ENVIRONMENTAL QUALITY COUNCIL
Meeting Minutes
City Hall Council Chambers Room
2101 O'Neil Avenue
Cheyenne, Wyoming
January 17 & 18, 2001

Members Present: Wendy Hutchinson, Chair
John N. Morris, Vice Chair
Stephen E. Williams, Secretary
Nick J. Bettas
Thomas D. Dunn
Robert Rawlings
Dr. Jason Shogren

Others Present: Dennis Hemmer, Director, DEQ; Terri A. Lorenzon, Director, EQC; Joe Girardin & Carmen Curtis, EQC; Gary Beach, Administrator, WQD/DEQ; Rick Chancellor, Administrator, LQD/DEQ;Maggie Allely, Attorney General's Office; Marissa Latady & Jerry Breed, S&HWD/DEQ; John Burbridge, Attorney General's Office; Bill Wuerthele, U.S./EPA, Denver, CO; Drake Hill, Brown, Drew & Macey Law Offices, Casper, WY; Kelly Mader and Mike Kegley, Kennecott Energy, Gillette, WY; John Farrell & Jon Jensen, Howell Petroleum Corp., Midwest, WY; Jack Young, Cheyenne Board of Public Utilities, Cheyenne, WY; Sue Lowry, State Engineer's Office; Cathy Begej, Devon Energy, Denver, CO; Harry LaBonde, City of Laramie and DEQ Water and Solid Waste Advisory Board; Dick Stockdale, State Engineer's Office, Cheyenne, WY; Steve Wolff, G&F Dept, Cheyenne, WY; Kelly Brown, WACD; Kathy Hinkle, Devon Energy, Oklahoma City, OK; and several others were in attendance.

Wendy Hutchinson, Chair of the Council, called the meeting to order at 3:15 p.m.

MINUTES:

Wendy Hutchinson asked if the members had any corrections to the October 23, 2000 meeting minutes. Bob Rawlings made the motion to approve the minutes. John Morris seconded the motion. There was no discussion, and the Chair called for the vote. The motion carried.

APPROVAL OF ORDERS:

a. Federal Emergency Management (FEMA) – Order Approving NOV & Order, EQC Docket No. 00-3410, DEQ Docket No. 3222-00.

Dennis Hemmer said this Order was for failure to pay underground storage tank fees. Wendy Hutchinson asked what happens if the agency does not pay the fees and it becomes a violation because of contaminated tanks. Dennis Hemmer said that under State law they have to pay the fees. If the site is contaminated and they refuse to pay, then there is the question of whether or not the State would fund the cleanup. He noted that the site is not necessarily contaminated.

Nick Bettas asked they claim an exemption like the Parks Service. Dennis Hemmer said no.

John Morris asked what happens if they refuse to pay. Dennis Hemmer said since they have not appealed the order, he would have to decide whether it is worth the dollar amount is to seek an injunction to force them to pay. As the dollar amount is only $400.00, he doubted he would pursue the matter in court.

Nick Bettas made the motion to approve the Order Approving the NOV & Order, EQC Docket No. 00-3410. Steve Williams seconded the motion. There was no further discussion and Wendy Hutchinson called for the vote. The motion carried.

KG Construction Co., EQC Docket No. 00-5403, DEQ Docket No. 3180-00 – Order Approving Order on Consent:

Jerry Breed of S&HWD gave a summary of the case. He said KG Construction is a construction shop located in Gillette, Wyoming. The activities conducted at that site are fueling, storage, and repair of vehicles and construction equipment. In 1998, Reliance Electric Company, an adjacent neighbor of KG Construction, conducted an environmental investigation. They identified benzene concentrations in monitoring wells. Investigation reports suggested that the source of the contamination was likely from aboveground storage tanks that contained gasoline and diesel located on KG Construction property. Those aboveground tanks are not covered by DEQ's aboveground and underground storage tank program. In response to those investigation findings, KG Construction installed monitoring wells along their property boundary. The results of that monitoring indicated that benzene concentrations in groundwater exceeded the hazardous waste toxicity characteristics, and due to that, it was transferred from the WQD to the S&HWD in March 2000. KG Construction and S&HWD developed an Administrative Order on Consent, which is now before the Council for approval. KG Constructions agreed to the findings as to the extent of contamination in soils and groundwater at the facility and in the surrounding areas. They agreed to initiate actions to remediate the contamination in the area. The site where the contamination was found was prior to the enactment of the Voluntary Remediation Program Law. KG Construction opted to not participate in that program, but preferred the Administrative Order on Consent route.

Wendy Hutchinson asked if anyone from KG Construction is present. There was no response. There was no further discussion.

Nick Bettas made the motion to approve the Order Approving the Administrative Order on Consent, EQC Docket No. 00-5403, DEQ Docket No. 3180-00. Steve Williams seconded the motion. There was no further discussion. Wendy Hutchinson called for the vote. The motion carried.

Lion Coal Company, Permit No. 122 CN, Docket No. 00-4402 and Permit No. 552-T3, Docket No. 00-4403 - Bond Forfeiture Order:

Land Quality Administrator Rick Chancellor said that last fall, the Council forfeited the bond for Lion Coal Company for the Swanson Mine outside of Rock Springs. The company also held

Permit No. 122 CN authorizing coal exploration by drilling at the mine. The bond under that permit was $695.00 for four (4) wells in the area. He requested forfeiture of the bond.

He said there is little contact with the company since the bond forfeiture last October. The mine site should be cleaned up by the end of the month. He plans to accept bids for the dirt work reclamation this coming spring and summer.

Permit No. 552-T3 has a bond of $805.00. He said about seven or eight years ago this permit was transferred from the License to Explore 122 CN to Permit No. 552-T3 to boost the bond amount. The LQD missed bringing this bond before the Council last October.

Nick Bettas commented that he never heard of a bond so small. Rick Chancellor said it is part of a package of four different bonds associated with the site. Nick Bettas thought there was some minimum. Rick Chancellor agreed and explained that if an operator can show that reclamation cost is less than the minimum, the Department then has the flexibility to go with that amount.

John Morris asked if Rick Chancellor is closing down a good, viable industry. Rick Chancellor heard people say there is good coal there, but no one wants to come forward. There was no further discussion.

John Morris made the motion to approve Lion Coal Company's Permit No. 122 CN, EQC Docket No. 00-4402 and Permit No. 552-T3, EQC Docket No. 00-4403. Dr. Shogren seconded the motion. There was no further discussion.

Wendy Hutchinson called for the vote. The motion carried with Nick Bettas abstaining.

Gary Hillman, EQC Docket No. 99-3209, DEQ Docket No. 3156-99:

Terri Lorenzon said that this NOV and Order was issued to Gary Hillman for underground storage tank fees for one of five tanks on his property. A hearing was scheduled in Gillette on November 17th, but the case settled the day before the hearing. Mr. Hillman withdrew his request for a hearing. Terri Lorenzon reviewed the Dismissal Order.

Tom Dunn made the motion to approve the Order. Steve Williams seconded the motion. There was no further discussion. Wendy Hutchinson called for the vote. The motion carried.

Wyoming Resources Corporation, EQC Docket No. 00-3202, DEQ Docket No. 3218-00:

Terri Lorenzon said this Order was issued to address water discharges onto Christensen Ranch. The company chose not to challenge the Order and stopped the discharge. They settled the case with DEQ.

Steve Williams made the motion to approve the Order for dismissal on DEQ Docket No. 00-3202, EQC Docket No. 3218-00. There was no discussion and Wendy Hutchinson called for the vote. The motion carried.

Miscellaneous Discussions:

John Morris asked Dennis Hemmer what DEQ regulations affect underground pipelines, which are probably the biggest storage tanks in Wyoming. Dennis Hemmer responded that DEQ does not regulate pipelines. The Public Service Commission (PSC) and the Federal Energy Regulatory Commission regulates them.

John Morris asked who oversees cleanup of burst pipelines or diesel fuel pumped out into surrounding areas. Dennis Hemmer said DEQ would take over where there is contamination, and would oversee cleanup. But the actual regulation of the pipeline itself is done by other agencies. Dennis Hemmer said that the Voluntary Remediation Program gives operators a new method of dealing with contamination from pipelines, and he also has the authority to issue an Order for enforcement or take a matter to court.

John Morris asked how the pipelines are supervised. He said we are so worried about tanks at mom and pop operations. These tanks have no pressure in them and they are pumped out every few weeks, while pipelines run for miles and are under tremendous pressure. The pipelines are a greater hazard than the mom and pop gas tank operators.

Dennis Hemmer said PSC and the Federal Agency Regulatory Commission regulate pipelines. One difference between tanks and pipelines is that there is more control in terms of testing on pipelines than there is on underground storage tanks.

Wendy Hutchinson asked about jurisdiction if there is a gaseous release rather than a liquid spill.

Dennis Hemmer said that if it is a natural gas release, DEQ doesn't get involved because there is no contamination of the media that the DEQ would be involved in. Natural gas is volatile and it dissipates into the atmosphere, and at that point, there is more of a safety risk than an environmental risk.

Bob Rawlings asked if propane or butane underground storage tanks fall under this program.
Dennis Hemmer said these are not on the list of fuels that are regulated.

Steve Williams asked Terri Lorenzon if it is possible for the EQC to have a short informational session with PSC to learn the monitoring they do and how they interact with state agencies. Terri Lorenzon said she would talk to them.

John Morris asked how much authority the DEQ has over pipelines because large companies use the pipelines for storage rather than place oil or gas in storage tanks. He said it's a tremendous environmental concern for the state.

Mine Permit Hearing Procedures:

Wendy Hutchinson said that the discussion of mine permit procedures began with the Jacobs Ranch permit renewal and revision. When the Council was reviewing the case at the time of the hearing, the EQC began scrutinizing the procedure. They recognize that all decisions made in Dennis Hemmer's office were made to treat all parties fairly. The Council understands Dennis

Hemmer's intention as he made different decisions on holding informal conferences in the Jacobs Ranch case. However, as the Council went through the rules on the procedures, and considered what was in Dennis Hemmer's jurisdiction and what was within the EQC's jurisdiction, the Council had a difference of opinion. A debate started after Dennis Hemmer made some decisions, whether or not they were within his jurisdiction to make.

She said the goal of the discussion is to have everyone understand how the Council interprets the Rules of Practice and Procedure in the event this situation arises again in the future.

In referring to the Rules of Practice and Procedure, Chapter VI, Section 1, Wendy Hutchinson said, if requested, the Director may review by informal conference the decisions of his administrators.

Dennis Hemmer interjected and said that the statute and the rules say he may grant a conference, however, the federal program states that where an informal conference is requested, it will be granted. In a Black Thunder case in which the DEQ went to court, DEQ stipulated that, if requested, it would hold an informal conference.

Wendy Hutchinson said Jacobs Ranch submitted separate packages of revision and renewal to their Permit 271 and there were objections to both the revision and the renewal. The cases were combined to a certain extent through the procedure. Her focus was on the revision.

Dennis Hemmer said they were separate items because they had different objectors on the issues. He held one hearing, but they were handled as three different docket numbers, because early on he assigned two docket numbers to the same case.

Wendy Hutchinson said there were objections to the revision and renewal and Dennis Hemmer held an informal conference on September 14th. Due to a defective public notice procedure, Dennis Hemmer held a second informal conference, which then met the notice requirements. Up to that point in time, she said he was following the procedures correctly. After the two informal conferences, Dennis Hemmer issued Findings of Fact and Conclusions of Law.

Wendy Hutchinson said that once the first Findings of Fact and Conclusions of Law were issued, the process started to get confusing. One of the statements in Dennis Hemmer's decision was that he was going to maintain jurisdiction until the Bureau of Land Management (BLM) decided the priority on the minerals issue. The question is whether he could issue his decision and maintain jurisdiction, although she understood why he was attempting to do so.

She then read Chapter VI, Section 5(a) of the Rules of Practice and Procedure. The question she was trying to get clarification on is at what point did this matter, or should this matter, have fallen into jurisdiction of the Council.

She said Jacobs Ranch requested a rehearing after the DEQ decision because they then had a partial determination from the BLM. Dennis Hemmer said yes, and that issue should be addressed when the rules are updated. He also said that instead of granting Jacob's petition for rehearing, they decided they had continued jurisdiction and would continue the hearing.

That is where the big question comes in, Wendy Hutchinson said. One, whether or not Dennis Hemmer could maintain jurisdiction after he made the first decision. Two, even if he could maintain jurisdiction, there is no procedure for having another informal conference.

Dennis Hemmer said there is no procedure for a petition for rehearing. He thought there was merit to going backing and look at the case again. He thinks that's one of the things that needs to be addressed in the rules is whether, after an informal conference, someone can petition for rehearing. He recommended allowing that so that if there is something new that comes up that it could change the facts it would makes sense to continue that.

Steve Williams asked if the second informal conference was not really a second conference, but just a continuation of the first conference. For legal purposes, Dennis Hemmer said that is correct. He also said they were doing the same thing as rehearing it, but they did not have procedures for rehearing and so they were kind of innovative and simply continued it.

Nick Bettas asked if Dennis Hemmer ever had another occasion where he held an informal conference, issued Findings of Fact and Conclusions of Law, and then held another informal conference based on those findings. In his reading of the statutes, Nick Bettas said it doesn't say anything about having more than one informal conference.

Dennis Hemmer said they are on unclear ground, but there is some case law that suggests that unless the rules specifically lay out a procedure for holding a petition for rehearing, you probably should not grant one. He thinks there is merit if the parties really feel that in reading his Findings he may have misunderstood something or if he did not get the facts right. He said there is some legal question there.

Nick Bettas asked what if some new information came out in one of these hearings and based on that, someone would request another informal conference?

Dennis Hemmer said he did not know, unless the Council would do something like they did before, continue it, or have a procedure for a petition for rehearing, probably before the Council. In this case, he thought there was merit since BLM had taken some action.

Terri Lorenzon asked what the difference would have been if the people appealed it to the Council on his issuance of the Findings of Fact, he just let it come to the Council, and then the parties entered into settlement negotiations. She asked if he gets to the same point.

Dennis Hemmer said yes and no. Since his decision on Amax in blasting, he is very sensitive to negotiations after that decision. He now requires everybody at the table, thus giving DEQ a better procedure going through it again.

Terri Lorenzon asked if "by having everybody at the table", did he mean that people who hadn't filed objections or appealed his decision as well as those who had are included? Apparently, not everybody at the informal conference table had filed timely objections to the renewal or revision.

Dennis Hemmer said that was one of the issues between the two cases. He said they had two cases and had two separate sets of objectors because one of them had missed the objection

period. The rules read that anybody can come to an informal conference and anybody can participate. He said they would not necessarily be parties before the Council, and so what they had done is by going the route they did, they made sure it was inclusive and everybody got their say. After following some advice that was not great on Amax, he said he has reached the point that if they are going into informal conference that everybody will be at the table. He felt this is a better mechanism to make sure that everybody could talk.

John Morris asked if some of the people that were present at the second hearing were not present at the first hearing. Dennis Hemmer said yes. Terri Lorenzon also added that some people came in and alleged that they didn't have sufficient notice and that they had gas interests to protect. John Morris then said it was kind of a rehearing and then he opened it back up.

Dennis Hemmer said yes. He thinks that would have been a question before the Council whether or not some participants were parties since they did not object in a timely fashion. In the rules for informal conference, he said everybody could talk. He suggested that when the Rules of Practice and Procedure will be revised, that this issue be revisited.

Dennis Hemmer was asked to explain the Amax case. He said he issued a decision on blasting at an Amax Mine and that decision was appealed to the Council. One of the parties asked if they could meet with DEQ to try and settle. Since they were the only ones that appealed it to the Council, he was advised that they were the only parties, and therefore the only ones that can participate in a settlement. They settled. But when that settlement came to the Council, two of the other parties who had not been involved, or who had been involved in the informal conference but not in the settlement, said that the agreement had beam changed after their involvement. They claim they should have been involved. He said that technically and legally, the parties settled. From a public policy's perspective, he said they were right; they should have been involved. It's been his policy since that point that whoever would be involved in the informal conference will be involved in the settlement talks with DEQ.

Wendy Hutchinson agreed with Terri Lorenzon that in looking at the rules, Dennis Hemmer's first decision stands. She stated what Dennis Hemmer said that once the right to mine has been resolved he would issue the permit, which the permit can be issued once the BLM determines the right to mine issue. That's her interpretation of Dennis Hemmer's first decision.

She further stated that at the point at which the BLM came in and resolved the right to mine, the question at that point is, who has the right to issue that permit. Because there are people appealing it, she said that Dennis Hemmer felt it's best to get everybody back in the room and hold an informal conference again. But at that point in time, she thought it was under the Council's jurisdiction because it was appealed. The question she posed for Dennis Hemmer is, was his first decision appealed to the Council?

Dennis Hemmer said the question is whether he made the decision on the first one or on the second one. He said that the question is, can he issue the permit if there are objections? In this case, he said, historically they have not. He issued a decision and it has gone forward. In this case, he said it was argued to him that under 406(p) the law is clear that in making his decision, he either issues or denies the permit. He agreed with the argument and issued the permit.

Wendy Hutchinson asked if his first decision issued the permit. Dennis Hemmer said no. He said the he issued the permit in the second decision. He said the question is, whether that is within his jurisdiction.

Terri Lorenzon asked Dennis Hemmer to explain how 406(p) gave him that authority. Dennis Hemmer read 406(p), "if an informal conference is held, all parties to the conference shall be furnished a copy of the final written decision of the director issuing or denying the permit." He said it seemed clear in the law that his duty at that point is to issue or deny the permit.

Wendy Hutchinson said she would agree when he wrote his first decision, that it was under his authority to grant or deny the permit. She said there's one place where his decision stated that he issued the permit with the condition that the right-to-mine issues were resolved by the BLM. At that point in time, she said that once the BLM issues were resolved, the permit could have been issued without going into the second informal conference, presuming that his decision had not been appealed to the Council.

Dennis Hemmer said that there are two issues, whether they could uphold the second conference. He said they decided that there was merit in doing that and that they worded in such a way that they could continue the case. The second issue is, can he issue a permit if it has been appealed to the Council. He said 406(p) directs him to do that.

Terri Lorenzon commented that under Section (p), he makes a final decision, holds an informal conference, and says yea or nay on a permit. She said he has to make a final decision before it can come to the Council. This is different from how he phrased his argument and she agreed the question is whether the vehicle he chose was effective to keep the case open. He has to do one or the other because there has to be some finality so parties know what they have to do. She further stated that part of the reason there's confusion is because as he was trying to find a way to manage the situation as it was developing so that he could handle it as he saw it fair with all the people involved. Given the language of the rules, working with that system, the parties are out there trying to decide what their legal rights are and what they need to do to protect their clients. The Council received appeals based on the final decision. She said part of the problem arises when Dennis Hemmer was trying to work with the rules he had and do what he saw is needing to be done. Then the parties are saying, you issued a Findings of Fact and Conclusions of Law and that triggered 30 days in which the parties have to appeal. They appealed it to the Council and that gave the Council jurisdiction. She does not know if Section (p) gets Dennis Hemmer out of that, because he has to make a final decision or else the Council will have nothing to review.

Dennis Hemmer said he had to make a final decision. He thinks what confuses this in many instances is they appealed to the Council and then came back for an informal conference. He said there are two issues here. First, could he indeed continue the hearing? He said that when the Rules of Practice and Procedure are revisited that this ought to be addressed whether or not there ought to be a petition for rehearing. The second issue is could he have gone ahead issuing the permit? He thinks it is clear from Section (p) that it was his duty to hold the hearing, make a decision of either issue it or deny it.

Terri Lorenzon said that when it's appealed, the jurisdiction is with the Council.

He said if they issue an air quality permit or solid waste permit, or the permit is in standing it goes to the Council and the Council can overturn that permit, uphold the permit, or add something to the permit. At that point, he said the jurisdiction is with the Council to do whatever they deem appropriate to that permit.

Tom Dunn said the dichotomy between issuing and denying is something worth addressing, because if Dennis Hemmer denies a permit then nothing happens until the party appeals it and during that appeal process nothing happens until this Council either says yea or nay and it goes through its course. On the other hand if Dennis Hemmer issues a permit, then things can happen. He thinks it creates a different set of circumstances if the permit is issued and then the issuance of the permit is appealed. It puts a different light on the circumstances.

Dennis Hemmer said that is correct. When he issues a water permit, the operator is forewarned that there is an appeal period and if it has to appeal it to the Council that they do so with their own peril, knowing that the Council could reverse his decision.

Tom Dunn asked how long a party has to appeal the issuance or denial of the permit. Dennis Hemmer said it is more specific in coal cases, he thinks it's 30 days and in all those areas where it's not specified, it's 60 days.

Tom Dunn said a prudent operator would wait out the appeal duration and then proceed. Dennis Hemmer said it depends on the operator and depends on the nature of the objections.

Steve Williams said that where he got hung up is on the word "final" because even though Dennis Hemmer is saying his decision is final, it was not really final. It is final subject to approval or subject to filing of appeal and ultimately the deliberation by the Council.

Dennis Hemmer said their decision is the final agency decision. In other words, it can't come to the Council until it is the final agency decision. But anything he does with the exception of his administrative duties that are under other statutes, it is appealable to the Council.

Terri Lorenzon said the history of the coal program is different than the other DEQ programs. The DEQ Director's decision to issue a permit is a final agency decision, but the coal permit was not issued until the whole public process was done, including a hearing before the Council. DEQ has come before the Council many times over the years saying they will issue a permit "but for" anything new that comes to their attention in the public hearing. The assistant attorneys general have said that DEQ does not issue the permit until the public hearing is completed. That was the way the coal program was presented to the Council, and that's the way section 406(k) reads with notice and an informal conference. The Council has had the DEQ come to hearings before and change its mind because it has learned things in the public hearing that it didn't know before. So the coal program has always been presented as different from Water Quality and Air Quality Divisions. The Council, if it was appealed, and even though Dennis Hemmer had decided to issue it, issued the permit. The EQC orders have always concluded that the Council orders DEQ to issue a permit, issues the permit with specific conditions attached, or deny the permit. As she understands the conversation, Dennis Hemmer is now reversing that position.

To clarify it, Dennis Hemmer said the public hearing process for coal is through the objections, and then the informal conference. There is no public hearing process in Air Quality or Water

Quality. He said he has always treated the decision that comes out of the agency as the final agency decision. Historically, what has always happened is, he had made a decision. The decision has not issued the permit; the decision has brought it to the Council. In this case, it was argued that indeed the law doesn't say that. The law says he will make a decision issuing or denying the permit. In reviewing that, he believed they were right. The law says he will issue or deny the permit. What has changed through the process is that these provisions used to be the duty of the administrator prior to 1992. In fact, the administrator could not issue a permit. At that point it was different. In 1992, the law was changed and the director was inserted in both of those places. He reads the law to say and which is why he changed on Jacobs Ranch from the last procedure, that he would issue or deny the permit at that point and then it is subject to appeal before the Council.

Ms Lorenzon asked if that has created any questions because as the program came to the Council in 1980 that the public process had to be completely done before any decision to issue was made. She asked Dennis Hemmer if he is comfortable that this interpretation is consistent with the Federal coal program. Dennis Hemmer believed his interpretation is consistent with the Federal program, and he believed his interpretation is the way the law reads.

Wendy Hutchinson gave an example. If she has a permit to DEQ and it is challenged, then it goes into informal conference. Dennis Hemmer's decision is to issue the permit, and that decision is appealed to the Council. The Council then holds a hearing. She then asked Dennis Hemmer if he would really issue a letter to the coalmine stating that it's under appeal, but he has approved the permit. Dennis Hemmer's answer was that he did it in this case.

John Burbridge, the Assistant Attorney General representing LQD, said that historically and typically in administrative procedure, administrative decisions are not stayed unless that stay is requested. If you take this step further, and a contested case comes to the Council and the Council makes a decision issuing a permit, that Council's decision can be appealed to district court which is controlled by the Administrative Procedure Act. The Act states that administrative decisions are not automatically stayed. If that person is objecting to the Council's decision, they can appeal it to the district court. That person would then make a separate motion to the district court to stay the issuance of the permit. Even though there is time for the objecting party to appeal to district court, they have the obligation to go to court, and make the case.

He said that in reading through the case, he was faced with a situation where on March 2nd the permit did issue because the condition of that Order had been met. When he read 406 (k), he could not find anything that relates to an automatic stay from one of Dennis Hemmer's decisions. Historically, he said it's been explained to him that when there was an issuance of a permit, nothing will happen for 30 days until that appeal time expired. He said when you couple that with reading 406(p) where it says, " you shall issue or deny the permit" that left all in a quandary, particularly with this case because of the way the events played out.

Tom Dunn asked Dennis Hemmer for a quick summary of what happens when a person applies for a permit to mine coal. Dennis Hemmer explained it's a long process involving a lot of reviews. Eventually, it reaches the point where they believe it is complete, and at that point they give them direction to give notice as specified in the Act. He said the applicant then publishes the notice. The objection period follows. If during that period it's objected to and if one of the parties requests an informal conference, then they hold an informal conference. If there is an

objection and neither party request an informal conference, the next stop is the Environmental Quality Council. He said if no one objects to the permit, then he is directed to issue the permit within 30 days.

Tom Dunn asked approximately how many of those brand new coalmines are processed in a year. Dennis Hemmer said the DEQ hasn't had one in a long time.

Tom Dunn then asked if revisions are treated in much the same way, and do they require the same process. Rick Chancellor said the revision process does not include the completeness review. There's one publication notice required under a revision, otherwise, it's pretty much the same.

John Morris said if there is a formal appeal pending, could a permit be issued? Dennis Hemmer said the way the law reads, if he holds an informal conference even though somebody may have already submitted an appeal/objection to the Council, he has to issue or deny the permit. Then that decision is appealable to the Council. Historically, he said, if there was an objection, they do not issue the permit even if he held an informal conference. In this case he issued the permit.

John Morris asked if an appeal was pending. Dennis Hemmer said his decision was appealed.

John Burbridge said there might be some confusion at this point. He said that when you're talking about people filing an objection to a permit revision, if that objection comes to the Council, is that deemed appealed before a decision by the administrator or the director on the permit revision application itself?

Wendy Hutchinson interjected and said during the time period in which the public has opportunity to comment on a permit revision, they can object to that permit. One of two paths can be taken. A party can come directly to the Council. However, if any of those parties that objected wants to talk about it first, that's where the informal conference option comes in. From that informal conference, Dennis Hemmer must make a decision to approve or deny. People who don't like that decision could then appeal the decision and bring it to the Council.

John Burbridge said it confuses him because under 406(k), "any interested person has a right to file written objections to the application with the administrator."

Wendy Hutchinson said that is right, and therefore, Rick Chancellor, the administrator, would get the letter, and she thinks it is Rick Chancellor's obligation to notify the Council and Dennis Hemmer that he has an objection to the permit. In her mind that's still an objection to the permit, that point there is a decision by the objectors/parties involved. Do they bring it to the Council? If they do, it's the Council's jurisdiction and it's not under Dennis Hemmer's jurisdiction anymore. But they have the option to take it to Dennis Hemmer for informal conference, and the Council would just note it in the file that the case is still ongoing with Dennis Hemmer.

John Burbridge wants to find the authority for the jurisdiction to vest with the Council at the time of the written objection for the application. The law says specifically the objection itself is filed with the administrator; it would seem to him that the jurisdiction doesn't vest with the Council at that time.

Wendy Hutchinson said in her mind, it's in limbo until someone decides whether it is coming to the Council or is it going to Dennis Hemmer. John Burbridge said that's where the major confusion is.

Wendy Hutchinson does not think there is anything wrong with the rules. She thinks what went wrong in this particular case is that Dennis Hemmer did not make a decision in his first decision. She said that in reading Dennis Hemmer's decision, it said, "Once the right to mine has been resolved, I will issue the permit." What Wendy Hutchinson suggested that Dennis Hemmer should have said was, "I am issuing the permit with the condition that the right to mine is resolved" because this had to go for federal approval after it left DEQ. Then at that point, the other parties could object and it would be on EQC jurisdiction. The problem is, Dennis Hemmer did not make the decision. What would they have been objecting to if he were to make a decision in the future, which is why he said he will keep it in his jurisdiction? He was going to make the decision in the future based on something that was not under his jurisdiction, whatever the BLM was, was not under Dennis Hemmer's jurisdiction. Dennis Hemmer agreed with Wendy Hutchinson.

She said that is why this process went wrong because Dennis Hemmer said he will make a decision in the future.

Dennis Hemmer interjected and said whether or not that was a good decision, ultimately it could have come to the Council. He said there are two issues here. First, is it appropriate to have a provision if they don't like an informal conference and then go back through the informal conference again? In other words, should there be a petition for rehearing on the informal conference. He said that issue ought to be addressed when the Council will visit the Rules of Practice and Procedure. Secondly, was he correct that it was his duty to make a clear-cut decision?

Tom Dunn asked if a person can ask for an informal conference or appeal that issuance of a permit to the EQC. Dennis Hemmer said that if a person does not want an informal conference, then it goes directly to the Council. If a person is unhappy with an informal conference decision, the case can then go to the Council.

Nick Bettas said some of the statutes are unclear and John Burbridge and Terri Lorenzon should work to try and interpret the statutes. He said the more he reads it, the more questions he has. He suggested that the Council and DEQ get together and if it needed, bring somebody else in to get this cleared up.

Dr. Shogren said Wendy Hutchinson is correct that there has to be a decision. It can't be a delayed decision.

Tom Dunn suggested that Terri Lorenzon and John Burbridge address the question. He said John Burbridge talked about administrative actions that are not stayed, or automatically stayed. Does it mean administrative actions could be stayed until the appeal time has expired? Who would make that decision, the administrator? He said it makes sense that it did not happen automatically, because if a person objected and they found out that their objection was not heeded in the informal conference, they may think it's not worth it and may not pursue it.

For the record, Wendy Hutchinson said that from her expectation and hopefully speaking on behalf of the Council, she said to Dennis Hemmer that the next time he has an informal conference, he will clearly state that he is approving the permit or denying the permit and his basis in the rules for why he is denying or approving the permit. That decision once it's appealed is under the Council's jurisdiction. At that point if it's appealed it's the Council's jurisdiction and not his to take it back or to keep, she said. Until the rules are changed, it's Dennis Hemmer's obligation under the Act is to make a decision.

Dennis Hemmer said that until those rules are changed, that's the Council's interpretation of what the rules say. Wendy Hutchinson said she though that was also his interpretation.

He said in terms of the informal conference, she was correct that he has to make a decision one way or another. Wendy Hutchinson added that after the Council starts the hearing process, the parties can continue discussions on how to resolve their issues. The appeal can be dismissed if the matter settles.

She said when everybody came in to the room and requested a stay in this case, the Council's first question was whether Jacobs Ranch had a valid permit. The Council did not think it was under Dennis Hemmer's jurisdiction to make that second decision. That was one of the questions that were up for debate and part of the purpose for the discussion today. She said it puts that company in an unfortunate situation where they believe they have a decision from Dennis Hemmer that says they have a permit, and the Council is saying it's not his right to do that. That first decision, be a decision or not, was appealed and it's the Council's jurisdiction now and it is the Council's right to deny or approve that permit.

Terri Lorenzon said that typically when people file objections, especially where it is not a small coal operation, they file their request for a hearing before the Council with the objection. Sometimes they ask for an informal conference. So the Council does take jurisdiction. But since Dennis Hemmer is the one who has to act within 20 days as opposed to the Council, then Terri Lorenzon just notes it down in the file.

John Burbridge interjected and said that is where his confusion is at, because it didn't appear that the appeal to the actual decision came after because there is the objection. There is the informal conference, and there is the ability to appeal the decision of the informal conference back to the Council. He does not know if it hurts anybody if Dennis Hemmer is able to continue an informal conference over a period of time until a final decision, if there hasn't been an appeal of that particular decision to the Council even though the Council has the objections sitting there.

Wendy Hutchinson said if somebody objects to the permit, they have two options. Public notice is done and there is an objection period. The objector decides to go into informal conference or come to the Council. The Council can do the hearing within the 20 days, but it's a more arduous process to have a hearing before the Council than it is to have an informal conference with Dennis Hemmer. If you're in a hurry, your best bet is to take the informal conference route.

Tom. Dunn interjected and asked when does the jurisdiction transfer? Does it transfer when there is an objection? Does that automatically transfer jurisdiction from DEQ to the Council? Does jurisdiction transfer from DEQ to the Council only if the objector chooses to go before the Council?

Terri Lorenzon said the Council has 20 days to hold a hearing or Dennis Hemmer will have to do his informal conference with the parties at that time. If they don't specify that they want an informal conference then it goes to the Council.

Steve Williams said that jurisdiction then is ambiguous. Wendy Hutchinson said it is until someone makes the decision.

Terri Lorenzon said that until they indicate that they don't want it before the Council, that they want to visit with Dennis Hemmer, the Council takes jurisdiction. The Council always looks at the most cautious route to give them the maximum protection they are afforded under the Act.

Wendy Hutchinson does not think that 20 days is a problem, that once they choose which way to go, that determines jurisdiction. If they want informal conference, it's on Dennis Hemmer's table. If they choose to come before the Council, it's the Council's case. Terri Lorenzon said that the law is clear that one of those things has to happen.

Tom Dunn said that assuming the person chooses the informal conference, the jurisdiction then passes back to DEQ, and it stays there until the decision is made to issue or deny. It could pass back to EQC. After the informal conference, Terri Lorenzon said a person has to take some affirmative action to initiate it back to the Council.

Nick Bettas made a recommendation for Terri Lorenzon and John Burbridge review the 35-11-406, whether the Council would want to go with 406(k) and (p). He is not into limiting anywhere there and maybe try and get back to the Council with some areas where they think there could be some improvement and whether there are some areas that need to be more precise, for lack of a better word, or if we need to do something statutorily or make recommendations to the Rules of Practice and Procedure. Dennis Hemmer questioned whether part of the Act should be rewritten.

Nick Bettas made the motion that Terri Lorenzon and John Burbridge review that portion of the Environmental Quality Act and also the Rules of Practice and Procedure, along with a call for recess. Tom Dunn seconded the motion.

Nick Bettas said that Terri Lorenzon will come back after a review with John Burbridge in maybe 60 days. Terri Lorenzon said that time line may be too short.

Nick Bettas just wanted to stick to the 60 days and if something comes up at the next meeting, the Council could address it at that time.

Wendy Hutchinson noted that members of the audience were trying to get her attention. She explained that at this time, the question of who has jurisdiction is an issue between the Council and DEQ. She understands that others have different opinions from their experience with the case. She hopes that when or if the Council modifies these rules that the public will comment on them. That will be the appropriate time to take all that discussion from members of the public.

Nick Bettas agreed with Wendy Hutchinson. He added that if someone has some concerns about, they could write to the Council.

There was no further discussion. Wendy Hutchinson called for the vote. The motion carried.

Wendy Hutchinson called for a recess at 5:08 p.m. and announced that the meeting will reconvene the following day at approximately 9:00 a.m., January 18, 2001.

January 18, 2001:

Water Quality Rules and Regulations, Chapter 1 – Triennial Review:

Nick Bettas convened the meeting to order at 9:20 a.m. He announced that the discussion of Water Quality Chapter 1 was not completed at the meeting in Casper. There are questions the Division will address; there are concerns about the Game & Fish (G&F) database; and questions of the State Engineer's Office database.

In attendance were Cathy Begej, Denver, CO.; Harry LaBonde, City of Laramie & member of the Water & Waste Advisory Boards; Dick Stockdale & Sue Lowry, State Engineer's Office, Cheyenne; Jon Jensen & John Farrell, Howell Petroleum; Steve Wolff, Game & Fish Dept., Cheyenne; Maggie Allely, Assistant Attorney General, Cheyenne; Maggie Davison, Beth Pratt & Patti Burns, WQD/DEQ; Jack Young, Cheyenne Board of Public Utilities; Bill DiRienzo, WQD/DEQ. There were other attendees that came in later.

Nick Bettas asked Bill DiRienzo from the Water Quality Division to proceed with his summary of the case. Bill DiRienzo said Class 1 Water is a special designation for outstanding water. The way they've been designated in previous rulemaking hearings is that people petition the Council for this special designation.

The goal for the Class 1 water designation is to protect it to existing quality. From the aspect of regulation, WQD does not permit any new point source discharges or any increased discharges from existing point sources. If a discharger had a permit before a particular water was designated, they can continue that discharge at the levels that they were discharging.

Regarding non-point sources, he said WQD doesn't regulate those, but they have voluntary programs and funding programs, and around Class 1 Water, they would implement those types of programs toward the goal of protecting the existing water quality.

Class 2, 3, and 4 waters are based on the uses that those waters support. In Section 3 of the Standards, they have about 9 or 10 uses. Class 2 waters are designated for all uses, and they are the only waters that are protected for fisheries and drinking water. There are sub-categories to Class 2: Class 2(a) would be protected for drinking water, not game fish; Class 2 (b) would be protected for game fish and not drinking water; Class 2(c) are waters that are protected for non-game fish, those are not protected for drinking water.

Class 3 waters are protected for all of the uses except fish and drinking water and most importantly, aquatic life. That's sort of a default classification. Class 3 (c) gets that basic protection for aquatic life, recreation, agriculture industry, and wildlife. Class 4 waters are waters where an aquatic life use has been removed pursuant to the federal regulations, which has been repeated in Section 33 in these proposed rules. So if water starts off as Class 3 water but it may be a dry draw or there may be other reasons why that water may not be able to support

aquatic life, the WQD would then do a Use Attainability Analysis (UAA) when that demonstration is made, and they would place it in Class 4. The only difference between a Class 4 water and Class 3 water is that Class 4 waters are not protected for aquatic life. In that category, they also include artificial irrigation canals, ditches, etc.

John Morris said that Class 1 and 2 are classified for drinking water; Class 3 for lakes, dams, ponds, intermittent streams, and Class 4 would be impoundments where there might or might not be water. Bill DiRienzo said that if a wetland community would develop around it, it would be a Class 3. If it's dry enough that there is no type of aquatic life that appears on it, then it could be Class 4.

Tom Dunn had a concern on the accuracy of the database that WQD proposed to use. He asked what the State Engineer's Office could offer that could improve the accuracy. He would also like to know more about the UAA and what "attainability" means.

Bill DiRienzo responded that regarding the accuracy of the database, the classifications they have now are based on that same information.

Tom Dunn asked if Bill DiRienzo or the G&F representative could describe how the information is collected, where it's kept, and who is responsible for checking the database to make sure that the information is accurate and timely.

Steve Wolff, staff biologist with G&F responded. He said the database is a listing of streams. Anytime they sample a stream, if it's a new stream, they give it a certain ID number and it's entered in the database. They do have several databases. The Stream Life Inventory lists the species of fishery found when it was sampled along with other general information. Some streams are sampled every year and the data is checked and updated every year. Some streams have been sampled once in the last 20 years and that information is still in there, and it also shows that it hasn't been sampled for a long time.

As far as who is in charge, Steve Wolff said they have seven regions within their department and every region maintains their waters within their region. They are responsible for entering and checking all the data that is entered and that is done on a continual basis. The statewide database is updated once a year around May.

Steve Williams asked if observations from private individuals, companies, organizations, public groups are also taken into account. Steve Wolff said yes, and anybody who samples fish in the state, they have to get a permit from G&F and part of that requirement is they have to report back their findings. For example, U.W. graduate students do a lot of sampling. They gather the information and submit it for review to the Regional Fisheries Supervisor. If the Supervisor thinks it's good quality information, that information would then go into the database. But it's up to the Regional Supervisor to determine whether the information submitted is valid to be put into the database.

Steve Williams asked if there is a standard set of things that every Regional Supervisor would consider. He wanted to know how consistent this would be from region to region as to individual determinations that each Regional Supervisor makes.

Steve Wolff thinks it's fairly consistent and that most of the data they receive from other parties goes to the database. Tom Dunn asked if all creel censuses go into the database. Steve Wolff said creel census doesn't apply to this because it's harvest information and pressure information. There is another database for that type of information.

Tom Dunn said if, for example, a graduate student samples some stream and records the types of species, records the location, etc., how does that student have any idea where he's at? Steve Wolff said that typically, locations have been on quad sheets, but people have been using the GPS. GPS has been in use over the last several years, and they see more and more of that type. All of their fisheries crews use GPS on all their sampling sites.

Steve Wolff thinks the G&F maps and the State Engineer's maps match. He said the USGS quads are accurate. Tom Dunn said that in the comments section, the Council found some instances where they weren't. Their streams were misnamed or they're located differently than what the database says. He wanted to know if information that's in the State's Engineer's Office could improve the quality of the stream and lake inventory. Steve Wolff said he did not see those comments.

Tom Dunn said that looking at the quad map in the wrong place probably caused those mistakes in the comments and entered that into the narrative database rather than some point on the map.
Steve Wolff said that some streams could have different names and they typically use the names off of the USGS quads. He also said that the final locations are the downstream point of any stream segment that they are referencing.

Steve Williams said the State Engineer's has a database, the G&F has a database, and the Water Research Center at the U.W. when it existed had a database. He asked if there's been any attempt to bring all of these together into one central location where comparisons can be made so all data from one stream can be put into one spread sheet. What is the nature of the databases? Is it a computerized database, or is it narrative database? What is the integrity of the database?

Steve Wolff said their database currently runs in MS Access as a computer database. There is an effort to bring together all kinds of data through the State in GIS form. He thinks that is the more applicable form to bring it all together. Every agency has lots of databases, and that's how they keep their information. They are usually run for different purposes and different reasons, but there has never been any effort to bring this together.

Steve Wolff then presented slides showing the data WQD's used from the G&F system. He explained the codes, water names, tributaries, legal descriptions, species, landownership information, management codes, and lake and reservoir information.

Tom Dunn commented that when and where a sample was collected are recorded but there was no estimate of stream flow at that point. Typically not, Steve Wolff said. In their current data base, if they had done any in-stream flow study and had a minimum flow, or had an in-stream flow request filed with the State Engineer's Office, that would be identified in the database.

Steve Williams asked if in-stream flow is the kind of information that the State Engineer's Office has. Steve Wolff said on certain streams, the minimum amount of water they'd like to see

kept in the stream is 10 cfs. They then file for an in-stream flow right with the State Engineer's Water Development Office.

Tom Dunn asked the State Engineer's representative for information on Crow Creek. Dick Stockdale, Deputy State Engineer, said the State Engineer's database consists of information related to quantification of water rights. It does not specifically indicate water availability in segments of streams. They have a stream-gaging program in cooperation with the United States Geological Survey (USGS) and they collect stream flow data throughout the state. The second part of the program is one that is internal to his agency. They have water commissioners around the state, the Hydrographer Commissioners, who collects data related to stream flow diversions. They keep diversion records and stream flow data for water administrative purposes related to water rights aspects. The State Engineer's database is related to water rights and water right activities. They don't specifically have the diversion records or the stream flow records incorporated into the database at this point. But they are working on a computer database that will keep those diversion records available to the general public or anybody who wants to use that information. At the present time, their Hydrographer Commissioners submit Annual Reports that publish the diversion records for particular streams and/or irrigation ditches or reservoirs. That information is available, but it's not in a readily available format through an access database.

Tom Dunn said that attainability of a particular classification of water is heavily dependent upon the flow. The one-month of the year of water that's in the stream for one month of the year, could be utilized for irrigation purposes if there was a water right filed for that. Dick Stockdale said yes. Tom Dunn said the State Engineer's has some information that would be useful in this classification and he is trying to figure out how the two pieces of information could be put together in some way that could be useful in classification.

Dick Stockdale said they have that information available but he is not familiar with the process that's used in the stream classification that is being discussed now. He assumes that kind of information is fed into the process.

Tom Dunn said this year, at least in his neighborhood; they were made aware that a lot of streams that weren't ephemeral are ephemeral. Dick Stockdale said they recognize that also.

Wendy Hutchinson said the G&F folks have stated how they identify their streams, how they name them, they take it from USGS quads. She asked if that is similar to that of State Engineer's database, and those streams have been named consistent with the USGS quad.

Dick Stockdale said they are consistent with the USGS quads, and his office has a member on the Board of Geographic Nomenclature and that individual is involved with the National Board of Geographic Names so that they can correlate and try to standardize the names of streams and other geographic features that are around the state. He said they do have that ability and the appropriators themselves name many of the irrigation facilities. The names can range all over, but if they are a natural feature such as a stream channel that comes right off the quad sheets, the Board of Geographic Names chooses what to call them.

For identification purposes, Bill DiRienzo said they use USGS maps or however an applicant identifies the water. He said there is some consistency. It is the same as the State Engineer's.

In answer to Steve Williams' question, Dick Stockdale said the USGS does some collecting of chemical and sediment data, the DEQ did in the past, and G&F had done some also.

Bill DiRienzo said data comes from all sources. He said they have a monitoring program and rely on USGS data. All that data generally comes from USGS, although they do their own water quality sampling, have a reference program; do sampling on streams, and so forth.

Tom Dunn asked if the State Engineer's Office maintains a record of underground water quality. In response, Dick Stockdale said that the only reference they have is if an individual who gets a water well drilled has a sample collected and gets it analyzed, they require that it gets filed with them. This is not necessarily a requirement in the water rights process. Although they do have a large amount of that kind of information available, it is not readily accessible in their database because they haven't scanned in the actual analyses. But the printouts they are able to provide indicate whether a water quality analysis is available through his office.

Dick Stockdale also said that the same information is available on a coalbed methane well if the operator chooses to submit the analysis. Bob Rawlings asked whether they submit database info to him as far as testing is concerned.

Dick Stockdale said that the information that the State Engineer's receives on coalbed methane developments are a result of the requirement that the coalbed methane operators have to get a permit to drill each and every coalbed methane well from the State Engineer. They are required to submit a Statement of Completion form that gives the as-built information on that particular facility. In some cases, he said they get water quality information. But generally, as a broad-brush approach, he said every well doesn't have site-specific water quality information associated with it. But over time, they get a fair idea of what the general water quality is in both the shallow Wasatch wells and also the deeper Ft. Union wells in the Powder River Basin. He said they do have some information, but can't say that they have information for all coalbed methane wells that have been drilled.

Bill DiRienzo said that in order for someone to get a discharge permit for a well, do they have to do analysis and it happens in two parts. When they initially apply for a permit to drill the well, they may characterize that groundwater or what they expect to get out of that well, and there is a large amount of information the WQD asks for. That information could be taken from a well within a certain vicinity, about 10 or 20-mile vicinity, and that can be used on the initial application. Once that is processed and the operator has a permit to discharge, then they also have to characterize the actual quality of that well when it discharges and then report periodically.

Tom Dunn asked if that information gets shared with the State Engineer's Office. Dick Stockdale said at this point it does not, but they are working on trying to figure out a way to correlate the DEQ permitting process with the State Engineer permitting process with the Oil and Gas Commission permitting process. Unfortunately, he said it gets kind of confusing because in some instances the information the DEQ has is a composite water quality of numerous wells that are being piped to a common discharge point. Their permits are site specific to individual wells as are the Oil and Gas permits.

Dick Stockdale said that in their permitting process, there is no requirement for a water quality analysis; it's just voluntary. He said they are in the process of developing a system to handle that and they've got the industry folks involved also. He hopes that in the near future there will be a mechanism to get that water quality analysis.

Dick Stockdale said normally they would not collect water quality information on streams in which they regulate the diversion for ditching purposes, but in some instances where special types of issues come up, sometimes they would do that and there would be some amount of water quality information. He pointed out that a number of the stream gaging sites that they cooperate with the USGS on, are also water quality sampling sites that other entities use, such as the DEQ, and in some cases the Dept. of Agriculture and the BLM. Oftentimes the cost of a particular stream gauge is shared among a number of participants so that each one gets the type data that they need.

Tom Dunn commented that there are piles of information out there that are not necessarily assembled in one spot. Steve Williams asked if there's a long-term objective to bring all this information together in one database.

Dick Stockdale said that the Water Development Commission is currently going through a water basin planning program. They have just completed that planning effort in a couple of basins, the Green River Basin and the Bear River Basin. That is the initial step to get all the existing data collected in one spot. He is not sure of how large the scope they have in mind is--as far as keeping that current. It's an initial step in collecting all the information from all of the different sources that are available. It deals not only with quantity, it deals with quality, it deals with some long range planning, and myriad of issues that are involved in water planning.

Steve Williams asked what the other states do? He would like to know where Wyoming might fit in the grand scheme of things. He asked if we are behind the curve in terms of how we have brought our water quality, quantity, and characteristics of data together, and are we kind of ahead of the curve, or, do we know, or do we care?

From Dick Stockdale's agency perspective, he thinks they are in the middle of things at this point. There have been a lot of things that have come down quite recently because of Wyoming's lower population in some of the areas and some of the recreational and human resource demands that have been placed on the water supplies in the state. They haven't necessarily had the incentive or the direction to proceed with some of those issues. He thinks that as time goes on in the next five-ten years, those issues will become more and more important and will have to be dealt with. He said they are certainly behind the curve with respect to some of the western states like Washington, Oregon, as they have been addressing this water quality, quantity issues for a number of years now. He thinks that is more of a result of their population-base than anything else.

Steve Wolff also commented and said that there is an initial effort at the University through the Spatial Data Visualization Center (SDVC) and some of the remnants of the Water Center to start pulling all the natural resource type data together into a Geographic Information Systems (GIS) type of database format. As a matter of fact, he has a meeting with them the following day to see what sort of data is available that could go into a effort like this.

Steve Williams asked if part of that is through the Wyoming Natural Diversity Database or is it strictly SDVC? Steve Wolff thinks it's being run through SDVC.

Steve Williams said the SDVC existed for sometime on their own even when the Water Center existed. Their focus has been to bring data together into material that can be new to the number of different scales using GIS.

In regard to a time frame for all these, Bill DiRienzo said there is no way that they can hold up the adoption of the Surface Water Standards and bringing those into full compliance with the Clean Water Act until something like that would occur. Bringing all this information together is an enormous thing.

Gary Beach said the Clean Water Act requires that they do this every three years. He claims they will be before the Council probably every year with changes to classifications and so forth. So he would like to get this issue done before they start the next one. He said that Bill DiRienzo is right that a lot of the pieces are there, but they need to adopt and upgrade the water quality standards so they can start working with those pieces in the future as all of these come together.

Bill DiRienzo believes that the rules WQD proposes recognize that there is a large gap in information. There are a lot of areas in Wyoming that WQD doesn't have a lot of information on, and wouldn't even have that information after everything that's out there is brought out together. What they tried to do is to base their classification on the information that they have and build into the system the means to revise that. As certain streams get identified, and if there's going to be a discharge on that stream, that would be a priority. Now they need to collect the information and have some way to adjust the classification and criteria to ensure that it's correctly designated and that they applied the proper regulation. That's the idea that the WQD proposed, he said.

Sometime back at one of these meeting, Bob Rawlings said a staff from the WQD made a statement that with all of the coalbed methane being developed the WQD is shorthanded. He asked which ones take priority, the permitting of the wells or adopting of the rules.

Bill DiRienzo replied that he cannot say one has a priority over another. They have to have rules in place so that they can have some basis to issue permits that get applied for. He said they need the basic rules adopted. When somebody applies for a permit, that is a priority. They have certain time frames they need to be responsive to. Where activity is occurring it drives the priority for doing UAA. They are interconnected, but it's not like trying to get all of the information they can and have all of the classifications right before they would permit because that would be years before someone would get a permit.

Steve Williams was curious of what the WQD's intentions are for handling all of the comments. He asked if Bill DiRienzo is attempting to incorporate those into the full document.

Bill DiRienzo said yes. He said the comment response document's first 10 pages are the responses to questions and comments from the Council. Pages 11 through 20 are responses to EPA's approval issues and issues that they have raised and said that some fix needs to be made or risk not having the standards approved. The remainder of the document is a summary of all of the comments received. There is a legend that's included that indicates where the comment

came from, a summary of what the comment was, and the WQD's response to that comment. On some of the responses, the WQD recommend some change to the rules that it proposed based on that comment, and those are indicated with a bold print and there will three little three stars before it. There's been substantial changes made all the way through, but they have tried to be responsive to these.

He explained that one of the bigger changes that the WQD made, because of this discussion made now, they have sensed at the hearing that there were a lot of questions about the accuracy of Appendix A of the database and they have made an attempt to minimize those. They've gone through the listing in Appendix A, and compared every one of those streams that are listed there with the G&F database to see if the information is correct. They have identified a number of changes, like streams that were named wrong, not tributary to the stream they were indicated to, and so forth. They've changed 188 of the streams classifications, like a stream that may have been listed as Class 2, and in searching through the database they found the listing for it and showed no species present which meant no one found fish in the stream, no data to support it, so they would modify that back. Or, they may have a stream classified as Class 3 to where there was a list of fish and they made that adjustment. They recommend making these changes in Appendix A.

Bill DiRienzo distributed a document to the Council showing individual stream classification changes based upon a reference with the G&F Inventory Database. The document shows the name of the streams, current classification and the proposal. Because the classification system itself is changing, he thought he'd indicate whether that was a more stringent classification or less stringent classification. The last page of the document showed the total Appendix A waters, total changed, percent changed, total upward change, total downward change and total waters changed. In Appendix A there is documented basis stating why that classification is what it is. He also commented that there may be other information that still may turn out to be wrong.

John Morris asked Bill DiRienzo what procedure he used in making these calculations. Bill DiRienzo said they went through Appendix A, stream-by-stream and did a manual comparison on the database that took a lot of hours. They haven't passed the information to the G&F because DEQ hasn't changed any fish information. He also doesn't know if the G&F would change their information like DEQ because where there was a conflict between the two listings, DEQ relied on the G&F information and made the change to DEQ's database. This was done in response to comments.

Dr. Shogren asked if the numbers are based on historic attainability. Bill DiRienzo said this would be the best time to address the issue of "attainability." He said DEQ is required to designate existing uses and attainable uses. The uses DEQ are required to designate are fish, shellfish, wildlife, and recreation. The approach DEQ has taken is, if fish have been found and documented in a particular water, that's an indication that that use is attainable. If they have not been found they may still be attainable, although some of these classifications may still be challenged. If they aren't found, they're being classified as Class 3(b) for other aquatic life but not for fish. That may be challenged, because the G&F hasn't necessarily sampled every one. If people claim there are fish out there, DEQ can now address that, identify if there really are fish and reclassify the water appropriately. But the classifications that are in Appendix A, the difference between Class 2 and Class 3 is based one whether or not there was some documented data on that water.

Bob Rawlings asked if after DEQ has adopted the regulations, would that be reason enough if someone shows that there were fish. Would DEQ be able to reclassify a stream after the adoption of these rules?

Bill DiRienzo said yes, and they anticipate that is going to be a normal and a routine function. He said the purpose of the new Sections 33 and 34, is to allow DEQ to do that. The way that would work is the person will make the petition and send the information. The DEQ has developed UAA implementation policies where you get some general information on what kind of information DEQ would be looking for, such as stream names, what maps, what needs to be done and why, and the data that supports the proposed reclassification. That is what UAA is in Section 33. The removal or addition of a use is what changes classification. The rule on that is explained in Section 33. DEQ also has a guidance document that explains the process.

He said reclassification could be a time consuming, expensive process depending on the circumstance. For instance, if you are going to go at a downward direction, like petitioning a classification from Class 3 to Class 4. Class 3 is protected for aquatic life where it exists or where it's attainable. What you have to show is that the use is not attainable which can be difficult. It's a much simpler demonstration if you are moving in an upward direction like from Class 3 to Class 2 because all you need to show is the presence of fish. In Section 33, you can only remove a use by demonstrating one of the six factors that are allowed under the federal regulations.

Bill DiRienzo said the process of getting this information to the public and landowners is it will be posted in the website, there will be public notice of meetings, and through the normal way of notifying the public of these proceedings.

Bill DiRienzo said if the regulations passed and then an error was found, the way WQD will make the changes in the classification system is to look at it not as Section 4 that describes the classification or Appendix A that lists them and Section 33 that provides the mechanism to refine and revise them. He said these sections should be taken as a whole. DEQ must meet all the requirements to establish the correct classifications. Therefore, what DEQ has proposed to be adopted are, Class 1, 2, 3, 4, and the descriptions of what types of water are in each, a listing in appendix A of which waters the DEQ thinks what those are at this point, a process to revise those classification in Section 33, and Section 34 which provides the clear authority for that to be based on an Administrative decision rather than another rulemaking. The process won't be done totally in-house. The process would be that DEQ would advertise a proposed reclassification; indicate whether it came on a petition or was developed by DEQ; or whether it came from the G&F. DEQ would put together in some structure and explain what is being done. This is the Use Attainability Analysis. During that public notice period people can add new information. After the 30 days, the agency would make the decision whether the classification changes are appropriate or not. If there is a change DEQ will submit it to EPA for approval.

Nick Bettas asked if there is any recourse. Gary Beach said that decision would be a final decision and is appealable to the Council. Nick Bettas said it would seem that part of the credibility of the DEQ's program is dependent on what the G&F does; yet DEQ has no control over how they conduct their business.

Gary Beach said if you have UAA and DEQ reviews it and finds it shallow, DEQ may choose not to change the class because it doesn't meet the requirement standard it thinks is necessary to make that classification change. It's going to be a judgment call on the quality of the UAA.

Nick Bettas said if an individual disagrees with DEQ's rating that they would look at the issue and would not necessarily go to another division.

Gary Beach said if they decide a permit and put it out for public comments, they will weigh the value and substance of those comments before they make a final decision. They always have the right to appeal DEQ's decision to the Council.

Dr. Shogren said this sounds like the topic taken up the day before about the informal hearings, decisions and no decisions, and appeals and no appeals. This is not related directly to this topic now, but the same undefined window.

Gary Beach said this is a critical section. What the Council is doing now is to decide whether to grant authority for the agency to make classification changes. He said there is a reason why they are proposing that to the Council. They have this default Class 3 which is all of the streams out in Wyoming that don't have a Class 4, and therefore, they fall into that by default. A lot of those are the dry streams, dry tributaries that run into perennial streams. A lot of those fall into the Class 3 because DEQ doesn't have data on them right now to put them into the proper class. If a person wants to discharge on one of these streams and applies for discharge permit, DEQ will inform him that since it is designated as Class 3, that he will have to meet a Class 3 which is aquatic life protection standards. Even though DEQ knows that it should be a Class 4, there is no documentation. If the Council decides it has to make the change that means it goes through a rulemaking process before that change can be implemented which is six months to a year that the permit is delayed to be able to discharge. But if they want the permit right away, DEQ has to write it for Class 3. So the reason why DEQ put the procedure in is to expedite that decision-making for reclassification. The Council will have to weigh this on what its comfort level is. He put this in so DEQ's decision is the final decision that's appealable to the Council. He wants to assure that people have the right to appeal the decision to the Council, if they think the DEQ erred in their decision. He said they received a lot of comments when they started this rule in the Advisory Board from citizens who first of all didn't like the default Class 3. He understood why, and it's because there are a lot of dry streams in Wyoming and will be overprotected by this rule. His assurance to them was that he would do everything to correct the classification of these streams and yet meet the Federal requirements, and to have a UAA on them if they are going to protect them for less than aquatic life, which is Class 4.

Gary Beach said his division could start this process by itself. They also have their own monitoring program. As they develop data on streams they may also develop the UAA. They would advertise the reclassification, make it open for comments, and after 30 days, based on the comments, they may decide to reclassify.

Gary Beach said it could be done for whatever geographic area you want to work with, whether it's a segment of a stream, a watershed, and so forth. There are two things driving this, it's the permittee who wants to get a discharge permit and it's the Total Maximum Daily Load (TMDL) requirements where the DEQ is dealing with impaired water bodies and landowners are concerned about dry streams running across their lands that are dry and being protected by

aquatic life standards. But if the permittees want to just do the UAA, they have to submit the information to DEQ to help them by properly classifying that stream expeditiously.

Gary Beach said that the Conservation Districts are also on this case. He thinks they have a number of them that are waiting for this rule to be finalized so they can look at what does it take in the way of the UAA to submit it to the DEQ to get a lot of these dry streams properly classified.

Wendy Hutchinson thinks by keeping the UAA in DEQ is a very practical and technically sound. If it's appealed they can come to the Council. One administrative concern she then is about DEQ doing rulemaking, and having the authority to do rulemaking without the Council seeing those rules.

Gary Beach said they talked with the Attorney General's Office, and his feeling is if the Council authorizes this process by rule, the process is the standard. He said they've done this elsewhere like in their groundwater classification rules. He said the Council does not classify groundwater, but gives the DEQ criteria that say ground waters will be classified by this criterion. He said they have criterion that they follow to classify groundwater.

Wendy Hutchinson said there are standards for the groundwater, and when you sample your groundwater, the difference is that the listing of the stream classification is in the rules, and to her, it is different. It does not mean that's good or bad, but she is just pointing out that it is different because it is part of the rules.

Gary Beach said the difference is that they have an Appendix A in these rules that shows the classes. He thinks the proper thing to do is, if the Council decides to pass this rule and when DEQ makes these classes whether it's annually or whenever they come back as rulemaking, they ought to update that Appendix A so it will show the current classification. The confusion is that there is Appendix A that the Council adopted and then there are these administrative changes which is different from Appendix A

Bill DiRienzo said there are 2,000 streams listed in Appendix A. There are also waters that are not listed in Appendix A, because what's there is only a very small subset of all the waters in the state. On Page A1 at the beginning of Appendix A, it describes how you determine what the classification is for any water that is not listed. That's where most of these discharges are happening. There is a section there dealing with unlisted waters. If it's not listed in Appendix A and it is shown in the G&F database which is also part of the record and what the classification should be, if it is shown in that database as supporting fish, it will be classified as a fishery. If it were shown in the database as not having any fish, it would be a Class 3. There are also other waters that are supported by an approved UAA containing defensible reasons for not protecting aquatic life uses would be for 4A, 4B, or 4C. He said they don't have UAA's at this time, but this language was constructed so that when they do have one on an unlisted water, that it is not a rule change. He gave an example of how the process works from Class 3 water to Class 4 water. He does not think that is a rule change.

Dr. Shogren said that since DEQ can file a UAA for watersheds, what if somebody comes in and files a UAA to classify the entire big watersheds as Class 1.

Not for Class 1, Bill DiRienzo said. They are the special waters that the community or the people feel should be set aside and maintained at that existing quality for whatever that quality is. It doesn't mean that they have fish in it.

Bill DiRienzo said the UAA can only be used for Class 2 to Class 4 waters. The demonstration you can make is that the whole watershed supports fish or supports the drinking water supply. If you can't make that demonstration, DEQ would be assigning a use that is not attainable. If you assign a fish use on the dry streams in that watershed, that stream would be permanently impaired because it would never be supporting that use.

Dr. Shogren then asked how busy would the WQD and how much would that tie them up to do this for the whole state. Bill DiRienzo said there's years of work involved.

Nick Bettas called for a break.

In reconvening the meeting, Nick Bettas announced that Dick Stockdale of the State Engineer's Office had left. He asked for comments from Harry LaBonde, Director of Public Works for the City of Laramie and a member of the Water and Waste Advisory Board.

Harry LaBonde said the Water and Waste Advisory Board (Board) has struggled with this Chapter as well. They've spent over two years and it was an ongoing effort when he came on to the Board. What the Board tries to do is, create a regulation that has environmental safeguards in them, but at the same time try to make it a practical regulation. There were some changes that the Board went ahead and implemented into the draft regulation to try to make it a more practical regulation, and some of the temperature standards that had been changed in the draft do reflect that kind of intent. Because the discussion earlier involved the database for stream listings, his comment from the Board's perspective is that the G&F database probably represented the best database that is available. He thinks everyone should recognize that databases aren't perfect, and if the Council approves a database today, it will be outdated the next day. He said that G&F database is the best in the state and obviously it will be refined as time goes on, and the regulation will allow for it to be updated as new information becomes available. It's probably the most comprehensive in dealing with the fishery issue, which is the reason the Board approved and supported it.

Tom Dunn said that in his reading of the Analysis of Comments, there were some comments that dealt with the process for petitioning to raise a body of water from Class 2 to Class 1. He said it seemed like the process had been in one draft, and in and out.

Harry LaBonde said what came to the Board on the first draft was the requirement to have a UAA if the classification is downgraded, and that's logical. The first draft that he saw did not have in it the same requirement if you're going to upgrade a stream classification. From the Board's discussion, they felt it was only reasonable that if you're going to use scientific justification to downgrade, why not apply that same standard to upgrade the stream classification. That's why that is in the current draft.

To further explain it, Gary Beach said that in their very first draft, which went before the Board, they had a list of criteria that the Council would consider in classifying the waters of Class 1. It is included the packet because they received some public comments that wanted that criteria in

the rules. After the criteria was added and went out for a second comment period before the Board, the fight began over whose criteria. Everybody agreed that there ought to be some criteria that guide the Council's decision on how it will decide what is Class 1 Water that has these unique characteristics. Opponents began to develop what those criteria should be. There is one group that said those criteria should strictly be based on scientific data, which is like use driven. Others said they should be based on value judgments, like aesthetics. A debate ensued and what they decided in about the second or third draft is to recommend to the Board to stay with what's already in the rule because that seems to have worked in the past. They then recommended pulling all of those criteria back out of that rule rather than struggle with that issue in this rule. He thinks that's the comments that the Council is going to hear. He does not disagree; he thinks that may be an issue the Council wants to take up about how do you make this decision on Class 1. He thinks that's a different struggle and he'd like to do that in a different rulemaking so it doesn't hold up all the rest of these rules.

Gary Beach said the current rule is still in place for changing something to Class 1 Waters. It's the old language that's been used for years and they decided to just retreat to that and leave it alone for now.

Terri Lorenzon had a question for Gary Beach regarding his comment that when the Council does the reclassifications it will take six months to a year. Was he thinking of the public notice and the public comment period both being time-consuming and those are features that are more expensive for people to go through? When she read the rule that Bill DiRienzo handed out where it said that DEQ provides for public comment and public notice. She asked what is the difference in time, the savings that he is seeing if he's going to go through public notice and public comment.

Gary Beach said that Bill DiRienzo has different recommended language for Section 34. Bill DiRienzo said that they received a lot of comment on that provision. It seemed that most of the comment was directed at the DEQ assuming authority that it doesn't have like what Wendy Hutchinson had said. It is the Council's duty to approve rules and the standard is a rule and the DEQ is assuming that. That's where it mostly came from. He said in the current draft that was subject to the hearing, the language really leads you to that conclusion because it said that this would be an interim decision, that it would be brought to the Council for final adoption. It's not a rule change; it is an implementation of the rule taken as a whole. In response to comments, what he had passed out was some new language that DEQ may recommend to the Council. They've added some language about it being appealable, so where there may be an issue or a large public interest in, it could be appealed to the Council before they would finalize the decision. What the Council has before them is the language that is different than what's in the draft. Gary Beach said that with respect to schedules, Terri Lorenzon is correct. Wendy Hutchinson said that if Appendix A was not in the rules, then it isn't a rule change.

Gary Beach said it's proposed in Section 34 that there will be a public comment period and administrative decision. The way they had it before is that they would receive the UAA, and they would determine whether it was complete or not. Once they decide it is complete, they would recommend it to the Council and the Council would start the rulemaking process. What the Council would envision is how fast could they move that rulemaking through. Does that goes back to the Board and then back to the Council which really lengthens it, or would that go strictly to the Council and make a rule on it because many times when the WQD has petitions

like it, they are sent back to the Board for a rulemaking process. He is worried about the length of time it takes to go through a rulemaking process for a classification change.

Terri Lorenzon said she is aware of the need to expedite the process, but agreed with the point that Wendy Hutchinson raised about the Appendix being in the rules. She asked Gary Beach if he considered not having them in the rules, assuming he wants it there for enforcement purposes in writing a permit. She asked if the Appendix needs to be included in the rule.

Gary Beach said that's an option if the Council does not want it included there. Somehow there needs to be a database that people can access to learn the classification. It's always been in the rules and people can always find it there. He said the Council could remove the Appendix from the rules, if it wishes, and just have a database that shows what the classification is.

Wendy Hutchinson asked what good is it to have it in the rules if, over the course of a year or two, he will change things in it and that piece in the rules won't get physically changed until there is some reason to come to the Council to update it.

Gary Beach said that is something to be worked out as they look at the concept. Although, most importantly, he said the first question is if the Council wants to go with the concept of delegating that decision to the administration, then the Council can decide whether to take the Appendix out.

Maggie Allely, the attorney for WQD said that she had discussed this with Bill DiRienzo and with her Deputy Supervisor Tom Davidson at the Attorney General's Office. Their feeling is that this is not going to be a rule change. She said that if the Council will adopt the rules as proposed, they would be adopting the criteria by which the administrator would just implement the rule. She originally suggested just loosing the attachment and not giving the appearance of changing a rule. She views the Appendix as just a list demonstrating those streams that they have implemented pursuant to the Council's rules.

Wendy Hutchinson said that it's dangerous to keep the Appendix in because of implications in the other Departments and because there are appendices to rules that are part of the rules in the LQD rules and the Council views those as rules. It is dangerously inconsistent, she said

Steve Williams thinks that Appendix A is also going through continuous change, like a proposed change of 188 streams. He said that if we have to deal with every single change that comes through that avenue as a change in the rules, it would be a 40-hour week for the Council. He thinks that Appendix A is an application of the rules, and should be separate from the rules. If a classification is contested, it will come before the Council. In some ways it comes like issuing a mining permit. That is something that DEQ makes the final determination and is not subject to the Council's approval. Otherwise, he said, go ahead and make those. He asked if he got the issue correctly.

Terri Lorenzon said that the reason she raised the question was because she wanted DEQ to tell the Council if taking that appendix out causes a problem for them in enforcement or permitting.

Bill DiRienzo thinks that the appendix can be segregated from the rules. But it will have to exist and would have to be a part of their submittal to EPA. EPA needs to know what the waters are

because they are going to approve the standards for Clean Water Act purposes. They need to know when DEQ makes changes to Appendix A as part of the regulation or part of a procedural policy document. He thinks it probably can be segregated from Chapter 1.

Steve Williams said there are several databases, which if they are all brought together become an outcome of that database. As the database changes, that might be a manifest in this classification system, and hopefully you could call up that ultimate result that the public can print out. He said that if you want to use this information that would be the best location for it.

Nick Bettas asked if there would be any problem if someone petitions to change a stream classification if in fact that listing is not part of the rules. Maggie Allely said that if Appendix A is not attached to the rules, they could make that readily available. They need to know what is the current status of it before they go through the effort of making UAA changes. She said if it weren't part of Chapter 1 itself, they would have to pass some sort of a policy or something to make that document readily available.

Bill Wuerthele, Regional Standards Coordinator for EPA in Denver said that they commented on Section 34, a section that has troubled them. They met with WQD on January 5th to go over some issues related to Section 34. He then summarized the history of Appendix A. He said 1989 was the last time that the Council reviewed the standards in a triennial review of the classification of waters in Wyoming, and it was an issue then. At that time, Appendix A did have sort of a quasi-regulatory status, and it was not part of the regulation. That was one of their comments to the Council at that time that the State had to designate and list in its standards the designation of uses. What it says in terms of minimum requirements for water quality standards is, and he read, "The following elements must be included in each state water quality standard submitted to EPA for review… A use designation consistent with the provisions of Section 101 (a)(2) and Section 303 (c)(2) of the Act." (referring to Clean Water Act). He said those have to be included in the standards. That was the comment that they made back in 1989 and the Council at that time added the list in Appendix A to the standards. They became part of the rule, and that's what EPA had required. At that time, he said there was a tributary rule, and EPA knew the State could not list every water in the state because it's a huge document in itself, but that was covered in the tributary rule. What the State did at that time was to list the waters that were named in USGS map and unlisted tributaries had the same class as the first listed water to which they were tributary. That was how it was resolved.

Bill Wuerthele said his understanding of the discussion now seemed to be aimed at going back to where it was in 1989. He said that is not going to be acceptable to EPA to have the use classifications somehow separate from the water quality standards document. They have tried to accommodate the going away from the tributary rule where you would end up with a huge list of streams in the water quality standards

Steve Williams asked if the Appendix is part of the rule, to supplement the rule, or is separate from the rule? It is part of the document so people can refer to it.

Bill Wuerthele said it's more than that. He had talked to the DEQ about those issues and one remaining concern they have about Section 34 and the changes that are being proposed now. There will be confusion about what the current classifications are if Appendix A says one thing and the changes are made and that the Council through rulemaking does not adopt change. That

is a lingering problem that they have with the proposal for Section 34. They think they can accommodate that if once a year or whenever Appendix A is updated and that the EPA agrees that that is not a rule change to make those changes in classifications. He said it's not just so people know where to look to see what a particular stream is classified as. He said it is a requirement in the regulation that the State designate classifications in its standards. In 1989, Appendix A was not really part of the standards and that was a change made to make it part of the standards document.

Steve Williams said it might be possible for all the proposed changes in a given year to be processed by DEQ and brought before EQC on an annual basis to make those changes. It would be the official changes that would go in to the rules.

Bill Wuerthele said they've talked about that and up until this year, that would have definitely been possible. The problem is that in April of this year, EPA changed its regulations. It used to be that when a State took an action on a standard, it was an effective standard and could be used for Clean Water Act purposes. For example, in writing permits. EPA changed that regulation. Now it has to be approved by EPA before it's a standard for Clean Water Act purposes. That would delay changes for a year

He said that Gary Beach, Maggie Allely and Bill DiRienzo were attempting to address the ability to change the uses delegated to the DEQ. Their argument is that the standard is all four pieces of the regulation and those four pieces establish a process by which changes can be made in these classifications, which aren't regulatory changes.

But, he said they were willing to entertain that idea if what's proposed in Section 34 is functionally equivalent to a regulatory process. Their regulation requires that in changing the standard there be a public hearing and that the results of that public hearing be submitted to EPA for review and approval. What is being proposed is that through UAA process there will be public notice, comment, and response to public comment similar to what would occur in a hearing and then the results of that would be submitted to EPA for review and approval. That change would not become effective in State law or for Clean Water Act purposes until EPA approves it.

Bill Wuerthele said if WQD wanted to make all these changes, bundle them up and the Council would adopt them as standards once a year that would be what EPA would be looking at to review and approve for federal purposes. It would then make it a Clean Water Act standard. He said the whole idea of expediting the change process would be lost because you would be holding the change for a year, then doing them all at once.

Maggie Allely said they would submit it to EPA, as the official State standard that had been adopted by the Council and that's the one EPA would act on. So a year would be lost in holding them before bringing them to the Council.

Wendy Hutchinson said the process that is currently being proposed whereby the WQD does the public comment, reclassify stream, then she presumes the WQD would immediately send notice to the EPA and they would be reviewing them on a continual basis.

Bill Wuerthele said at the regional level, they were saying that could work. The outcome would be submitted to EPA, which they will review. Once they approve that outcome, then that change would be effective for Clean Water Act purposes. But, the problem that is there is Appendix A has stream classification that's adopted by the Council and a different one that was done by DEQ and there needs to be some catch-up. Updating Appendix A once a year could do that, but that would mean those outcomes would never be brought before the Council for adoption. Once you did that, then it becomes the standard and that is what EPA would review and approve.

Wendy Hutchinson asked if there's a way the Council could use EPA public comment and hearing and just take their recommendation and approve it as a rule change. She does not know if the rules allow it.

Terri Lorenzon said that is a good suggestion, but the Council would have to look at the Rules of Practice and Procedure.

Gary Beach said it would be like an NOV and Order that comes before the Council. Gary Beach said we need one practice, one procedure, so it applies to everything. He also said that whenever they get a UAA, just like an NOV, they would put it on the docket and if no one appeals it, then EQC would just go ahead and approve it. If somebody has a problem with it then they can object to it, appeal it, and set a hearing.

Bill Wuerthele said that in EPA's letter to the Council, they made two suggestions. The first suggestion was whether there is going to be a process that has the same public notice requirements and there is a process in which the UAA is reviewed by EPA as well as the public, and the DEQ resolves any conflicts or questions. Basically the outcome would be something that's stipulated to. It's like saying the EPA has already reviewed the UAA and it's going to be acceptable. They felt that would be a way of expediting the process. Their second suggestion was that they recognize the problem with using a default classification and not being able to list all of the streams. But once one has gone through the UAA process and then sort of single out and the classification has been determined, that should be added to Appendix A so that there is a record in the appendix where people can look it up and they would know what that classification is on that particular stream.

He understands DEQ's concern and especially early on and once these rules are adopted there is going to be a rush of UAA's and there is going to be a lot of work. He thinks that after the initial loop of activity that it will become a more standardized process. He also said that other states are dealing with the same issue, doing the UAA's, upgrading their base classification that applies to all waters.

Bob Rawlings asked if a company approaches the State and wants to drill a well, discharge the water into a dry wash that's dry 11 months out of the year, and they get a permit from the State, and at a later date another company approaches the State and wants to drill another well, where would that draw fall if there's water from the first well.

Bill DiRienzo said that under the rules that they are proposing, the dry stream for the first driller would be protected for aquatic life. DEQ would provide the permit to meet the aquatic life criteria. Maybe they'll do the UAA and classify it. It may also be downgraded to a Class 4 because aquatic life doesn't exist there and it's not attainable. If they are successful with that

and show that it should be a Class 4, they would then reclassify it under whatever procedure comes out of this. The applicant then would not have to meet aquatic life criteria, and that is what that stream would be classified. The second person comes and would be discharging and it would now be a Class 4 stream. Whoever else is discharging on that stream would be discharging under Class 4 standards. If this goes on for many years and there are now wetlands because of these discharges, then there is the provision under the proposed rules that does not require more stringent regulations now that these wetlands had developed. That is what Class 4C classification is about.

Wendy Hutchinson said that would make sense if it were tomorrow, the rules had passed tomorrow, reclassifying something to Class 4, and so forth. She said what about today, say there are streams out there that were Class 4 waters, but in the last 2-3 years water has been discharged into those streams and now there are wetlands and there's fish. She asked how are the other dischargers on that stream who were discharging into Class 4 streams protected or not penalized?

Bill DiRienzo said that is where the first rush of UAA's will come from. In some of the earlier drafts, when the WQD first tried to approached that problem, they were going to raise all of the streams up to Class 3 for aquatic life protection. But they added a new table containing a list of about 600 active dischargers who are right now discharging to Class 4 waters; they thought this would be very difficult to now comply with these higher standards. Streams on the new table would not be upgraded for a period of 5 years while UAA's were completed and the proper classification determined. Whether these waters were properly classified as Class 4 waters initially or not, or would they support any aquatic life without that discharge or not, are what WQD tried to ascertain and failed in the early drafts. The demonstration that a discharger would need to make in the UAA under DEQ's current proposal is that 100% of the flow, except for occasional rainfall, is attributable to his discharge. He thinks it's a relatively easy thing to be able show. In making that showing, DEQ is proposing that water would remain a Class 4. That would be a cause to keep it as a Class 4. But that is the main disapproval item for EPA. They don't feel they can approve that, but DEQ still maintains that in the rules.

Wendy Hutchinson thinks that is critical from practical standpoint. Bill DiRienzo said it's critical in a lot of places.

Steve Williams said that somewhere when the economic incentive for methane production disappears and it's not pumping those wells and these wetlands goes back to a dry creek that is not going to have repercussions, where you're decreasing wetlands.

Wendy Hutchinson asked whether that coal mine on that same creek that's been discharging, would it be in trouble because that wetland is gone away because someone else's industrial activity has quit?

Bill DiRienzo said the difficulty under the Federal rule with this circumstance isn't that somebody has to maintain that discharge to preserve the wetland. The real difficulty comes into place is that when the creek dries up, EPA maintains that you have to continue to designate that wetland use because it's an existing use, and also under the rules, existing uses cannot be removed by UAA. Existing uses must be a designated in perpetuity. So when these people discharge water, create a wetland for 10 years, stop discharging and it dries up, you still must

keep that aquatic life designation on that stream and always apply the criteria, even though the use is not attainable. That is another difficulty the WQD is trying to solve.

Steve Williams said this is very real, and he knows that in the Casper area where they are proposing to re-line a leaky water canal and this same thing came up. They have been leaking for 20 years, created wetlands around it, and by upgrading the quality of the canal, they're going to lose the wetlands.

Bill DiRienzo said a good example is the Frontier Refining Company located on Crow Creek in Cheyenne. He expects that if the rules are adopted as they are, it would be one of the first UAA that DEQ would be doing. Crow Creek used to be a Class 4 and is now going to be a Class 2, although they still have trouble meeting Class 4 effluent limits right into Crow Creek. In order to solve that problem, some time ago they began discharging to Porter Draw on the south part of town. Porter Draw is a completely dry draw. They put a dam, piped their effluent a few miles south of town, and in the lake that they have formed enough treatment they could meet all the effluent limitations even for a Class 4 waters. They have been doing that for years. The lake there now gets agricultural use, bird use, and Porter Draw itself has a pretty nice flow from this. There is also wetland that has been developed and it is a good environmental benefit. If they will have to classify Porter Draw now, essentially the same as they would Crow Creek, and place on the refinery the same requirements to discharge into Porter Draw as into Crow Creek, and if they make big investments in treatment and everything to do that, they'll now be discharging into Crow Creek. They are not going to spend a lot of money to discharge at the Porter Draw, and that whole system will be lost. Crow Creek won't be any better off, and it just doesn't make sense. They need to be able to say that Porter Draw is 100 percent dependent on this effluent and the aquatic life that has developed is overall a benefit and that there is more damage by removing the discharge than by leaving it in place.

Dr. Shogren said that what you're looking for is an equivalent of a safe harbor and no surprises like in the Endangered Species Act. If you set aside land and you attract more woodpeckers and then you decide you're going to develop it, you can develop up to the point of your baseline woodpeckers. You're not responsible for the ones that moved on.

Wendy Hutchinson asked Gary Beach if this is in their current rules to take care of that, but EPA can't cope with that part of the rules? Gary Beach said yes, it's in the rules. EPA has said they can approve what's in the rules, and they may have trouble in DEQ's application of that provision in the rules. So he thinks there may be battle they'll fight down the road. Bill DiRienzo said there is a provision for them keeping that as Class 4.

Bill Wuerthele said DEQ can have that provision for Class 4C. What they were questioning is the beforehand determination that all of those waters that receive effluent will automatically be in Class 4C. They want to look at them on a case-by-case basis. In the situation that Bill DiRienzo described for Porter Draw, he said they recommended a process that was developed by Region 9 that is an environmental risk benefit. It is an approach to look at the benefits of leaving the water in place or leaving the discharge in place versus removing the discharge. Their recommendation in a situation like Porter Draw is site-specific criteria value rather than removing the use or downgrading the use to a Class 4.

In regard to a question from Nick Bettas whether any litigation taking place regarding that default classification, Bill Wuerthele believed there was a lawsuit in Idaho. They had unclassified waters that didn't include fishable/swimmable uses and EPA disapproved it. The state failed to make the changes and so EPA initiated a federal promulgation of federal standards, and they were applying fishable/swimmable uses to all waters in Idaho. The challenge was whether EPA was being arbitrary and capricious on individual waters where they had the information showing that it was fishable/swimmable use. EPA has outstanding disapprovals in Colorado and Utah, and they've sent a letter to both states saying that they will initiate promulgation unless they upgrade those uses. They have been doing that; Colorado operates on a basin process whereby they do their standards basin-by-basin. In going through their basins, they've either upgraded their uses or provided EPA with UAA. Two years ago, EPA also disapproved South Dakota's standards for the same reason. They had a lot of waters that were Class 9, which were not fishable/swimmable, so they changed the Class 9 classification. What they are now doing is using the attainability analysis on a case-by-case basis to determine the proper classification. He said they are in the midst of promulgating the fishable/swimmable uses in Kansas.

In regard to EPA's view of the attainability, Bill Wuerthele said the way it's described legally in the regulation; there are three levels that define attainability. (1.) If it's an existing use, and that's attainable. (2.) If it could be achieved through the technology requirement from the Clean Water Act. Those are the requirements that are placed on a discharger regardless of what kind of stream you are discharging into. That's a categorical requirement for a type of industry, like the oil & gas industry that has effluent guidelines they have to meet regardless of what kind of a water body that's going into. So it's not driven by the water quality standards, it's driven by the technology that industry is expected to meet in any discharge. In meeting those technology requirements, say for example for a wastewater treatment plant, it's equivalent to secondary treatment. The secondary treatment protects and supports a use classification. By definition, that's attainable because the discharger has to meet those technology requirements. (3.) As Bill DiRienzo had mentioned earlier, the 6 criteria that are in both the Federal regulation and would be in the Wyoming regulation if the Council adopted Section 33. Those 6 criteria set out the kinds of conditions that could be used in removing a use. So if the uses are precluded by one of those criteria, then it's not attainable. If you haven't demonstrated that it's precluded by one of those criteria, it's attainable. So it's an existing use, it's a use that can be met by the technology requirements or it's a use where it hasn't been demonstrated that one of the use removal criteria are met.

Steve Williams asked for examples of use criteria. Bill Wuerthele said what's being proposed in Section 33 is verbatim out of the regulation. Naturally occurring pollutant concentrations prevent the attainment of the use. Example, arsenic levels, natural levels of arsenic are well above the drinking water value. For the drinking water users, the treatment that's available won't resolve the problem. Naturally occurring pollutant - natural, ephemeral, intermittent or low flow conditions on water levels prevent attainment of the use unless these conditions maybe compensated for by the discharge of sufficient volume of effluent discharges without violation of state water conservation requirements. Human-caused conditions or sources of pollution prevent attainment of the use and cannot be remedied or would cause more environmental damage to correct them than leave in place. Then there is the economic one. Another reason is, if meeting the standard would cause substantial and widespread economic harm. That's the legal definition of attainability.

Bill Wuerthele said they are looking at doing controls more stringent than those required by Sections 301B and 306 of the Act, which are the technology requirements. So if you have to go beyond those technology requirements and they would resolve in substantial and widespread economic and social impact, that's the basis for not assigning this, and that's the economic piece.

In actually doing a UAA and trying to answer the question in a more practical way of what's attainable, what they are looking at according from Bill Wuerthele is responding to three questions. (1) What is the potential for the stream (2) What are the stressors limiting that potential (3) Are those stressors controllable. Those are the kinds of things that are addressed in the UAA. That's why Bill DiRienzo's implementation procedures are a more detailed set of procedures for getting at those kinds of questions. So leading an applicant through the process, the kind of information they would have to provide is to satisfy one of the 6 downgrading criteria or answer those more practical questions.

Often times, Bill Wuerthele said the questions that are asked are how detailed or what goes into these UAA. What they've seen is a whole range and it depends on the complexity of the problem and how contentious the issue is. For example, in Colorado they have a lot of streams that were not classified for swimmable uses for primary contact recreation. The UAA is a checklist that is put together, and they go out and talk to the locals and they go through their checklist and then look at things like access and depth of the water and things like that to come to a conclusion about whether or not it should be classified for primary contact recreation. In a lot of cases in the last go-around of hearings, they upgraded a lot of those waters. But where they haven't, they provide that checklist to EPA as their UAA, and he said that's acceptable. On the other hand, in some of the controversial mining sites in Colorado, the UAA has been very detailed and quite extensive looking at quite a bit of data collection. The affected party generally does those. The state of South Dakota right now is doing the UAA. EPA looks at the practicality of the issues whether or not a state has made a reasonable response to those three questions that they asked.

Tom Dunn asked what does "control" mean and as an example he said that the stress is low stream flow and low stream flow is caused by irrigation. If all the irrigators on that stream use sprinkler irrigation instead of flood irrigation, there would be adequate water. Therefore, the answer is the stressors can be removed.

Bill Wuerthele said he is aware that water quantity is a delicate issue, and that's one that they haven't addressed, but the answer could be yes. Some adjustment in the practices may not spare irrigation, but may be through the state's in-stream flow provisions allowing a minimum in-stream flow in the stream, that would be considered a controllable condition. An uncontrollable condition would be a naturally ephemeral stream that isn't impacted by irrigation.

Tom Dunn found out that a lot of streams are naturally ephemeral this summer and Bill Wuerthele said that's the case. Tom Dunn then asked how often do they have to be ephemeral before it penetrates EPA's eye. Bill Wuerthele said what they've used is the hydrologic definition of ephemeral. If the stream does not normally intersect the groundwater table and is not receiving flow from groundwater and flows only in response to precipitation events, then they would use that as a basis for ephemeral stream. Bill Wuerthele further stated this is a difficult issue that EPA and the states are struggling with.

Bill Wuerthele said that if you're looking into aquatic life and you're talking to an aquatic ecologist, ephemeral streams have aquatic life in them and some of them can be fairly diverse aquatic communities. If you get into the situation of trying to decide where does aquatic life begin, he said it is a very difficult issue to address. So what they've done historically in his region is not try to answer that question based on the biology because a continuum and ephemeral wetlands can be very important not just for aquatic organisms but for water fowl. Therefore, they cannot answer that question in terms of biology. So they look at it in terms of hydrology, and that's where they made the distinction. They made the distinction between ephemeral streams and intermittent streams. The reason they've made that distinction also is because intermittent streams do have water in them for longer periods of time. They have more diverse aquatic communities and also can serve as nursery areas for fish. They've made that distinction whether or not other folks in EPA would agree with that. Right now, they are saying that a natural ephemeral stream is not a stressor that's controllable.

He further stated that what they've disagreed with the state is on one flow, as provided by a discharger, to a naturally ephemeral stream. That changes things. That is where they are going to have some future discussions.

Tom Dunn asked to agree or disagree that the flow from coalbed methane will cease at some finite period of time. Bill Wuerthele said they agree and he said that Bill DiRienzo brought up a good point, in that, the way the regulation is written now is, existing uses are to be protected. There is no provision for removing an existing use. But when you have situations like repairing a leaking irrigation ditch and the wetland goes away or the coalbed methane ceases to pump water, that's a reality that they are going to deal with. Another situation is the drinking water reservoir below Rocky Flats. He said it was abandoned because of plutonium levels and as part of building a new reservoir for the City that used that old reservoir. The City agreed never to use that old reservoir as a drinking water supply. Historically, it had been used so it makes it an existing use. Realities like that are going to be addressed in their review of standards. He thinks that the general concept of existing use is right on, if under normal circumstances, you have an existing use. Clearly it's attainable and you shouldn't back off from that, he said. But the regulation probably didn't anticipate the kinds of situations that are being discussed now, a use that's in place for five or ten years and then disappears because that industry quits discharging. This will also be addressed in its review of the standards.

Bob Rawlings asked if there is a draw that has a wet spring towards the head of it and for example the draw runs for 10 miles and five miles down someone applies to the State to discharge from coalbed methane. There is no way that any of the water from the head of this draw has ever got to that point, so how do you consider this whole draw?

Bill DiRienzo said to answer this hypothetical question is for example a hypothetical creek he calls Kangaroo Creek, is it ephemeral, or is it intermittent? The fellow who applied to discharge in there is going to say there is no water now, doesn't know if it intersects with the groundwater at some part of the year, he doesn't know if it's low in March, and so forth. The way he would approach that hypothetical issue is by using the National Wetlands Inventory, and using the existence of wetlands in and along those channels as an indicator of how much or how often that water is available. If you have that channel that's 10 miles long and no wetlands in it at all, they feel that would be a clear indication that this is ephemeral water. If there are a lot of wetlands, it's a clear indication that it's at least intermittent. They did run into difficulty when they

received comments on what really is the line, what if you have some spots of wetlands here and there. The individual UAA is where a person will describe, what is the value of those wetlands and why do they occur and it will just be a reasonable case-by-case decision. It can be done. The classifications will change naturally as a stream coming off the mountain is a good coldwater trout stream. It is going to change and enter in a different physical environment when it's off the mountain, out in the prairie or run in across the desert. And, there are logical, natural places where classifications will change. Generally, he said, they like proposing a single classification for an entire stream.

At this time, the Council called for a lunch break.

Nick Bettas reconvened the meeting at 1:45 p.m.

Wendy Hutchinson said that the listing of streams that's in appendix A does not include other things. She asked how that cutoff is made as to which streams are included and which are not.

Bill DiRienzo said that what Bill Wuerthele was saying earlier was, prior to 1990 there wasn't an Appendix A. The only streams that were listed in the standards themselves were just those Class 1 waters that have been specifically designated. It had Section 4 that described which waters would be Class 2, would be Class 3 and so forth. The way these classifications were applied was, as needed. If somebody applied for a discharge permit on particular water, then the DEQ collected the information on that water and put it to the appropriate category. Then in 1990, EPA said that wasn't acceptable anymore and that DEQ needed to have classifications on all waters at all times. So the way DEQ handled that was to take the 1:500,000-scale hydrologic map of the state and all of the streams that were named on that map became the list. Then all the other smaller waters were given a classification as to whether they were tributary to one of the listed waters. In addition to that, there are the geographic designations where in the current rule all the waters on National Forests were simply given Class 2 regardless of what uses they actually support. If it's on the National Forests, it's Class 2.

In going through the Analysis and Comments, Bob Rawlings said it appears now that EPA is going to adopt the 5 ppb (parts per billion) for arsenic. He asked why not change that now.

Bill DiRienzo said that just got adopted. He saw the announcement by email that EPA has adopted the final rule of 10 ppb. The current State's standard is 7 ppb.

Going back to Section 14, addressing dead animals, Bob Rawlings had a concern on Page 41 of the Question and Response document, that stated, "This section is silent on the matter of responsibility, thereby allowing such discretion." It seems similar to a Council case involving the railroad. What if the railroad hits several animals in their right-of-way and knocks a few of them into a stream. If the Division thinks it's the railroad's fault and tells them to remove it and they disagree and appeals that decision, would you turn to the rancher to remove them because the railroad appealed? What happens to the animal if both parties appeal?

Bill DiRienzo couldn't say how that dispute would be resolved. All he can say is if DEQ is given notice that there are dead animals in a stream, DEQ would investigate and try to find out whose animals they are, what happened, and who needs to do something about it. If the result of that investigation leads them to believe that it seems mostly likely that it's the railroad's

responsibility, then DEQ would issue a Notice or an Order to the railroad to clean them up. If they dispute that and appeal that Order, that appeal would go to the Council to decide. The DEQ would also decide whether it had a legal basis to require either one to do it in this circumstance.

Gary Beach said that if the Order is appealed, it stays the Order. So by the time the Order is heard they maybe cleaned up by the coyotes or something.

Gary Beach again addressed Section 34 and the question of whether reclassification is a rulemaking procedure or to delegate that to the agency for administrative decision, he said that he and Maggie Allely discussed the issue over lunch and he said the only authority they have now is either go through rulemaking and follow APA which takes time because that process has to start with the Governor's approval, the Council holds a hearing, then goes to the governor for approval in the end, and filing with the Secretary of State. That is not the concept they were thinking about.

What they were thinking about is where they just bring it to the Council for approval like Orders. He said about 90 percent of these are going to be a slam-dunk. He does not know if the Council would like to look at every one of the UAA's and debate them. The other option is for the standard to be in an administrative approval just like they approve permits, which are appealable to the Council. They also talked about the middle ground whereby the Council keeps that in and still has Appendix A. He said that Wendy Hutchinson is right in that it's confusing, because DEQ will administratively change what's in Appendix A and the public would be confused about rulemaking. He will also have trouble with the concept that periodically they come back to the Council to update Appendix A because people are going to think that's a rulemaking, even though they have already been changed administratively. If you start changing what have been changed administratively, then it's going to be confusing. He is not sure there is some kind of authority in-between where the Council could approve Appendix A if it is kept as a rule, short of a rulemaking process. He thinks the Council is stuck to that. The question is, if the Council wants this to be a rule change and preserve it to this body to decide that. If so, they go through a rulemaking process and expedite that as much as possible, but realize the time constraints it has to meet to do that and the burden the Council has to go through also. Another option is to delegate that for the standard to be the process and the agency makes that decision and they're appealed to the Council. In that case his recommendation would be to take Appendix A out. He realizes that EPA is not going to like to hear that, but will fight that battle with EPA. This is short of some kind of legislation that gives the Council some other ability or mechanism to expedite approval of reclassification like the Council does with orders.

Gary Beach said that Maggie Allely is willing to argue with EPA that these are standards that are approved by the agency under those rules if the Council decides to go that route. If the EPA disapproves it, then they will be back to the Council to modify that rule where it changed the classifications.

Wendy Hutchinson does think it would be difficult for DEQ to justify that Appendix A is just an administrative attachment. Under Land Quality rules, it's rules. Maggie Allely agreed with Wendy Hutchinson, but if you look at it in a vacuum, she thinks it might be something they could propose. She said the Council, as a body, needs some consistency too.

Gary Beach said the public would be confused too if it's attached and the DEQ is making changes to it. The public will raise questions about authorizing the Council to approve those changes.

Steve Williams addressed the issue of SAR (Sodium Absorption Ratio). He realizes there is some controversy, and that several Council members suggested establishing a cutoff for SAR. A number of people have commented that DEQ shouldn't because it's complicated and nobody knows what it really means. He asked for a short summary of the process.

Bill DiRienzo doesn't think they are comfortable on picking the number or process at this stage of the game. They're not saying that this is not a proper solution to the salinity issue and maybe there needs to be a standard or maybe there needs to be a policy by which they would interpret the narrative that they have in Section 20 that would kick out a number to be used. He said they have to start that process from the beginning, and can do that in a separate rulemaking, although he doesn't think it's necessary to hold off the adoption of what they have proposed contingent upon that. It's been 10 years since they've had the triennial review. He doesn't know if they will ever do another comprehensive review like this. It seems that rulemaking is now going to be just a constant thing. As soon as this is done, he already has a list of things that need to be addressed that aren't included in the process. One, the fecal coliform standard is no longer going to be recognized and they have to migrate to an e-coli standard by 2003. As soon as DEQ is done with the present issue, they will be starting that rulemaking, and they're going to have the UAA rulemaking. EPA is developing nutrient standards; there will be the sediment standards, etc. Bill DiRienzo said they are taking it piece-by-piece where they can focus on salinity.

Steve Williams said his feelings about SAR and experience with SAR is there is a very viable way of evaluating irrigation water to protect soil properties. Right now where low quality irrigation waters are used, you have this damaging of soils that happens right in the state of Wyoming. He's trying to get this into the record and try to do what is called the exchange with a sodium percentage that doesn't exceed 15 percent in the soils itself. Once that happens, it's almost prohibitively expensive to reclaim those soils, and that is what the SAR is connected to. To be sure that exchange with sodium percentage does not reach the 15 percent or above. In some ways it's conceptually complicated, but in other ways it's a very simple concept and he hopes they can come back and discuss it. He said that if DEQ wants to bring some experts that are fine too. He said we could devise a rubric, combining SAR and salinity summation and as considered for various textured soils, to come up with a very simple rubric as to how you can use SAR.

Gary Beach said there are two issues in this package, and they need to get these rules through. What they can't do is add some new controversial issues at the twelfth hour, as that would spin it back into another year. He said that maybe the Council would want to direct DEQ to start a rulemaking process on the criteria for Class 1 Waters. The Council needs to decide if it wants to engage in that discussion, because there are a lot of people that want that to happen. The other issue is SAR. Does the Council want a numerical standard or to come up with some standard for SAR. He suggested that when the Council gets down to adopting these rules, that if the Council wants DEQ to engage in rulemaking on those, to direct DEQ to do so. They can go back and start with the Advisory Board again and go through a separate process for those works. All the parties will get a chance to work on them and come back to the Council later with those specific items. They are going to be controversial, he said.

At this point in time, Tom Dunn left the meeting.

Bob Rawlings said that on Page 21, the Wyoming Farm Bureau made a comment about isolated waters, and he said Bill DiRienzo's response was they agree that every minor wet area that occurs on the surface "should" be considered a water of the state. Bill DiRienzo said the word should be "could" and not "should." He further stated that if it becomes an aquatic site or wetland or something like that, it becomes a water of the State.

On Page 25, under the response column for the Niobrara Conservation District comment, "Unacceptable odors, for example, from any water body may constitute a public nuisance…" Bob Rawlings asked if there's a stock water pond and it is offensive to some people to smell. Bill DiRienzo said a good exercise in judgment is always necessary and he does not think they would really be addressing that circumstance. That would rise at a level at some kind of an action by the DEQ. He thinks that there are waters that run through towns, and if there are discharges to them or some condition of that water body that becomes offensive, then the community should do something to address that problem is DEQ. Also, under scenic value, he said they are not talking about the general landscape scenery, but only water body aesthetics. And so it is appropriate to regulate, for instance, the type of materials that can be used for riprap, for placement on stream banks, disposal of wastes and things like that, that they could rely on the standard for regulation. He does not know of any circumstances where they addressed odors from a stock pond. There were quite a few comments about the temperature variation like the 40 to 60 degrees. He asked why not adopt for example 50 degrees.

Bill DiRienzo said this particular standard went through a lot of discussion through the Advisory Board. It is a difficult situation to manage temperature because like SAR, there are so many variables, so many inputs of heat and energy into water bodies, and the background of water temperatures is very variable. The main problem they are trying to solve with this revision is the standard that is current. They don't really apply it and they don't know of any good way to apply it. Therefore, it is sort of a meaningless standard, so they thought they needed to get rid of those parts that they can't implement. For instance, it now says that there is a straight 2 degrees temperature change. Discharges are limited to increasing temperature not more than 2 degrees on cold water and 4 degrees on warm water. It's extremely difficult to apply that. That situation came up from the City of Cheyenne which discharges into Crow Creek. In the winter when the flows are low, the grand majority of the water in Crow Creek comes through the wastewater treatment plant. It's going to be coming through at groundwater temperature. It will probably cool off somewhat into their process before final discharge, but the background temperature upstream on their discharge would be at 32 degrees, and there is no reasonable way for the wastewater plant or for most discharges to meet that type of a standard. Almost any circumstance where you have background temperatures that fluctuate 10 degrees daily, you could never match a discharge to be within 2 degrees of that. So they thought it as kind of being unmanageable. They think they need ceiling temperatures or clear temperatures where fish will be killed or will be adversely affected. The 60 degrees was chosen because from coldwater fisheries it is a very acceptable temperature and most coldwater fish will thrive in waters of 60 degrees or less. It is not simple and there are the rapid changes, there are seasonal highs and things like that that have to be considered. He said they just thought that 60 degrees was an intelligent number and as long as the water is below that they don't really need to be concerned with long-term type changes and constant changes to the water. They need to be concerned that

once it reaches that, because that's pushing the upper limit for coldwater fish and they need to regulate what happens to water above that.

Bill DiRienzo also said that when they first proposed 40 degrees a lot of comment came in saying it was too low and it will not be effective to solve the problem. They thought the 60 degrees was a good number for coldwater fish.

Jack Young of the Cheyenne Board of Public Utilities said what it amounted to is they had to refrigerate 6 million or 7 million gallons a day to meet the standards. Refrigerate the effluent in wintertime. They measured the temperature; they just couldn't get it that cold.

Bill DiRienzo said he called some "standards" people from surrounding states to try and figure out when they were wrestling with the standard. He said everybody has a standard like what we have already adopted. He asked how these people use it in these circumstances and their answer is they don't. These people said they are there and it just doesn't do anything. He said there is a narrative standard in Section A, which says that temperature changes can't be such that they cause an adverse effect. That ought to be a site-specific decision. He said if you're in a circumstance where they can recognize that there is a temperature issue, that standard in Section A gives them the ability to compel some remedy or some limit. That is why, he said, the strength of the temperature standard is contained just in that narrative and they have the flexibility to apply a right standard on each individual water. It is also why they got rid of Section F that allows no artificially induced temperature change over spawning areas. That's another one that is there, and they know that spawning is the most sensitive life stage to temperature, but they don't know when fish are spawning, where fish are spawning, and how realistic it is that every single consumptive use of water will probably have some effect on temperature. How can you implement a standard like that, if it's decided they can't. So it's not proper to have it there, and that was the logical move. Although they recognized that's the most sensitive time and would just have to apply an effluent limit based on the narrative.

Bill DiRienzo said one of the recommendations to the Council is to revise the proposed ceiling temperatures. They had the temperature change numbers in Sections B and C, but also have ceiling temperatures in Section D and the current values are is 78 degrees Fahrenheit for coldwater fishery and 90 degrees for a warm water fishery. Those are the absolute, the upper limits. They've received a lot of comments that those were too high. It seemed that all the scientific literature that people had sent them indicates that those numbers are too high for those categories of water, and in comparison to the other surrounding states, he said that our standards are higher than all of the rest of the states. He said they are prepared to recommend changing the ceiling temperature for coldwater fishery to 20 degrees centigrade, which would be 68 degrees Fahrenheit, and the warm water temperature to 30 degrees centigrade, which would be 86 degrees Fahrenheit. That is more in line with the literature and with the surrounding states.

Dr. Shogren said that a lot of comments were received about the terms "credible data" and what's "incredible." He asked what sort of bar do you have to cross before data is credible. In going through this entire process, does the definition of "credible" match up with the Federal definition, the EPA definition?

Bill DiRienzo does not believe there is such a thing. What they have implemented there is what we have in the State's statute, and he did not believe there is anything comparable for the

purposes that we are using "credible data" on the Federal side. What they were doing isn't in conflict within the Federal regulations. EPA was just concerned that the requirements for "credible data" would be unacceptable if they resulted in the state not making decisions. For instance, failing to make a determination on impairment simply because we haven't met all of the credible data requirements.

Dr. Shogren asked who would decide whether data is credible, although he doesn't think this would come up in questions of appeal. Bill DiRienzo responded that the statute prescribes it. The statute addresses two types of decisions on which we need credible data: to determine support of designated use, and the other for assigning designated uses. In determining the support of whether water is impaired or not, that's the more complicated decision. He said the statute is clear they can't make that determination until they have investigated all the components of credible data, until they have looked at the situation from the physical, chemical, biological standpoint and that the data they've used has a quality control on it and it's conducted in an appropriate manner. He doesn't think they have an option as it's pretty much spelled out in the statute. For the purpose of designating uses, the statute states "… credible data consistent with the Clean Water Act" and they've run up against this attainability issue. The Federal regulation requires them to presume that aquatic life is attainable unless you have data to show that it is not. That language was inserted so that "credible data" couldn't be interpreted as an obstacle to presume the uses and write standards that comply with the federal regulations. He said that if they are going to change the standards, they will need to have credible data. It also introduced in there the "relevant credible data." If the action being proposed is to move a stream from a Class 3 to a Class 2 because it supports fishery that is all you have to know. You have to have good data to support the idea that it supports fishery, but you don't need to have chemical, physical, historical data, if it is known to support a fishery or drinking water supply.

Nick Bettas said the Council needs to see is the strike and cap version of the changes to be made to the regulations based on the comments received, including the discussion made today and how they may tailor that submittal to EPA.

Gary Beach asked for the Council recommendation of which way to go. He said that what the Council will find here are the changes that Bill DiRienzo has suggested in his analysis of comments. He will incorporate them in the draft rule and will give the Council their recommendation on which way to go on Section 34.

Terri Lorenzon said this would not be on the February 8 and 9 agenda. It's been marked as tentative on the February agenda because the agenda needed to be sent out immediately.

Steve Williams mentioned about anticipating rulemaking regarding salinity, sodicity, and criteria for Class 1 designation. Nick Bettas also instructed WQD to make that as part of the submittal.

Gary Beach asked for direction from the Council if it thinks it's important to address those two elements in the rulemaking. Wendy Hutchinson said to not put this rule back but directed the WQD to go ahead with it.

Gary Beach said they will go through the Outreach Advisory Board and it would be a year or so before it would come back to the Council.

Nick Bettas thought what Gary Beach wants is to wait until the culmination of the submittal took place and then start the procedure.

Gary Beach said he wants to finish this and then if the Council wanted WQD to address those two elements, it can be done it in a separate rulemaking.

Steve Williams made the motion that after this is finished, that the Council will direct the WQD in a separate happening to address a rulemaking regarding salinity, sodicity issues and designation of Class 1 Waters.

Wendy Hutchinson seconded the motion. She asked about time frame because Steve Williams just said "after this" in his motion. She suggested directing them to do it. Steve Williams agreed to Wendy Hutchinson's suggestion.

Nick Bettas announced that there is a motion by Steve Williams and seconded by Wendy Hutchinson to ask the Division to come up with Class 1 criteria and to investigate the need for salinity issue. There was no further discussion. Nick Bettas called for the vote. The motion carried. Tom Dunn left earlier in the meeting.

There was no further discussion. Nick Bettas adjourned the meeting at 2:30 p.m.

RESPECTFULLY SUBMITTED,

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Secretary

Approved by:

_____

Chairman