

Wyoming Administrative Rules

Environmental Quality, Dept. of

Practice and Procedure

Chapter 2: Contested Case Hearings

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CHAPTER 2 CONTESTED CASE HEARINGS

Section 1. Purpose and Scope.

These rules are promulgated with the intent to adopt as much of the Chapter 2 Rules for Contested Case Practice and Procedure before the Office of Administrative Hearings (OAH Rules) adopted under W.S. 16-3-102(d) as is consistent with the specific and distinct requirements of the Department and the Council and applicable law. These rules shall govern all contested case proceedings before the Council.

Section 2. Applicability of the Wyoming Rules of Civil Procedure.

The Council shall conduct all contested case hearings with reference to the Wyoming Rules of Civil Procedure. Section 26 of this chapter specifically incorporates Rules 11, 12(b)(6), 24, 45, 52, 56, and 56.1 of the Wyoming Rules of Civil Procedure.

Section 3. Informal Proceedings and Alternative Dispute Resolution.

(a) Parties to a contested case are encouraged to resolve the contested case through settlement, mediation, arbitration, or other means throughout the duration of a contested case. If the parties choose to engage in mediation or arbitration, they shall file a joint request for continuance pending outcome of the mediation or arbitration. If the parties choose to engage in informal settlement discussions, they may file a joint request for continuance pending outcome of the informal settlement discussions.

(b) With the consent of all parties, the hearing officer may assign a contested case to a mediating hearing officer on limited assignment for the purpose of nonbinding alternative dispute resolution methods. Such methods shall be conducted in accordance with the procedures prescribed by the mediating hearing officer.

(c) Parties shall promptly notify the hearing officer of all settlements, stipulations, agency orders, or other action eliminating the need for a contested case hearing. The hearing officer shall forward such notice to the Council. Upon such notice, the Council shall enter an order dismissing the case.

Section 4. Initiation of Contested Case.

(a) All persons requesting a contested case hearing or protesting a permit shall file the original written petition with the Council and serve additional copies to the Director of the Department and any other parties.

(i) A person initiating a contested case shall serve the petition by registered mail, return receipt requested. Thereafter, all service shall be proved in accordance with the Wyoming Rules of Civil Procedure.

(ii) Where a person is objecting to a permit, service of all documents shall include the permit applicant when serving the petition and all other pleadings and motions.

(b) The petition for hearing shall set forth:

(i) Name, phone number, electronic mail address, and physical address of the petitioner and, if applicable, the petitioner's attorney;

(ii) The action, decision, order, or permit upon which a hearing is requested;

(iii) A statement in ordinary but concise language of the specific allegations on which the petition is based, including references to the statute, rule, or order that the petitioner alleges has been violated, and

(iv) A request for hearing before the Council.

(c) The contested case shall be deemed commenced on the date of filing the petition with the Council.

(d) No responsive pleadings are mandatory prior to the prehearing scheduling conference.

Section 5. Filing and Service of Papers

(a) In all contested case proceedings, the parties shall file all original documents, pleadings, and motions with the Council and serve all other parties with true and correct copies of the particular document, pleading, or motion. The original and all copies shall be accompanied by a certificate of service. The Council shall maintain the complete original file, and all parties and the hearing officer shall be provided copies of all contested case documents, pleadings, and motions contained therein.

(b) Filing and service under this rule shall be made by hand delivery, U.S. mail transmittal to the last known address, or electronically uploaded to the relevant docket at <http://wyomingeqc.wyo.gov/>. Where all parties have not consented to receive electronic service, the party electronically filing shall otherwise serve the documents to the parties who have not consented to receive electronic service. Parties may file by means other than those described in this Section upon approval from the hearing officer.

Section 6. Referral to Office.

(a) Upon referral to the Office to conduct a contested case in accordance with W.S. 35-11-112(a), the Council shall transmit to the Office copies of appropriate documents reflecting the dispute and the basis thereof, including any written challenge(s) initiating the contested case and a reference to applicable law.

(b) The Council shall submit a transmittal sheet, on a form provided by the

Office, sufficiently identifying the contested case, including:

- (i) The name of the known parties and their attorneys or representatives;
- (ii) A concise statement of the nature of the contested case;
- (iii) Notification of any time limits for the setting of a hearing or entry of a decision, location requirements, and anticipated special features or unique requirements; and
- (iv) Certification by an authorized officer of the Council that all parties have been properly served with a true and complete copy of the transmittal form.

Section 7. Designation and Authority of Hearing Officer; Recusal.

(a) The Chair may refer, assign, or designate a hearing officer to preside over any contested case unless otherwise provided by law. When appropriate under applicable law and at the Council's request, the hearing officer may provide a recommended decision.

(b) At any time while a contested case is pending, a hearing officer or Council member may withdraw from a contested case by filing written notice of recusal or entering a verbal notice of recusal into the record. As soon as the notice of recusal is entered, the recused hearing officer or Council member shall not participate in the contested case.

(c) Upon motion of any party, recusal of a hearing officer or Council member shall be for cause. Whenever the grounds for such motion become known, any party may move for recusal of a hearing officer or Council member on the ground that the hearing officer or Council member:

- (i) Has been engaged as counsel in the action prior to being appointed as hearing officer;
- (ii) Has a material interest in the outcome of the action;
- (iii) Is related by consanguinity to a party;
- (iv) Is a witness in the action;
- (v) Is biased or prejudiced against the party or the party's attorney or representative; or
- (vi) Any other ground provided by law.

(d) A motion for recusal shall be supported by an affidavit or affidavits of any person or persons stating sufficient facts to show the existence of grounds for the motion. Prior to a hearing on the motion, any party may file counter-affidavits. The motion shall be heard by the hearing officer or, at the discretion of the hearing officer, by another hearing officer. If

the motion is granted, the Council Chair shall immediately designate another hearing officer to preside over the contested case or shall excuse the Council member(s).

(e) A hearing officer appointed from outside the Council members shall not be subject to a voir dire examination by any party.

(f) Subject to limitations imposed by the hearing officer, any party may be permitted to conduct a voir dire examination of a Council member.

Section 8. Appearances and Withdrawals.

(a) A party, whether it be an individual, corporation, partnership, governmental organization, or other entity may appear through an attorney or representative. An individual may represent himself/herself. An individual or entity seeking to intervene in a contested case under Rule 24 of the Wyoming Rules of Civil Procedure may appear through an attorney or representative prior to a ruling on the motion to intervene.

(b) Prior to withdrawing from a contested case, an attorney shall file a motion to withdraw. The motion for an attorney's withdrawal shall include a statement indicating the manner in which notification was given to the client and setting forth the client's last known address and telephone number. The hearing officer shall not grant the motion to withdraw unless the attorney has made reasonable efforts to give actual notice to the client that:

(i) The attorney wishes to withdraw;

(ii) The client has the burden of keeping the hearing officer informed of the address where notices, pleadings, or other papers may be served;

(iii) The client has the obligation to prepare, or to hire another attorney or representative to prepare, for the contested case and the dates of proceedings;

(iv) The client may suffer an adverse determination in the contested case if the client fails or refuses to meet these burdens;

(v) The pleadings and papers in the case shall be served upon the client at the client's last known address; and

(vi) The client has the right to object within fifteen (15) days of the date of notice.

(c) Prior to withdrawing from a contested case, a representative shall provide written notice of withdrawal to the Council.

Section 9. Intervention.

(a) Any person interested in obtaining the relief sought by a party or otherwise

interested in the determination of a proceeding, other than surface coal mining operations pending before the Council, may file a motion to intervene before or at the hearing, but not thereafter except for good cause shown. The motion shall set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and affirmative relief sought. Leave shall not be granted unless the Council determines that the movant is adversely affected by the action and has a legal right to intervene, under the standards set out in W.R.C.P. Rule 24.

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

(c) If the motion to intervene is granted, the movant 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. The party intervening shall give notice of intervention to all other parties.

Section 10. Ex Parte Communications.

Except as authorized by law, a party or a party's attorney or representative shall not communicate with any Council member in connection with any issue of fact or law concerning any pending contested case, except upon notice and opportunity for all parties to participate. Should ex parte communication occur, the Council member shall advise all parties of the communication as soon as possible thereafter and, if requested, shall allow any party an opportunity to respond prior to ruling on the issue.

Section 11. Motions and Motion Practice.

(a) Unless these rules or an order of the hearing officer establish time limitations other than those contained herein, all motions except motions for enlargement of time and motions made during hearing shall be served at least ten (10) days prior to the hearing on the motion. A party affected by the motion may serve a response together with affidavits, if any, at least three (3) days before the hearing on the motion or within twenty (20) days after service of the motion, whichever is earlier. Unless the hearing officer permits service at some other time, the moving party may serve a reply, if any, at least one day prior to the hearing on the motion or within fifteen (15) days after service of the response, whichever is earlier. Unless the hearing officer otherwise orders, any party may serve supplemental memoranda or rebuttal affidavits at least one day prior to the hearing on the motion.

(b) Unless the hearing officer otherwise orders, a request for a hearing on the motion may be served by the moving party or any party affected by the motion within twenty (20) days after service of the motion. The hearing officer may determine such motion without a hearing.

(c) Prior to filing any non-dispositive motion, a moving party shall make reasonable efforts to contact all other parties, representatives, and attorneys. Any such non-dispositive motion shall include a statement concerning efforts made to confer with the other party(s) and position(s) on the motion.

(d) All written motions filed with the Council shall be accompanied by a proposed order.

Section 12. Setting Hearings and Other Proceedings.

(a) The hearing officer or Chair of the Council, as applicable, shall assign a docket number to each contested case. All papers, pleadings, motions, and orders filed thereafter shall contain:

(i) A conspicuous reference to the assigned docket number;

(ii) A caption setting forth the title of the contested case and a brief designation describing the document filed; and

(iii) The name, address, telephone number, and signature of the person who prepared the document.

(b) The hearing officer shall set the course of proceedings through the issuance of a scheduling order. This may include, but is not limited to, pre-hearing conferences, confidentiality issues, summary disposition deadlines, motion practice, settlement conferences, and the evidentiary hearing.

(c) Prehearing conferences may be held at the discretion of the hearing officer. Any party may request a prehearing conference to address issues such as discovery, motion deadlines, scheduling orders, or case status.

(d) At the hearing officer's discretion and unless otherwise provided by the Council, telephone or videoconference calls may be used to conduct any proceeding. At the discretion of the hearing officer, parties or their witnesses may be allowed to participate in any hearing by telephone or videoconference.

Section 13. Consolidation.

A party may seek consolidation of two or more contested cases by filing a motion to consolidate in each case sought to be consolidated. If consolidation is ordered and unless otherwise ordered by the hearing officer, all subsequent filings shall be in the case first filed,

and all previous filings related to the consolidated cases shall be placed together under that docket number. Consolidation may be ordered on a hearing officer's own motion.

Section 14. Continuances and Extensions of Time.

(a) A motion for a continuance of any scheduled hearing shall be in writing, state the reasons for the motion, and be filed and served on all parties and the hearing officer. A motion for a continuance shall be granted only upon a showing of good cause.

(b) A motion for an extension of time for performing any act prescribed or allowed by these rules or by order of the hearing officer shall be filed and served on all parties and the hearing officer prior to the expiration of the applicable time period. A motion for extension of time shall be granted only upon a showing of good cause.

(c) For contested cases conducted regarding objections pursuant to W.S. 35-11-406(k), a motion for continuance may not be granted if the motion would continue the hearing beyond the 20-day period provided in that statute unless the parties stipulate to a different period.

Section 15. Discovery.

(a) The taking of depositions and discovery shall be in accordance with W.S. 16-3-107(g).

(b) Unless the hearing officer orders otherwise, parties shall not file discovery requests, answers, and deposition notices with the Council.

Section 16. Subpoenas.

Any party may request the hearing officer to issue a subpoena to compel the attendance of a witness or for the production of documents. Requests for a subpoena shall be accompanied by a completed subpoena that conforms to Rule 45 of the Wyoming Rules of Civil Procedure.

Section 17. Summary Disposition.

Rules 12(b)(6), 52(c), 56.1, and 56, Wyoming Rules of Civil Procedure, apply to contested cases.

Section 18. Prehearing Procedures.

(a) Unless otherwise ordered by the hearing officer, each party to a contested case shall file and serve on all other parties and the hearing officer a prehearing disclosure statement setting forth:

(i) A complete list of all witnesses who will or may testify, together with

information on how that witness may be contacted, and a brief description of the testimony the witness is expected to give in the case. If a deposition is to be offered into evidence, the original shall be filed with the Council;

(ii) A statement of the specific claims, defenses, and issues which the party asserts are before the hearing officer for hearing, based on the party's initial filing;

(iii) A statement of the burden of proof to be assigned in the contested case with reference to specific regulatory, statutory, constitutional, or other authority established by relevant case law;

(iv) A statement of stipulated facts. If the parties are unable to stipulate to facts, the parties shall indicate what efforts have been made to stipulate to facts and the reasons facts cannot be stipulated;

(v) A complete list of all documents, statements, etc., which the party will or may introduce into evidence; and

(vi) An approximation of the time required for the hearing.

(b) Parties shall file and serve prehearing disclosure statements on or before the date established by the hearing officer.

(c) The information provided in a prehearing disclosure statement shall be binding on each party throughout the course of the contested case unless modified for good cause.

(d) Additional witnesses or exhibits may be added only if the need to do so was not reasonably foreseeable at the time of filing of the prehearing disclosure statement, it would not unfairly prejudice other parties, and good cause is shown.

(e) The hearing officer may modify the requirements of a prehearing disclosure statement.

(f) Failure to file a prehearing disclosure statement may result in the hearing officer's striking of witnesses, exhibits, claims and defenses, or dismissal of the contested case.

(g) If a prehearing order is entered, the prehearing order shall control the course of the hearing.

Section 19. Burden of Proof.

The hearing officer shall assign the burden of proof in accordance with applicable law.

Section 20. Evidence.

(a) The hearing officer shall rule on the admissibility of evidence in accordance with the following:

(i) Evidence of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded.

(ii) Evidence may be offered through witness testimony or in documentary form;

(iii) Testimony shall be given under oath administered by the hearing officer. Deposition testimony and other pre-filed testimony may be submitted as evidence, provided the testimony is given under oath administered by an appropriate authority, and is subject to cross-examination by all parties;

(iv) The rules of privilege recognized by Wyoming law shall be given effect; and

(v) A hearing officer may take administrative notice of judicially cognizable facts, provided the parties are properly notified of any material facts noticed.

(b) Each party shall have the opportunity to cross-examine witnesses. The hearing officer may allow cross-examination on matters not covered on direct examination. Each party shall have the opportunity to perform re-direct examination of witnesses on matters covered during cross-examination.

(c) The hearing officer or Council member, when applicable, may ask questions of any party or witness.

Section 21. Contested Case Hearing Procedure.

(a) The hearing officer shall conduct the contested case and shall have discretion to direct the order of the proceedings.

(b) Unless otherwise provided by law, and at the hearing officer's discretion, the party with the burden of proof shall be the first to present evidence. All other parties shall be allowed to cross-examine witnesses in an orderly fashion. When that party rests, other parties shall then be allowed to present their evidence. Rebuttal and surrebuttal evidence shall be allowed only at the discretion of the hearing officer.

(c) The hearing officer shall have discretion to allow opening statements and closing arguments.

Section 22. Default.

Unless otherwise provided by law, a hearing officer may enter an order of default or

an order affirming agency action for a party's failure to appear at a lawfully noticed hearing.

Section 22. Expedited Hearing.

(a) At the hearing officer's or Council's discretion and when allowed by applicable law, a contested case may be heard as an expedited hearing upon the motion of any party.

(b) An expedited hearing shall be decided on written arguments, evidence, and stipulations submitted by the parties. A hearing officer or the Council may permit oral arguments upon the request of any party.

(c) The hearing officer may require an evidentiary hearing in any case in which it appears that facts material to a decision in the case cannot be properly determined by an expedited hearing.

Section 24. Recommended Decision.

In those contested cases where the hearing officer makes a recommended decision, the hearing officer shall file the recommended decision with the Council and serve copies of the recommended decision on all parties to the contested case. Unless otherwise ordered, parties shall have ten (10) days to file written exceptions to the hearing officer's recommended decision. Written exceptions shall be filed with the Council and served on all parties.

Section 25. Final Decision.

(a) A final decision containing findings of fact, conclusions of law, and an order entered by the Council shall be in writing and served upon all parties to the contested case and the hearing officer, if applicable.

(b) A final decision shall include findings of fact and conclusions of law, separately stated. When the hearing officer allows the parties to submit a proposed final order, the parties shall file the original with the Council and serve copies of the proposed order on all other parties and the hearing officer.

(c) A hearing officer may at any time prior to judicial review correct clerical errors in final decisions or other parts of the record. A party may move that clerical errors or other parts of the record be corrected. During the pendency of judicial review, such errors may be corrected only with leave of the court having jurisdiction.

Section 26. Incorporation by Reference.

(a) The code, standard, rule, or regulation below is incorporated by reference and can be found at:

http://www.courts.state.wy.us/Documents/CourtRules/Rules/WYOMING_RULES_OF_CIVIL_PROCEDURE.pdf

(i) Rule 11, Wyoming Rules of Civil Procedure, adopted by the Wyoming Supreme Court and in effect on March 1, 2017;

(ii) Rule 12(b)(6), Wyoming Rules of Civil Procedure, adopted by the Wyoming Supreme Court and in effect on March 1, 2017;

(iii) Rule 24, Wyoming Rules of Civil Procedure, adopted by the Wyoming Supreme Court and in effect on March 1, 2017;

(iv) Rule 45, Wyoming Rules of Civil Procedure, adopted by the Wyoming Supreme Court and in effect on March 1, 2017;

(v) Rule 52, Wyoming Rules of Civil Procedure, adopted by the Wyoming Supreme Court and in effect on March 1, 2017;

(vi) Rule 56, Wyoming Rules of Civil Procedure, adopted by the Wyoming Supreme Court and in effect on March 1, 2017;

(vii) Rule 56.1, Wyoming Rules of Civil Procedure, adopted by the Wyoming Supreme Court and in effect on March 1, 2017.

(b) These rules do not incorporate later amendments or editions of the incorporated matter.

(c) All incorporated matter is available for public inspection at the Department's Cheyenne office or at the Council's Cheyenne office. Contact information for the Department's Cheyenne office may be obtained at <http://deq.wyoming.gov/> or from (307) 777-7937. Contact information for the Council's Cheyenne office may be obtained at <http://wyomingeqc.wyo.gov/> or from (307) 777-7170.