

# *Office of the Attorney General*

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September 8, 2015

Todd Parfitt, Director  
Wyoming Department of Environmental Quality  
122 West 25th Street  
Cheyenne, WY 82002

RE: Rulemaking under the Wyoming Environmental Quality Act

Dear Director Parfitt:

In a letter dated August 21, 2015, you requested an Attorney General opinion on the following questions:

- I.** Does the Environmental Quality Council (“Council”) have independent rulemaking authority or does it require a recommendation from the Director of the Wyoming Department of Environmental Quality (“DEQ”) before being empowered to develop or act on proposed rules? If a recommendation is required as a condition precedent to the Council’s authority, does that recommendation have to be positive? In other words, does the Director of DEQ need to positively recommend a proposed rule as necessary for the administration of the Wyoming Environmental Quality Act (“EQA”) before the Council has the authority to act on the proposed rule? Does the Council have the authority to act if DEQ advises against the adoption of a proposed rule?
  
- II.** If the Council receives a petition for rulemaking from a member of the public, does it have authority to act on that petition and, if so, does the

Council have the authority to unilaterally initiate rulemaking? What is DEQ's role in the decision to initiate rulemaking in response to a petition filed with the Council? If the Director of DEQ determines that rulemaking should not be initiated in response to a petition filed with the Council, is that decision judicially reviewable?

- III.** When DEQ and the Council work to incorporate the standardized Office of Administrative Hearings rules of practice and procedure, do those rules fall within the typical rulemaking structure of the EQA? Should DEQ initiate rulemaking to adopt those standardized rules in accordance with the standard procedure? Do rules of general applicability, such as the rules of practice and procedure, require submission to DEQ's various technical advisory boards if those rules do not fall within the assigned subject matter expertise of a particular board under the EQA?

#### **SHORT ANSWER**

The Wyoming Environmental Quality Council plays an important role in the rulemaking process established by the Environmental Quality Act, but it does not have independent rulemaking authority. As the final decision-maker in the rulemaking process, the Council may promulgate rules necessary for the administration of the Act, but only after it receives a recommendation from the Wyoming Department of Environmental Quality through the Director of the Department. That recommendation must endorse the promulgation of a proposed rule before the Council obtains jurisdiction. If the Department advises against, or does not recommend, the adoption of a proposed rule, the Council is not authorized to act because it cannot unilaterally initiate rulemaking. This is true regardless of the origin of a proposed rule. While the Council may receive a petition for rulemaking from the public, the Council may not initiate rulemaking in response to that petition.

The Department can initiate rulemaking to adopt rules of practice and procedure, including the uniform Office of Administrative Hearings rules, in accordance with the Department's typical procedures. That process includes consulting with the advisory boards. The rules of practice and procedure reasonably relate to the regulatory programs implemented by the Department's divisions and warrant consultation with the advisory boards before those rules can be recommended to the Council for adoption.

#### **STATUTORY BACKGROUND**

The Environmental Quality Act, Wyo. Stat. Ann. §§ 35-11-101 through -1904, governs the relationship between the Department and the Council. In 1973, the Wyoming Legislature established a governance system for Wyoming's air, land, and water resources that relied on the dual authority of the Department and Council. *See* 1973 Wyo. Sess. Laws 615-52. The Legislature empowered the Governor to appoint a Director of the Department to serve as the Department's "executive and administrative head." *Id.* at 621. In that role, the Legislature authorized the Director

to run the day-to-day operations of the Department, including appointing administrators to serve as the executive heads of the air, land, and water divisions. *Id.* at 621-23. The Act also created a seven-member Council, appointed by the Governor, to serve as the “hearing examiner” for the Department. *Id.* at 623-24. The Legislature authorized the Council to promulgate rules after recommendation from the Director, and to conduct rulemaking and contested case hearings for the Department. *Id.* at 624-25.

When the Legislature originally enacted the Environmental Quality Act, it envisioned a close working relationship between the Department and Council. For example, the Director was authorized to hire professional and technical assistants to help administer the Act, but that authority was conditioned upon the Director receiving “the advice of the respective administrators and the approval of the council.” 1973 Wyo. Sess. Laws 621. As one commentator mentioned at the time, the “Act superimpose[d] the seven-member Environmental Quality Council on the regular administrative structure.” Michael J. Morgan, *Wyoming Environmental Quality Act of 1973*, 9 Land & Water L. Rev. 65, 66 (1974). In fact, the Chairman of the Council submitted the first annual report to the Governor summarizing the Department’s start-up activities, and the Director served as the executive secretary of the Council for many years. Over time, the Legislature moved to more clearly delineate and segregate the roles of the Department and Council. The Legislature eliminated the need for Council approval of the Director’s personnel hiring decisions in 1987. 1987 Wyo. Sess. Laws. 468. In 1992, after having operated under the same organizational structure since enactment, the Legislature formally divided the agencies and established the Council as a “separate operating agency of state government.” 1992 Wyo. Sess. Laws 395. The agencies were separated “[t]o ensure impartiality in hearing matters.” *Department of Environmental Quality Annual Report*, at 4 (1992).

As currently structured, the Director of the Department has broad powers under the Environmental Quality Act to perform “any and all acts necessary to promulgate, administer and enforce the provisions of this act and any rules, regulations, orders, limitations, standards, requirements or permits adopted, established or issued thereunder, and to exercise all incidental powers as necessary to carry out the purposes of this act . . . .” Wyo. Stat. Ann. § 35-11-109(a)(i). Division administrators for air, water, waste, land quality, industrial siting, and abandoned mine reclamation assist the Director in implementing the requirements of the Act. *Id.* §§ 35-11-108 and -110. The air, land, solid and hazardous waste, and water quality divisions also consult with advisory boards assigned to the respective divisions in developing policies, plans and regulations relating to the abatement of air, water, and land pollution in Wyoming. *Id.* §§ 35-11-113, -114 and -503.

The Council’s primary role under the Environmental Quality Act is to “hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered” by the Department. *Id.* § 35-11-112(a). The Council is empowered to “[p]romulgate rules and regulations necessary for the administration of this act, after recommendation from the director of the department, the administrators of the various divisions and their respective advisory boards . . . .” *Id.* § 35-11-112(a)(1). The Council must “[c]onduct hearings as required by the Wyoming Administrative Procedure Act . . . for the adoption, amendment or repeal of rules,

regulations, standards or orders recommended by the advisory boards through the administrators and the director.” *Id.* § 35-11-112(d)(ii). The Council conducts contested case hearings to hear challenges to the Department’s enforcement and permitting decisions. *Id.* § 35-11-112(d)(iii) and (iv). In resolving those cases and in determining whether to promulgate rules and rule revisions that have been recommended by the Department, the Council is empowered to approve new and revised rules and to repeal, amend, and modify existing Department rules. *Id.* § 35-11-112(c). The Council may also affirm, modify, or deny the issuance of permits and cease and desist orders issued by the Department. *Id.*

## ANALYSIS

### I. The Council does not possess independent rulemaking authority.

Under the statutory scheme described above, the Council does not possess any independent rulemaking authority. The powers of an administrative agency, like the Council, are limited by its statutory authority. *Mont. Dakota Utils. Co. v. Pub. Serv. Comm’n of Wyo.*, 847 P.2d 978, 983 (Wyo. 1993). When determining the authority granted to an administrative agency, statutes must be “strictly construed.” *U.S. West Commc’ns, Inc. v. Wyo. Pub. Serv. Comm’n*, 907 P.2d 343, 346 (Wyo. 1995) (quoting *Mont. Dakota Utils. Co.*, 847 P.2d at 983). “[A]ny reasonable doubt” regarding the “existence of power must be resolved against the exercise thereof.” *Id.* In fact, a “doubtful power does not exist.” *Id.* In certain circumstances, agencies may have some implied powers, but only as “derived by necessary implication from express statutory authority granted to the agency.” *Voss v. Godman*, 2009 WY 40, ¶ 13, 203 P.3d 415, 420 (Wyo. 2009) (quoting *BP Am. Prod. Co. v. Dep’t of Revenue*, 2006 WY 27, ¶ 28, 130 P.3d 438, 466-67 (Wyo. 2006)). Under the plain language of the Environmental Quality Act, there is no question that the Council’s rulemaking powers – while important – are limited by the Department’s role in the rulemaking process.

When interpreting a statute, as we are required to do in this instance, the Attorney General’s Office begins with the plain meaning rule as articulated by the Wyoming Supreme Court: “If a statute is clear and unambiguous, we simply give effect to its plain meaning.” *Rodriguez v. Casey*, 2002 WY 111, ¶ 9, 50 P.3d 323, 326 (Wyo. 2002); *see also Dike v. State*, 990 P.2d 1012, 1018 (Wyo. 1999) (“We begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. We construe statutes as a whole, giving effect to every word, clause, and sentence, and we construe together all parts of the statutes on the same subject.”) (internal citations and quotations omitted).

The Environmental Quality Act authorizes the Council to promulgate rules “**after recommendation** from the director of the department, the administrators of the various divisions and their respective advisory boards . . . .” Wyo. Stat. Ann. § 35-11-112(a)(i) (emphasis added). The Act requires the Council to conduct hearings for the adoption, amendment, or repeal of any rule that has been “**recommended by** the advisory boards through the administrators and the director.” *Id.* § 35-11-112(a)(ii) (emphasis added). The Council “shall approve all rules . . . before they become final . . . .” *Id.* The Director is empowered to “[p]erform any and all acts necessary

to promulgate . . . any rules [and] regulations . . . and to exercise all incidental powers as necessary to carry out the purposes of” the Environmental Quality Act. *Id.* § 35-11-109(a)(i). According to the Wyoming Supreme Court:

There is no question from these provisions that the [Council] is responsible for conducting public hearings on changes the [Department] proposes to the [Department’s] rules. The [Council] is also charged with approving or disapproving the [Department’s] proposed rule changes. There is also no question that the [Department] and its divisions are responsible for recommending, enforcing, and administering [Department] rules and changes to the rules.

*Wyo. Outdoor Council v. Wyo. Dep’t of Env’tl. Qual.*, 2010 WY 20, ¶ 11, 225 P.3d 1054, 1057 (Wyo. 2010).

Under the system established by the Legislature, the Department is “the administrative agency statutorily charged with carrying out the purposes of the Environmental Quality Act, including promulgation, administration and enforcement of the Act’s provisions and any rules and regulations . . . .” *Id.* ¶ 19, 225 P.3d at 1059. The Council serves as a “hearing examiner” for the Department, Wyo. Stat. Ann. § 35-11-112(a), and has “the authority to approve rules **after** recommendation from the director, the division administrators and the advisory boards . . . .” *Wyo. Outdoor Council*, ¶ 20, 225 P.3d at 1059 (emphasis added). Without a recommendation from the Department as a condition precedent, the Council does not have rulemaking authority. The ordinary meaning of the term “after” in this statutory scheme can support no other conclusion. *See Allied-Signal, Inc. v. Wyo. Bd. of Equalization*, 813 P.2d 214, 220 (Wyo. 1991) (a “statute is unambiguous if its wording is such that reasonable persons are able to agree as to its meaning with consistency and predictability”); *Webster’s New Collegiate Dictionary* 21 (4th ed. 1976) (defining “after” to mean “subsequent to in time or order”). The Legislature could not have used clearer language when describing the Council’s rulemaking authority – the Council has the authority to promulgate rules, but only **after** receiving a recommendation from the director, his or her administrators, and their respective advisory boards. Wyo. Stat. Ann. § 35-11-112(a)(i). Without a recommendation, the Council may not act. *See Mont. Dakota Utils.*, 847 P.2d at 983 (noting that an agency’s powers are limited by its statutory grant of authority).

Given the plain language of Wyo. Stat. Ann. §§ 35-11-112(a)(i) and (ii), particularly when read together, it also is clear that the recommendation from the Director must be positive. The Director must recommend the adoption of rules as necessary for the administration of the Environmental Quality Act before triggering the Council’s role in the rulemaking. The Council has the statutory authority to conduct rulemaking hearings but only for the express purpose of considering the adoption, amendment, or repeal of rules that have been “recommended by” the Director and the relevant administrators and advisory boards. Wyo. Stat. Ann. § 35-11-112(a)(ii). In this context, the term “recommend” clearly means “to present as worthy of acceptance” or “to endorse as fit, worthy, or competent.” *Webster’s New Collegiate Dictionary* 965 (4th ed. 1976). It follows then that “recommended by” means a positive recommendation from the Director to the Council to adopt rules as worthy of acceptance.

In conclusion, the Council may not conduct rulemaking independent of the Department, and the statutes require a positive recommendation from the Director for the Council to obtain jurisdiction over any proposed rulemaking. But to be clear, the converse also is true. The Department is not empowered to promulgate rules without the final word of the Council. The Legislature created a system of checks and balances that envisions a mutually dependent relationship between the separate agencies. The Council cannot adopt rules without the Department, and the Department cannot finalize rules without the Council.

**II. The Council may receive a petition for rulemaking from any interested person, but the Council is not empowered to initiate rulemaking in response.**

The Wyoming Administrative Procedure Act authorizes any person to petition an administrative agency to promulgate, amend, or repeal any rule. Wyo. Stat. Ann. § 16-3-106. In response, administrative agencies have two options: (1) deny the petition or (2) initiate rulemaking. *Id.* If the agency denies the petition, the decision must be conveyed in writing and must state the reasons for denial. *Id.* Decisions to deny are considered final and are not subject to judicial review. *Id.*

Members of the public can petition the Council under the Administrative Procedure Act because the Council is an independent administrative agency. Once the Council receives a petition, however, its options are even more limited than the narrow scope of options authorized by that Act. That is because the Administrative Procedure Act guides the process of rulemaking by state agencies, but it does not grant substantive rulemaking authority to those agencies. *See Thunderbasin Land, Livestock & Inv. Co. v. Laramie Cnty.*, 5 P.3d 774, 782 (Wyo. 2000) (“As indicated by its title, the [Administrative Procedure Act] is procedural and not substantive in nature . . . .”); *Wyo. Downs Rodeo Events, LLC v. State*, 2006 WY 55, ¶ 14, 134 P.3d 1223, 1230 (Wyo. 2006) (“An administrative agency’s authority to promulgate rules is circumscribed by the statutes that govern its activities.”).

As discussed in Section I above, the Council does not have independent rulemaking authority and may not initiate rulemaking. Its role as the final decision-maker in the rulemaking process is to approve or deny rules that have been recommended by the Department. A petition for rulemaking under the Administrative Procedure Act cannot confer power on the Council that does not exist under the Environmental Quality Act. *See McLean v. Hyland Enters., Inc.*, 2001 WY 111, ¶ 30, 34 P.3d 1262, 1270 (Wyo. 2001) (“An agency may not exceed its statutory authority in promulgating rules. Administrative agencies have only those powers expressly conferred by statute. This legal principle applies with equal force to an agency’s authority to promulgate rules.”) (internal quotations and citations omitted). The Council therefore cannot initiate rulemaking in response to a petition. Any other result would alter the delegated management structure established by the Legislature under the Environmental Quality Act. The Council may deny the petition, stating the reasons why, or it could redirect the petition to the Department to make the decision to initiate rulemaking or to deny the petition. If the Department denies the petition in that context, its decision is not reviewable pursuant to Wyo. Stat. Ann. § 16-3-106, but it must provide a written

statement of reasons in support of the denial. Members of the public also can directly file petitions for rulemaking with the Department, as the Director is empowered by the Environmental Quality Act to either deny or initiate rulemaking in response to public petitions. *See, e.g.*, Wyo. Stat. Ann. § 35-11-109(a)(i) (the Director shall perform “any and all acts necessary to promulgate . . . rules”).

The Department’s current rules of practice and procedure may create confusion regarding the rulemaking process in this context. Those rules currently state that “[a]ny party may petition the Council to promulgate, amend, or repeal any rule or rules.” *Rules Wyo. Dep’t of Env’tl. Qual., Practice and Procedure*, ch. 3, § 2 (1994). Such petitions must be submitted in duplicate to the Chair of the Council and the Director of the Department. *Id.* § 2(a). The rules also state that “[a]s soon as practicable, the Council shall deny the petition in writing (stating its reasons for the denial) or initiate rule-making procedures.” *Id.* § 2(d).

These provisions were adopted before the Council was formally separated from the Department as an independent operating agency in 1992<sup>1</sup> and should have been amended to reflect the new status of the respective agencies. As currently written, the rules could be read to imply that the Council can initiate rulemaking without Department involvement. Such an interpretation would render the rules *ultra vires* because they exceed the statutory authority delegated to the Council pursuant to the Environmental Quality Act. *See State ex rel. Dep’t of Revenue v. Buggy Bath Unlimited, Inc.*, 2001 WY 27, ¶ 10, 18 P.3d 1182, 1186 (Wyo. 2001) (“Rules promulgated in excess of an agency’s statutory authority are null and void.”). On the other hand, the provision in Chapter 3, Section 2(d) relating to the initiation of rulemaking “procedures” could be interpreted narrowly within the statutory limits on the Council’s rulemaking authority. Under that interpretation, the proper rulemaking procedure would be for the Council to redirect a petition for rulemaking to the Department for the Director’s decision as to whether to deny the petition or initiate rulemaking in response. In any event, the Legislature’s intent, as expressed in statute, governs.

### **III. Revisions to the Department’s current rules of practice and procedure must be submitted to the Department’s advisory boards as part of the rulemaking process.**

The Department currently is preparing revisions to its existing rules of practice and procedure to incorporate the recent uniform contested case rules promulgated by the Office of Administrative Hearings as required by Wyo. Stat. Ann. § 16-3-103(j). Nothing about this particular rulemaking process modifies the general rulemaking structure discussed above in Sections I and II. The Department should follow its standard procedures for developing the proposed amendments, including consulting with its advisory boards.

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<sup>1</sup> *Compare Rules Wyo. Dep’t of Env’tl. Qual., Practice and Procedure*, ch. 3, § 2 (adopted Dec. 1, 1975; superseded July 7, 1980), with *Rules Wyo. Dep’t of Env’tl. Qual., Practice and Procedure*, ch. 3, § 2 (adopted July 7, 1980; superseded Feb. 2, 1994), and *Rules Wyo. Dep’t of Env’tl. Qual., Practice and Procedure*, ch. 3, § 2 (adopted Feb. 2, 1994; current). The provisions in Chapter 3, Section 2(d) remained unchanged in the various iterations of the Department’s *Rules of Practice and Procedure*.

The Council must conduct hearings in any contested case arising under the Environmental Quality Act. Wyo. Stat. Ann. § 35-11-112(a)(iii). This means that the adoption of contested case rules by the Department and Council are “necessary for the administration” of the Act, as are other applicable rules of practice and procedure. *Id.* § 35-11-112(a)(i); *see also id.* § 35-11-109(a)(i) (authorizing the Director to promulgate rules necessary to “administer” the Act). The Environmental Quality Act does not differentiate between substantive and procedural rules that are necessary for its administration. If any rule is necessary, the regulatory framework described in Sections I and II above governs – the Department initiates the rulemaking process and seeks ultimate approval for the recommended rules from the Council.

The Administrative Procedure Act requires every agency to “[a]dopt rules of practice setting forth the nature and requirements of all formal and informal procedures available in connection with contested cases.” Wyo. Stat. Ann. § 16-3-102(a)(i). While this provision applies generically to each agency, it does not confer power that does not exist under the Environmental Quality Act. *See Wyo. Downs Rodeo Events*, ¶ 14, 134 P.3d at 1230. The Council and Department are required to have contested case rules under the Administrative Procedure Act, but those rules must be adopted in accordance with the regulatory framework established by the Environmental Quality Act. The “specific statute controls over a general statute on the same subject.” *Thunderbasin*, 5 P.3d at 782. The Department should move forward with its standard rulemaking procedures, including developing the proposed rule, consulting with its advisory boards, seeking authorization to proceed from the Governor, providing the public with an opportunity to review and comment on the proposed revisions, and submitting the proposed revisions to the Council with a recommendation to adopt those revisions.

The Department should consult with its advisory boards regarding the adoption of general rules of practice and procedure because those rules govern the conduct of contested cases relating to permitting and other regulatory decisions that originate within the various divisions. The role of the advisory boards under the Environmental Quality Act is to “recommend to the council, through the administrator and director, the adoption of rules, regulations and standards to implement and carry out the provisions and purposes of this act **which relate to their divisions**, and variances therefrom.” Wyo. Stat. Ann. § 35-11-114(b) (emphasis added). Their charge is to assist the air, land, solid and hazardous waste, and water quality administrators, the Director, and the Council with the development of regulations, plans, and programs to prevent, abate, and control air, land, and water pollution in Wyoming. *Id.* §§ 35-11-114(a) and -503(a). That includes developing standards for the issuance of permits. *See, e.g., id.* §§ 35-11-302(a)(v) and -503(a). Rules governing the final administrative resolution of permitting decisions, if those decisions are appealed to the Council, reasonably fall within the consultative role envisioned by the Legislature for the advisory boards. The administrative permitting process begins with an application for permit coverage and ends when a final administrative decision is made. Procedures governing the end of that process are important to ensuring the integrity and defensibility of the overall permitting decision. The advisory boards should be given an opportunity to review and comment on that process.

**CONCLUSION**

While the Department and Council are two separate independent state agencies, they must work together to promulgate rules. The Environmental Quality Act does not grant independent rulemaking authority to either agency. Instead, they each have been delegated specific roles in the rulemaking process by the Legislature. The Council is authorized to promulgate rules necessary for the administration of the Environmental Quality Act but only after receiving a positive recommendation from the Department. Thus all rulemaking is initiated by the Department; the Council cannot initiate rulemaking without Department involvement. Conversely, the rulemaking process ends when rules are approved or denied by the Council; the Department cannot promulgate rules without securing Council approval.

As a state agency, the Council may receive rulemaking petitions from the public under the Administrative Procedure Act, but it may not initiate rulemaking in response to those petitions. The Council may either deny petitions or redirect them to the Department to determine whether to deny or initiate rulemaking in response.

The rules of practice and procedure, including the uniform Office of Administrative Hearings rules, are necessary for the administration of the Environmental Quality Act and are subject to the rulemaking requirements as discussed herein. The Department, through its Director, can initiate rulemaking to adopt rules of practice and procedure in accordance with the Department's standard procedures, including consulting with the advisory boards regarding those procedures.

If you have any additional questions, or if this Office can be of further assistance, please do not hesitate to contact us.

Sincerely,



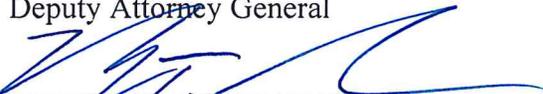
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