



September 21, 2017

Water & Waste Advisory Board  
c/o Gina Thompson, DEQ/WQD  
200 W. 17th Street, Suite 400,  
Cheyenne, WY 82002

Submitted online via: <http://wq.wyomingdeq.commentinput.com/?id=SGA79>

RE: Proposed Revisions to DEQ Rules of Practice & Procedure for collection of fees for public records requests

Dear Chair Bedessem and Members of the Water & Waste Advisory Board,

Thank you for the opportunity to submit comments on the Department of Environmental Quality's (DEQ) proposed revisions to the Rules of Practice and Procedure. DEQ proposes to incorporate by reference the Wyoming Department of Administration and Information's Uniform Procedures, Fees, Costs, and Charges for Inspection, Copying, and Producing Public Records. For the following reasons, the undersigned organizations oppose the proposed rules and ask that the Water and Waste Advisory Board reject them at your upcoming meeting in Jackson.

The Powder River Basin Resource Council was formed in 1973 by ranchers and concerned citizens of Wyoming to address the impacts of strip mining on rural people and communities. Today, we work for the preservation and enrichment of our agricultural heritage and rural lifestyle; the conservation of our unique land, mineral, water, and clean air resources, consistent with the responsible use of those resources to sustain the livelihood of present and future generations; and the education and empowerment of our citizens to raise a coherent voice in the decisions that will impact their environment and lifestyle.

Established in 1967, the Wyoming Outdoor Council is the state's oldest independent statewide conservation organization. Our mission is to protect Wyoming's environment and quality of life for future generations.

Sierra Club Wyoming Chapter, representing more than 3,750 Wyoming members and supporters, works to help people explore, enjoy, and protect Wyoming's wild places, wildlife, and natural wonders.

The Wyoming Wilderness Association (WWA) is a grassroots non-profit, protecting Wyoming's wild public lands for 15 consecutive years. Our mission is to protect Wyoming's

magnificent and increasingly imperiled public wild lands. We strive to ensure these lands remain pristine and intact for every American citizen to enjoy now and into the future.

The Greater Yellowstone Coalition was founded in 1983 to protect the lands, waters, and wildlife of the Greater Yellowstone Ecosystem, now and for future generations.

CURED is a citizens' advocacy group whose mission is to protect air and water quality, other elements of the environment, and human health in and about Sublette County, Wyoming, and to raise awareness and educate the public regarding energy development-related issues. CURED's 6-year advocacy efforts to protect the health of Sublette County residents, the environment and wildlife is an ongoing process. CURED is considered the "GO TO" group for issues related to Sublette's air, water, health and community concerns. The influence of CURED can be seen in multiple media quotes, interviews and documentaries from newspapers, photojournalists and videographers throughout the west and civilized world.

On behalf of our members who live throughout the state of Wyoming, the undersigned organizations oppose the proposed rules because high fees and charges to have access to DEQ's public records will thwart the agency's mandate of operating in an open and transparent manner and in compliance with Section 1101 of the Environmental Quality Act.

Our organizations are frequent requesters of DEQ records. We routinely request public documents from DEQ as part of our government watchdog functions related to oversight and public accountability of DEQ permitting, rulemaking, and enforcement processes. The scope of records requests can vary from needing to look at a single file available in a public reading room to needing copies of electronic correspondence and third-party provided information over a period of time. In all cases, our organizations' requests are made in the public interest. The information we obtain is often disclosed in a variety of forums, including our newsletter and social media, and is shared with our members, reporters, and other organizations. The information we obtain is necessary to inform our advocacy work. We routinely request access to DEQ files and information to help our organization and our members better participate in DEQ comment processes. If we are not informed, we will not adequately be able to provide comments and information to DEQ for the agency to consider in its decision-making process. In short, it is critical that our organizations maintain access to DEQ public records to help fulfill our tax-exempt, public missions.

The proposed fees and costs will be prohibitive for small public interest organizations and members of the public. Over the course of our organizations' lifespans (in some cases spanning multiple decades), we have always been able to access DEQ records. We have paid minimal copying fees when records are unavailable electronically, but have never paid for staff time associated with fulfilling a records request. And for electronic files, we have never been charged fees for their production. This proposal would change that trend and would force our organizations and our members to pay exorbitant fees for routine requests of records. These fees will likely be cost prohibitive for our nonprofit organizations and for members of the public, resulting in denial of access to the records.

### **The Proposed Rules Violate the Environmental Quality Act**

The rules were written for all agencies and not specifically for DEQ. Thus, there has not been a careful evaluation of whether agency specific law prevents DEQ from adopting the uniform rules. Such an evaluation is necessary because in addition to complying with the Public Records Act, DEQ must also comply with the Wyoming Environmental Quality Act's specific requirements for public records contained in W.S. § 35-11-1101. These requirements provide that "Any records, reports or information obtained under this act or the rules, regulations and standards promulgated hereunder are available to the public." The *only* exception to this open access mandate afforded in the Environmental Quality Act is for records that will "divulge trade secrets." High fees for access to records will prevent these records from being "available" to the public.

Additionally, the Environmental Quality Act largely implements federal law and its requirements are necessary to maintain primacy under various federal programs. Public access to agency records is necessary for the DEQ to meet minimum standards for public participation and engagement contained in federal laws that the agency administers. For instance, to charge for review and disclosure of a permit application that is out for public notice and comment, along with associated electronic and paper correspondence between the agency and the permit applicant related to the permitting process (which in some cases can be quite voluminous), could violate the terms of DEQ's primacy agreements with the Environmental Protection Agency and the Office of Surface Mining because such fees would hinder a member of the public's ability to participate in the comment process.

While we appreciate the desire for consistency across state agencies, such consistency cannot come at the cost of forcing DEQ to violate the Environmental Quality Act. The Advisory Board should reject the rules.

### **General Comments on the A&I Uniform Rules**

In addition to the comments above, we provide the following general comments on the uniform rules. We ask the Advisory Board to consider them specifically as they apply to DEQ policies and procedures. In all cases, it may make more sense for DEQ to adopt its own fee policies that are specifically tailored to the agency.

### **The \$180 Threshold is Too Low and More Requests Must Be Cost Free**

We understand that there are some burdens on agency staff in fulfilling records requests. That is why our organizations work with DEQ staff to minimize the burden they have to produce the records, and we do our own scanning through a copier/scanner in a public records room if possible.<sup>1</sup> However, for electronic records only available on staff computers and other records that are not accessible in public reading rooms, it takes agency staff time to search, compile, and produce the records. Additionally, in some cases, the records must be reviewed by an agency attorney or supervisor before the records can be released. For instance, for the Ramaco coal mine

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<sup>1</sup> Unfortunately, due to unwarranted concerns about record custodianship and electronic viruses, new DEQ policy now requires citizens to bring their own portable scanner or else scanning is limited to 25 pages, done by DEQ staff.

permit contested case proceeding before the EQC Powder River Basin Resource Council was a part of this year, over 10,000 pages of agency emails were produced. Multi-year permitting and rulemaking actions accumulate thousands of pages of electronic records, and production of those records can take substantial staff time.

Additionally, because of search terms and constraints, it is often the case that records that are irrelevant to the request or duplicative (because of several staff members being included on the same email) are also produced. Under the proposed rules, requesters will have to pay for production of some records they don't even want or need.

For these reasons, the \$180 threshold is simply too low as it covers only 4.5 hours of professional staff time. Fees beyond that amount could easily accumulate into hundreds of dollars for each request, making them cost prohibitive for the public.

### **Costs for Programming and Computer Services**

It is unclear what costs for programming and computer services would be in the case of a records request. These costs should be absorbed as part of the agency's mission and function, and they should not be billed to the requester of the records.

### **Pre-Payment is Not Necessary**

We also do not believe pre-payment is necessary. At the very least, this portion of the rule should be re-visited once DEQ has a better understanding of how long it will likely take the staff to respond to requests. Otherwise, DEQ staff will likely over-estimate the cost of producing records.

Requiring up-front payment – of potentially too high of rates – will deter askers of the information from pursuing their requests. If payment is required (and as stated above, we believe it should not be required at all), it should be after the fact, allowing organizations like ours that already have a billing relationships with DEQ to be billed for fees. Additionally, there should be accommodation in the rules to allow requesters to work with DEQ staff to reduce the anticipated costs, or limit the work to a certain amount, not just a “pay up or you don't get the records” policy. The best practice is for there to be communication between the requester and the agency staff fulfilling the request so both parties can accommodate each other.

### **The Inspection Requirement is Not Necessary for Electronic Records**

We are also opposed to the “inspection” requirement of the proposed rules for electronic records. The proposal of requiring the document requester to inspect the records at DEQ's designated location could be quite problematic in a state as big as Wyoming. Our organizations often request records from remote DEQ offices, which can be a long drive from our main offices, and the inspection requirement could therefore be a prohibitive burden for us. In fact, we're not sure why there is this requirement at all. The records are electronic, so there is an electronic means to deliver them to the requester. DEQ often provides emailed records in response to records requests, or a CD with records if the records are too numerous or too large to email. As

opposed to requiring “inspection” at the DEQ’s office, the default rule should be electronic production, saving expenses and time of both the requester and the agency.

### **The “Request Priority” Provision Is a Solution Looking for a Problem**

We also oppose the “request priority” provision as currently written. While it may make sense to allow smaller requests that are easier to fill to have priority over others, using the arbitrary and much too low amount of \$180 is problematic. The rule could propose using a term such as a “voluminous” request, like many federal agencies do to implement the Freedom of Information Act (FOIA). Also, FOIA allows requesters to split requests into two or more parts, with production of specifically named documents or easy to obtain records getting produced before more general requests for records. As discussed above, we encourage DEQ staff to have practices to work with requesters to clarify their request and negotiate what should be produced and in what order. From our experience in working with DEQ staff, communication between the agency and the records requester solves many of the perceived problems these rules are trying to correct.

### **Fees for Copying Supervision Are Unnecessary**

On the non-electronic record fees, we are unsure what it means to “supervise” copying, and are opposed to this fee. As discussed above, we frequently review records in public reading rooms and then do our own copying/scanning. The DEQ staff know who we are and know that we take good care of the files and put them back in place after copying/scanning. No DEQ staff is there to “supervise” our staff, as the agency staff generally goes back to their desk to do other work once they show us where the records are. Does the proposed rule imply that an agency staff member will be just standing there watching us use the copier? That seems like a waste of valuable DEQ staff time. At the very least this fee needs to be clarified to explain what it means to “supervise” copying.

### **Fees for Scanning**

The proposed rules include a 10 cent/page fee for scanning. This fee is unnecessary and unwarranted as there is no cost to the agency for scanning a record.

In conclusion, our organizations are opposed to DEQ’s proposed rules. Thank you for your time and attention, and we look forward to expanding on these comments during the upcoming public hearing. Please keep us on your mailing list and notify us about developments related to these proposed rules.

Sincerely,

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