compliance with those laws. However, the rules should also address other conflict of interests. The rules should establish a process for a member of the EQC to declare a conflict of interest and specify what will happens if a conflict is declared. Proposed Chapter 2, Section 7(c) deals with conflicts for hearing officers, but any EQC member with a conflict of interest should be recused from the contested case or rulemaking.

The prior version of Section 14(a) required EQC and Advisory Board meetings to follow Robert's Rules of Orders. It is unclear why this provision is being deleted. Outside of the contested case hearings, the EQC and boards need rules to follow for their meetings.

Comments on Proposed Chapter 2

Section 3(a) should include a continuance motion for settlement negotiations, mediation, or arbitration. Most settlement discussions are informal in nature and do not involve mediation or arbitration.

In Section 4(a), it is unclear what "other parties" means because this is the beginning of the case and there are no other parties at this time. We would suggest striking the "other parties" language for that reason. There are already service requirements for the permit applicant.

Section 4(a)(i) should be clarified that service after the initial petition can be made through the Council's electronic docket system. This subsection should be amended to have parallel

language with Section 5(b) later on or it could just reference that section here to say "Thereafter, all service shall comply with subsection 5(b) of Chapter 2 of these rules."

Section 4(a)(ii) needs to be amended to clarify what address a petitioner should use for the permit applicant. Often the address of the company applying for the permit can be out of state, so in practice, our organizations often serve the WY registered agent as well, but if the address on the permit is sufficient that would be preferable.

Section §4(a)(iii) should be amended to state that after representatives make an appearance for a party, service is to that representative to clarify that a petition does not have to keep serving the company or DEQ directly if they are represented.

There is some inconsistency between Section 4(c) and the provisions of 4(a). The "defendant" of an EQC contested case proceeding is the DEQ and DEQ is required to be served under Section 4(a). We would suggest deleting 4(c) and keeping 4(a). Also, some hearings have statutory requirements for their timing, such as the 20 day hearings for mining permits, so if the case is commenced with the petition filing but then the DEQ is not served for 60 days, that seems problematic. We understand that there should be an allowance for additional time for mail to reach DEQ and the permit applicant, but 60 days seems too long of a time-frame. At most 7 days should suffice.

In section 7(d), it is unclear why an affidavit would be required in all cases for a recusal motion. For instance, some motions could be proven with attachment of websites or other publicly available records demonstrating a conflict of interest. Also, fact witnesses should not make statements of law. We would suggest amending this subsection to read that "A motion for recusal may be supported by an affidavit or affidavits of any person or persons stating facts to support the motion."

Section 9(a) allows a motion to intervene to be filed at the hearing, which is too late because that intervening party will not have designated witnesses or otherwise sufficiently been involved in pre-hearing activities that afford proper notice to all other parties. There should be a deadline before the hearing to file a motion to intervene, perhaps at least 7 days prior, which even in 20 day hearings should be more than enough time to intervene. Alternatively, you could reference the requirements of Section 11 which requires a motion to be filed 10 days before a hearing. Additionally, there should be an opportunity for the petitioner and other parties to file a response in opposition or support of a motion to intervene, like other motions in Section 11. We also suggest using the standards set forth in the Wyoming Rules of Civil Procedure for intervention of right as opposed to the phrase "legal right to intervene." Rule 24 is "incorporated by reference" in Section 25, but it may not be apparent that the standards of Rule 24(a) governs a motion to intervene. Additionally, this would serve to clarify whether permissive intervention (under Rule 24(b) is available. Typically, most contested case proceedings do not have intervenors beside the permit applicant, which is automatically made a party, but if forced to intervene would be able to intervene by right.

In past EQC contested cases, parties have moved for summary judgment, which saves them time and resources. However, this process has been somewhat ad hoc as the current rules do not

specify the process. We support rules, like the proposed Section 22, where issues of fact are undisputed and issues of law can be decided without a full hearing. However, we are not sure if "expedited" is the right phrase, as the process is abbreviated not expedited. "Expedited" gives a connotation that the hearing would be prioritized as urgent rather than a process where a full hearing is not required, which seems to be the intent of Section 22. If this is a summary judgment process, we suggest calling it that because parties will understand what that means. Additionally, it may also be important to reference or pull from the Wyoming Rules of Civil Procedure on summary judgment. You "incorporate by reference" Rule 56 and 56.1 in Section 25, but it may not be readily apparent to someone wanting to file a motion under Section 22 that those rules apply to that motion. This is particularly important if the EQC desires to require things like a statement of material facts for the motion under Section 22. Also, some of the procedure for motions practice under Rule 56, such as timing, may conflict with Section 11 in these rules, so it needs to be specified which portions of Rule 56 govern motions under Section 22. We would suggest that instead of incorporating by reference the entirety of Rule 56 and 56.1 that you just include the language needed in Section 22.

We suggest incorporating some of the discovery rules in Section 25(a) or alternatively specifying which discovery rules, if any, apply to Section 15.

We would suggest striking the language in Sections 25(a)-(b) limiting the incorporation to rules in effect in 2016 because if these rules are amended, it would generally be for good reason. The Rules of Civil Procedure are rarely changed and are only done so after significant deliberation by members of the bar and the bench.

In Section 25(c), we suggest adding in the link to where the Rules of Civil Procedure are available electronically: http://www.courts.state.wy.us/Documents/CourtRules/Rules/WYOMING_RULES_OF_CIVIL_PROCEDURE.pdf The link provided in Section 25(a) no longer works.

Comments on Proposed Chapter 3

Section 3 sets up an awkward, and perhaps ineffective, relationship between the DEQ and the EQC. We understand the AG's opinion on this issue (having been subject to it in a recent rulemaking proceeding), but it is important to remember that the EQC is an independent agency separate and distinct from the DEQ. We remain frustrated with this new interpretation of the WEQA that limits the ability of the EQC to independently respond to a citizen proposed rulemaking, as we believe it improperly takes away some of the EQC's important oversight authority over DEQ. Nevertheless, if the public truly has no ability to petition the EQC for rules that the DEQ does not first propose, then this section should require all petitions to be filed with the DEQ as the public really does not have the ability to petition the EQC. That would clean up the section and remove the step of the EQC transmitting the petition to the DEQ.

Additionally, this section should specify the role of the Advisory Boards in considering a citizen proposed rulemaking petition. The phrase "preliminary rulemaking" is mentioned, but it should be made clear that the process is intended to be the same as the one laid out in Section 4. The

definition of "preliminary rulemaking" in Section 2(b) does not specifically reference the Advisory Boards.

Moreover, we are concerned with the proposed Section 4(b) language because the advisory boards are advisory in nature and this proposed section effectively gives them veto power over DEQ rules. We encourage DEQ staff, the boards, and the EQC to fully consider the possible consequences of this section for primacy from EPA, OSM, and NRC.

Comments on Proposed Chapter 5

We are concerned that Section 1(c) overcomplicates the procedure needed for an award of costs. A petition for award of costs should not be treated as a contested case proceeding as there is likely not a need for discovery, pre-hearing witness designation, evidence production, and other aspects of a contested case. Instead, it should be treated as a summary proceeding (called expedited hearing in the proposed rules) or even just a motion. This section is rarely used and has never caused problems before, so it is unclear why it is being amended. It is a necessary component of our rules to maintain primacy under SMCRA.

Unfortunately, because of scheduling conflicts, we are unable to attend the hearing in person on June 29th. However, if DEQ staff or Advisory Board members have any questions about these comments, we would be happy to address them another way. Additionally, we look forward to participating in this rulemaking before the EQC.

Thank you for your time and consideration of these comments.

Sincerely,

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June 14, 2016

RECEIVED
JUN 16 2016
DEQ WATER QUALITY

Gina

Mr. Todd Parfitt
Director
Department of Environmental Quality
200 West 17th Street, 4th Floor
Cheyenne, Wyoming 82002

RE: Proposed Revisions to Department of Environmental Quality Rules of Practice and Procedure

Director Parfitt:

The Wyoming Mining Association (WMA) is a statewide trade organization that represents and advocates for 37 mining company members producing bentonite, coal, trona and uranium, as well as one company developing a rare earth element mine. WMA also represents 129 associate member companies, two railroads, one electricity co-op, and 180 individual members.

The Wyoming Mining Association appreciates the opportunity to provide comment on the proposed revisions to the Department of Environmental Quality's Rules of Practice and Procedure. We recognize that the Rules of Practice and Procedure are critical to the conduct of routine business for the Department of Environmental Quality. If properly crafted, these rules can provide certainty and fairness to those doing business with the Department.

It is our understanding that the proposed rules are an attempt to incorporate Wyoming's uniform contested case procedures into the Department's processes. This action must be done with care to ensure that Department programs that involve some kind of primacy issues with federal agencies are not compromised. Wyoming has gone to great pains and efforts to develop and implement primacy in numerous areas with the support of the mining industry. We believe those primacy efforts need to be preserved and maintained. Although we have not found any revisions which would appear to jeopardize these state primacy programs, we request that you and the respective advisory boards pay attention to and act to protect these programs on behalf of the State of Wyoming.

1. Chapter 1 Section 8 of the proposed rules contains provision (c)(iv) that prevents the granting of relief, if the relief is in the form of an approval of a permit that was denied by the Director. There are provisions in the Environmental Quality Act (such as 35-11-405(e)) which guarantee the right of renewal for certain permits if various conditions are met. We believe this proposed rule revision is in conflict with the Environmental Quality Act. Where a permitting right is specifically called out and afforded by statute or approved rule, Chapter 8 Section 1 should defer to that provision.

2. Chapter 2 Section 4(a) provides that the original petition for a contested case hearing shall be sent to the Director and other parties. The term "other parties" is too vague and subject to misuse or appeal as a way to simply delay the process. We request some criteria be developed to define which parties should legitimately receive the petition.

3. Chapter 2 Section 4(c) states that a contested case filing does not commence until a maximum of 60 days after the original filing with the EQC, based upon the filing and distribution of paperwork with the other parties. In the worst of cases, waiting for up to 60 days for a hearing to be scheduled can result in cancellation of a project, or result in loss of substantive material interests. We believe the rule should be revised to reduce the time frame dramatically and/or to provide an alternative avenue to be pursued to move the process along much more quickly when the situation warrants. Waiting 60 days for copies of filings to be distributed is excessive.

4. According to Chapter 2 Section 7(c)(ii) almost anyone can have an interest in the outcome of a contested case hearing. The language of this provision needs to incorporate some qualifying descriptors to keep parties from stalling the process on frivolous grounds.

It is our opinion that the proposed rule revisions are intended to meet the high standards of providing certainty and fairness in the contested case processes. We appreciate the opportunity to help improve the proposal. Please let me know if you have any questions.

Sincerely,

Jonathan Downing
Executive Director