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

The following document details the actions taken by the Wyoming Department of Environmental Quality (Department) to gather public comments and input regarding the proposed revisions to Chapters 1, 2, 3, 5, 6, and 7 of the Rules of Practice and Procedure prior to the presentation of these proposed revisions to the Environmental Quality Council. The Department is taking this opportunity to summarize and respond to all comments officially submitted in advance of the December 23, 2016 deadline of the public notice period.

The Department requested the publication of a 45-day public notice of the intent to adopt rulemaking revisions to Chapters 1, 2, 3, 4, 5, 6, and 7 and to adopt new chapter 9 of the Rules of Practice and Procedure. Due to an error, the Casper Star Tribune did not publish the requested notice. Due to this error, the Department requested an additional notice be published on November 4. 2016 and extended the deadline for comments from October 24, 2016 to December 23, 2016.

The Wyoming Attorney General's Office representatives for both the Department and the Environmental Quality Council worked on this rule package collectively. In its notice, the Department informed readers that the Environmental Quality Council was scheduled to consider a rule package from the Department regarding several proposed changes to the Rules of Practice and Procedure. In particular, readers were informed that the proposed revisions were being recommended in order to adopt the uniform contested case rules developed by Wyoming Office of Administrative Hearings (OAH) in accordance with W.S. 16-3-102, to the extent possible under applicable state and federal law. The uniform rules themselves went through a public comment period before being finalized by the OAH on October 17, 2014. The proposed revisions also update and clarify requirements applicable to rulemaking, petitions for award of costs and expenses under W.S. 35-11-437(f), director review involving surface coal mining operations, hearings before the department, and very rare or uncommon areas. Readers were provided an electronic link to the proposed revisions and also invited to submit comments to the Director.

The Department received comments from the Powder River Basin Resource Council (PRBRC). This document includes the Department's response to PRBRC's comments.

***Chapter 1, Sections 6 and 7***

**Comment 1: (PRBRC):** For a board like the EQC, conflicts of interest are inevitably present. EQC members represent certain constituencies, like industry, and while their day jobs may bring technical experience, they may also present conflicts. It is therefore important that the rules have clear and easy to use conflict of interest provisions that will prevent bias in agency decision-making. This is important not just for the few areas specifically mentioned in the draft rules but for all EQC decisions. We encourage the EQC to expand the conflict of interest rules to cover all rulemaking and contested case hearings. The toughest provisions (consistent with federal law and regulation) should apply uniformly to all divisions, hearings, and proceedings.

**Department Response 1:** The Department carefully considered this comment and does not recommend making this change. Expanding the currently proposed language for conflict of interest rules is unnecessary. The current language is included in order to make it easier for our federal partners to see that DEQ is compliant with their standards and primacy requirements for Clean Water Act and Clean Air Act programs. Modifying the language could have primacy implications for these programs. Council members are subject to ethical statutes, such as the Ethics and Disclosure Act, § 9-13-101 et seq.. Council members who are attorneys are also subject to ethical requirements for attorneys.

However, in our review of the comment and preparation for the rulemaking hearing, we identified areas that do need to be updated. Section 6, Contested Surface Water Discharge Permit Hearings has been changed to "Members of the Council shall recuse themselves from contested case proceedings involving the review of surface water discharge permits if they receive, or have during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit, as required by the Clean Water Act, Section 304(i)(D), 33 U.S.C. § 1314(i)(D), and 40 C.F.R. § 123.25(c)." Section 10(a)(ii) has been changed to "Section 304(i)(D) of the Clean Water Act, 33 U.S.C. § 1314(i)(D), available at: https://www.gpo.gov/fdsys/; and"

***Chapter 2, Section 9(a)***

**Comment 2: (PRBRC):** The proposed Chapter 2, Section 9 allows parties to file motions to intervene "before or at the hearing." Filing an intervention motion at the hearing will prejudice the other parties and will be procedurally difficult to handle. In particular, intervening parties will not be able to complete the requirements of Chapter 2, Section 18's prehearing procedures. Having participated in a 20-day hearing, we understand that time constraints may present concerns, but intervention should serve to benefit the process, not frustrate it. If parties have real rights at stake they will most likely be an original party to the hearing - the petitioner(s), the permit applicant, or DEQ. While intervention may be important – for both sides – from our experience, it is rarely used in EQC proceedings. In our opinion, the interests of the other parties, especially in allowing them to know what witnesses and evidence another party is likely to present at hearing and to adequately prepare, outweighs the interest of a potential intervenor to weigh in at the last minute. We encourage a deadline for motions to intervene, at least seven days in advance of a hearing.

**Department Response 2:** The Department carefully considered this comment and does not recommend making any changes at this time. It is crucial to the process that all interested parties are given equal opportunity to participate. The benefits of ensuring that all timely intervenors participate in discovery do not outweigh the costs of barring the participation of other affected intervenors.

***Chapter 3***

**Comment 3: (PRBRC):** The proposed changes set up an awkward, and ineffective and inefficient, 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 Environmental Quality Act 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. EQC has responded to citizen rulemaking petitions in the past and those actions were never challenged. 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. In its response to comments DEQ called this recommendation "unduly harsh." Perhaps it is, but it is also being honest with the citizens that their recourse is with DEQ, not the EQC.

**Department Response 3:** The Department carefully considered this comment and does not recommend making any changes at this time. The Environmental Quality Act statutorily binds the EQC and DEQ together in the rulemaking process. Providing an additional opportunity for the public to participate is a benefit.