

ADOPTED RULES DELIVERY

I, Terri A. Lorenzon (agency head or chairperson) hereby certify that I sent a copy of this certification page and the adopted rules to the Legislative Service Office and the Attorney General's Office.

STATEMENT OF REASONS

The Statement of Reasons and other justifications for these rules are on file with this agency.

ADOPTION OF RULES

After consideration of public comment and appropriate response, my agency or board adopted the rules on December 15, 1993. (NOTE: The agency or board has 60 days after the date of adoption to file the rules with the Secretary of State.)

Terri A. Lorenzon
Agency Head or Chairperson of Board

CONTACT INFORMATION

This program's Attorney General representative is Tom Roan.

The agency person who should receive the stamped, filed copy is:

Name Tom Roan
Address Capitol Building, Cheyenne, WY
Phone 777-7823

Upon receipt of adopted rules, the agency's Attorney General representative will review the rules for the Governor. The Attorney General representative will then forward the rules to the Governor. When the Governor signs the rules, he will return them to the Attorney General representative for filing with the Secretary of State. The Secretary of State will file stamp the agency's or board's copy of the rules with the filing date and the Attorney General representative will return them to the agency.

GOVERNOR'S CERTIFICATION

Pursuant to W. S. 16-3-104(d), I have reviewed these rules and determined that they:

- (1) are within the scope of the statutory authority delegated to the adopting agency;
- (2) appear to be within the scope of the legislative purpose of the statutory authority; and
- (3) have been adopted in compliance with the procedural requirements of the Wyoming Administrative Procedure Act.

Therefore, pursuant to said statute, I approve the same.

Date Approved 2/14/94

[Signature]
Governor

STATE OF WYOMING
Office of the Secretary
Filed 14th day of Feb
19 94 at 4:59 P.M.
KATHY KARPAN
Secretary of State



Certification Page for Regular Rules

AGENCY HEAD

I, Terri A. Lorenzon do hereby certify:

Check
one

I am the agency head of the Environmental Quality Council

I am the chairperson of the _____
(Board)

The attached is a true and correct copy of rules pertaining to _____
Department of Environmental Quality Rules of Practice
and Procedure, Chapter III, Section 1(e) and Chapter
VII.

My agency has authority to promulgate this rule pursuant to W. S. 35-11-112.
(Do not use the Administrative Procedure Act but rather your agency's authorizing statute.)

RULE INFORMATION

(Check one)

This is a new rule, Chapter(s) 7

This is an amendment to existing rules at these chapters and sections.
Chapter III, Section 1(e)

This rule supersedes all other rules previously filed, Chapter(s): _____

This rule repeals Chapter(s) _____ in its (their) entirety.

FORMAT

(Check one)

A disk with an exact copy of the attached rules and regulations is attached.

A disk is not attached as this office has no computer available.

NOTICES OF INTENT

(See Appendix E)

On Oct. 26, 1993, my agency (or board) sent a copy of the Notice of Intent to Adopt Rules and the proposed rules to the Attorney General.

On October 27, 1993, my agency (or board) sent a copy of the Notice of Intent to Adopt Rules and the proposed rules to the Legislative Service Office.

On October 25, 1993, my agency (or board) sent Notice of Intent to individuals who had requested advance notice of my agency's (or board's) rulemaking proceedings:

Notice of Intent to the public:

Check
one

Notice was published in the following newspapers on the following dates:
See Exhibit A (attached)

Any other means of public notice: _____

(Agency may not adopt these rules until 45 days after the notice is given.)

Rules and Regulations

DEPARTMENT OF ENVIRONMENTAL QUALITY
LAND QUALITY DIVISION
STATE OF WYOMING

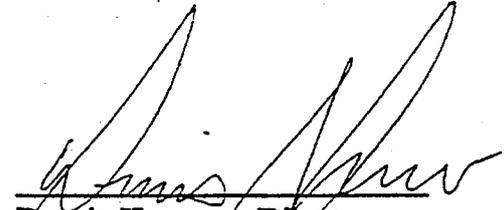
I certify that the attached is a true and correct copy of the ^{amended} ~~new~~ rules of the Department of Environmental Quality, Rules of Practice and Procedure on the subject of petitions for award of costs and expenses adopted in accordance with W.S. 35-11-437(f) on December 17, 1992. This is an amendment removing Section 2(a)(ii)(B) from Chapter V.

Prior to adoption, this rule was made available for public inspection on November 2, 1992, and a notice of intended adoption was mailed to the Attorney General and the Legislative Service Office.

The rule has been approved by the Governor as indicated below.

The attached rule is effective immediately upon filing with the Secretary of State.

Signed Jan 25, 1993


Dennis Hemmer, Director
Department of Environmental Quality


Reviewed and Approved by the Governor

254
93 JAN 25 2:10 P
KATHY KANE
Secretary of State



DEPARTMENT OF ENVIRONMENTAL QUALITY
LAND QUALITY DIVISION
STATE OF WYOMING

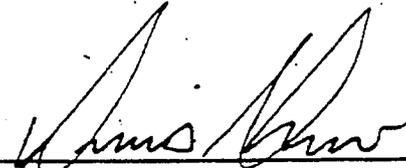
I certify that the attached is a true and correct copy of the new rules of the Department of Environmental Quality, Rules of Practice and Procedure on the subject of petitions for award of costs and expenses adopted in accordance with W.S. 35-11-437(f) on October 22, 1992. This is an amendment removing Section 2(a)(ii)(B) from Chapter V.

The Department of Environmental Quality finds that an **emergency** exists and the Governor concurs in the finding by his signature below, allowing the rule to qualify as an emergency rule which is effective for a period of no longer than one hundred twenty (120) days.

The rule has been submitted to the ^{Attorney General's Office and} Legislative Service Office and approved by the Governor as indicated below.

The attached rule is effective immediately upon filing with the Secretary of State.

Signed Nov. 24, 1992.



Dennis Hemmer, Director
Department of Environmental Quality



Reviewed and Approved by the Governor
Concurs in Emergency Finding

STATE OF WYOMING
Office of the Secretary
Filed the 30th day of NOVEMBER
1992 at 10:55 AM M
KATHY WARRAN
Secretary of State

DEPARTMENT OF ENVIRONMENTAL QUALITY
LAND QUALITY DIVISION
STATE OF WYOMING



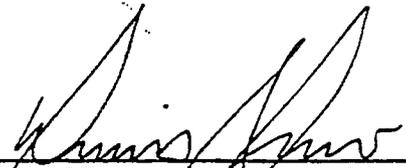
I certify that the attached is a true and correct copy of the new rules of the Department of Environmental Quality, Rules of Practice and Procedure on the subject of petitions for award of costs and expenses adopted in accordance with W.S. 35-11-437(f) on October 22, 1992. This is an amendment replacing Chapter V, Section 2(a).

Prior to adoption, this rule was made available for public inspection on May 16, 1992, and a notice of intended adoption was mailed to the Attorney General and the Legislative Service Office.

The rules have been approved by the Governor as indicated below.

The attached rules are effective immediately upon filing with the Secretary of State.

Signed Nov. 24, 1992.



Dennis Hemmer, Director
Department of Environmental Quality



Reviewed and Approved by the Governor

STATE OF WYOMING
Office of the Secretary
Filed the 25th day of Nov.
19 92 at 10:40 A.M.
KATHY KARPAN
Secretary of State

SS

Rules and Regulations

DEPARTMENT OF ENVIRONMENTAL QUALITY

State of Wyoming

I certify that the attached is a true and correct copy of certain new rules and amendments to other rules of the Department of Environmental Quality relating to the definition of "toxic materials", the standard for intervention in coal mining proceedings, and procedures and standards for the award of costs and expenses (including attorney fees) in enforcement proceedings involving coal mining operations. The rules also contain a new regulatory chapter describing t procedures for a request to the Director of the Department t review a decision by any of the Administrators (including Solid Waste Management). All rules were adopted in accordance with W.S. 35-11-112(a)(i) and W.S. 9-4-101 et seq. This is an amendment superseding Chapter I, Section 2 (99), Land Quality Division Rules and Regulations, and Chapter II, Section 7, Department Rules of Practice and Procedure. The rules also create Chapters V and VI, Department Rules of Practice and Procedure.

Prior to adoption this rule was made available for public inspection on the 18th day of May, 1982 and a notice of intended adoption was mailed to the Attorney General and the Legislative Service Office.

The rules have been approved by the Governor as indicated below.

The attached rules are effective immediately upon filing with the Secretary of State.

Signed this 3rd day of August, 1982.

Robert E. Sundin
Robert E. Sundin, Director
Department of Environmental Quality

[Signature]
Reviewed and Approved by the
Governor

STATE OF WYOMING }
Office of the Secretary

Filed the 17th day of August
1982 at 8:20 A.M.

THYRA THOMSON
Secretary of State

AUG 17 AM 8 16

WYOMING
SECRETARY OF STATE

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CHAPTER I
GENERAL RULES OF PRACTICE AND PROCEDURE

Section 1. **Authority.**

These rules are promulgated as authorized by the Wyoming Administrative Procedure Act (W.S. 94-101 through 9-4-115) and the Wyoming Environmental Quality Act (W.S. 35-11-101 through 35-11-1104). These rules shall apply in all proceedings before the Environmental Quality Council and its examiners. Existing Chapters I through IV are hereby repealed. These rules and regulations are effective upon final approval of a state program pursuant to P.L. 95-87.

Section 2. **Definitions.**

(a) All of the definitions set forth and contained in the Wyoming Environmental Quality Act and the Administrative Procedure Act are incorporated herein by reference. In addition, the following definitions are set forth:

(i) Applicant: Any person applying for a permit authorized under the Environmental Quality Act or any party petitioning for rulemaking in accordance with W.S. 9-4-106.

(ii) Protestant: Any person desiring to protest the application of a permit or any person requesting a hearing before the Environmental Quality Council in accordance with the Environmental Quality Act and who is objecting to an action of the Department of Environmental Quality and desiring affirmative relief.

(iii) Presiding officer: The officer designated by the Chairman of the Environmental Quality Council to conduct hearings.

(iv) The Wyoming Administrative Procedure Act: W.S. 9-4-101 through 9-4-115, as amended.

Section 3. **Initiation of Proceedings.**

(a) All hearings before the Council, appeals or others, shall be held pursuant to these rules, the provisions of the Environmental Quality Act W.S. 35-11-101 through 1104 and the Wyoming Administrative Procedure Act.

(b) All persons requesting a hearing or protesting a permit shall file two copies of a written petition directed to and served upon both the Chairman of the Council and the Director of the Department.

(i) Original service shall be by registered mail, return receipt requested. Thereafter, all service shall be proved in accordance with the Wyoming Rules of Civil Procedure.

(ii) Where protestant is objecting to a permit, he shall also serve the permit applicant with a copy of the petition and all other pleadings and motions.

(c) The petition for hearing shall set forth:

(i) Name and address of the person making the request or protest and the name and address of his attorney, if any.

(ii) The action, decision, order or permit upon which a hearing is requested or an objection is made.

(iii) A statement in ordinary, but concise language of the facts on which the request or protest is based, including whenever possible particular reference to the statutes, rules or orders that the Applicant or Protestant alleges have been violated.

(iv) A request for hearing before the Council.

(d) The filing of such petition shall constitute the commencement of the proceeding on the date filed.

(e) A copy of the petition shall be served on any party who appeared in prior proceedings pertaining to the same matter.

Section 4. **Notice.**

(a) Notice of hearings shall conform to W.S. 9-4-107(b). The manner and time for giving notice shall be as follows:

(i) When the Council determines that it shall hold a hearing on its own motion, it shall give notice as promptly as possible in advance of the hearing date to all parties by registered or certified mail, return receipt requested.

(ii) When a party desires that a hearing be held before the Council he shall file his petition and the Council shall forthwith set a date for hearing and notify the applicant thereof.

Section 5. **Attorney General Presence.**

(a) In all matters before the Council, the Council may request the Attorney General of the State of Wyoming or a representative of his staff to be present throughout the hearing.

(b) The Council, upon its own motion or the motion of any party, may certify an issue of law to the Attorney General for his opinion. Such opinion shall thereafter be part of the record of any proceeding before the Council, and may, if the court so directs, constitute a finding of the Council with respect to the issuance of final orders or decisions.

Section 6. **Record of Proceedings - Reporter.**

(a) Unless otherwise agreed by the parties and consented to by the Council, all hearings, including all testimony, shall be reported verbatim by a competent reporter. The compensation of such reporter shall be paid as required by law and as ordered by the Council. The Council may direct any party or parties to assume the cost of the transcript.

Section 7. **Record.**

(a) The record in all contested cases (Chapter II) shall include:

- (i) All formal and informal notices.
- (ii) Evidence received or considered including matters officially noticed.
- (iii) Questions and offers of proof, objections, and rulings thereon.
- (iv) Any proposed findings and objections thereto.
- (v) The decision and order of the Council.
- (vi) The transcript of all recorded proceedings.

(b) The record in hearings held under Chapter III shall include all relevant information presented to the Council.

(c) At the close of the hearing, the presiding officer may afford all interested parties time in which to submit additional written testimony or written proposed corrections of the transcript, pointing out errors that may have been made in transcribing the testimony. The presiding officer shall promptly thereafter order such corrections made as in his judgement are required to make the transcript conform to the testimony.

Section 8. **Appeals.**

(a) Appeals to the District Court from decisions of the Council are governed by W.S. 9-4-114 Rule 12 of the Wyoming Rules of Appellate Procedure, and W.S. 35-11-1001, and 1002.

(b) In case of an appeal of the District Court as above provided, the party appealing shall secure and file a transcript of the testimony and all other evidence offered at the hearing.

The compensation of the reporter for making the transcript of the testimony and all other costs involved in such appeal shall be borne by the party prosecuting such appeal.

Section 9. **Pre-Hearing Conference.**

(a) At a time on or before the day of any hearing, the Council may direct the parties to appear before the Council to consider:

(i) The implication of the issues.

(ii) The necessity or desirability of amending the pleadings.

(iii) The possibility of obtaining admissions of the fact and of documents to avoid unnecessary proof.

(iv) Formulating procedures to govern the hearing.

(v) Such other matters as may aid in the disposition of the case.

(b) Such conferences shall be conducted informally. An order will be prepared which recites the actions taken at the conference, amendments allowed, agreements of the parties and agreements of counsel and the parties. The pre-hearing order will control the court of the hearing unless modified by the presiding officer to prevent manifest injustice.

(i) If a party determines an order does not fully cover the issues presented, or is unclear, he may petition for a further ruling within ten days after receipt of the order.

Section 10. **Time.**

(a) When time prescribed by these rules or by order of the Council for doing any act expires on a Saturday or legal holiday, such time shall extend to and include the next succeeding business day.

(b) For good cause shown, extensions and continuances of time may be granted or denied in the discretion of the Council.

Section 11. **Settlement.**

(a) Informal dispositions may be made of any hearing by stipulation, agreed settlement, consent, order or default, upon approval of the Council.

Section 12. **Deviation and Amendment.**

(a) The Council may permit deviations from these rules insofar as it may find compliance therewith to be impossible or impracticable.

(b) Any amendments to these rules shall become effective as provided by W.S. 9-4-103 and 9-4-104.

Section 13. **Exclusion.**

(a) Nothing in these Rules shall be construed as prohibiting the Environmental Quality Council and the Administrators of the Divisions of Land, Air, or Water Quality or their designee from holding informational proceedings, hearings, or conferences for the purpose of aiding the Council or the Administrator in ascertaining and determining facts necessary for the performance of their respective duties. Any person believing himself aggrieved by a determination made by the Administrator or his designee following an informational proceeding, hearing, or conference and who is otherwise entitled thereto, may upon filing a petition or complaint with the Council, obtain a full hearing or review upon the merits, which matter shall be heard and tried de novo.

(b) Disrespectful, disorderly or contumacious language or contemptuous conduct, refusal to comply with directions, continued use of dilatory tactics, or refusal to adhere to reasonable standards of orderly and ethical conduct, at any hearing before the Council, shall constitute grounds for immediate exclusion before the hearing.

Section 14. **Meeting of Council and Advisory Boards.**

(a) All meetings of the Council and the Advisory Board shall be conducted in accordance with Robert's Rules of Order.

(b) The four regular meetings of the Council and the Advisory Boards required by W.S. 35-11-113 and W.S. 35-11111(d) of the Act shall be called by the Chairman after consultation and coordination with the Administrator or Director, respectively.

Section 15. **Contested Water Discharge Permit Hearings.**

Members of the Environmental Quality Council who do not comply with the requirements set forth in 40 C.F.R. 123.25 (July 2003) shall recuse themselves from contested case proceedings in which the approval of a surface water discharge permit, or portions of a permit, is being considered by the Council.

Section 16. **Appeals to Council.**

(a) Unless otherwise provided by these Rules or the Environmental Quality Act, all appeals to Council from final actions of the Administrators or Director shall be made within sixty (60) days of such action.

(b) Within 30 days after notification of any administrative decision following an informal conference relating to a surface coal mining operation, the applicant or any person with an interest which is or may be adversely affected may appeal the decision to the Council for a hearing in accordance with Chapters I and II. The Council shall make a final written decision within thirty (30) days after the hearing and furnish the decision to the applicant and all parties to the hearing.

CHAPTER II

RULES OF PRACTICE AND PROCEDURE APPLICABLE TO HEARINGS IN CONTESTED CASES

Section 1. Answer or appearance.

(a) The Director or Applicant shall promptly file a responsive pleading to the petition directed to and served upon the opposing party and the Council, not later than five days before the hearing date.

Section 2. Docket.

(a) When a hearing is instituted, it shall be assigned a number and entered with the date of its filing on a separate page of a docket provided for such purpose. The Council shall establish a separate file for each such docketed case, in which shall be systematically placed all papers, pleadings, documents, transcripts, evidence and exhibits pertaining thereto, and all such items shall have noted thereon the docket number assigned, and the date of filing.

Section 3. Motions.

(a) The Council or presiding officer may, upon reasonable notice to all parties, hear orally, or otherwise, any motion filed in connection with hearings under these rules.

Section 4. Order of Procedure at Hearings.

(a) As nearly as possible, hearings shall be conducted in accordance with the following order of procedure:

(i) The presiding officer shall announce that the Council is open to transact business and call by docket number and title the case to be heard.

(ii) The parties will each be allowed an opening statement to briefly explain their position to the Council and outline the evidence they propose to offer together with purpose thereof.

(iii) Parties' evidence will be heard. Witnesses may be cross-examined by the opposing party or his attorney and by members of the Council and legal counsel for the Council.

(iv) The presiding officer may offer any evidence necessary on behalf of the Council subject to cross examination.

(v) The presiding officer may allow, in his discretion, evidence to be offered in any order.

(vi) The Council may allow, after service of copies on all parties of record, the direct testimony of a witness to be in writing, either narrative or question and answer form, upon the witness being sworn and identifying the written testimony. It may be received into the record as if read, in accordance with W.S. 9-4-108. The witness giving such testimony in writing shall be subject to cross-examination and such evidence shall be received into the record subject to a motion to strike. The written testimony must be served on all other parties in advance to allow a reasonable time to prepare cross-examination.

(vii) Closing arguments of the parties will be made in the manner set by the hearing officer.

(viii) Time for oral argument may be limited by the presiding officer.

(ix) The presiding officer may recess the hearing as required.

(x) After all interested parties have been offered the opportunity to be heard, the presiding officer shall declare the evidence closed and excuse all witnesses. The evidence may be reopened at a later date, for good cause shown, by order of the Council upon motion by a party or on the Council's own motion.

(b) The presiding officer may, at his discretion, require parties to tender written briefs and set the time for filing such briefs.

(c) The presiding officer may declare that the matter is taken under advisement and that the decision and order of the Council will be announced at a later date.

(d) The Council may, at its discretion, appoint a presiding officer, who will then preside during the course of such hearing.

(i) The presiding officer shall, for purposes of that hearing, have all necessary powers normally vested in the Chairman.

Section 5. Witnesses at Hearings to be Sworn.

(a) All persons testifying at any hearing before the Council shall stand and be administered the following oath or affirmation by the presiding officer:

“Do you swear (or affirm) to tell the truth, the whole truth, and nothing but the truth in the matter now before the Council, so help you God?”

(i) No testimony will be received from a witness except under oath or affirmation.

Section 6. Appearance.

(a) Appearances and representation of parties shall be made as follows:

- (i) An individual may appear and be heard in his own behalf.
- (ii) A co-partnership may appear and be represented by a co-partner.
- (iii) A corporation may appear and be represented by a corporate officer or a full-time employee of said corporation.
- (iv) A municipal corporation or its Board of Public Utilities may appear and be represented by a municipal officer, a member of said Board or a full-time employee of said municipality or Board.
- (v) An unincorporated association may appear and be represented by any bona fide general officer or full-time employee of such association.
- (vi) The Department of Environmental Quality may appear and be represented by the Director or Administrator of the relative division, or by the Attorney General or his representative.
- (vii) Any party to a proceeding may appear and be represented therein by an attorney at law who is duly admitted to practice in Wyoming and an active member of the Wyoming State Bar. Any attorney who is not duly licensed to practice law in Wyoming shall not be entitled to enter his appearance in, prosecute or defend any action or proceeding pending before the Council unless he shall have associated with him in such action or proceeding an active member of the Wyoming State Bar.

(b) Any person appearing in a proceeding before the Council shall conform to the recognized standards of ethical conduct.

Section 7. Intervention.

(a) Any person interested in obtaining the relief sought by a party or otherwise interested in the determination of a proceeding relating to other than surface coal mining operations pending before the Council may petition for leave to intervene in such proceeding prior to or at the date of hearing, but not thereafter except for good cause shown. The petition shall set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and if affirmative relief is sought, the same should conform to the requirements for a formal petition. Leave will not be granted unless Council shall determine that the party requesting to intervene is adversely affected by the action, has a legal right under the Environmental Quality Act or the Wyoming Administrative Procedure Act.

(b) For proceedings related to surface coal mining operations, any person may petition for leave to intervene as a full party or, if desired in a limited capacity, at any stage of a proceeding conducted by the Council. The petition shall include the basis for intervention and shall be granted to any person who either could have initiated the proceeding or has an interest which may be adversely affected by the outcome of the proceeding. Regardless of these bases, intervention may be granted whenever appropriate, after consideration of the nature of the issues, the adequacy of the existing parties representation of petitioner's interest, the ability of the petitioner to present relevant evidence and argument, and the effect of intervention on the implementation of the Act. The extent

and terms of participation by an intervenor in a limited capacity shall be determined by the Council.

(c) If leave is granted, the petitioner becomes an intervenor and a party to the proceeding with the right to have notice, appear at the taking of testimony, produce and cross-examine witnesses, and be heard on the argument of the case.

(d) The party intervening must give notice of such intervention to all other parties to the appeal.

Section 8. General Hearing Rules.

(a) Every party shall be accorded the right to appear and testify in person or by counsel or other duly qualified representative. If testifying on behalf of another person or several persons, such person shall present to the hearing officer evidence he is a qualified representative thereof.

(b) Every person testifying shall, at the Council's discretion, be qualified prior to testifying. Such qualification will include ascertaining the residency, occupation, background, education, and expertise of said person.

(c) All parties shall have the right to respond and present evidence and argument on all issues involved.

(d) No person shall be required to report, inspect, or perform any investigative act except as authorized by law.

(e) All persons required to submit data or evidence shall be either entitled to retain the data or evidence or upon payment of a reasonable cost may procure a copy thereof.

(f) All irrelevant, immaterial, or unduly repetitious evidence may be excluded.

(g) Effect to the rules of privilege shall be given as recognized by law. Documentary evidence may be received in the form of copies of excerpts, if the original is not available. All copies are subject to being compared with the original.

(h) The presiding officer shall:

(i) Administer oaths and affirmations.

(ii) Issue subpoenas.

(iii) Rule upon offers of proof and receive relevant evidence.

(iv) Take or cause to be taken depositions.

(v) Preside over the hearing and regulate its proceedings.

(vi) Preside over and set the time for such pre-hearing conferences as he deems necessary.

(vii) Dispose of procedural requests. The presiding officer may be assisted by a representative of the Attorney General's Office when such assistance is deemed necessary.

(viii) The presiding officer shall officially open and officially close the hearing.

Section 9. Subpoenas.

(a) Subpoenas requiring the attendance of witnesses from any place in the State of Wyoming at any designated place of hearing or for the production of books, papers, or other documents may be issued by the presiding officer upon written application of any party or upon motion of the presiding officer in accordance with the Wyoming Rules of Civil Procedure and Administrative Procedure Act.

(i) Items sought shall be set forth with particularity.

(ii) All subpoenas shall be served by personal delivery or by certified mail return receipt required, to the party served.

(iii) Cost of the subpoenas shall be paid by the party requesting the service.

Section 10. Depositions.

(a) In all contested areas coming before the Council, the taking of depositions and discovery shall be available to the parties and to the Council on its own motion in accordance with the provisions of W.S. 9-4-107(g).

(b) The Council, for the purposes of allowing orderly presentation of evidence, may govern the conduct of discovery and the time limitations involved.

Section 11. Witness Fees.

(a) Witnesses who are summoned before the Council are entitled to the same fees as are paid for like service in the District Courts of the State of Wyoming. Such fees shall be paid by the party at whose insistence the testimony was taken.

Section 12. Decision and Order.

(a) The Council shall make a written decision and order in all cases, which decision shall contain findings of fact and conclusions of law based exclusively on the record and include the vote on the decision. The decision and order of the Council shall be placed in the record of the case which shall be retained by the Council.

Section 13.

(a) The Council may, in its discretion, allow any pleadings to be amended or corrected, or any omission therein to be supplied.

Section 14. Applicability of Rule of Civil Procedure.

(a) The Wyoming Rules of Civil Procedure, insofar as the same may be applicable and not inconsistent with the laws of the state and these rules shall apply to matters before the Council.

envqlty/pracproc/03_Rule-Making_Hearings_or_Hearings_by_Administrator_of_a_Division Agency
ENVQLTY
Program PRAC&PROC Practice and Procedure
Chapter Name Rule-Making Hearings or Hearings by Administrator of a Division Chapter No.3

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CHAPTER III

RULES OF PRACTICE AND PROCEDURE APPLICABLE TO RULE-MAKING HEARINGS OR HEARINGS BY AN ADMINISTRATOR OF A DIVISION OF DEQ

Section 1.

Except as otherwise directed by the Council, the provisions of the Rules contained in this Chapter (III), (Sections 1 et seq.), shall govern:

- (a) Any hearings conducted pursuant to a petition (within the meaning of W.S. 9-4-106) for the promulgation, amendment, or repeal of any rules (as defined in W.S. 9-4-101(a)(vii)).
- (b) Any hearings conducted pursuant to W.S. 9-4-103 for the promulgation of rules and regulations recommended by the Director or Administrator.
- (c) Any hearings by the Administrator on land, air or water quality or solid waste management permits held because of significant public comment.
- (d) Any hearings by the Administrator for a variance under W.S. 35-11-601, excluding SO₂ variances.
- (e) Any hearings by the Council to consider the designation of areas of unique and irreplaceable historical, archaeological, scenic or natural value pursuant to W.S. 35-11-112(a)(v).
- (f) Any informal conference held by the administrator of Land Quality on a permit application. However, a record shall be made of the conference, unless waived by all parties. Such record shall be maintained and shall be accessible to the parties until final release of the performance bond.

Section 2.

Any party may petition the Council to promulgate, amend, or repeal any rule or rules.

- (a) Each petition must be submitted in duplicate to the Chairman of the Environmental Quality Council and to the Director of the Department of Environmental Quality.
- (b) Except as otherwise provided by the Council, the filing of a petition under this section shall not stay the effectiveness of any rule or rules.
- (c) After filing of the petition, the Council may hold a prehearing conference to review the petition and its persuasiveness.
- (d) As soon as practicable, the Council shall deny the petition in writing (stating its reasons for the denial) or initiate rule-making procedures.
- (e) Before the adoption, issuance, amendment, or repeal of any rule, or the commencement of any hearing on such proposed rule-making, the Council shall cause notice to be given in accordance with the provisions of W.S. 9-4-103.

Section 3. Informal Conference.

(a) Any request that the Administrator hold an informal conference on any application for a surface coal mining permit shall briefly state the issues to be discussed, whether the requester desires the conference to be held in the locality of the proposed mining operation, and whether access to the proposed permit area is desired. If requested, the Administrator may arrange with the applicant to grant parties to the conference access to the permit area for the purpose of gathering information relative to the conference. The conference shall be held in the locality of the operation or at the state capitol, at the option of the requester, within 20 days after the final date for filing objections unless a different period is stipulated to by the parties. If all parties requesting the conference reach agreement and withdraw their request, the conference need not be held.

(b) Where a hearing is requested pursuant to Chapter I, Section 16b, the Council may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if:

- (i) All parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;
- (ii) The person requesting that relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding;
- (iii) Such relief will not adversely affect the

public health or safety or cause significant imminent environmental harm to land, air or water resources; and

(iv) The relief sought is not the issuance of a permit where a permit has been denied by the Administrator.

Section 4.

(a) The provisions of W.S. 9-4-107 through 9-4-112 (relating to the conduct of hearings for contested cases) do not apply to hearings held under this Chapter (III) of these Rules.

As a fact-finding legislative proceeding, each hearing is nonadversary and there are no formal pleadings or adverse parties.

(b) Prior to the adoption, amendment or repeal of any rules, other than interpretive rules or statements of general policy, the Department shall publish notice of its intended action, including the date, time and place of any hearing, in a newspaper of general circulation in the state, and afford a thirty (30) day public comment period after the last publication. In addition, the council will hold at least one public hearing on the proposed action. All information will be received by the council without regard to rules of evidence.

(c) The hearing is directed to receiving factual evidence and expert opinion testimony relative to the issues in the proceeding.

(d) The Council, upon its own motion or upon the motion of any party, to promote the orderly presentation of evidence, may adopt one or more of the provisions contained in Chapter II of these Rules governing procedures in contested cases. Such action by the Council shall not constitute an agreement that the proceeding before the Council is in the nature of a contested case.

(e) The Council or Administrator may impose time limitations upon oral presentations.

Section 5. Witnesses.

(a) The Council, designated hearing officer, or Administrator may direct that summaries to the testimony of witnesses be prepared in advance of the hearing. If so directed, copies of such summaries shall be served upon the members of the Council or Administrator or upon any other party as the designated hearing officer may direct.

(b) Witnesses will be permitted to read summaries of their testimony into the record or make other oral statements as they so desire. Witnesses shall not be available for crossexamination, but will be permitted to answer questions directed to them by members of the Council or Administrator.

(c) When necessary to prevent undue prolongation of the hearing, the presiding officer may limit the number of times any witness may testify.

Section 6. Comments.

(a) All timely comments shall be considered by the Council before final action is taken on any proposal to promulgate, amend, or repeal any rule. Late filed comments may be considered so far as possible without incurring additional expenses or delay.

Section 7. Decision.

(a) As soon as practicable after receipt of the official transcript or as soon as practicable after the expiration of the time set for the submittal of written comments, the Council or Administrator shall render a written decision on the issues presented at the hearing.

CHAPTER IV

REHEARING

Section 1. Petition for Rehearing.

(a) Any party seeking any change in any decision of the Council may file a petition for rehearing within twenty (20) days after the written decision of the Council has been issued.

(b) Any petition for rehearing filed under this section must be confined to new questions raised by the decision and upon which the petitioner had no opportunity to argue before the Council.

(c) Any petition for rehearing must specify whether the prayer is for reconsideration, rehearing, further hearing, modification of effective date, vacation, suspension or otherwise.

(d) Except as the Council may otherwise direct, the filing of a petition under this section shall not stay the effectiveness of any decision respecting the promulgation, amendment, or repeal of any rule or rules.

Section 2. Scope.

(a) A petition for rehearing may be filed in hearings conducted under Chapter II or Chapter III.

(b) The granting of a petition to rehear is solely within the discretion of the Council.

CHAPTER V

PETITIONS FOR AWARD OF COSTS AND EXPENSES UNDER W.S. 35-11-437(f)

Section 1. Petition and Answer.

(a) As described in W.S. 35-11-437(f), any person may file a petition for award of costs and expenses within forty five (45) days of receipt of a final order from the Council. Any person served with a copy of the petition shall have thirty (30) days from service within which to file an answer to the petition. Failure to make a timely filing of the petition may constitute a waiver of the right to such an award.

(b) The petition shall contain the petitioner's name and a detailed accounting, including receipts, of all costs and expenses authorized under W.S. 35-11-437(f). Where attorneys' fees are claimed, the petition shall include evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, and the experience, reputation and ability of the individual(s) performing the services.

Section 2. Who May Receive an Award.

(a) Appropriate costs and expenses including attorneys' fees may be awarded:

(i) From the permittee to any person if he initiates or participates in any administrative proceeding reviewing enforcement actions, but only if the Council finds that:

(A) A violation of the Act, regulations or permit has occurred, or that an imminent hazard existed; and

(B) The petitioner substantially contributed to a full and fair determination of the issues.

(ii) To a permittee from any person, but only if the Council finds that:

(A) The person initiated or participated in enforcement action in bad faith for the purpose of harassing or embarrassing the permittee.

(iii) To any person, other than a permittee or his representative, from the Department if the person initiates or participates in any contested case proceeding under the Act as it provides for regulation of surface coal mining and reclamation operations in accordance with P.L. 95-87, who prevails in whole or part, achieving at least some degree of success on the merits and the Council finds that the person substantially contributed to a full and fair determination of the issues.

(iv) To a permittee from the Department when the Council finds that the Department issued an order of cessation, a notice of violation or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee.

(v) To the Department where it demonstrates that a person initiated or participated in reviewing of any enforcement action in bad faith for the purpose of harassing or embarrassing the Department.

Section 3. Awards.

(a) An award under this chapter may include:

(i) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred as a result of initiation and/or participation in a proceeding under the Act as it provides for regulation of surface coal mining and reclamation operations in accordance with P.L. 95-87.

(ii) All costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred in seeking the award before the council.

CHAPTER VI

REVIEW BY THE DIRECTOR

Section 1. Review by the Director.

(a) Pursuant to the supervisory authority recognized in W.S. 35-11-110, and subject to any applicable law and to any right of appeal to the Council, the Director may review by informal conference or otherwise and affirm, modify, terminate or vacate any decision, order, notice by the Administrator, or assessment of penalty by the agency.

(b) Such review and action shall be taken by the Director when required by law. Apart from this, the Director may grant a petition for review filed with him by any interested person after considering the following factors: the need for a consistent policy in the area; the final nature of the decision; the amount of discretion statutorily vested with the Administrator; any potential adverse environmental or public health or safetyrelated impacts; and consistency of the Administrator's decision with law or regulations.

Section 2. Initiation of Review.

(a) The petition for review by the Director shall set forth in writing those items required by Chapter I, Section 3.c.(1)-(3). Upon receipt, the Director shall forward a copy thereof to the affected Administrator and to any party who appeared in prior proceedings pertaining to the same matter. A petition for review of a notice of abatement under W.S. 35-11-437 shall be filed within thirty (30) days. All other notices shall be filed within fifteen (15) days.

(b) Within thirty (30) days the Director shall grant or deny the petition and schedule any requested conference. Notice of the decision on the petition shall be sent to the petitioner, the affected Administrator, any person served with the petition and all district offices. If the petition is denied, the Director shall give a brief statement of the reasons for the denial.

Section 3. Conduct of Conference and Decision.

(a) If an informal conference is held, any person has the right to attend and participate in the conference. The procedure shall be informal, with no pre-hearing conference, discovery or cross-examination. The Director may accept oral or written statements and any other relevant information from any participant to the conference. An electronic or stenographic record shall be made of the conference proceeding, unless waived by all the participants. The record shall be maintained and shall be accessible to the participants of the conference.

(b) Following the Director's review, including any informal conference, the Director shall give each participant and the Administrator a brief written statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, together with a notice of any available appeal to the Council.

Section 4. Appeal to the Council.

(a) Where an appeal to the Council of the Administrator's decision is afforded, a petition should be filed with the Council within the time provided by law. This proceeding will be stayed if an informal conference with the Director is requested until the Director has made his determination. If the petitioner is not satisfied with the Director's determination, he shall inform the Council that he wishes to proceed with appeal to the Council. The Council shall conduct the hearing as if the informal hearing had not occurred, provided however, that the Director's decision may be introduced into evidence.

(b) At formal review proceedings before the Council, no evidence as to statements made or evidence produced by one participant at a conference shall be introduced as evidence by another participant.

Section 5. Miscellaneous.

(a) This Chapter shall not be construed to allow the Director to review matters or issues and grant relief either in areas which are within the exclusive jurisdiction of the Council, or from any informal conference proceeding requested and held pursuant to W.S. 35-11-406(k).

(b) Unless review by the Director is required by law, failure to seek review shall not be construed as a failure to exhaust administrative remedies.

(c) For the purposes of this Chapter, "Administrator" shall also include the Solid Waste Management Program Supervisor.

CHAPTER VII

DESIGNATION OF AREAS PURSUANT TO W.S. §35-11-112(a)(v)

Section 1. Authority.

These rules are promulgated by authority of the Environmental Quality Act, W.S. §35-11-112 and W.S. §16-3-103.

Section 2. Purpose.

These rules are intended to provide a process to implement W.S. §35-11-112(a)(v) of the Environmental Quality Act which provides that the Council shall designate those areas of the state that are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical or scenic value. These rules apply only to the Land Quality Article, Article 4., of the Environmental Quality Act. The scope of these rules is limited to areas sought to be designated for purposes related to the permit approval and denial process contained in W.S. §35-11-406(m) for noncoal mining operations. Included in these rules are criteria to be used in evaluating lands of the state that are being considered for this designation. The hearing procedure is similar to that of Chapter III of these rules, and is authorized by W.S. §16-3-103.

Section 3. Applicability.

(a) Areas designated pursuant to these rules are subject to the limitation contained in Section §35-11-406(m). A designation under Chapter VII shall not bar issuance of a coal mining permit under Section §35-11-406(n).

(b) No areas subject to existing mining operations for which the Department of Environmental Quality shall have issued a permit shall be affected by a designation so long as the permit remains in effect.

(c) No area subject to an application for a noncoal mining permit shall be considered for designation if the petition to designate is filed after the close of the public comment period allowed by Section §35-11-406(k).

(d) A designation as very rare or uncommon shall not restrict non-mining agricultural operations. Nor shall such designation restrict activities excluded from the Environmental Quality Act, Section §35-11-401(e) and Section §35-11-1104.

Section 4. Definitions.

(a) “Critical habitat” as defined in Section §35-11-103(e)(xxix) means only that fish and wildlife habitat designated as critical by the United States Secretary of the Interior or Secretary of Commerce, for the survival and recovery of listed threatened and endangered species.

(b) “Important habitat” or “Crucial habitat” as defined in Section §35-11-103(e)(xxx) means

that fish and wildlife habitat, exclusive of agricultural lands, which in limited availability, increases the species diversity of a localized area and fulfills one (1) or more of the essential living requirements of important wildlife species.

(c) “Fragile lands” means geographic areas containing natural, ecologic, scientific or aesthetic resources that could be damaged or destroyed by mining operations. For examples of fragile lands see Section 1.(a), Chapter XXVIII, Land Quality Rules and Regulations.

Section 5. General Procedure.

(a) The rules in this Chapter shall supersede the rules of Chapter III, Section 1.e. for petitions for designation of lands pursuant to W.S. §35-11-112(a)(v).

(b) The hearing under this chapter is not a contested case proceeding but is a non-adversarial legislative proceeding except where the surface and/or mineral owner objects to the designation. Under those circumstances all parties shall be entitled to cross-examine witnesses and proceed under contested case procedures.

(c) The Council, on its own motion or on the motion of any person, in the interests of developing information about the area considered for designation, may adopt one or more of the provisions contained in Chapter II of the rules governing procedures in contested cases. Such action by the Council shall not constitute a finding that the proceeding before the Council is in the nature of a contested case.

Section 6. Initiation of Proceedings.

(a) Any person may file a petition to designate lands as very rare or uncommon pursuant to W.S. §35-11-112(a)(v) or a petition to modify or terminate an existing designation. The petition shall contain the following:

(i) The name, address, phone number, and fax number for the petitioner;

(ii) The location by legal description, including section, township and range, of the area the petitioner is proposing for designation;

(iii) The names, if any, by which an area may be known locally;

(iv) The distance of the area to the nearest city or town, and the county in which the area is located;

(v) An original USGS topographic map showing the area in question which reflects the surface land ownership pattern (private, state, federal) in the area;

(vi) A list of the names and addresses of the surface and mineral owners whose lands are included within the area proposed for designation, modification, or termination with a description of the ownership interest of each surface and mineral owner, including a legal description of the lands in which each person has an interest;

(vii) A concise statement of the reasons the area is alleged to be very rare or uncommon and a description of the archaeological, surface geological, historical, wildlife, botanical, or scenic attributes of the area, or, if the petition seeks to modify or terminate an existing designation, a concise statement of the reasons for the modification or termination including an explanation of the substantial change in circumstances that has occurred since the designation;

(viii) A description of the current and historical land use in the area;

(ix) A list of any special designations or descriptions of the area made by other governmental agencies, including, but not limited to, designations by the Department of Interior Bureau of Land Management or Office of Surface Mining, designations by the U.S. Fish and Wildlife Service, and designations by the Wyoming Department of Game and Fish;

(x) The names and addresses of all expert witnesses whose work or whose testimony may be offered by the petitioner to support the petition;

(xi) The names and addresses of the surface owners of lands contiguous to the area proposed for designation, modification, or termination;

(xii) A list of any scientific documents to be offered by the petitioner to support the petition that discuss the area to be designated, modified, or terminated; and

(xiii) At the time of filing, eight (8) copiers of the petition shall be submitted to the Chairman of the Environmental Quality Council at the Council's office in Cheyenne, Wyoming. The petition shall be considered to be filed in the Council's office as of the date it is received in that office.

(b) Upon receipt of a petition under these rules, the Council shall consider the petition at a regularly scheduled Council meeting and shall notify the petitioner and surface and mineral owners whose lands or minerals are within the area proposed for designation of the time, date, and location of the meeting. The Council's consideration shall be limited to whether the petition should be accepted or dismissed.

(c) The Council may dismiss a petition if, after a review of the petition, the Council determines that it does not provide the information required by these rules or that the petition does not provide sufficient information to support the conclusion that the area may be designated, modified, or terminated if the Council were to proceed.

(d) If the Council votes to dismiss the petition, a brief statement of the reasons for dismissal of a petition shall be served on the petitioner. The petitioner may file an amended petition at any time.

(e) If the Council votes to consider a petition, the Council shall initiate formal hearing procedures in accordance with these rules.

Section 7. Hearing and Notice.

(a) The Council shall:

- (i) Set the time, date, and location of a hearing on the petition, and
 - (ii) Schedule the hearing within the county in which the lands or a major portion thereof are located.
- (b) Subject to the review and approval of the form of the public notice by the Council, the petitioner shall:
- (i) Publish notice of the hearing once per week for 4 consecutive weeks with the notice beginning 45 days in advance of the hearing in a newspaper of statewide circulation and a newspaper of general circulation in the vicinity of the area proposed for designation, modification, or termination;
 - (ii) Serve notice of the hearing by personal service or by certified mail, which notice shall include a copy of the petition, to all surface and mineral owners whose lands and/or mineral interests are included within the area proposed for designation, modification, or termination;
 - (iii) Serve notice of the hearing by regular mail to all surface owners whose lands are contiguous to the area proposed for designation, modification, or termination;
 - (iv) Serve notice of the hearing by regular mail to the county commissioners of the counties wherein lands proposed to be designated, or a designation may be modified or terminated, lie, the Attorney General's Office, and the Governor's Office; and
 - (v) Except as otherwise provided in these rules, notice shall be served in accordance with the Wyoming Rules of Civil Procedure.
- (c) Costs of the publication and mailing of notice of the proceedings shall be borne by the petitioner.

Section 8. Witnesses.

- (a) Any person may comment on a proposed designation, modification, or termination either by appearing at the hearing and entering comments into the record orally, or by submitting written comments within a time period set by the Council.
- (b) Witnesses submitting testimony in writing shall submit one (1) copy, and are requested to submit 8 copies, of their complete testimony to the Council.
- (c) Witnesses will not be cross-examined except by the Council, the Council's staff, or other persons designated by the Council.
- (d) Whenever the Council allows testimony to be submitted in writing, the testimony shall be considered to be timely filed if it is received in the office of the Environmental Quality Council by the end of the business day on the date set by the Council. Late submittals shall not be considered by Council members unless the Council votes to reopen the record.

(e) Witnesses may be called by the Council, and expenses of these witnesses will be paid by the Council.

(f) The Council may impose time limitations on oral presentations at hearings.

Section 9. Record.

The hearing proceedings including all testimony shall be reported verbatim stenographically or by other appropriate means determined by the Council. A copy of the proceedings will be furnished to any person upon written request and the payment of a reasonable fee. If a person elects to have the hearing transcribed by a certified court reporter, he or she must make the necessary arrangements and bear the cost thereof.

Section 10. Decision.

(a) The Council, in its discretion, may direct the petitioner, the Council's staff, or others to analyze the oral and written comments.

(b) An analysis of comments shall be in writing, shall be submitted at a time to be set by the Council, and shall be a part of the record of the designation proceedings. The analysis may include recommendations to modify the petition to designate.

(c) The Council shall issue a written decision. The decision may be to designate all or a portion of the area or to deny the petition. The Council shall issue a written statement of reasons for the decision.

(d) The petitioner shall be served with a copy of the Council's decision and statement of reasons.

Section 11. Criteria for Designation.

(a) In considering designations, the Council shall follow a two-tiered review process. First, the Council must determine whether the area is eligible for designation by virtue of the existence of one or more of the particular values specified in the statute. Secondly, the Council must determine whether any particular value that is found to exist is very rare or uncommon.

(b) For an area to be eligible for designation, the Council must make an initial finding that the area at issue possesses particular historical, archaeological, wildlife, surface geological, botanical or scenic value. For purposes of making the initial finding, or refusing to make the initial finding, the Council shall consider the significance and the weight of all specifically identified factors that are set forth in these criteria.

(c) For purposes of determining whether an area of the State may be considered to have particular historical, prehistorical, or archaeological value the Council shall consider the following factors:

- (i) Whether the area is mentioned prominently in historic journals or other historic literature;
 - (ii) Whether the area is important because it is associated with cultural or religious traditions and practices;
 - (iii) Whether the area has received designation pursuant to state or federal laws that provide for special protection and management due to outstanding historic or prehistoric values such as national historic landmarks, national historic sites, or the National Register of Historic Places; or
 - (iv) Whether the area contains buildings, structures, artifacts, or other features that are significant in the history or prehistory of the state.
- (d) For purposes of determining whether an area has particular wildlife value the Council shall consider the following factors:
- (i) Whether the area includes lands that are considered irreplaceable fish or wildlife habitat;
 - (ii) Whether the area includes preserves or easements which have been established and used for the protection for habitat for wildlife;
 - (iii) Whether the area includes lands that the Game and Fish Department has designated as crucial or vital habitat for resident species;
 - (iv) Whether the area contains or may affect fisheries classified as class I by the Wyoming Game and Fish Department;
 - (v) Whether the area includes fragile lands that offer unique wildlife or scientific values;
 - (vi) Whether the area includes federally designated critical habitat for threatened or endangered plant or animal species which is determined by the U.S. Fish and Wildlife Service or the Wyoming Game and Fish Department to be of essential value and where the presence of threatened or endangered species has been scientifically documented;
 - (vii) Whether the area contains a bald or golden eagle nest or nest site that is determined to be active and includes all or a portion of a buffer zone of land around the nest which has been evaluated and approved by the U.S. Fish and Wildlife Service;
 - (viii) Whether the area includes bald and golden eagle roost and concentration areas used during migration and wintering;
 - (ix) Whether the area contains a falcon (excluding kestrel) cliff nesting site with an active nest and a buffer zone around the nest site which has been evaluated and approved by the U.S. Fish and Wildlife Service; or

(x) Whether the area includes lands which are high priority habitat for migratory birds of high federal interest on a regional or national basis as determined by the U.S. Fish and Wildlife Service.

(e) For purposes of determining whether an area has particular surface geological value the Council shall consider the following factors:

(i) Whether the area has unique surface geological formations that expose upheavals and faults that are indicative of sub-surface geological features;

(ii) Whether the area has significant paleontological resources; or

(iii) Whether the area has geologic features with unusual or substantial recreational, aesthetic, or scientific value.

(f) For purposes of determining whether an area has particular botanical value the Council shall consider the following factors:

(i) Whether the area is critical habitat for endangered or threatened plant species as designated by state or federal agencies;

(ii) Whether the area contains stands of a rare native vegetation type, or contains stands of a native vegetation type that is now rare, or contains stands of a native vegetation type in pristine condition for which pristine stands are unusual; or

(iii) Whether the area contains plant species and habitat determined to be crucial or vital for resident wildlife species.

(g) For purposes of determining whether an area has particular scenic value the Council shall consider the following factors:

(i) Whether the area includes lands within or adjacent to a corridor for a river designated as a National Wild and Scenic River or a corridor for a National Scenic Byway;

(ii) Whether the area has been the subject of substantial artistic attention in the works of artists, sculptors, photographers, or writers; or

(iii) Whether the area has substantial aesthetic value and its value would be apparent to a reasonable person.

(h) An area shall be designated pursuant to W.S. §35-11-112(a)(v) if, in addition to finding that the area is eligible for designation pursuant to Section 11.a., the Council finds that the area is very rare or uncommon. For purposes of determining if an area is very rare or uncommon the Council shall consider the following:

(i) Whether the area exhibits historical, archaeological, wildlife, surface geological, botanical, or scenic values that are very rare or uncommon when compared with other areas of the state or a region therein;

(ii) Whether the area contains historical, archaeological, wildlife, surface geological, botanical, or scenic values seldom found within the state or a region therein; or

(iii) Whether the area contains historical, archaeological, wildlife, surface geological, botanical, or scenic values known or suspected to be declining which, if left unprotected, could become extinct or extirpated.

CHAPTER 8

SMALL BUSINESS VOLUNTARY DISCLOSURE INCENTIVE

Section 1. **PURPOSE**

This Rule sets forth the requirements for waiving penalties against small businesses that voluntarily disclose environmental non-compliance to the Department or discover violations through compliance assistance or outreach seminars, and then, correct those violations in accordance with this rule. It is the Department's objective to provide small businesses with an incentive to approach the agency for assistance by reducing the fear of penalties.

Section 2. **DEFINITION OF A SMALL BUSINESS**

(a) A small business includes any person, as defined in W.S. § 35-11-103(vi), with 100 or fewer employees in all of its facilities or operations, whether located in or outside of the State of Wyoming, except that:

(i) Businesses seeking a penalty waiver for air quality violations under Article 2 of the Environmental Quality Act, W.S. §§ 35-11-201 through 212, must meet the definition of a small business stationary source found in W.S. § 35-11-209 and cannot be a major source of hazardous pollutants under W.S. § 35-11-203(a)(i)(B);

(ii) Businesses regulated under Article 5 of the Environmental Quality Act, W.S. §§ 35-11-501 through 520, are not entitled to a penalty waiver under this rule for violations of W.S. §§ 35-11-501 through 520 if they are a large quantity generator or are classified as a treatment, storage or disposal facility under the state hazardous waste regulations; and

(iii) Businesses under control or ownership of a large parent organization that does not qualify under this rule, are not small businesses.

(b) The number of employees shall be calculated by determining the full-time equivalents on an annual basis and does not include contractors and consultants. The Department shall not consider employees who work less than 35 hours per week as full-time equivalents.

Section 3. **QUALIFICATIONS FOR PENALTY WAIVER**

(a) The Department will not seek civil penalties from a small business that voluntarily discloses in writing to the Department non-compliance with the Act, any rule, regulation or standard promulgated under the Act, within 60 days of discovering the violation, provided that the business has corrected the violation or corrects the violation in accordance with a compliance schedule approved by the Department. The burden will be on the business to demonstrate that it has disclosed the violation within 60 days of discovery. If the business is unable to correct the violation within 180 days or violates a compliance schedule issued by the Department establishing a shorter period for correcting the violation, the business will no longer qualify for the penalty waiver. Upon good cause shown by the small business, the Director may grant an extension of the deadline for correcting the violation.

(b) The Department will not seek civil penalties from a small business that has made a good faith effort to operate in compliance prior to discovery of the violation, as evidenced by a request for compliance assistance from the Department or attendance at one or more compliance assistance seminars; and as evidenced by prompt correction of any violations discovered through such efforts and implementation of good environmental management practices. To qualify for the waiver, the business must document its participation in compliance assistance or outreach seminars and the steps it has taken as a result to improve compliance or correct the violations. In the event that the Department believes the small business needs to take further steps to correct a violation, the Department shall issue a compliance schedule. The small business must meet the requirements of the compliance schedule to maintain the penalty waiver.

Section 4. EXCEPTIONS TO PENALTY WAIVER

(a) The penalty waiver is unavailable if:

(i) The Department has previously issued a warning letter, a notice of violation or taken other enforcement action against the small business for violation of the same standard disclosed to the Department;

(ii) The small business has been subject to three or more enforcement actions for any non-compliance of environmental regulations within the last 5 years;

(iii) The small business violates a Department permit or order of the Council;

(iv) The small business is under investigation for any violation of the Act at the time it discloses the violation to the Department, seeks compliance assistance from the Department or participates in an outreach seminar;

(v) The violation involves criminal conduct;

(vi) The violation results in a significant economic advantage for the business;

(vii) The violation was committed willfully;

(ix) The violation presents a significant threat or imminent and substantial endangerment to public health or the environment;

Section 5. MANDATORY DISCLOSURE

Notwithstanding Sections 1 through 4 above, disclosure of a violation is mandatory and not subject to a penalty waiver under this rule when the Environmental Quality Act, any rule, regulation, standard, federal law or regulation, local ordinance, order of the Council or any court, or any Department permit requires reporting of the violation to the Department.

Section 6. LIMITATIONS OF THE RULE

(a) Nothing in this rule diminishes the Department's authority to conduct investigations, investigate complaints, or to issue notices of violation and orders under Article 7 of the Environmental Quality Act, W.S. § 35-11-701, or to seek injunctive relief under W.S. § 35-11-115 or Article 9 of the Environmental Quality Act, W.s. §§ 35-11-901 through 904.

(b) Nothing in this rule prohibits a small business that otherwise qualifies for a penalty waiver from declining to exercise the waiver and allowing the Department to seek a penalty.